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MEMORANDUM April 1, 2013

SUBJECT: Constitutionality of abortion funding restrictions under Medicaid (HB 173) (Work Order No. 28-LS0512\N)

TO: Representative Max Gruenberg

FROM: Jean M. Mischel
Legislative Counsel

You have asked whether HB 173 is limited to Medicaid funding. The answer is "yes." HB 173, at page 1, line 6, limits its restrictions on funding to abortion services provided "under this chapter," which is AS 47.07. That chapter pertains only to the state Medicaid program.

You have also asked about the constitutionality of HB 173. HB 173 prohibits Medicaid funding for abortions that are not medically necessary except for terminations of a pregnancy resulting from an act of rape or incest. The bill also defines "medically necessary" only as it applies to abortion services. A restriction and definition of "medically necessary" that limits a person's exercise of a fundamental constitutional right takes on constitutional significance. Unless the Alaska Supreme Court modifies its previous holdings, or the state can articulate a compelling state interest, the restrictions in HB 173 that apply only to abortion services appear to be unconstitutionally discriminatory and may violate privacy rights, as further explained below.

HB 173 is similar to the federal exclusion for coverage of most abortion services known as the "Hyde Amendment," which is more restrictive than the general concept of "medically necessary" applicable to other types of Medicaid services, including prenatal services.[1] The Alaska Supreme Court has previously rejected the uniquely restrictive

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[1] The bill also appears to be more restrictive, except for the provision for immediacy, than the federal definition of "emergency medical condition" for coverage of costly emergency care under Medicaid. That definition under 42 C.F.R. 438.114, defines "emergency medical condition" as:

> Emergency medical condition means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably

limitation on Medicaid coverage that was based on the "Hyde Amendment" as it was worded in the 1990s.[2] In addition, the express legislative purpose for providing medical care at public expense for needy persons is to provide "only uniform and high quality care that is appropriate to [a person's] condition and cost-effective to the state" under AS 47.07.020. Consistent with this purpose, the current state standard for "medically necessary" under Medicaid generally relies on the treating health care provider's expert knowledge of the standard of care and the patient's condition, and includes services that are broader than life saving services but less than purely elective services. In contrast, federal law treats pregnant women who terminate their pregnancy differently and requires a more demanding standard than the generally applicable standard of medical necessity.

In several close decisions, the U.S. Supreme Court determined that the federal constitution does not require public financial support of the right to choose an abortion in cases that do not involve rape or incest or a threat to the mother's life. *Beal v. Doe*,

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> expect the absence of immediate medical attention to result in the following:
> (1) Placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy.
> (2) Serious impairment to bodily functions.
> (3) Serious dysfunction of any bodily organ or part.

[2] The current version of the "Hyde Amendment" in the federal budget provides as follows:

> Sec. 506(a) None of the funds appropriated in this Act, and none of the funds in any trust fund to which funds are appropriated in this Act, shall be expended for any abortion.
>
> . . .
>
> Sec. 507(a)The limitations established in the preceding section shall not apply to an abortion--
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> (1) if the pregnancy is the result of an act of rape or incest; or
> (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.
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> (b) Nothing in the preceding section shall be construed as prohibiting the expenditure by a State, locality, entity, or private person of State, local, or private funds (other than a State's or locality's contribution of Medicaid matching funds).

H.R. 2055.ENR, 112th Congress (Consolidated Appropriations Act, 2012).

432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989). It is instructive to note that the trial court definition in the *McRae* case of the phrase "medically necessary" for purposes of abortion funding was "a professional judgment for the physician that may be exercised in the light of all factors -- physical, emotional, psychological, familial and the woman's age -- relevant to the well-being of the patient." The federal courts ruled in these cases that governments are not required to provide money to assist in the exercise of constitutional rights; governments are only prohibited from placing obstacles in the way of exercising those rights.

However, the Constitution of the State of Alaska has been consistently interpreted by the Alaska Supreme Court to provide broader protections than the federal constitution. In *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997), the Alaska Supreme Court held that "reproductive rights are fundamental . . . [and] include the right to an abortion."

