NLWJC - Kagan
DPC - Box 001 - Folder 016

Abortion - Medicare Coverage

Current law -- Hyde amendment (Labor/HHS appropriations bill for FY 1998) (with proposed addition for the FY 1999 bill in boldface)-

Sec. 509. (a) None of the funds appropriated under this Act, **and none of the funds in any trust fund to which funds are appropriated under this Act,** shall be expended for any abortion.

(b) None of the funds appropriated under this Act, **and none of the funds in any trust fund to which funds are appropriated under this Act,** shall be expended for health benefits coverage that includes coverage of abortion.

(c) The term "health benefits coverage" means the package of services covered by a managed care provider or organization pursuant to a contract or other arrangement.

Sec. 510. (a) The limitations established in the preceding section shall not apply to an abortion--

(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.

(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).

(c) Nothing in the preceding section shall be construed as restricting the ability of any managed care provider from offering abortion coverage or the ability of a State or locality to contract separately with such a provider for such coverage with State funds (other than a State's or locality's contribution of Medicaid matching funds).

Thomas / Hyde

Suggested Language

Current law — Hyde amendment (Labor/HHS appropriations bill for FY 1998)
(with proposed addition for the FY 1999 bill in boldface)

Sec. 509. (a) None of the funds appropriated under this Act shall be expended for any abortion [or for the administrative expenses of any federal program, agency or Department which provides reimbursement for, or pays for, any abortion].

(b) None of the funds appropriated under this Act shall be expended for health benefits coverage that includes coverage of abortion [or for the administrative expenses of any federal program, agency, or Department which provides payments to any health plan which provides any benefits or coverage of abortion under a federal program].

Lower Alternative

alternatives to an exemption for plans that don't provide abortion

Option 1:

None of the funds appropriated by this Act may be expended by the Health Care Financing Administration unless it permits a ~~church~~ religiously controlled organization to participate in the Medicare HMO Plus program without offering abortions.

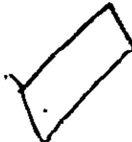
The term "~~church~~ religiously controlled organization" means a ~~qualified~~ health benefits plan controlled by a church ~~organization~~ (as defined by section 3121 of the Internal Revenue Code of 1986).

Option 2:

None of the funds appropriated by this Act may be expended by the Health Care Financing Administration if it requires a ~~church~~ religiously controlled organization to offer abortion services as a condition of particpation in the Medicare HMO Plus program.

The term "~~church~~ religiously controlled organization" means a ~~qualified~~ health benefits plan controlled by a church ~~organization~~ (as defined by section 3121 of the Internal Revenue Code of 1986).

Delay



Current Law -- Antidiscrimination Amendment to the Balanced Budget Downpayment Act II - March 19, 1996, now codified at 42 U.S.C. § 238n (with proposed additions and deletions for the FY 1999 Labor/HHS Appropriations bill)

§ 238n. Abortion-related discrimination in governmental activities ~~regarding training and licensing of physicians~~

(a) In general. The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—

(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform ~~such~~ [illegible] abortions, or to provide referrals for such training or such abortions;

(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

(3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

(b) Accreditation of postgraduate physician training programs. (1) In general. In determining whether to grant a legal status to a health care entity (including a license or certificate), or to provide such entity with financial assistance, services or other benefits, the Federal Government, or any State or local government that receives Federal financial assistance, shall deem accredited any postgraduate physician training program that would be accredited but for the accrediting agency's reliance upon an accreditation standard that requires an entity to perform an induced abortion or require, provide, or refer for training in the performance of induced abortions, or make arrangements for such training, regardless of whether such standard provides exceptions or exemptions. The government involved shall formulate such regulations or other mechanisms, or enter into such agreements with accrediting agencies, as are necessary to comply with this subsection.

(2) Rules of construction. (A) In general. With respect to subclauses (I) and (II) of section 705(a)(2)(B)(i) [42 USCS §292d(a)(2)(B)(i)(I), (II)] (relating to a program of insured loans for training in the health professions), the requirements in such subclauses regarding accredited internship or residency programs are subject to paragraph (1) of this subsection

(B) Exceptions. This section shall not—

(i) prevent any health care entity from voluntarily electing to be trained, to train, or to arrange for training in the performance of, to perform, or to make referrals for induced

abortions; or

(ii) prevent an accrediting agency or a Federal, State or local government from establishing standards of medical competency applicable only to those individuals who have voluntarily elected to perform abortions.

