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NE. STATE OF NEBRASKA
OFFICIAL
AUG 31 1994
DEPT. OF JUSTICE

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DEPUTY ATTORNEYS GENERAL

DATE: August 31, 1994

SUBJECT: State Funding of Medicaid Abortions

REQUESTED BY: E. Benjamin Nelson, Governor
State of Nebraska
Mary Dean Harvey, Director
Department of Social Services

WRITTEN BY: Don Stenberg, Attorney General
David T. Bydalek, Assistant Attorney General

Pursuant to your request for "any and all clear legal authority" regarding the necessity of the State of Nebraska expanding the scope of its funding for abortions for Medicaid recipients, the following legal analysis has been prepared for your review.

I. OVERVIEW OF THE CONTROVERSY

The present controversy stems from a directive issued to the State Medicaid Directors by the Department of Health and Human Services (HHS) on December 28, 1993. The directive's purpose was to notify the state directors of a revision in the "Hyde Amendment."

Since 1976, the Congressional bills appropriating funds to HHS have included a provision that no federal funds can be used to pay for abortions except in specified circumstances. This provision is known as the Hyde Amendment. From 1982 to 1993, the Hyde Amendment prohibited the use of federal funds to pay for abortions in any case except to save the life of the mother. During this period, States had the option to pay for other abortions without federal matching funds.

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As the HHS letter pointed out, the current version of the Hyde Amendment was revised to allow for the use of federal funds to pay for abortions in cases where the life of the mother is in danger, as well as those cases where the pregnancy has resulted from an act of rape or incest. The exact text of the current Hyde Amendment provides:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Pub. L. No. 103-112, § 510, 107 Stat. 1113 (1993). Thus, this modification permits federal funds appropriated by Congress under Title XIX (Medicaid) to pay for abortions in cases of rape or incest.

HHS informed the state directors that it interpreted the Hyde Amendment as signifying Congressional intent that abortions resulting from rape or incest should be considered to fall within the scope of services that must be provided by States in their state plans. Thus, HHS ordered the state directors to use state funds to pay for abortions in cases of rape or incest, even though most States, including Nebraska, prohibit the use of state funds for such abortions. HHS thus directed that "all States must ensure that their state plans do not contain language that precludes FFP (federal financial participation) for abortions that are performed to save the life of the mother or to terminate pregnancies resulting from rape or incest." HHS has threatened to withhold federal Medicaid funds from States that do not comply with the directive.

Nebraska currently permits the use of public funds for abortions only in cases where the mother's life is endangered. Neb. DPW Program Manual § 18-004.08 (1982), provides:

> NMAP covers medical procedures and abortions only when the life of the mother would be endangered if the fetus were carried to term. A physician shall certify the diagnosis by medical reports which include the name and address of the client.

471 NAC 18-004.08. Thus, Nebraska is not currently in compliance with the HHS mandate.

Abortion providers have also used this change in the law to bring lawsuits in several states seeking to overturn their abortion funding bans. In fact, Nebraska was sued on August 12, 1994, in Federal District Court. The theory in these suits is that the state funding bans are inconsistent with the requirements of Title XIX, as modified by the Hyde Amendment, and are thus in contravention of federal law. Under the Supremacy Clause of the United States Constitution, art. VI, Cl. 2, the abortion providers contend that the State funding bans are invalid.

An analysis of Title XIX and the Hyde Amendment, as well as case law regarding abortion funding under Medicaid, reveals that HHS's interpretation of the revised law is misguided. Title XIX permits, but does not mandate state funding of abortion.

II. STRUCTURE OF THE MEDICAID ACT

To better understand the issues involved, it is necessary to examine the structure of the Medicaid Act. Medicaid is a cooperative federal-state program under which federal financial assistance is given to states that choose to reimburse certain costs of medical treatment for needy applicants. Medicaid was authorized by Congress in 1965 when it enacted Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396V (1993), commonly known as the Medicaid Act. The "primary purpose" of the Medicaid Act is "to enable each State, as far as practicable, to furnish medical assistance to individuals whose income and resources are insufficient to meet the costs of necessary medical services." *Beal v. Doe*, 432 U.S. 438, 444 (1977) (citing 42 U.S.C. § 1396).

States are not required to participate in the Medicaid program. If a state chooses to participate, it must develop a plan explaining it's eligibility requirements and the services that will be funded. The "state plan" is submitted to the Health Care Financing Administration (HCFA) of the United States Department of Health and Human Services (HHS). See 42 C.F.R. § 430.1. The HCFA regional staff reviews the state plan, with the ultimate approval authority of the state plan proposals falling to the HCFA Regional Administrator. (42 C.F.R. 430 15(b). The disapproval authority of the state plan likewise lies with the HCFA Administrator. However, the Administrator will make the final determination of disapproval only after first consulting with the Secretary of Health and Human Services. 42 C.F.R. 430 15(c).

Under Title XIX, certain categories of medical care are mandatory and must be provided by every state Medicaid program. Certain other categories are optional and coverage is at the

state's discretion. A state plan must provide financial assistance to the "categorically needy" with regard to five general categories of medical treatment. The mandatory categories include: (1) inpatient hospital services, (2) outpatient hospital services, (3) other laboratory and x-ray services, (4) skilled nursing facilities, (early and periodic screening, diagnostic and treatment services, or `ESPDT') for persons under the age of 21 and family planning services and supplies, and (5) physicians' services. See 42 U.S.C. §§ 1396(a)(10)(A), 1396d(a)(1-(5), (17), (21). States may also include services to the "medically needy," who are defined as those who do not qualify for some forms of federal assistance but who nonetheless lack the resources to obtain adequate medical care. See 42 U.S.C. § 1396a(a)(10)(c).

