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MEMORANDUM

TO: Senator John Coghill

FROM: Kevin G. Clarkson, Esq.

DATE: March 8, 2013

RE: Medicaid Funding for Abortion in Alaska

UNDER THE ALASKA CONSTITUTION THE STATE ONLY HAS TO PAY FOR MEDICALLY NECESSARY ABORTIONS, DOES NOT HAVE TO PAY FOR ELECTIVE ABORTIONS, AND CAN DEFINE MEDICAL NECESSITY FOR ABORTION USING STANDARD, NEUTRAL MEDICAL TERMS AND CONCEPTS

I. THE MEDICAID PROGRAM, THE HYDE AMENDMENT AND THE FEDERAL CONSTITUTION

The Medicaid program was created in 1965 when Congress added Title XIX to the Social Security Act, 42 U.S.C. 1396, *et. seq.* Medicaid is a comprehensive health care program designed to provide medical assistance for all eligible poor persons. In function, it is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. Medicaid was designed for the purpose of providing federal assistance to States that choose to reimburse certain costs of medical treatment of needy persons. Although participation in the Medicaid program is entirely optional, once a State elects to participate it must comply with the requirements of Title XIX. Alaska participates in the Medicaid program and provides funding for medical services for poor Alaskans primarily through the Medicaid program.

By federal law, if Alaska is to receive federal Medicaid funding, Alaska must pay for certain types of medical care that is required by Title XIX, which includes childbirth related care. Under federal law, pursuant to what is known as the Hyde Amendment, federal Medicaid funds can only pay for abortions that are necessary to save a woman's life or to end a pregnancy that resulted from either rape or incest. The United States Supreme Court long ago ruled that the Federal Constitution does not require a State to pay for the costs of elective or nontherapeutic abortions just because it pays for the costs of childbirth related medical care.[1] The United States Supreme Court explained that the limitation "places no obstacles-absolute or otherwise-in the pregnant woman's path to an

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[1] *See Maher v. Roe*, 432 U.S. 464, 474 (1977).

abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of [the] ... decision to fund childbirth; she continues as before to be dependent on private sources for the services she desires."[2] The Court reasoned that although the funding limitation might make childbirth a more attractive alternative, thereby influencing the woman's decision, it imposes no restriction on access to abortion that was not already there (*i.e.*, the woman's indigency, which the State did not create).

The United States Supreme Court also long ago ruled that the Hyde Amendment does not violate an indigent woman's federal constitutional right to obtain a medically necessary abortion.[3] The Court explained that "regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Roe v. Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[4] Thus, by the *Maher* and *Harris* decisions the United States Supreme Court has ruled that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation" (namely the woman's indigency).[5] As the Court explained in *Harris* "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."[6]

II. MEDICAID ONLY PAYS FOR MEDICALLY NECESSARY MEDICAL CARE

The Medicaid program only provides funding for medically necessary medical care. "Medically necessary" is a blanket prerequisite for all medical services covered by the Medicaid Program. "The department will pay for a service only if that service . . . is medically necessary."[7] The term "medically necessary" is replete throughout the regulations governing Alaska's Medicaid Program. Hospital stays, eye care, emergency air or ground ambulances, mental health treatment, behavioral health services, B-complex vitamins, podiatry services, all are specifically limited to being covered by Medicaid only when they are "medically necessary."[8]

III. THE ALASKA CONSTITUTION REQUIRES THE STATE TO PAY FOR MEDICALLY NECESSARY ABORTIONS IF THE STATE PAYS FOR CHILDBIRTH RELATED SERVICE

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[2] *Id.*

[3] *See Harris v. McRae*, 448 U.S. 297 (1980).

[4] *Id.* at 316.

[5] *Id.*

[6] *Id.*

[7] 7 AAC § 105.100.

[8] *See* 7 AAC §§ 110.445(a)(1); 110.505(a); 110.715(a)(1); 120.110(e)(6)(H); 120.240; 120.415(a); 135.230(a)(1); 140.325.