(c) Definitions. For purposes of this section:

(1) The term "financial assistance", with respect to a government program, includes governmental payments provided as reimbursement for carrying out health-related activities.

(2) The term "health care entity" includes an individual physician ~~[illegible]~~, a postgraduate physician training program, ~~and~~ a participant in a program of training in the health professions ~~[illegible]~~.

(3) The term "postgraduate physician training program" includes a residency training program.

(July 1, 1944, ch 373, Title II, Part B, §245, as added April 26, 1996, P. L. 104-134, Title V, §515, 110 Stat. 1321-245, May 2, 1996, P. L. 104-140, §1(a), 110 Stat. 1327.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

Act May 2, 1996, P. L. 104-140, §1(a), 110 Stat. 1327, inserted the heading "TITLE I-OMNIBUS APPROPRIATIONS" after the enacting clause of Act April 26, 1996, P. L. 104-134.

Abortion – medicare coverage

MEMORANDUM

TO: Elana Kagan

FROM: Harriet S. Rabb
Marcy Wilder

DATE: June 12, 1998

RE: Medicare Funding and Abortion

QUESTION PRESENTED

On March 19, 1998, Senator Don Nickles wrote to the Secretary of the Department of Health and Human Services asking whether the language of the Hyde amendment controls the extent to which Medicare pays for abortion for its disabled population.

SUMMARY CONCLUSION

According to the Department of Justice's Office of Legal Counsel (OLC), the question of whether, as a matter of law, general appropriations riders apply to appropriated funds once deposited in a federal trust fund is a matter of first impression and the answer, at this time, is unclear. Therefore, we recommend certain prudential steps set forth below as "Options," so that until the answer is known as a matter of law, the Administration has protected the trust funds and has guarded against unauthorized expenditures.

DISCUSSION

Although Medicare is generally thought of as a health insurance program for the elderly, certain disabled individuals under the age of 65 are eligible to participate in the program. Among those who qualify for Medicare on the basis of disability, between approximately 400 and 500 each year are women who obtain abortion services funded by the program.[1] They include women who are mentally disabled as well as women suffering from HIV/AIDS, mental retardation, musculoskelatal disorders, and diseases of the circulatory or respiratory system. Although the Health Care Financing Administration (HCFA) does not keep records indicating the health status

[1] The number of abortions funded by the Medicare program has remained stable since the mid-1980s.

of women seeking Medicare-funded abortions, anecdotal evidence suggests that a number of the procedures are needed as a result of rape, including the rape of women who are institutionalized or are so severely mentally disabled that they do not have the legal capacity to provide consent. In addition, it appears that some Medicare beneficiaries in need of abortion are required to take drugs (such as anti-psychotic or anti-seizure medication) that are contra-indicated for pregnancy. If abortion were not available, these women would be left with a choice between stopping medications essential to their health and well-being, or continuing to take medication that can cause miscarriage, fetal deformity or other conditions that could lead to a pregnancy that seriously threatens a woman's already compromised health. Finally, for many disabled women insured by Medicare, pregnancy itself can be a health-threatening condition.

The Hyde Amendment

Every year since 1976, Congress has included in the HHS appropriation a provision restricting the expenditure of funds for abortion services. This funding restriction is commonly known as the Hyde amendment. The current Hyde amendment was enacted as section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, 111 Stat. 1467 (1997). That provision states that "[n]one of the funds appropriated under this Act shall be expended for any abortion." Exceptions to the prohibition are provided in section 510 for cases of rape and incest, and certain circumstances in which continuing a pregnancy would place a woman's life in danger. The parameters of the abortion funding prohibition change from year to year. For example, dollars appropriated in FY 97 could be expended for abortions needed in cases of rape, incest and life endangerment, whereas dollars appropriated in FY98 could be used for abortion in cases of rape, incest but not all life endangering circumstances. Appropriations from some years past could be used in all cases of life endangerment, but not in cases of rape or incest.