The Secretary must reimburse each state with an approved Medicaid plan a share of its costs in providing Medicaid services, as determined by an annually adjusted variable matching formula. 42 U.S.C. § 1396(b)(d); 45 C.F.R. § 201.5. The Secretary, through HCFA, advances funds to a state each quarter, based on an estimation of the state's costs to administer the Medicaid program. 42 U.S.C. § 1396(b)(d)(2). Nothing in Title XIX, however, requires participating States to fund every procedure that falls within the delineated categories of medical care. ***Beal v. Doe***, 432 U.S. at 444. Indeed, although there are certain minimum federal requirements, the Medicaid Act provides the States with a number of options, and state plans for medical assistance vary significantly from State to State.

Title XIX expressly provides: "A state plan for medical assistance must . . . include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which . . . are consistent with the objectives of this [Title]." 42 U.S.C. § 1396(a)(17). The United States Supreme Court noted that the above language "confers broad discretion on the states to adopt standards for determining the extent of medical assistance, requiring only that such standards be `reasonable' and `consistent with the objectives' of the Act." ***Beal***, 432 U.S. at 444.

In addition to the requirements of "reasonableness" and "consistency," Title XIX also requires that medical assistance be equitably distributed among the beneficiaries of the Medicaid program. 42 U.S.C. § 1396a(a)(10)(B) (1994 Supp.) This equitable distribution provision specifically states that "the medical assistance made available to any [categorically needy] individual . . . shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." ***Id.***, § 1396a(a)(10(B)(i). The implementing regulation provides that a "Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service . . . to an

otherwise eligible individual solely because of the diagnosis, type of illness, or condition." 42 C.F.R. § 440.230(c). The same regulation, however, provides further that "appropriate limits" may be placed on a service "based on such criteria as medical necessity. . . ." *Id.*, § 440.230(d). Stated simply, this requirement means that a given medical benefit cannot be administered to one group but not to another.

In ***D.R. v. Mitchell***, 456 F.Supp. 609 (D. Utah 1978), the court held that the Medicaid Act and its regulatory provisions led to two basic conclusions:

> **First, the participating state may select those procedures which it will fund under the Medicaid program and may determine the extent to which those procedures will be funded, placing "appropriate limits" on the services offered. Second, the discretion of the participating state is limited only by three factors: (1) the plan or standard adopted by the state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX.**

Id. at 617-18.

As will be discussed below, Nebraska's current regulation allowing payment for abortions "only when the life of the mother would be endangered if the fetus were carried to term" (471 NAC 18-004.08) meets the above-related criteria. Thus, Nebraska's policy is not inconsistent with any federal provisions and thus no questions of federal supremacy are raised.

III. DISCUSSION OF THE MERITS

The issue in the present controversy is whether states which participate in the Medicaid program are <u>required</u> to use State funds to pay for the cost of all abortions for which federal matching funds are <u>available</u>. Simply put, the question is whether the State must fund all abortions reimbursable under the Hyde Amendment? States which have resisted the HHS directive contend that they are not so compelled, and that they are simply <u>permitted</u> to use state funds in such a manner if they so desire.

The United States Supreme Court has not expressly addressed this issue. ***See Beal***, 432 U.S. at 444-45; ***Harris v. McRae***, 448 U.S. 297, 310 (1980); ***Williams v. Zbaraz***, 448 U.S. 358, 363 and n. 5 (1980). To resolve the issue, an examination of Title XIX and the Hyde Amendment is necessary.

A.

Title XIX and the Hyde Amendment are not ambiguous; nothing in either Title XIX or the Hyde Amendment purport to place any obligation on the State to fund abortion.

HHS and the abortion providers in the various States contend that state funding restrictions more stringent than those contained in the Hyde Amendment are void pursuant to the Supremacy Clause. However, the United States Supreme Court has held that "[p]reemption of state law by federal statute or regulation is not favored in the absence of persuasive reasons-either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakenly so ordained." ***Florida Lime & Avocado Growers v. Paul***, 373 U.S. 132, 142 (1963). Furthermore, there is a well-recognized rule of statutory construction that if Congress intends to put strings on the use of federal funds (e.g., Medicaid funds), it must do so unambiguously, so that States electing to participate in the program are aware of the conditions and know what is expected of them. In ***Pennhurst State School & Hospital v. Halderman***, 451 U.S. 1 (1981), the court stated the following with respect to the spending power of Congress:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: In return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract". . . . Accordingly, if Congress intends to impose a condition on the grant of federal monies, it must do so unambiguously.

Id. at 17; ***see also South Dakota v. Dole***, 483 U.S. 203, 207 (1987).

The above rule has been applied to abortion funding. *Beal*, 432 U.S. at 445-46. Thus, the question to be posed is whether Congress has imposed as an unambiguous condition on the grant of matching federal Medicaid funds that States pay for abortions in cases of rape or incest.