With respect to Medicaid funding for abortion, the Alaska Supreme Court has interpreted the Alaska Constitution differently than the United States Supreme Court has interpreted the federal Constitution. The Alaska Court has interpreted the Alaska Constitution to require the State to fund medically necessary abortions through its Medicaid program (using State funds that are not restricted by the Hyde Amendment). The Alaska Court has ruled that the State must fund medically necessary abortions through its Medicaid program so long as the State pays for childbirth related medical care.[9]

IV. THE *PLANNED PARENTHOOD* DECISION CREATED NO OBLIGATION FOR THE STATE TO PAY FOR ELECTIVE ABORTIONS OR ABORTIONS THAT ARE NOT MEDICALLY NECESSARY

The Alaska Supreme Court's decision in *Planned Parenthood* cannot reasonably be read to require the State to fund elective abortions or those abortions that are not medically necessary. The Alaska Court emphasized in its Opinion that the *Planned Parenthood* case did "not concern State payment for elective abortions."[10] The Court repeatedly limited the application of its decision to "medically necessary abortions."[11] The Court specifically and deliberately referred to the "medically necessary" nature of the abortions that it was addressing in the case on thirty-four (34) separate instances in its Opinion.[12] Given the Court's repeated limitation of its decision to "medically

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[9] *See State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001).

[10] *Planned Parenthood*, 28 P.3d at 905.

[11] *Id.* at 905-915.

[12] See *Planned Parenthood*, 28 P.3d at 905 ("it denies funding for medically necessary abortions"); *id.* ("the medically necessary procedure"); *id.* ("state funding of medically necessary abortions"); *id.* ("assistance to eligible women whose health depends on obtaining abortions"); *id.* ("women who's health is in danger"); *id.* at 906 ("women who medically require abortions"); *id.* at 906 n.7 ("government support for medically necessary abortions"); *id.* at 907 (""Medicaid assistance for medically necessary abortions"); *id.* ("a woman who medically requires an abortion"); *id.* ("face significant risks if they cannot obtain abortions"); *id.* ("funding for medically necessary abortions"); *id.* ("coverage for medically necessary abortions"); *id.* at 907 n. 11 ("funding for medically necessary abortions" . . . "available to pay for medically necessary abortions"); *id.* at 908 ("women who need abortions"); *id.* ("necessary care to eligible women"); *id.* at 908 n.21 ("jeopardize the health of . . . of poor women by excluding medically necessary abortions"); *id.* at 910 ("medically unnecessary inpatient treatment" is different); *id.* ("coverage for medically necessary abortions"); *id.* at 911 ("public assistance for medically necessary abortions"); *id.* ("State grants needed health care" to some but denies for abortion); *id.* ("provides necessary medical care" but not to those needing abortion); *Id.* ("women who medically require abortions"); *id.* at 912 ("jeopardize the health . . . of poor women by excluding medically necessary abortions"); *id.* at 913 ("women who for health reasons, require abortions"); *Id.* ("denying medically necessary care to women who need abortions"); *Id.* at 914 ("exclusion of medically necessary abortions"); *id.*at 914, n.78 ("require legislative funding for medically necessary abortion"); *Id.* at 915 ("to fund medically necessary abortions"); *Id.* ("medically necessary abortions"); *Id.* ("may not deny medically necessary services to eligible individuals"); *Id.* ("women who medically require abortions"); *Id.* at

necessary" abortions, and given the fact that Medicaid only provides funding for medically necessary medical care, it would be truly remarkable for anyone to claim that the Alaska Supreme Court's decision in *Planned Parenthood* requires the State to fund "elective" abortions or abortions that are not "medically necessary."