It is unclear, at this time, whether general appropriations riders like the Hyde amendment, apply as a matter of law to federal trust funds. In the Medicare example, once appropriated funds are deposited in the Medicare trust fund, they are co-mingled with premiums paid by beneficiaries, interest on investments, payroll taxes and other non-appropriated sources of income.[2] If, as a

[2] The Hospital Insurance Trust Fund (HI), which funds Medicare part A, is financed primarily through the hospital insurance payroll tax levied on current workers and their employers. Additional sources of income to the HI fund include premiums from voluntary enrollees, social security taxes and interest on investments. The Supplementary Medical Insurance Trust Fund (SMI), which funds Medicare part B, is financed primarily through a combination of monthly premiums and funds appropriated from Federal general revenues.

matter of law, appropriated dollars entering a trust fund lose their restrictions and are co-mingled with unrestricted funds, neither the Hyde Amendment appearing in the FY 98 Act, nor any earlier version of a Hyde Amendment, attaches to the funds paid out of the Medicare trust. Alternatively, as a legal matter, if the appropriated dollars retain their restrictions, the version of the Hyde amendment extant at the time the dollars were appropriated would remain with those dollars -- potentially indefinitely.

Medicare and Abortion

HCFA policy on Medicare coverage for abortion is not well-documented. Neither the Medicare statute nor the regulations explicitly mention coverage for abortion. It appears that the only available written guidance is contained in a 1991 Medicare Carriers Manual in a section on physician's expenses for surgery, childbirth, and treatment for infertility. A cover sheet indicates that the 1991 manual was being updated to reflect a guidance issued in 1987. The manual provides:

> [I]n the event of termination of pregnancy, regardless of whether terminated spontaneously or for therapeutic reasons (i.e. where the life of the mother would be endangered if the fetus were brought to term), the need for skilled medical management and/or medical services is equally important as in those cases carried to full term.

To the extent this can be considered a statement of Medicare policy on abortion, funding is to be provided only in cases where the life of the woman would be endangered if the pregnancy were carried to term.[3]

Although HCFA knows that some claims submitted for abortion services are paid and others are denied, the agency is unable to determine what limits, if any, different fiscal intermediaries have applied in determining whether to fund abortions.[4] HCFA has never issued guidance instructing intermediaries to provide abortion services consistent with the Hyde amendment.

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[3] In 1987 and 1991, the years in which the initial guidance was issued and the carrier manual updated, providing abortion funding only in cases of life endangerment was consistent with the then current Hyde amendment.

[4] In 1996, for example, there were 494 abortions allowed and 165 claims denied for therapeutic abortions. It is unclear, however, if the denials were based on a determination that the abortions fell outside the scope of abortion-related restrictions or whether they were for other reasons that claims are routinely denied such as processing deficiencies (e.g. submission of incomplete forms), a determination that the service was not medically necessary, or a failure to meet eligibility requirements.

OPTIONS

The General Counsel of the Office of Management and Budget (OMB) is of the opinion that if appropriations riders (like the Hyde amendments) survive inside of trust funds, they need not taint non-appropriated funds received from other sources (such as premium payments) if an accounting mechanism can segregate restricted appropriated funds from all others. This practice would leave the unrestricted funds (measured in the billions of dollars in both HI and SMI) to be spent in accord with policy established by the Administration. Funding from sources other than appropriations would remain unencumbered by any Hyde amendment which would apply, if at all, only to dollars appropriated in the HHS appropriations bill.

The Office of Legal Counsel should be asked to advise whether general appropriations riders remain attached to funds once they are deposited in a federal trust fund. Pending the outcome of that effort and planning cautiously for the possibility that Hyde does apply to appropriated dollars in the trust fund, prudence dictates that documentation be available to confirm that restricted funds were not expended for an impermissible purpose. That can be achieved in two ways:

Option 1

HHS policy would provide that abortion is available to Medicare recipients in cases of life endangerment, rape, incest and cases in which an abortion is necessary to preserve the woman's health. A tracking mechanism would be instituted to show that only non-appropriated dollars were expended for such services, and that restricted dollars were not spent for an impermissible purpose.

Option 2

HHS policy would limit the availability of all Medicare funds consistent with the conditions described in the current Hyde amendment. In the event that appropriations restrictions are found to survive inside a trust fund, it would be clear that no funds at all had been spent for abortions beyond those permitted by the current Hyde amendment.

Abortion - Medicare coverage

THE WHITE HOUSE

WASHINGTON

June 16, 1998

6-16-98

Copied
Reed
Ruff
CCG
KAGAN

MEMORANDUM FROM THE PRESIDENT

FROM: SEAN MALONEY

SUBJECT: Medicare Coverage of Abortions

The attached Reed/Ruff memo asks you to decide whether the Hyde Amendment's abortion-funding prohibitions should apply to Medicare.