Reviewing the statutory provisions in terms of the plain language of the legislation, there is nothing in Title XIX that purports to place any obligation on the States to fund abortion. The Medicaid Act does not mention abortion at all. Among the myriad minimum federal requirements, not one refers directly or specifically to abortion. Furthermore, it is important to note that Title XIX was enacted in 1965, eight years before ***Roe v. Wade*** 410 U.S. 113 (1973). In 1965, not one State allowed abortion in cases of rape or incest. In light of this, it is unreasonable to

assume that Congress intended for abortions to be included in the services offered pursuant to Medicaid. This point will be discussed further in an examination of the ***Beal v. Doe*** holding below. Likewise, the Hyde Amendment, by its very terms, does not impose any duty on State Medicaid programs to provide funding for abortions. The Hyde Amendment acts as a limit on the use of federal funds. It simply forbids federal funds from being spent for abortions except where necessary to save the life of the mother or in cases of rape or incest. It contains no language to the effect that States must pay for abortions whenever federal matching funds are available. Indeed, the Hyde Amendment does not mention the States at all.

If Congress had desired to establish an obligation upon the States for receipt of federal funds, it should have set forth within the Hyde Amendment mandating language for covered services. It did not do so. The use of the word "shall" is also notable. It appears before "be expended" to make absolute that no funds can be used for any abortion. When the exceptions are set out, however, the term "shall" is not present. Therefore, the amendment does not state that funds will be spent when a medical procedure is performed to terminate a pregnancy to save the life of the mother or when the pregnancy is the result of an act of rape or incest. Considering the purpose of the Hyde Amendment as expressed in its plain language, it must be considered to be a grant of authority rather than a mandate to the States. In other words, Medicaid coverage of abortion, in the cases of rape or incest, is permissive rather than mandatory.

Given the fact that Congress has not unambiguously required States participating in Medicaid to use state funds to pay for abortion, HHS's directive lacks statutory authority. The Tenth Amendment to the United States Constitution provides:

> [T]he powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The State of Nebraska is lawfully exercising its reserved right to determine whether state funds should be used to pay for abortions.

B.

Nebraska's refusal to pay for abortions in cases of rape and incest is reasonable given the State's legitimate and stated interest in protecting unborn human life.

Nebraska's regulation prohibiting use of state funds to pay for abortions unless the life of the mother is endangered is reasonable within the meaning of Title XIX. This position is buttressed by the Supreme Court's opinion in ***Beal***. The Plaintiff's in ***Beal***, Medicaid eligible women under Pennsylvania's state plan, were denied financial assistance for desired nontherapeutic abortions pursuant to Pennsylvania regulations limiting such assistance to those abortions that were certified by physicians as medically necessary. The question before the Court was whether Title XIX required Pennsylvania to fund under its Medicaid program the cost of all abortions that were permissible under state law.

The Court rejected the argument that it was unreasonable for Pennsylvania not to fund nontherapeutic abortions. In so doing, the Court began its analysis by reviewing the plain language of Title XIX. It noted that Title XIX made no reference to abortions. "Instead, the statute is cast in terms that require participating States to provide financial assistance with respect to five broad categories." ***Id.*** at 444. It found, however, that "nothing in the statute suggests that participating States are required to fund every necessary medical procedure that falls within the delineated categories of medical care." ***Id.*** The Court further stated that under the language of the Medicaid Act, the States had broad discretion to adopt standards for determining the extent of medical assistance, requiring only that such standards be reasonable and consistent with the objectives of the Act.

The ***Beal*** court also held that "the State has a valid and important interest in childbirth." ***Id.*** at 445. Although this interest in protecting the "potentiality" of unborn human life "does not . . . become sufficiently compelling to justify unduly burdensome state interference with a women's constitutionally protected privacy interest" until viability, "it is a significant interest existing throughout pregnancy." ***Id.*** at 446. The Court concluded:

> Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this unquestionably strong and legitimate interest in encouraging normal childbirth. Absent such a showing, we will not presume that Congress intended to condition a State's participation in the Medicaid program on its willingness to undercut this important interest by subsidizing the costs of nontherapeutic abortions.

The Court opined that its interpretation of Title XIX was reinforced by the fact that Title XIX was enacted at a time when the only abortions generally allowed in any State were those done

to save the life of the mother. No abortions were allowed in the cases of rape or incest. As the Court noted:

> [W]hen Congress passed Title XIX in 1965, non-therapeutic abortions were unlawful in most States. In view of the then prevailing state law, the contention that Congress intended to require-rather than permit-participating States to fund non-therapeutic abortions requires far more convincing proof than [plaintiffs] have offered.

The ***Beal*** decision thus strongly supports the reasonableness of Nebraska's decision not to use state funds to pay for abortions except where the mother's life is endangered.

The holding in ***Beal*** is in accord with other decisions on this matter. In ***Doe v. Rose***, 499 F.2d 1112 (10th Cir. 1974), the tenth circuit determined that the Medicaid Act does not provide any guidance on whether abortions must be funded by the States. In ***Rose***, the director of Utah Social Services Department had adopted an informal policy of denying abortion funding except in cases where the mother's life was threatened. This policy was challenged on both statutory and constitutional grounds. Although the director's policy was struck down on federal constitutional grounds, the court rejected the argument that the policy's invalidation was required by Title XIX. In addressing the statutory argument, the court stated:

> [t]he applicable federal statutes regarding Medicaid make no mention, as such, of abortions. Hence, we lack specific guidance as to whether Congress intended that abortions be covered by Medicaid and, if so, more critically, <u>which</u> abortions were to be covered by Medicaid benefits.