V. THE STATE CAN DEFINE MEDICAL NECESSITY FOR ABORTION USING STANDARD, NEUTRAL MEDICAL CRITERIA

Under the *Planned Parenthood* decision the State of Alaska may not "grant[] needed health care to some Medicaid-eligible Alaskans, but den[y] it to others, based on criteria unrelated to the Medicaid program's purpose of granting uniform and high quality medical care to all needy persons of this state." *Planned Parenthood*, 28 P.3d at 911. Thus, if the State provides "medically necessary" care to Medicaid eligible women desiring childbirth, it must also provide "medically necessary" abortions to Medicaid eligible women who choose abortion. By repeatedly emphasizing that its decision required the State to pay for "medically necessary abortions" and by emphasizing that its decision did "not concern State payment for elective abortions,"[13] the Court unmistakably concluded that there is a distinction between "elective" and "medically necessary abortions." The Court drove home the distinction between elective abortions and medically necessary abortions by detailing the rare but potential medical conditions that could make an abortion medically necessary.[14] By the Alaska Court's 2001 decision, not all abortions are medically necessary and the State is not obligated to pay for abortions that are elective or that are not medically necessary.

The Alaska Supreme Court's decision in *Planned Parenthood* did not define the difference between what is or what is not a "medically necessary" abortion. The Court simply summarized the "medical evidence" that had been provided to the superior court in that case to demonstrate that some abortions are "medically necessary." *Id.* at 907 ("According to medical evidence provided to the superior court, some women . . . face significant risks if they cannot obtain abortions."). The Court did not constitutionalize a definition of "medical necessity" in *Planned Parenthood* and it did not rule that any particular medical condition constitutionally rendered an abortion medically necessary. *Id.* Instead, the Court simply noted that medical evidence in the case established that some abortions are medically necessary. *Id.*

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915 n. 79 ("funding medically necessary abortions").

[13] *See Planned Parenthood*, 28 P.3d at 905.

[14] *See id.* at 907 ("The range of women whose access to medical care is restricted by the regulation is broad. According to medical evidence provided to the superior court, some women-particularly those who suffer from pre-existing health problems-face significant risks if they cannot obtain abortions. Women with diabetes risk kidney failure, blindness, and preeclampsia or eclampsia-conditions characterized by simultaneous convulsions and comas-when their disease is complicated by pregnancy. Women with renal disease may lose a kidney and face a lifetime of dialysis if they cannot obtain an abortion. And pregnancy in women with sickle cell anemia can accelerate the disease, leading to pneumonia, kidney infections, congestive heart failure, and pulmonary conditions such as embolus. Poor women who suffer from conditions such as epilepsy or bipolar disorder face a particularly brutal dilemma as a result of DHSS's regulation-medication needed by the women to control their own seizures or other symptoms can be highly dangerous to a developing fetus.").

The State is permitted to distinguish between the two types of abortions (those that are elective and those that are medically necessary) by way of "neutral criteria" that are related to "the purposes of the public health care program." *Id.* at 915.[15] The Alaska Court found in *Planned* Parenthood that the purpose of the Alaska Medicaid program is to grant "needed health care" to Medicaid eligible Alaskans. *Id.* at 911. The Court concluded that the constitutional problem with the Medicaid regulation at issue in 2001 was that it "grant[ed] needed health care to some Medicaid-eligible Alaskans, but denie[d] it to others, based on criteria entirely unrelated to the Medicaid programs purpose of granting uniform high quality medical care to all needy persons of th[e] state." *Id.* at 911. In other words, by simply excluding all abortions from the Medicaid Program the State was excluding care from the Program without regard to medical evidence and medical knowledge. The Court observed that restrictions which limited funding based upon criteria like "medical necessity, cost and feasibility" are permissible; *i.e.*, distinguishing between medical care that is "medically necessary" and other medical care which is not, and then providing Medicaid funding only for that care which is "medically necessary", involves the permissible use of neutral criteria which does not violate the Alaska Constitution. *Id.* at 910. The "neutral criteria" that the Court found permissible in *Planned Parenthood* was accepted medical knowledge regarding what is or is not medically necessary.