Background. Medicare covers about 500 abortions/year; about the same as during the Reagan/Bush Administrations. (Some 2 million non-elderly women qualify for Medicare through SSDI.) In 1991, HCFA issued a reimbursement directive, tracking the Hyde Amendment, which stated that Medicare would cover abortions only where the mother's life was endangered. Congress later expanded the Hyde exception to encompass rape/incest, but the HCFA directive did not change, leaving it more restrictive than Hyde. Some Medicare carrier medical directors, however, may be covering abortions in cases of rape, incest, deformed fetuses, or mentally impaired mothers. This may explain why pro-choice groups have never complained about the HCFA directive. Recently, the Catholic Health Association (CHA) complained to us and to Senator Nickles about a HCFA regional-office ruling that a Catholic-run Provider Sponsored Organization (PSO) could participate in Medicare only if it agreed to cover qualified abortions for disabled women. Senator Nickles then wrote Secretary Shalala asking whether the Hyde Amendment applies to Medicare, and whether religion-based health plans that do not offer abortion services can qualify as PSOs under Medicare.

Options/Views. All of your advisers agree (i) that we should offer the CHA a new administrative option that lets Catholic plans participate in Medicare without covering abortions; and (ii) that we should broaden the 1991 HCFA directive to track Hyde and permit funding in cases of rape/incest. *HHS* disagrees with the rest of your advisers, however, over whether Medicare might also cover other types of abortions. Two options are presented:

Option 1: Rule that Hyde applies to Medicare -- say all Medicare expenditures must abide by the Hyde restrictions because some Hyde-covered appropriated funds are deposited into the Medicare Trust Fund; would avoid a showdown with Congress; covers more abortions than the current HCFA directive; helps a possible agreement with Catholic plans. *DPC, OMB, Podesta, Sylvia, Maria, and Audrey Haynes support Option 1; Sylvia expresses some concern about angering women's groups when Nickles may do little more than reaffirm Hyde's applicability.*

Option 2: Rule that Medicare can cover abortions necessary to protect a woman's health -- could segregate appropriated funds (covered by Hyde) from non-appropriated funds (*e.g.*, payroll taxes, premiums) in the Medicare Trust Fund; could use non-appropriated funds to cover health-related abortions; would permit abortion coverage for vulnerable and disabled women; would please women's groups; *HHS supports this option.*

Approve Option 1 ✓ ___ Approve Option 2 ___ Discuss ___

THE WHITE HOUSE

WASHINGTON

June 12, 1998

MEMORANDUM TO THE PRESIDENT

FROM: Bruce Reed
Charles F.C. Ruff

SUBJECT: Hyde Amendment Application to Medicare and Abortion Coverage Requirements for Catholic Provider Sponsored Organizations

As you know, some women of child-bearing age qualify for Medicare because they receive Social Security Disability Insurance (SSDI). Senator Nickles has asked HHS whether the Hyde Amendment's restrictions on government funding of abortion apply to the Medicare program. He also has asked whether health plans that refuse, on religious grounds, to provide abortion services can still become Provider Sponsored Organizations (PSOs) eligible for Medicare payments.

We believe that we must respond quickly to Senator Nickles to have any chance of avoiding another legislative confrontation over abortion policy. This memo provides background information and policy options for your consideration.

Background

Earlier this year, the Catholic Health Association (CHA) contacted HHS and the White House about a ruling by a HCFA regional office that a Catholic-run PSO could participate in Medicare only if it agreed to cover qualified abortions for women with disabilities. The CHA vehemently objected to this ruling and asked if we could intervene administratively. At the same time, the CHA contacted Senator Nickles' office. The CHA discussed with Nickles both whether the Hyde Amendment applies to Medicare and whether Catholic PSOs can decline to provide all abortions (even those permitted under Hyde) because of their religious objections. The Senator, clearly sensing another abortion wedge issue, wrote to Donna Shalala to obtain the Department's formal position on both of these issues.

Medicare and Abortion coverage. Five million non-elderly disabled Americans -- including two million women -- receive Medicare coverage by virtue of their SSDI eligibility. The Medicare program currently covers about 500 abortions each year, while denying claims in another 100-200 cases. These figures are consistent with those from the Reagan and Bush Administrations.

In 1991, HCFA issued a reimbursement directive stating that Medicare would cover abortion services only in cases where the life of the mother was endangered. (Prior to this

time, there was no clear guidance on the subject.) This directive, which comported with the then-existing Hyde Amendment, is actually more restrictive than the current Hyde amendment, because it fails to cover abortions arising from rape and incest. The directive, however, has not been modified, and remains the only policy guidance on abortion coverage under the Medicare program.