In the early 1990s, the state attempted to adopt an older but similar federal standard for funding of abortion services.[3] In a direct challenge to the state regulation that provided for public funding of abortion services only to preserve the life of the mother or in cases of rape or incest, the Alaska Supreme Court held that the state must pay for medically necessary abortions for participants in the Medicaid program, as it does for other types of services. *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001). The Alaska Supreme Court determined then that the "rape, incest, and to prevent the death of the mother" restrictions of the Hyde Amendment were too narrow to satisfy the equal protection requirements of the Alaska state constitution. The conclusion was that if the state Department of Health and Social Services (DHSS) restricted abortion coverage for Medicaid-eligible women to only those covered by the exceptions in the Hyde Amendment, it would result in unconstitutional implementation of Medicaid in Alaska.

There is language in the *Planned Parenthood of Alaska, Inc.* case strongly suggesting that the Alaska Supreme Court considers women who carry their pregnancy to term to be similarly situated with women who have an abortion (in that they are both exercising their constitutional freedom of reproductive choice). The court explained:

> Because 7 AAC 43.140 infringes on a constitutionally protected interest, the State bears a high burden to justify the regulation. Unless the State

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[3] The invalidated and later repealed regulatory definition in 7 AAC 43.140 provided that:

> (a) Payment for an abortion will, in the department's discretion, be covered under Medicaid if the physician services invoice is accompanied by certification that the (1) life of the mother would be endangered if the pregnancy were carried to term; or (2) pregnancy is the result of an act of rape or incest.

> asserts a compelling state interest, the statute will necessarily fail constitutional scrutiny. The State has failed to demonstrate such an interest in this case. It primarily defends 7 AAC 43.140 on the grounds that "medical and public welfare interests . . . are served by the legislature's decision to fund childbirth." But the regulation does not relate to funding for childbirth, and the State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.
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> The State also asserts an interest in minimizing health risks to mother and child, and submits that these interests are often closely aligned. But those interests are not aligned in precisely the situation contemplated by 7 AAC 43.140's Medicaid exclusion: when pregnancy threatens a woman's health. Under the U.S. Supreme Court's analysis in *Roe v. Wade*, the State's interest in the life and health of the mother is paramount at every stage of pregnancy. And in Alaska, "the scope of the fundamental right to an abortion . . . is similar to that expressed in *Roe v. Wade*." Thus, although the State has a legitimate interest in protecting a fetus, at no point does that interest outweigh the State's interest in the life and health of the pregnant woman.

Planned Parenthood, supra, 28 P.3d at 913 (footnotes omitted).

If the court continues to hold that position when faced with a renewed public abortion funding challenge to HB 173, if enacted, it is likely that the court will find HB 173 an unconstitutional burden on the right to abortion services under the state Medicaid program unless a similar burden is placed on medical services to continue a pregnancy. In the absence of comparable burdens on public funding for continuation of a pregnancy, the state may not uniquely burden the right to abortion services by limiting public funding for them absent a compelling state interest.

Over the years, language has appeared in Alaska budget acts that purports to prohibit DHSS from using any of its appropriated money for abortions outside the scope of the Hyde Amendment. However, DHSS has been under court order to continue to pay for medically necessary abortions and has complied with the state attorney general's advice

to do so.[4] The August 2002 Superior Court for the Third Judicial District order enjoined the state from denying Medicaid coverage for all abortions except those necessary to save a woman's life or where the pregnancy resulted from rape or incest. The stipulated order,

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[4] For instance, with regard to the 2007 fiscal year operating budget, the attorney general wrote the following:

> This year's budget, as did the prior four years' budgets, contains the following language regarding abortion funding:
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> > No money appropriated in this appropriation may be expended for an abortion that is not a mandatory service required under AS 47.07.030(a). The money appropriated for Health and Social Services may be expended only for mandatory services required under Title XIX of the Social Security Act and for optional services offered by the state under the state plan for medical assistance that has been approved by the United States Department of Health and Human Services . . . .
>
> [citation omitted]. As we opined before, this language is intended to prevent expenditures from these appropriations for therapeutic or medically necessary abortions. DHSS, however, is under a superior court order to operate its Medicaid program in a constitutional manner by providing payment for them. That superior court order has been upheld by the Alaska Supreme Court, which specifically rejected an argument that the separation-of-powers doctrine precluded the superior court from ordering the state to pay. *State, Dept. of Health & Social Services v. Planned Parenthood of Alaska*, 28 P.3d 904 (Alaska 2001). Thus, the DHSS is faced with a ruling from the state's highest court that the limit on payment for abortion services results in the operation of the Medicaid program in an unconstitutional manner, while DHSS is ostensibly without the money available to pay for services to operate the program legally. . . . Five years ago, the plaintiffs in the Planned Parenthood case asked the superior court to clarify how similar budget restrictions impacted its judgment. The superior court, three days after the supreme court affirmed the judgment, issued an opinion ordering the DHSS not to comply with the restrictions. To date, therefore, DHSS has obeyed the superior court's order and we must advise DHSS to continue to obey it; i.e., to continue to pay for these medically necessary abortions, until such time as a court reverses the order that is now in effect.

2007 Op. Alaska Att'y Gen (June 6), 2007 Alas. AG LEXIS 21, 7 - 8.

at paragraphs 6 and 7, distinguishes between life saving and otherwise medically necessary abortions as follows:

> 6. Because federal Medicaid mandates coverage only for those abortions necessary because the pregnancy is life-threatening or results from rape or incest, the current budget restrictions are identical to the restrictions adopted [and held to be constitutionally infirm] in 1998 and 2001.
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> 7. Consistent with the prior Order of this Court and of the Alaska Supreme Court, the current budget restriction is without effect and the Department shall continue to pay all claims for services for medically necessary abortions for women otherwise eligible for coverage of pregnancy-related services in Alaska's Medicaid program.

According to DHSS, the money used for Medicaid abortions not covered by the Hyde Amendment (i.e., abortions for which the federal government will not contribute federal money) comes from the appropriation made by the legislature to DHSS for Medicaid.[5] For that reason, DHSS modified the medical necessity form required for abortions in November 2012 to assist in getting reimbursement of federal funds.

Following the *Planned Parenthood* decision in 2001 and subsequent injunction, attempts to narrow the definition of "medically necessary" for purposes of abortion services funding have also failed. In 2002, for example, the Alaska Legislature passed and the governor vetoed a bill (SB 364, 22nd Legislature) that added a new section to AS 47.07 to provide that the state Medicaid program may only pay for medically necessary abortions as described in the bill and for abortions to terminate pregnancies resulting from rape or incest. That bill provided as follows:

> (b) A claim for payment for a medically necessary abortion that is submitted to the department must be accompanied by a written certification by the treating physician that the abortion is medically necessary to treat a serious
>
> (1) adverse physical condition of a pregnant woman that
>
> (A) either is caused by the pregnancy or would be significantly aggravated by continuation of the pregnancy; and
>
> (B) would seriously endanger the physical health of the woman if the pregnancy were not terminated by an abortion; or
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> (2) psychological illness of a pregnant woman who requires medication for treatment of the illness if

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[5] If the physician submitting the Medicaid claim for costs associated with an abortion does not provide the information that would allow DHSS to document to the federal government that a particular abortion falls within the Hyde Amendment exceptions, then DHSS does not seek a federal match for the costs associated with that abortion.

(A) the medication required to treat the illness would be highly dangerous to the fetus; and

(B) the health of the woman would be endangered if the medication was not taken during pregnancy.

Since the bill was vetoed, and the definition of "medically necessary" for purposes of abortion services funding contained in former 7 AAC 43.140(a) was held to be unconstitutional in 2001, the state currently has no separate definition of the phrase as it applies to abortion services and the treating physician must continue to verify medical necessity of the services as is done for some other services.

In 2012, the DHSS again proposed, but did not adopt, a change to the meaning of "medically necessary" in the context of abortions. The phrase "medically necessary" is used by the department at least 40 times in its implementing regulations for Medicaid without definition. In addition to the new certification, what remains in the regulations that pertains uniquely to abortion services funding are the terms "elective" and "therapeutic" (a term that appears to be used as a substitute in the regulations for "medically necessary"), defined in 7 AAC 47.290, along with the general concept of "medically necessary" for all covered services under 7 AAC 105.100.[6]

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[6] For general relief funding that is not directly applicable to Medicaid funding, 7 AAC 47.290 provides as follows:

. . .

