LETTER OPINION
94-L-38

February 9, 1994

Mr. Henry C. "Bud" Wessman
Executive Director
Department of Human Services
600 East Boulevard Avenue
Bismarck, ND 58505-0250

RE: Medicaid Funding of Abortions

Dear Mr. Wessman:

Thank you for your January 5, 1994, letter inquiring whether any provision of North Dakota law inhibits or prevents the state Medicaid director from carrying out federal requirements that the state Medicaid program fund abortions which terminate pregnancies resulting from rape or incest in addition to funding abortions to save the life of the mother.

Before the Hyde Amendment was passed in 1976, the Department of Health, Education, and Welfare,[1] the agency charged with administrating Medicaid, took the position that the Medicaid program allowed but did not require states to fund non-therapeutic abortions. Beal v. Doe, 432 U.S. 438, 447 (1977). In 1976, the Hyde Amendment prohibited the use of federal funds to reimburse the costs of abortions under the Medicaid program except under specified conditions. Harris v. McRae, 448 U.S. 297, 302 (1980). The conditions under which federal funds could be spent for abortions under the Hyde Amendment have varied on occasion. Id. at 302-303. The present version of the Hyde Amendment states:

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 under this Act 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.

P.L. 103-112, ? 509, 107 Stat. 1082, 1113 (1993).

[1]Now designated as the Department of Health and Human Services. P.L. 96-88 ? 508, 93 Stat. 668, 692 (1979).

The federal government provides funds to states for the purpose of enabling each state to furnish medical assistance to certain individuals whose income and resources are insufficient to meet the costs of necessary medical services. To be eligible to receive such funds, a state must have submitted a state plan for medical assistance which has been approved by the Secretary of Health and Human Services. 42 U.S.C. ? 1396 (1988). If the Secretary, after reasonable notice and an opportunity for hearing, finds that a state plan no longer complies with federal requirements or that the administration of the plan fails to substantially comply with any federal requirement, the Secretary may discontinue further payments to the state or, in the Secretary's discretion, payments may be limited to categories or parts of the state plan which are not affected by the failure until the Secretary is satisfied that there is no longer a failure of the state to comply. 42 U.S.C. ? 1396c (1988).[2] Federal law requires that state plans make certain types of medical assistance available to qualified individuals. 42 U.S.C. ? 1396a(a)(10)(A) (1991).

The director of the Medicaid Bureau, Department of Health and Human Services, has recently determined that abortions resulting from rape or incest are medically necessary:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

Letter from Sally K. Richardson, director, Medicaid Bureau, to state

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[2]Declaratory and injunctive relief against the payment of federal monies are also appropriate remedies when states are using federal funds in a plan which is operated in violation of federal requirements. Rosado v. Wyman, 397 U.S. 397, 420-421 (1970). Further, declaratory and injunctive relief are available despite the fact that state participation is voluntary and that the sole statutory remedy is a reduction in federal payments to the state. Stanton v. Bond, 504 F.2d 1246, 1251 (7th Cir. 1974).

Medicaid directors, p. 2 (December 28, 1993) (Richardson letter).

A court may overturn the Secretary's interpretation of the Medicaid statute only if the court finds that the Secretary has abused his or her discretion or that the Secretary's decision was arbitrary or capricious or otherwise not in accordance with law. Sherman v. Griepentrog, 775 F. Supp. 1383, 1390 (D. Nev. 1991). In this instance, however, the letter was not issued by the Secretary nor has the interpretation been promulgated as a regulation. If the letter represents the Secretary's interpretation and the interpretation is not found by a court to be an abuse of discretion, arbitrary, capricious, or contrary to law, states will be required to provide funding for abortions of pregnancies resulting from rape or incest in order to qualify for federal Medicaid funds. 42 U.S.C. ? 1396c (1988). The Medicaid Bureau of the Department of Health and Human Services is requiring all states to submit state plans which do not preclude federal financial participation for abortion to save the life of the mother or to terminate pregnancies which result from rape or incest. Richardson letter, p. 2.