Although we believe that most Medicare carrier medical directors have largely complied with this directive, some may have covered other kinds of abortions -- e.g., abortions arising from rape or incest, abortions involving deformed fetuses, or other medically necessary abortions. In particular, carriers may have decided to cover some very difficult cases involving the one-third of women on Medicare disability who have some serious mental impairment (about 700,000 women). Such individual coverage decisions may help explain why no one on the pro-choice side of the abortion debate has ever complained about our coverage policy.

Legislative and Political Environment. The Nickles' letter has started yet another controversial abortion debate. The CHA is working with Senator Nickles and others on drafting legislation to make clear that Hyde applies to Medicare, as well as to exempt organizations with ethical or religious objections from any abortion coverage requirements. (CHA and Nickles have gotten the impression from HHS that Hyde does not apply to Medicare and that the religious convictions of Catholic PSOs cannot be fully accommodated.) Absent administrative action, there is no doubt that we will see this issue raised on some appropriations bill. At the same time, the womens' groups have become aware of this issue and are urging the Administration to adopt a generous Medicare abortion coverage policy.

In the next few months, the Administration will have to deal with several other controversial abortion issues. Most notably, the Republicans will bring up the partial-birth abortion legislation sometime prior to the November elections. In addition, Republicans in both the House and Senate will attempt to pass a bill, which most in the Administration strongly oppose, to prohibit transfering a minor across state lines to bypass parental consent requirements. Finally, we can expect the usual abortion riders to appear on appropriations bills.

Options

All of your advisors (HHS, OMB, and DPC) agree that we should offer the CHA a new administrative option that allows Catholic health plans to participate in Medicare without covering any abortions, so long as they accept a slightly reduced capitated payment. We do not know whether CHA will accept this offer, but we think it may do so, particularly if the offer is combined with CHA's preferred outcome on the Hyde issue.

The outstanding question is whether Hyde applies to Medicare. We all agree that we should inform Nickles that current Medicare policy, as set out in the 1991 directive, is to

cover only abortions necessary to protect the life of the mother. We also all agree that because this "life of the mother" standard is more restrictive than the current Hyde amendment, we should modify the directive to cover at least abortions arising from rape and incest. We have not reached consensus, however, on whether we also should cover any other abortions (i.e., abortions that Hyde generally prevents the federal government from funding). We see two viable options:

Option 1: Rule that the current Hyde Amendment (allowing funding where the life of the woman is in danger or in cases of rape and incest) applies to Medicare. Under this option, we would take the position that since some Hyde-covered appropriated funds are deposited into the Medicare Trust Fund, all Medicare expenditures must abide by the Hyde restrictions. We then would update our Medicare coverage policy to reflect the current, comparatively expansive Hyde Amendment. DPC and OMB support this option.

Pros:

- This option is most likely to avoid a legislative showdown on abortion funding that we are unlikely to win.
- This option is consistent with our current position on Medicaid funding, and will cover more abortions than the current policy allows.
- This option will enhance our ability to reach an agreement with the CHA on the PSO abortion coverage issue.

Cons:

- This option may expose us to criticism about non-coverage of extremely sympathetic cases involving vulnerable and disabled women.
- This option will anger womens' groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke the Republicans to enact contrary legislation.

Option 2: Rule that Medicare can cover abortions necessary to protect the health of the woman (in addition to abortions allowed by Hyde). Under this option, we would segregate appropriated funds from non-appropriated funds (payroll taxes, premiums, etc.) in the Medicare Trust Fund and use the non-appropriated (and hence unrestricted) funds to pay for the health-related abortions. HHS supports this option.

Pros:

- This option will ensure that all abortions necessary to protect a woman's health are

covered, and will allow us to avoid criticism arising from non-coverage of highly sympathetic cases involving vulnerable and disabled women.

- This option will assuage the womens' groups by providing for Medicare coverage of a larger class of abortions.

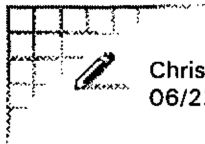
Cons:

- This option will virtually guarantee a legislative battle with Nickles and his allies on the appropriateness of using public funds to pay for abortions. We should expect to lose this battle and to have to veto a bill over government funding of abortion.
- This option diverges from this Administration's past practice on government funding of abortions.
- This option might well undermine our ability to reach agreement with the CHA on the PSO abortion coverage issue.