449 F.2d at 1114.

> The court concluded that:
>
> in light of the applicable statutes' complete silence on the abortion matter, we prefer to dispose of the present appeal on constitutional grounds, rather than by any strained effort to show that the policy in question is, in effect, though not in so many words, prohibited by either federal or state statute.

Id. at 1115. Similarly, the plaintiffs in the cases challenging state abortion funding restrictions are attempting to make a "strained effort" to say that the Medicaid Act requires funding for abortions, although the Act itself does not say so. ***See, Roe v. Ferguson***, 515 F.2d 279, 283 (6th cir. 1975) ("[t]here is no

indication that Congress intended to require the furnishing of abortion services not required for the preservation of the health of the women at a time when the performance of such abortions was illegal in most jurisdictions"); ***Roe v. Norton***, 522 F.2d 928, 935 (2nd Cir. 1975).

C.

Nebraska's policy of excluding abortion from its' state Medicaid plan, except to save the life of the mother, does not violate the equality of benefits requirement of Title XIX.

Title XIX, as previously noted, requires that medical assistance be equitably distributed among the beneficiaries of the Medicaid program. 42 U.S.C. § 1396a(a)(10(B). In particular, the medical assistance made available to any "categorically needy" individual "shall not be less in amount, duration, or scope than the medical assistance made available to any such individual." ***Id.*** at § 1396a(a)(10)(B)(i).

According to the Supreme Court, this section "provide[s] that the medical assistance afforded to an individual who qualifie[s] under any categorical assistance program [may] not be different from that afforded to an individual who qualifie[s] under any other program." ***Schweiker v. Hogan***, 457 U.S. 569, 573 n.6 (1982). "In other words, the amount, duration and scope of medical assistance provided to an individual who qualifie[s] to receive assistance for the aged [may] not be different from the amount, duration, and scope of benefits provided to an individual who qualifie[s] to receive assistance for the blind." ***Id.***

Nebraska has chosen not to use state funds to pay for any abortions except those necessary to save the life of the mother. That choice does not violate the equality-of-benefits requirement of Title XIX because, regardless of the "categorical assistance program" in question, public funds are not available for abortion services unless the mother's life is endangered. And this conclusion, that the state abortion funding ban does not impermissibly discriminate in providing medical assistance to indigent women, is not affected by the State's election to pay for the expenses of childbirth. ***See Beal v. Doe***, 432 U.S. at 446 n.11 (in allocating public funds, States may prefer childbirth to abortion without violating the "equality-of-benefits" principle).

The Supreme Court has consistently held that States have a legitimate and substantial interest in protecting unborn human life; Nebraska has indicated its desire to protect unborn human life and its preference in favor of childbirth over abortion.

Before continuing an examination of the present controversy, it is necessary to briefly analyze two cases which have held that limiting abortion services violates the equality of benefits requirement. ***See Preterm, Inc. v. Dukakis***, 591 F.2d 121 (1st Cir. 1979), and ***Hodgson v. Board of Commissioners of Hennepin County***, 614 F.2d 601 (8th Cir. 1980). In ***Preterm***, Massachusetts provided funding for abortions in cases of rape, incest, or to save the life of the mother. It did not pay for abortions to prevent severe and long lasting damage to the mother's physical health. At that time, the Hyde Amendment allowed for federal reimbursement for such abortions. The Plaintiffs argued that such abortions were medically necessary and were within the category of services which a state must provide. The Court held that "[w]hen a state singles out one particular medical condition -- here a medically complicated pregnancy -- and restricts treatment for that condition to life and death situations, it has . . . crossed the line between permissible discrimination based on medical condition." 591 F.2d at 126.

In ***Hodgson***, the court struck down Minnesota's policy of funding abortions only in cases where the life of the mother was in danger. The court held that "[t]he infirmity of the Minnesota scheme is that it subsidizes health-related services, generally, including pregnancy related services, but subsidizes abortions only if they are life-sustaining." Both ***Preterm*** and ***Hodgson***, however, failed to take into account the Supreme Court's repeated admonition regarding the States' legitimate interest in "protecting the potentiality of human life." ***Beal***, 432 U.S. at 444.

Furthermore, the Court has made it clear that abortion is in a class by itself as a medical procedure. In ***Harris v. McRae***, 448 U.S. 297, 325 (1989), the Court stated that abortion is inherently different from other medical procedures because "no other procedure involves the purposeful termination of potential life." Thus, as the Supreme Court noted in ***Maher v. Roe***, 432 U.S. 464, 469 (1977), "disparate treatment in pregnancy related procedures may be presumptively more justified than such treatment in other medical procedures." The ***Maher*** Court added that "[t]he simple answer to the argument that similar requirements [regarding medical necessity] are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life." ***Id.*** at 480.