(7) "elective abortion" means a procedure, other than a therapeutic abortion, to terminate a pregnancy;

(8) "therapeutic abortion" means the termination of a pregnancy;

(A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or

(B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410 - 11.41.425, a crime of sexual abuse of a minor under AS 11.41.434 - 11.41.440, or the crime of incest under AS 11.41.450.

For state funding under Medicaid for all services, 7 AAC 105.100 describes "covered services" to include the general concept of "medically necessary" with cross-references to specified types of services as follows:

The department will pay for a service only if that service

(1) is identified as a covered service in accordance with AS 47.07, 7 AAC 43, and 7 AAC 105 - 7 AAC 160;

(2) is provided to an individual who is eligible for Medicaid under 7 AAC 100 on the date of service;

Except for a few limited and costly services, funding for other Medicaid covered services is limited by physician determinations of what is "medically necessary." I don't know whether the costs of abortion services could provide a similar cost-saving basis for limiting coverage of them. Because the right to state funding for medically necessary abortions under the current state Medicaid program is protected by the Alaska constitution as interpreted by the Alaska Supreme Court, the term "medically necessary abortion" has acquired a constitutional component of unknown scope. The relatively few Alaska cases involving abortion rights do not provide guidance as to how broadly the term "medically necessary abortion" is to be construed, but do indicate that reproductive services should be similarly available for all pregnant women absent a compelling state interest that justifies discriminatory treatment.

The restriction on funding in HB 173 is not made applicable to all reproductive services covered for pregnant indigent women and therefore is facially discriminatory. There is also the possibility that the Alaska courts will find that there are additional situations, other than those described in HB 173, that fall within the scope of a medically necessary abortion and thus must be covered under the state Medicaid program. The "catch-all" or the inclusive language in the bill to describe serious risk of death or "impairment of a major bodily function" may allow for circumstances that are protective of the health of the mother in situations that are not threats to her life, consistent with the general concept of medical necessity for other types of covered reproductive services. But the exclusions of fetal abnormalities, mental health conditions, and other bases for the provision of health care appear to narrow the definition more than a court may tolerate under strict scrutiny standards, which require a compelling state interest. In addition, the lack of availability of health promotion and preventive care in the bill, which are considered to be medically necessary for other Medicaid recipients, including medical coverage for

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(3) is ordered or prescribed by a provider authorized to order or prescribe that service under applicable law;

(4) is provided by a person who is enrolled as a Medicaid provider or rendering provider under 7 AAC 105.210, or otherwise eligible to receive payment for services under 7 AAC 43 and 7 AAC 105 - 7 AAC 160;

(5) is 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;

(6) has received prior authorization from the department, if prior authorization is required under 7 AAC 43 or 7 AAC 105 - 7 AAC 160; and

(7) is not specifically excluded as a noncovered service under 7 AAC 43 or 7 AAC 105 - 7 AAC 160.

(Emphasis added.)

prenatal care for pregnant women without regard to the medical conditions mandated by HB 173, establishes a dual standard that the court may again find to be unconstitutional.

In summary, the concept of what is "medically necessary" provides the baseline for Medicaid and other types of public and private funding of covered health care services. Under federal law, the United States Supreme Court upheld an exemption for coverage of abortion services that was much narrower than the standard for all other types of covered services. Some states, including Alaska, found an equal protection, privacy, or due process violation in drawing a distinction that unduly restricts access to services when the services implicate a constitutional right. Although the issue in Alaska was decided over ten years ago, attempts at new legislation and regulations have failed to subsequently describe the meaning of the phrase "medically necessary" as it applies only to abortion services covered under Medicaid. I do not know whether the record in HB 173 can establish a compelling state interest for a separate and more restrictive standard for abortion services alone that is different than the interests previously considered by the court. If not, it is likely the Alaska Supreme Court will again find an equal protection violation if it has occasion to review HB 173.

If I may be of further assistance, please advise.

JMM:ljw
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