Recommendations

As noted, DPC (Bruce, Chris, and Elena) and OMB support Option 1, because (1) it is most consistent with this Administration's prior practice on government funding of abortions and (2) it stands the best chance of avoiding a high-profile legislative battle -- on both the Hyde and PSO issues -- that we are unlikely to win. HHS supports Option (2) because of the special vulnerability of the population seeking abortion services under the Medicare program. Counsel's Office takes no position as between the two options.

Abortion - medicare coverage



Christopher C. Jennings
06/22/98 01:24:21 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cathy R. Mays/OPD/EOP
Subject: My fun travel plans

I am leaving Monday morning for Nashville for the 7th Annual VP Family Conference. I know you both are quite envious; I cannot tell you what a special experience this has been. Most important, of course, is that you will have to endure a Monday morning meeting without my presence and my recounting of my never-ending and fascinating woes. I know it will be difficult.

Seriously, if you need me, please page me through Sky Page.

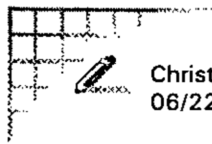
Although I believe there will be a brief USA Today story, I am not expecting a lot of break-through news. We will do all that we can to push the kids outreach Exec Memorandum and the announcement of new Medicare benefits and information assistance initiatives. However, there is little doubt in my mind that the tobacco statement will get the most news.

Bruce, Elena can fill you in on the latest on the Hyde and Medicare coverage issue, as well as the increasing pressure to mandate contraceptive coverage for FEHBP and the rest of the private sector as well. FYI, Rich is pushing on us to release the Donna letter to Nickles, outlining our position on Hyde, as early as Monday afternoon. The hope is that our letter confirming we can do this administratively will significantly reduce the likelihood that the Republicans will legislate over this issue this year.

Other notables this week include Tuesday's FDA Commissioner nomination announcement, as well as the likely release of CBO's estimates on the Dingell bill. That is just some quick rambling to substitute for my appearance tomorrow. Must go. Page me if you need me.

cj

Abortion - medicare coverage



Christopher C. Jennings
06/22/98 12:16:21 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: HHS letter re Hyde Amendment application to Medicare

Apparently we need to seriously contemplate getting the HHS/Hyde letter out on Monday. According to Rich Tarplin (and Martha you would know better than anyone re this), the relevant appropriations bill is up for a mark-up on Tuesday. If we do not get the letter out by Monday, it may be too late to have a constructive impact on this bill; in other words, the Hill may not mark-up a Hyde-like legislative fix if we get this letter up in a timely matter.

I told Rich that I would relay this info to you. My recommendation is that we get the letter up ASAP (Monday), unless Martha and Janet have major objections? Elena has a copy of the letter in case any of you have not seen it. Can we proceed???

cj

Message Sent To:

Elena Kagan/OPD/EOP
Martha Foley/WHO/EOP
Daniel N. Mendelson/OMB/EOP
Robert G. Damus/OMB/EOP
Audrey T. Haynes/WHO/EOP
Ann F. Lewis/WHO/EOP
Janet Murguia/WHO/EOP
Jennifer L. Klein/OPD/EOP

Abortion - Medicare coverage

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUN 22 1998

The Honorable Don Nickles
Assistant Majority Leader
133 Hart Senate Office Building
Washington, DC 20510-3602

Dear Senator Nickles:

Thank you for writing concerning Health Care Financing Administration (HCFA) policy with respect to the coverage of abortion under the Medicare program. We share your goal of ensuring the broadest possible choice of health plans for Medicare beneficiaries, including provider-sponsored organizations, and look forward to working with you and your colleagues to achieve this end. Specifically, you posed three questions with respect to HCFA policy in this area: (1) Does the language of the Hyde amendment control the extent to which Medicare pays for abortions for its disabled population? (2) Does HCFA view abortion as a "medically necessary" service covered by Medicare? (3) Is a health plan required to certify that it will cover abortions in order to qualify as a Medicare + Choice plan?

With respect to your first question, the answer is yes. This Administration is committed to applying the criteria of Hyde to the expenditure of Medicare funds for abortions. The most recent Hyde amendment was enacted in the 1998 Labor, Health and Human Services, and Education Appropriations Act and provides that "[n]one of the funds appropriated under this Act shall be expended for any abortion." Exceptions are provided for cases of rape and incest, and certain circumstances in which a woman's life would be endangered. The Medicare program will provide funding for abortions only as consistent with Hyde.