A North Dakota statute is inconsistent with the submission of such a plan.

No funds of this state or any agency, county, municipality, or any other subdivision thereof and no federal funds passing through the state treasury or a state agency may be used to pay for the performance, or for promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman.

N.D.C.C. ? 14-02.3-01. North Dakota law also prohibits anyone from authorizing or performing an abortion in a hospital owned, maintained, or operated by the state or any of its agencies or political subdivisions unless the abortion is necessary to prevent the death of the woman. N.D.C.C. ? 14-02.3-04. Violation of these provisions is a class B misdemeanor. N.D.C.C. ? 14-02.3-05. These laws were passed in 1979. 1979 N.D. Sess. Laws ch. 192.

In 1989 the state Legislature gave the Department of Human Services authority to "submit state plans in forms that are consistent with and which meet requirements for such plans which are or may be imposed under the Medicare Catastrophic Coverage Act of 1988." 1989 N.D. Sess. Laws ch. 583, ? 1 (codified as N.D.C.C. ? 50-24.1-01.1). Furthermore, "[t]he department may take such actions as are reasonably necessary to conform the administration of programs under its supervision and direction to the requirements of the Medicare Catastrophic Coverage Act of 1988." Id. The Department is also authorized to seek waivers of the requirements of federal statutes and regulations under federal law. Id.

The Medicare Catastrophic Coverage Act of 1988 includes coverage and payment of medical services for pregnant women under the Medicaid program.[3] P.L. 100-360, ? 302, 102 Stat. 729, 750 (1988). Medicaid previously covered pregnant Aid to Families With Dependent Children (A.F.D.C.) recipients. 42 U.S.C. ? 1396d(n) (1988). The Medicare Catastrophic Coverage Act of 1988 expanded this coverage to include A.F.D.C. recipients and all pregnant women below a specified minimum income level. P.L. 100-360 ? 302(a)(1)(A) (1988), codified at 42 U.S.C. ? 1396a(a)(10)(A)(i)(IV) (1991). See also 42 U.S.C. ? 1396a(l)(1)(A) (1988).

Although the Legislature's consideration of the bill including what is now N.D.C.C. ? 50-24.1-01.1 mentioned medical assistance for pregnant women, its primary focus was the bill's mitigating effect on community spouse impoverishment. Hearing on S. 2198 Before the Senate Comm. on Human Services and Veterans Affairs, 51st N.D. Leg. (January 19, 1989), Hearing on S. 2198 Before the House Comm. on Human Services and Veterans Affairs, 51st N.D. Leg. (February 24, 1989), Hearing on S. 2198 Before the House Comm. on Human Services and Veterans Affairs, 51st N.D. Leg. (March 3, 1989) (Statement of Rep. Scherber). The Legislature was also aware that the bill

> [a]s amended, allows the Department of Human Services to take actions reasonably necessary to conform to federal law and eliminate potential conflicts between state law and federal law with respect to the Medicare Catastrophic Coverage Act of 1988.

Id. (Legislative Council, Bill Summary of S. 2198 (March 6, 1989).) In keeping with the legislative history, the Department of Human Services has consistently applied N.D.C.C. ? 50-24.1-01.1 to address only issues concerning community spouse impoverishment.

The Department of Health and Human Services Medicaid Bureau's present interpretation that abortion may be medically necessary in pregnancies resulting from rape or incest creates a potential conflict between the policies of N.D.C.C. ch. 14-02.3 and the legislative policy to take actions to conform to federal requirements under the Medicare Catastrophic Coverage Act of 1988 as noted at N.D.C.C. ? 50-24.1-01.1. The conflict between these sections is unavoidable due to the requirement by the Medicaid Bureau of the Department of Health and Human Services that all states must insure that their state plans do not preclude federal financial participation for abortions that are performed to save the life of the mother

[3]Title III of the Medicare Catastrophic Act of 1988 contains provisions relating to the Medicaid program. P.L. 100-360, ?? 301 et seq., 102 Stat. 729, 748 (1988).

or to terminate pregnancies resulting from rape or incest. If the Department complies with the directive of N.D.C.C. ? 50-24.1-01.1, it arguably must provide funding for abortions of pregnancies resulting from rape or incest. However, this would directly violate the prohibition against the use of state or federal funding for abortions except when necessary to prevent the death of the woman under N.D.C.C. ? 14-02.3-01.