Moreover, there is no constitutional requirement for states to provide funds to perform abortions. "Nothing in the Constitution requires States to enter or remain in the business of performing abortions." ***Webster v. Reproductive Health Services***, 492 U.S. 490, 510 (1989). Indeed Nebraska has clearly stated its interest in protecting unborn human life and its preference in favor of childbirth over abortion. Neb. Rev. Stat. § 28-325 provides:

The Legislature hereby finds and declares:

(1) That the following provisions were motivated by the legislative intrusion of the United States Supreme Court by virtue of its decision removing the protection afforded the unborn. Sections 28-325 to 28-345 are in no way to be construed as legislative encouraging abortions at any stage of unborn human development, but are rather an expression of the will of the people of the State of Nebraska and the members of the Legislature to provide protection for the life of the unborn child whenever possible;

(2) That the members of the Legislature expressly deplore the destruction of the unborn human lives which has and will occur in Nebraska as a consequence of the United States Supreme Court's decision on abortion of January 22, 1973;

(3) That it is in the interest of the people of the State of Nebraska that every precaution be taken to insure the protection of every viable unborn child being aborted, and every precaution be taken to provide life-supportive procedures to insure the unborn child its continued life after its abortion;

(4) That currently this state is prevented from providing adequate legal remedies to protect the life, health, and welfare of pregnant women and unborn human life; and

(5) That it is in the interest of the people of the State of Nebraska to maintain accurate statistical data to aid in providing proper maternal health regulations and education.

The Nebraska Legislature also passed Legislative Resolution 152, whereby it resolved to petition the United States Congress to pass a right to life amendment to the United States Constitution. Nebraska's Medicaid plan is not arbitrary because it furthers the State's legitimate interest in "protecting the potentiality of human life." *Beal*, 432 U.S. at 444. This choice does not violate the equality of benefits requirements of Title XIX.

D.

Nebraska's regulation is consistent with the objectives of Title XIX.

Pursuant to 42 U.S. C. § 1396(a)(17), a state Medicaid plan must include reasonable standards for determining the extent of medical assistance under the plan "which . . . are consistent with the object of this [Title]." As was discussed previously in section A, there is nothing in either Title XIX or in the Hyde Amendment that purports to place any obligation on the States to fund abortion. The decisions in ***Beal***, ***Rose*** and ***McRae*** line of cases support this proposition.

First of all, Congress could not have intended to include abortion within the list of mandatory benefits when it adopted the Medicaid Act in 1965. At that time, abortion was illegal in nearly every state. Congress clearly did not intend the States to fund criminal activity. In ***D.R. v. Mitchell***, 456 F.Supp. 609, the court stated that "[b]ecause of the general illegality of abortions at the time of enactment of Title XIX, . . . it is utterly untenable to suggest that the Medicaid Act as originally enacted required payment for abortions." 456 F.Supp. at 622.

Along the same line, the Second Circuit, in ***Roe v. Norton***, ***supra***, stated:

> In the light of the circumstances and conditions at the time the statute [Title XIX] was enacted, the absence of any language in the statute regarding the subject [i.e., abortion], and the lack of legislative history indicating a contrary position, it cannot be supposed that Congress, in 1965, intended to or did impose a requirement that states must provide coverage for elective abortions when the criminal statutes of the majority of states forbade the performance of such abortions.

Id. at 935. ***Accord Roe v. Ferguson***, 515 F.2d 279, 282-83 (2d Cir. 1977).

There is nothing in the Medicaid Act that imposes an unambiguous condition of providing funding for abortions in order to receive federal Medicaid funds. Similarly, a conflict is not established by the 1993 Hyde Amendment in that it does not present an unambiguous obligation upon the states for payment of a medical procedure within the Medicaid program. The Hyde Amendment acts as a limitation on the use of federal funds to pay for abortions.

E.

The Hyde Amendment is not a substantive Amendment to Title XIX; the line of cases which purportedly stand for the proposition that states must pay for all medically necessary abortions for which federal funds are available are distinguishable.

Two main arguments have been propounded to advance the contention that states must use state funds to pay for abortions in cases of rape/incest under the Medicaid Act. First, proponents of this viewpoint allege that the Hyde Amendment acts as a substantive amendment to Title XIX, signifying congressional intent that states fund rape and incest abortions. Second, there is a line of cases which were decided in 1979-1980 which purportedly stand for the proposition that states must provide all "medically necessary" services whenever federal funds are available, which, in effect, establishes a floor or minimum level of services which must be provided by the states. The following is an assessment of these arguments.

1. The Hyde Amendment is Not a Substantive Amendment to the Medicaid Act.

Given the fact that the Medicaid Act does not refer to abortion and that nontherapeutic abortions were illegal in nearly every state at the time the Medicaid Act was passed, opponents of the abortion funding restrictions are left to look for other authority to support their position. Thus, they argue that Congress, through an amendment to the annual HHS appropriations act, intended to substantively amend Title XIX. The Hyde Amendment, however, does not mention the states. Looking at the plain language of the Hyde Amendment, it must be considered to be a limitation on the use of federal funds, rather than a mandate upon the states. Therefore, it follows that abortion funding restriction opponents must argue that Congress employed the Hyde Amendment to substantively amend Title XIX by implication. This argument flies in the face of generally accepted propositions of law. The United States Supreme Court, in ***United States v. Will***, 449 U.S. 200, 221 (1980), stated that "repeals by implication are not favored." In fact, the Court specifically noted that "[t]his rule applies with special force when the provision advanced as the repealing measure was enacted in an appropriations bill." ***Id.*** at 221-22. The Court went on to say that "the rules of both Houses limit the ability to change substantive law through appropriations measures." ***Id.*** In light of this, it is difficult to understand how the Hyde Amendment can be considered a substantive amendment to Title XIX.