Your second question asks whether HCFA views abortion as a "medically necessary" service covered by Medicare. Under the statute, Medicare covers items and services that are "reasonable and necessary for the diagnosis or treatment of illness or injury . . . ." Absent application of the criteria set out in Hyde, claims for abortion services would be assessed under this general statutory standard. As stated above, however, the Medicare trust funds will be administered consistent with the Hyde criteria.

Finally, you ask whether health plans are required to certify that they will cover abortion in order to qualify as Medicare + Choice plans. You express concern in your letter that such a requirement would eliminate certain qualified provider-sponsored organizations (PSOs) from participation. As you know, the Balanced Budget Act of 1997 (BBA) provides that each Medicare + Choice plan must provide all items and services (excluding hospice care) available under Medicare Parts A and B. In addition, the Medicare + Choice statute provides that "only the Medicare + Choice organization shall be entitled to receive payments from the Secretary under this title for services furnished to the individual ." Therefore, in almost all instances, HHS is prohibited from making direct payments to providers for Medicare + Choice services.

We share your concern that these legal obligations could make it difficult for plans to participate as PSOs if they have a moral or religious objection to covering abortion services. Our objective in implementing Medicare + Choice is to encourage the participation of as wide a range of PSOs as is permissible under the statute, to help maximize the choices available to beneficiaries across the country. As you know, my Department is committed to working through a number of administrative actions that could make it possible for plans that have a moral or religious objection to providing abortion coverage, to participate as PSOs in Medicare + Choice. We look forward to working together to ensure that Medicare beneficiaries have a broad range of choices in selecting a health plan, and to working with you on appropriate means of resolving these issues.

Sincerely,

Donna E. Shalala

Abortion - Hyde Amendment/ Medicare

June 12, 1998

MEMORANDUM TO THE PRESIDENT

FROM: Bruce Reed
Charles F.C. Ruff

SUBJECT: Hyde Amendment Application to Medicare and Abortion Coverage Requirements for Catholic Provider Sponsored Organizations

As you know, some women of child-bearing age qualify for Medicare because they receive Social Security Disability Insurance (SSDI). Senator Nickles has asked HHS whether the Hyde Amendment's restrictions on government funding of abortion apply to the Medicare program. He also has asked whether health plans that refuse, on religious grounds, to provide abortion services can still become Provider Sponsored Organizations (PSOs) eligible for Medicare payments.

We believe that we must respond quickly to Senator Nickles to have any chance of avoiding another legislative confrontation over abortion policy. This memo provides background information and policy options for your consideration.

Background

Earlier this year, the Catholic Health Association (CHA) contacted HHS and the White House about a ruling by a HCFA regional office that a Catholic-run PSO could participate in Medicare only if it agreed to cover qualified abortions for women with disabilities. The CHA vehemently objected to this ruling and asked if we could intervene administratively. At the same time, the CHA contacted Senator Nickles' office. The CHA discussed with Nickles both whether the Hyde Amendment applies to Medicare and whether Catholic PSOs can decline to provide all abortions (even those permitted under Hyde) because of their religious objections. The Senator, clearly sensing another abortion wedge issue, wrote to Donna Shalala to obtain the Department's formal position on both of these issues.

Medicare and Abortion coverage. Five million non-elderly disabled Americans -- including two million women -- receive Medicare coverage by virtue of their SSDI eligibility. The Medicare program currently covers about 500 abortions each year, while denying claims in another 100-200 cases. These figures are consistent with those from the Reagan and Bush Administrations.

In 1991, HCFA issued a reimbursement directive stating that Medicare would cover abortion services only in cases where the life of the mother was endangered. (Prior to this

time, there was no clear guidance on the subject.) This directive, which comported with the then-existing Hyde Amendment, is actually more restrictive than the current Hyde amendment, because it fails to cover abortions arising from rape and incest. The directive, however, has not been modified, and remains the only policy guidance on abortion coverage under the Medicare program.

Although we believe that most Medicare carrier medical directors have largely complied with this directive, some may have covered other kinds of abortions -- e.g., abortions arising from rape or incest, abortions involving deformed fetuses, or other medically necessary abortions. In particular, carriers may have decided to cover some very difficult cases involving the one-third of women on Medicare disability who have some serious mental impairment (about 700,000 women). Such individual coverage decisions may help explain why no one on the pro-choice side of the abortion debate has ever complained about our coverage policy.