The constitutional key to distinguishing between "elective abortions" that the State is not obligated to fund, and "medically necessary" abortions that the State is obligated to fund, is the use of "neutral criteria" derived from accepted medical knowledge. The Court has already recognized "medical necessity" as being a "neutral criterion." *Id.* at 910. Thus, the distinction between "medically necessary" care and "non-medically necessary" care is a constitutionally "neutral" distinction. If the criteria for distinguishing between what the state must fund and need not fund must be "neutral," then the terms and concepts used in drawing that distinction must likewise be "neutral." Medical necessity is a neutral medical concept. Thus, drawing a distinction between "medical necessity" and "election" with respect to abortion using accepted medical knowledge, terms and concepts is likewise constitutionally neutral. So long as the State defines the difference between "medically necessary" abortion and "elective" abortion using accepted medical knowledge, terms and and concepts, there is no constitutional infirmity in the State's action in adopting such a definition for purposes of funding "medically necessary" abortions.

The State is not obligated to leave the definition of "medical necessity" for purposes of Medicaid funding in the sole and unquestioned discretion of the physician. If that were the case, then the State would not be permitted to define the types of medical care that is covered by Medicaid and the types of medical care that is not. But, the Alaska Court plainly indicated that it was permissible for the State to draw such a distinction independent of the physician. *See Id.* at 910 (unnecessary inpatient treatment and beautifying cosmetic surgery). The notion that the Legislature cannot define "medical necessity" for some or all, or even one, of the various medical procedures covered by Medicaid is simply incorrect. The Alaska Supreme Court recognized in its 2001 decision that "medical necessity" is a neutral criterion. *Planned Parenthood*, 28 P.3d at 910. And, the Court recognized that the Legislature or the Department of Health and Human Services could draw a distinction between "medically necessary" medical care and other elective medical care independent of the

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[15] *See also* 28 P.3d at 908 ("when the State government seeks to act for the common benefit, protection, and security of the people in providing medical care for the poor, it has an obligation to do so in a neutral manner so as to not infringe upon the constitutional rights of its citizens").

physician. *See id.* at 910 (the state was permitted to exclude from Medicaid such things as unnecessary inpatient treatment and beautifying cosmetic surgery; *i.e.*, the State was not required to leave it to a physician to decide whether such things were "medically necessary" but instead could place them in that category on its own).

Alaska abortion providers have proven themselves to be unreliable with respect to distinguishing between abortions that are medically necessary and those that are not. For example Dr. Whitefield, one of Alaska's leading abortion providers and now employed with Planned Parenthood, has testified under oath three separate times in three separate cases that he has consistently defined medical necessity to include women who believe pregnancy will interfere with their employment or education plans, as well as women who view their pregnancy as being an "affront" to them (which essentially means nothing more than that the woman does not want to be pregnant). *See* attached Trial Transcript from the Alaska Parental Consent litigation.

If the Legislature receives medical testimony and opinion from recognized and qualified medical experts as what physical or medical conditions make an abortion "medically necessary," and then crafts a definition based upon that expert medical testimony and opinion, then the Legislature is not running afoul of the Alaska Constitution in any manner or form.

Q Now, in your practice the State will pay for a minor girl's abortion -- and again we're -- i'm speaking now at this time of -- when i speak of a minor I'm talking about the classification of 16 and under for our purposes of definitions -- and the State will pay for any abortion that is medically necessary; is that correct?

A Correct.

Q And since you've been practicing since 1985 you have been able to find a medical necessity for State-paid abortions for these girls except perhaps for only 10; is that correct?

A i believe that's what i said in my deposition.

Q And your definition of medical necessity is what you refer

to if the pregnancy is an affront to the minor; is that correct?

A It's that the pregnancy in some way is a threat to the patient's medical or psychological well-being.

Q And what you use for a definition is a theoretical hazard to her mental health; is that correct?

A i think i've used those terms.

Q And this could mean that if, in fact, the pregnancy would cause her some conc-- problems in dealing with education, her continued employment, things of this nature, would be

the kind of affront you're talking about; is that correct?

A Independence would be another one, the ability to raise a family. There's multiple factors that will go into it.