In ***Harris v. McRae***, 448 U.S. 297, the Court pointedly refused to endorse the theory that the Hyde Amendment was a substantive amendment to the Medicaid Act. In ***McRae***, the district court held that the Medicaid Act required the funding of medically necessary abortions, but that the Hyde Amendment was a substantive amendment to the Medicaid Act relieving states of the obligation to fund abortions except where federal funds were available. The Supreme Court noted that it agreed with the district court, "but for somewhat different reasons." 448 U.S. at 308. The Court stated that "we need not inquire . . . whether the Hyde Amendment is a substantive amendment to Title XIX." *Id.* at 312 n. 14.

2. <u>The *Preterm* line of cases are distinguishable from the issue presented in the present controversy</u>.

Plaintiffs in the various suits regarding the revised Hyde Amendment rely upon four decisions by the federal circuit courts for the proposition that states must fund abortions to the extent that federal funds are available. They further urge that the Medicaid Act requires participating states to fund every medically necessary service falling into the generally defined categories of mandatory services. Upon examination of these cases, it is apparent that they are all distinguishable.

In ***Preterm***, 591 F.2d 121 (1st Cir. 1979), the Hyde Amendment at that time allowed federal funding for abortions in cases of rape, incest, to save the life of the mother or to prevent severe and long lasting damage to the mother's physical health. Massachusetts, however, provided funding for all such abortions except those in the latter category. Plaintiffs challenged Massachusetts' failure to pay for such abortions, arguing that the Medicaid Act required states to pay for all medically necessary abortions whenever federal funds were available, therefore, establishing a floor or minimum level of services. Massachusetts countered that "states are afforded great latitude in deciding which services will be furnished under their plans, and maintain[ed] that the Act nowhere requires a state to provide all `medically necessary' services." 591 F.2d at 124.

The court noted that 42 U.S.C. § 1396a "is the provision which details the required contents of a state plan for medical assistance. Among the 37 items listed, we find no mandate that all `medically necessary' services be provided." 591 F.2d at 124-25. After reviewing ***Beal v. Doe***, 432 U.S. 438 (1977), the court said ***Beal*** did not create "a flat rule that all services within the five general categories deemed `medically necessary' by a patient's physician must be provided by the state plan." 591 F.2d at 125. Instead, the court held it would review the State's decision regarding the medical services offered under its plan to determine

whether they were "reasonable" and "consistent with the objectives of the Medicaid Act." *Id.* at 125-26.

The court did not rule that the state must fund all medically necessary abortions, but struck down the policy pursuant to the equality of benefits requirement. The court held that "[W]hen a state singles out one particular medical condition - - here a medically complicated pregnancy -- and restricts treatment for that condition to life and death situations, it has . . . crossed the line between permissible discrimination based on medical condition." *Id.* at 126. The holding in ***Preterm*** does not comport with the claim that the states must fund all medically necessary services whenever federal funds are available.

If the court was going to rule in favor of the Plaintiffs on such grounds, it would merely have held that because federal funds were available, the state was required to pay for such abortions. Instead, the ***Preterm*** court analyzed the contested limitations on abortion funding to determine whether they were reasonable and consistent with the Medicaid Act. The court held that the exclusion of abortion funding in the state's Medicaid Plan was unreasonable.

In ***Zbaraz v. Quern***, 596 F.2d 196 (7th Cir. 1979), Plaintiffs brought a class action suit seeking to enjoin the State of Illinois from enforcing a statute restricting funding of abortions in all cases except those necessary to save the life of the mother. Plaintiffs argued that Title XIX required the state to fund all medically necessary abortions. In reaching its conclusion, the court agreed with the finding of the court in ***Preterm*** that Title XIX did "not require funding of all medical care which is deemed `necessary' by the treating physician, . . ." *Id.* at 198. It further held, however, that the State's exclusion of payment for abortions in cases of rape, incest and serious physical harm to the mother was unreasonable. *Id* at 199. The court did not convey exactly why the failure to fund such abortions was violative of the Medicaid Act, and it also ignored the State's interest in protecting unborn human life.

In ***Hodgson***, 614 F.2d 601, the court struck down Minnesota's policy of funding abortions only in cases where the life of the mother was in danger. The court, while striking down the policy on the equality of benefits requirement of Title XIX, did not hold that the states must fund all medical services for which federal reimbursement is necessary. *Id.* at 607-08 n.11. Instead, following the reasoning in ***Preterm***, it found that the state plan impermissibly "subsidized health related services, generally, including pregnancy related services, but subsidizes abortions only if they are life threatening." *Id.* at 608. As noted previously, the court entirely ignored the state's legitimate interest in

protecting potential life and encouraging childbirth. ***See McRae***, 448 U.S. at 325; ***Maher***, (***Roe v. Wade*** "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds").

Roe v. Casey, 623 F.2d 829 (3rd Cir. 1980) is the last of the four decisions relied upon. In ***Casey***, Pennsylvania , akin to the situation in Illinois in the ***Zbaraz*** case, did not provide funding for abortions in cases of rape or incest. Once again, the court refused to hold that states must fund all medically necessary services, (***see id.*** at 832-33) but concluded, without analysis, that "Title XIX, as now modified [by the Hyde Amendment], requires the States to fund abortions in two categories: where the mother is endangered and where the pregnancy was the result of rape or incest." ***Id.*** at 836.