Legislative and Political Environment. The Nickles' letter has started yet another controversial abortion debate. The CHA is working with Senator Nickles and others on drafting legislation to make clear that Hyde applies to Medicare, as well as to exempt organizations with ethical or religious objections from any abortion coverage requirements. (CHA and Nickles have gotten the impression from HHS that Hyde does not apply to Medicare and that the religious convictions of Catholic PSOs cannot be fully accommodated.) Absent administrative action, there is no doubt that we will see this issue raised on some appropriations bill. At the same time, the womens' groups have become aware of this issue and are urging the Administration to adopt a generous Medicare abortion coverage policy.

In the next few months, the Administration will have to deal with several other controversial abortion issues. Most notably, the Republicans will bring up the partial-birth abortion legislation sometime prior to the November elections. In addition, Republicans in both the House and Senate will attempt to pass a bill, which most in the Administration strongly oppose, to prohibit transfering a minor across state lines to bypass parental consent requirements. Finally, we can expect the usual abortion riders to appear on appropriations bills.

Options

All of your advisors (HHS, OMB, and DPC) agree that we should offer the CHA a new administrative option that allows Catholic health plans to participate in Medicare without covering any abortions, so long as they accept a slightly reduced capitated payment. We do not know whether CHA will accept this offer, but we think it may do so, particularly if the offer is combined with CHA's preferred outcome on the Hyde issue.

The outstanding question is whether Hyde applies to Medicare. We all agree that we should inform Nickles that current Medicare policy, as set out in the 1991 directive, is to

cover only abortions necessary to protect the life of the mother. We also all agree that because this "life of the mother" standard is more restrictive than the current Hyde amendment, we should modify the directive to cover at least abortions arising from rape and incest. We have not reached consensus, however, on whether we also should cover any other abortions (i.e., abortions that Hyde generally prevents the federal government from funding). We see two viable options:

Option 1: Rule that the current Hyde Amendment (allowing funding where the life of the woman is in danger or in cases of rape and incest) applies to Medicare. Under this option, we would take the position that since some Hyde-covered appropriated funds are deposited into the Medicare Trust Fund, all Medicare expenditures must abide by the Hyde restrictions. We then would update our Medicare coverage policy to reflect the current, comparatively expansive Hyde Amendment. DPC and OMB support this option.

Pros:

- This option is most likely to avoid a legislative showdown on abortion funding that we are unlikely to win.
- This option is consistent with our current position on Medicaid funding, and will cover more abortions than the current policy allows.
- This option will enhance our ability to reach an agreement with the CHA on the PSO abortion coverage issue.

Cons:

- This option may expose us to criticism about non-coverage of extremely sympathetic cases involving vulnerable and disabled women.
- This option will anger womens' groups, which would prefer us to provide Medicare coverage of the widest possible range of abortions, even if doing so would provoke the Republicans to enact contrary legislation.

Option 2: Rule that Medicare can cover abortions necessary to protect the health of the woman (in addition to abortions allowed by Hyde). Under this option, we would segregate appropriated funds from non-appropriated funds (payroll taxes, premiums, etc.) in the Medicare Trust Fund and use the non-appropriated (and hence unrestricted) funds to pay for the health-related abortions. HHS supports this option.

Pros:

- This option will ensure that all abortions necessary to protect a woman's health are

covered, and will allow us to avoid criticism arising from non-coverage of highly sympathetic cases involving vulnerable and disabled women.

- This option will assuage the womens' groups by providing for Medicare coverage of a larger class of abortions.

Cons:

- This option will virtually guarantee a legislative battle with Nickles and his allies on the appropriateness of using public funds to pay for abortions. We should expect to lose this battle and to have to veto a bill over government funding of abortion.
- This option diverges from this Administration's past practice on government funding of abortions.
- This option might well undermine our ability to reach agreement with the CHA on the PSO abortion coverage issue.

Recommendations

As noted, DPC (Bruce, Chris, and Elena) and OMB support Option 1, because (1) it is most consistent with this Administration's prior practice on government funding of abortions and (2) it stands the best chance of avoiding a high-profile legislative battle -- on both the Hyde and PSO issues -- that we are unlikely to win. HHS supports Option (2) because of the special vulnerability of the population seeking abortion services under the Medicare program. Counsel's Office takes no position as between the two options.