LEGAL SERVICES

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MEMORANDUM March 29, 2011

SUBJECT: Discussion points relating to medical necessity
(SB 5 (Work Order No. 27-LS0057\B))

TO: Senator Bettye Davis
Chair of the Senate Health and Social Services Committee
Attn: Tom Obermeyer

FROM: Jean M. Mischel
Legislative Counsel

You have provided a March 28, 2011 memorandum from the Department of Health and Social Services and comments from the Planned Parenthood of the Greater Northwest pertaining to the above-referenced bill and the concept of medical necessity as it relates to Medicaid funding of abortions.

I understand the basis for the Department of Health and Social Services memorandum relates at least indirectly to my own memorandum on the concept of medical necessity dated November 18, 2010. The department appears, however, to be interested in clarifying its own undated fact sheet presented to you that contains the following statement:

> "Medically necessary" as it applies to abortions paid for under Denali KidCare is not defined in statute or regulation, or by Court decision.

My memorandum on the subject provided a survey of the several instances in state regulation, and in federal and state court cases in which the concept is or was defined. 7 AAC 105.100(5), I pointed out, provides that the department will pay for medical assistance, including Denali KidCare and abortion services, that are

> medically necessary as determined by criteria established under 7 AAC 43 and 7 AAC 105 - 7 AAC 160 or by the standards of practice applicable to the provider.

In the same memorandum, I also explained that a statutory definition of medical necessity that was limited only to abortion services funding was vetoed in 2002, that the general relief assistance program contains a regulatory definition for abortion funding, and that a former regulatory definition (7 AAC 43.140(a)) was found to be unconstitutional by the

Alaska Supreme Court, resulting in the state's current lack of a clear definition of the phrase as it applies to medical assistance funding for abortion services. (November 18 memorandum at page 5). I also explained that although the phrase is "not clearly defined in Alaska" the regulations that pertain to all covered services and to other specified types of services provide "some guidance" (November 18 memorandum at page 8). The memorandum further described several court cases in which the concept is analyzed and described.

In this context, the March 28, 2011 memorandum from the department is confusing. While admitting that current and unrepealed (the lack of funding for one of the programs is not relevant to the existence of the regulation) definitions of the phrase exists in several sections of state regulations, the department stated that

> . . . the Department believes its previous statement that there is no statute, regulation, or court decision that defines medical necessity as it applies to abortions paid for under Denali KidCare is accurate.

My understanding of the purpose of the November 18 memorandum by my office and the discussion in committee, was to come to some agreement on the meaning of the concept of medical necessity and to discern which definition is currently applied by the department for medical assistance funding of abortions in this state and elsewhere. The department doesn't answer that question except to refer to a definition in the regulations for all medical assistance funding. So the department's position becomes quite circular.

In any event, the legislature could provide a definition in statute of the phrase "medical necessity" that allows for consideration of physical, mental, and age of a patient by a physician. In so doing, the concept must in my opinion be consistent for all reproductive services covered by medical assistance payments. The current regulatory definition in 7 AAC 105.100(5) acknowledges the applicability of standards of medical practice to covered services but confuses the issue by cross-referencing medical necessity considerations for mental health and other services that may or may not be relevant to other types of services.

Another option that would allow for an increase in income eligibility limits include raising the limit only as it pertains to persons under 19 years of age and not for pregnant women. The difficulty with that option is that the state plan combines children and pregnant women and the federal law also treats them similarly. A separation would require federal approval.

A third option, proposed by Planned Parenthood in various ways, is to introduce a separate bill to address family planning services for both men and women, including adoption services. That, of course, would also necessitate a state plan amendment and approval as well as additional funding.

As a modification of this third option, it is possible to amend the informed consent provisions for abortion under AS 18.16.060(b)(1) to require a physician's office to provide the information contained on the state website (currently it is one of two options for consent) and to amend AS 18.05.032 to provide additional information about adoption services and costs.

If I may be of further assistance, please advise.

JMM:plm
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