Although opponents of the abortion funding restriction ban suggest the above cases hold that a state participating in Medicaid must provide any and all "medically necessary" services to eligible clients, all of these cases reject that sweeping interpretation. ***Preterm*** and the cases which follow it held that certain abortion funding restrictions imposed by the various States were unreasonable and inconsistent with the Medicaid Act. From 1982 to 1993, however, ***Congress*** itself imposed the very restrictions that were found to be in violation with the requirements of the Act. Therefore, if these limitations are somehow constitutionally reasonable when imposed by Congress, they are no less reasonable when imposed by the States.

Furthermore, these holdings presuppose that the States have an obligation under Title XIX to fund abortions. This presupposition is incorrect. The United States Supreme Court in ***Beal*** and its progeny has made that point clear. A look at another aspect of ***Beal*** is helpful at this time. First of all, the position of HEW (now HHS) in ***Beal*** was that "Title XIX allows - but does not mandate - funding of [nontherapeutic] abortions." 432 U.S. at 447. Obviously, the Department's position has changed, even though Title XIX substantively has not. The court also made the following observation in a footnote:

> Respondents rely heavily on the fact that in amending Title XIX in 1972 to include "family planning services" within the five broad categories of required medical treatment, see n.2, ***supra***, Congress did not expressly exclude abortions as a covered service. Since Congress had expressly excluded abortions as a method of family planning services in prior legislation, see 42 U.S.C. § 300a-6, respondents conclude that the failure of Congress to exclude coverage of abortions in the 1972

> amendments to Title XIX "strongly indicates" an intention to ***require*** coverage of abortions. This line of reasoning is flawed. The failure to exclude abortions from coverage indicates only that Congress intended to allow such coverage, not that such coverage is mandatory for nontherapeutic abortions.

432 U.S. at 446, n.10. Thus, the mere fact that Congress did not specifically exclude abortion coverage, especially when it added family planning coverage, did not indicate a Congressional intent to require coverage of abortion. In fact, the current federal regulations (42 C.F.R. § 441.203) still require certification from a physician that "the life of the mother would be endangered if the fetus were carried to term," before federal funds are disbursed.

Finally, all of the above cases were decided before ***Harris v. McRae*** and prior to the decision of Congress to restrict Medicaid funding to cases where it was necessary to save the life of the mother. In ***Harris***, the court found that Congress' authorization of "reimbursement for medically necessary services generally, but not for certain medically necessary abortions" was "rationally related to the legitimate governmental objective of protecting potential life" and "encouraging childbirth." 448 U.S. at 325. The decision in ***Harris*** cannot be interpreted to endorse the assertion in the ***Preterm*** line of cases that the Medicaid Act requires the states to pay for abortions in order to receive federal Medicaid funds.

3. **The Hyde Amendment does not represent an annual determination as to which abortions are medically necessary.**

Another theory espoused by abortion providers is that Congress, through the Hyde Amendment, makes an annual determination regarding which abortions are medically necessary. The plain language of the Hyde Amendment fails to support this assertion. The amendment contains no reference overriding the basic standard of medical necessity as a precondition for allowing payment for medical services. The amendment does not contain the words "medically necessary" or any other words that imply or even suggest that Congress was making such a determination.

4. **The legislative history of Title XIX does not require states to fund abortions.**

Courts that have struck down state funding restrictions have intimated that the legislative history of the 1993 Hyde Amendment mandates that states fund abortions. The United States Supreme Court has stated: "[W]hen confronted with a statute that is plain and unambiguous on its face we ordinarily do not look to legislative history as a guide to its meaning." ***Tennessee Valley Authority v. Hill***, 437 U.S. 153, 184 (1978). Thus, the plain

language of the Hyde Amendment controls its interpretation. The actual words of the Hyde Amendment do not suggest that the States are required to fund abortions. The language is simply a directive as to when federal funds may be used in the case of abortion.

Furthermore, statements made by Senators in a floor debate on a 1993 appropriations act are of no use in determining congressional intent in enacting Title XIX in 1965. "A statute must be construed with reference to the circumstances existing at the time of its passage and in the light of the conditions under which Congress acted at the time." ***Roe v. Norton***, 522 F.2d 928, 935 (2nd Cir. 1975).

The Supreme Court has also said:

> In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analyses of statutory phrases by the sponsors of the proposed laws. . . . The reason is the caveat of Mr. Justice Holmes, "We do not inquire what the legislature meant; we ask only what the statute means."

S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972) (quoting Holmes, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417, 419). Nothing in the floor debate changes the clear, unambiguous wording of either Title XIX or the Hyde Amendment. Members of Congress from Nebraska have also publicly denounced the HHS directive as an incorrect interpretation of the law. Congressman Doug Bereuter stated:

> Your letter is an unjustified and incorrect interpretation of the law and of Congressional intent. It is overzealous and overreaching. It certainly is not the intent of Congress to mandate states to fund Medicaid abortions in the case of rape or incest, regardless of state law. The 1993 amendment to public law is clearly not a mandate, but an enlargement on the limitation on the use of Federal funds, allowing states to use Medicaid funds to finance abortions in the case of rape or incest and of course to continue such use in order to save the life of an indigent mother.
>
> Like many other members of the House, I reluctantly voted for this change to the Hyde amendment because it was the only alternative presented to keep some limitation on the use of Federal Funds for abortions, and I am frankly appalled that your office would interpret the revised statute in the manner which you have. You are unconstitutionally attempting to usurp the

legislative powers given to those of us who are elected for that purpose.