Conflicting statutory provisions are to be construed to give effect to both, if possible. The Legislature's intent in enacting N.D.C.C. ? 50-24.1-01.1 was to permit the Department of Human Services to address potential conflicts between state and federal law with regard to community spouse impoverishment. As illustrated by the legislative history, the Legislature did not intend to permit the Department of Human Services to contravene the direct prohibition of abortion funding as proscribed by N.D.C.C. ? 14-02.3-01. Furthermore, even though N.D.C.C. ? 50-24.1-01.1 was enacted later than N.D.C.C. ?? 14-02.3-01 and 14-02.3-04, there is a strong presumption against amending or repealing legislation by implication. E.g., Birst v. Sanstead, 493 N.W.2d 690, 694-695 (N.D. 1992).

Therefore, it is my opinion that the prohibition against the use of state funds and federal funds passing through the state treasury or a state agency for the performance or for promoting the performance of an abortion unless the abortion is necessary to prevent the death of the woman under N.D.C.C. ? 14-02.3-01 prevails to the extent it is in conflict with the Legislature's grant of authority to the Department of Human Services to submit state plans in forms that meet the requirements which are or may be imposed under the Medicare Catastrophic Coverage Act of 1988, pursuant to N.D.C.C. ? 50-24.1-01.1. This interpretation allows both statutes to remain effective.

The construction of the most recent Hyde Amendment by the Department of Health and Human Services does, however, create a risk that the contrary provisions of N.D.C.C. ch. 14-02.3 may be enjoined from operation. "Although participation in the Medicaid program is entirely optional, once a State elects to participate, it must comply with the requirements of Title XIV [of the Social Security Act]." Harris v. McRae, 448 U.S. at 301. A state statute which prohibited the state from paying for abortions except where necessary to save the life of the mother was enjoined from operation under the Medicaid program where the relevant Hyde Amendment allowed federal funding for the abortion of pregnancies resulting from rape or incest. Roe v. Casey, 623 F.2d 829, 838 (3d Cir. 1980). Despite the possibility of such an injunction, none is presently in place against the operation of N.D.C.C. ch. 14-02.3. "[A]dministrative agencies are creatures of legislative action" which therefore "must assume the law to be valid until judicial determination to the contrary has been

made." First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-585 (N.D. 1984). The possibility that a court could issue an injunction against the operation of N.D.C.C. ch. 14-02.3 does not allow the Department of Human Services to disregard the statute prior to issuance of such an injunction.

Therefore, it is my further opinion that N.D.C.C. ch. 14-02.3 operates to prevent the Department of Human Services from submitting a state plan which conforms to any requirement of the Department of Health and Human Services including abortion of pregnancies resulting from rape or incest which do not endanger the life of the woman in the state plan for the Medicaid program.

Accordingly, you may choose to submit a plan in conformity with the limitations and restrictions of N.D.C.C. ch. 14-02.3 and, if the Department of Health and Human Services adheres to the position expressed in the December 28, 1993, Richardson letter, the state could appeal this adverse decision pursuant to 42 U.S.C. ? 1316 (1988). Alternatively, the state could request a waiver, as authorized by N.D.C.C. ? 50-24.1-01.1, at least until the 1995 Legislative Assembly has had an opportunity to revisit the abortion funding issue.

Should you have further questions on this, please contact me.

Sincerely,

Heidi Heitkamp
ATTORNEY GENERAL

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