Letter of Congressman Bereuter to Sally Richardson, Director, Medical Bureau of HCFA. Congressman Bereuter and Congressman Bill Barrett both signed a letter, written by two other members of Congress and joined by several others, to President Clinton, decrying the Administration's interpretation of the Hyde Amendment.

Consequently, as a matter of legal interpretation, any attempt to place weight upon the legislative history of the 1993 Hyde Amendment in the context of Title XIX is misplaced.

F.

Nebraska is in no immediate danger of losing federal Medicaid funding.

At this point, there is no imminent danger to the State of Nebraska of having federal Medicaid funds withheld. Before funds could be withheld, the State would have to submit a State Medicaid plan to HCFA. As of this writing, Nebraska has yet to submit its state plan. Once the plan is submitted, the HCFA Regional Administrator will determine whether or not to approve the plan. If the Regional Administrator decides that the state plan is unacceptable (which, in this case, is all but certain), the Administrator will make the final determination of disapproval only after first consulting with the Secretary of HHS. 42 C.F.R. 430.15.

In order for the Secretary to make a final determination to withhold Federal Financial Participation prospectively, the State must first receive notice and a hearing. 42 U.S.C. § 1396c, 42 C.F.R. Part 430, Subpart D. Only after a subsequent final departmental decision could FFP be withheld.

The following represents a timetable of the administrative hearing process. First, once the Regional Administrator gives notice of disapproval, the state has 60 days to request the Administrator reconsider the issue of whether the plan conforms to the requirements for approval. The Administrator, within 30 days of the State's request, will notify the State of the time and place of the hearing. The hearing takes place not less than 30 nor more than 60 days after the date of notice. 42 C.F.R. 430.18. If the hearing officer is the Administrator, he or she will issue the hearing decision within 60 days after the expiration of the period for submission of posthearing briefs. If the hearing officer is someone other than the Administrator, the officer will, upon expiration of the period allowed for posthearing briefs, certify the entire record of the proceedings, including his or her

recommended findings and proposed decision, to the Administrator. The Administrator then serves a copy of the recommended findings and proposed decision upon the parties. Any party, within 20 days, may file with the Administrator exceptions to the recommended findings. The Administrator then reviews the recommended decision, and within 60 days of its issuance, issues his or her own decision. 42 C.F.R. 430.102. Only then can FFP be withheld. Thus, Nebraska is in no imminent danger of losing federal funds. Furthermore, the Secretary, in her discretion, may limit the amount of funds withheld to those parts of the program found to be out of compliance. To our knowledge none of the States that have had a plan disapproved have had funding withheld.

States which have resisted the HHS mandate, and which have been challenged in court, have lost at the district court level. ***Little Rock Family Planning Services, P.A. v. Dalton***, Docket No. LR-C-93-803, ___ F.Supp. ___ (E.D. Ark. July 25, 1994), ***appeal filed***, Docket No. 94-2885; ***Planned Parenthood Affiliates of Michigan v. Engler***, Docket No. 4:94-CV-49, ___ F.Supp. ___ (W.D. Mich. July 18, 1994); ***Hern v. Beye***, Docket No. 93 N 2350, ___ F.Supp. ___ (D. Colo. May, 9, 1994, May 12, 1994), ***appeal filed***, Docket No. 94-1204 (same); ***Planned Parenthood of Missoula, Inc. v. Blouke***, Docket No. CV-94-028-GF, ___ F.Supp. ___ (D. Mont. July 19, 1994) (same); ***Hope Medical Group for Women v. Edwards***, Docket No. 94-1129 (E.D. La. July 28, 1994). However, every state but Montana has subsequently appealed the decision to the respective federal circuit court. These appeals are all currently pending. The fact that these States are appealing exemplifies a belief that the federal mandate constitutes a usurpation of State sovereignty in an area where the federal government has not unambiguously occupied the field. Moreover, several other states are also resisting the HHS mandate, but have yet to have a legal determination regarding their refusal to comply. These States include North Dakota, Oklahoma, Pennsylvania, South Dakota and Utah.

CONCLUSION

Although the ultimate resolution of this controversy by the courts is uncertain, there is strong legal authority supporting the State's current limitation on funding of medicaid abortions, as set forth above. The most principled legal position is that Title XIX and the Hyde Amendment permit, but do not mandate State funding of abortions. The State of Nebraska has a legitimate and substantial legal interest in protecting unborn human life, and given the fact that Congress has not unambiguously required States participating in Medicaid to use state funds to pay for abortion, HHS's directive to the Nebraska Department of Social Services lack's statutory authority. Furthermore, the Tenth Amendment to the United States Constitution protects States from what Congressman Bereuter has

correctly called an "overzealous and overreaching" mandate issued by the federal bureaucracy.

Finally, before any federal funds may be withheld, a lengthy administrative appeals process would have to be followed. Moreover, it is extremely unlikely that even the insensitive federal bureaucracy or the Clinton administration would deny medical care to each and every poor person in the State of Nebraska in retaliation for the State of Nebraska using lawful appeals procedures to obtain a proper legal interpretation of the Hyde amendment.

It is, therefore, our recommendation that the Department of Social Services and the Governor of Nebraska not amend state rules to expand the use of taxpayer funds to pay for abortions. We would note, however, that the Department of Social Services and the Governor do possess the legal authority to expand the use of taxpayer funds for abortions, and accordingly we are forwarding the proposed rules to the Governor for his approval or denial.

Sincerely,

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Attorney General

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APPROVED BY:

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