

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

RULES REVIEW CHECKLIST

DATE RULES RECEIVED 10/8 Temporary Rule X

Resubmitted and Received _____

DUE DATE 10/15

a. Returned to Agency w/o filing w/Secy of State _____
b. Approved 10/10 Date Sent Back to Agency 10-10

- -

1. Rules as Adopted _____
2. Rules as Proposed _____
3. Certificate of Board's Authorizing Resolution, where applicable _____
4. Order for Hearing _____
5. Notice of Hearing _____
   (i) Sufficiency _____
6. Secretary of State's List _____
7. Certificate of Acquisition of Secretary of State's List _____
8. Affidavit of Mailing _____
   (i) At least 30 days prior to hearing _____
9. Statement of Need and Evidence _____
10. Hearing Examiner's Report _____
11. Agency's Findings of Fact _____
12. Certificate of Board's Resolution Adopting Rules, where applicable _____
13. Order Adopting _____
14. Report of Chief Hearing Examiner _____
    (i) Finding of No Substantial Change _____
    (ii) Permission to Incorporate by Reference, where applicable _____
15. Certificate of Compliance with Rulemaking Procedures _____
16. Copy of Notice of Intent to Solicit Outside Opinion, where applicable _____
17. Petition by Public, where applicable _____.

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : ARTHUR E. NOOT
Commissioner
of Public Welfare

DATE: October 10, 1979

FROM : LEE E. SHEEHY
Special Assistant
Attorney General

PHONE: 296-1288

SUBJECT: In the Matter of Temporary Rules On Medical Assistance Payments For Abortions.

The above-captioned rules have been approved by this office. Based upon my understanding of the present procedural posture of the related litigation, these rules are approved subject to further order by the Court to begin payment.

Your department is responsible for insuring the notice in the State Register as required pursuant to Minn. Stat. § 15.0412, Subd. 5. Additionally, although the statute does not require it, this office recommends that a copy of the rules be filed with the Secretary of State.

LES/bw

cc: Duane Harves
Melvin Goldberg
Marshall Whitlock
William Marshall
Beverly Heydinger

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TEMPORARY RULE AS ADOPTED AMENDING A PORTION OF 12 M.C.A.R. § 2.047 (MEDICAL ASSISTANCE) - PAYMENT FOR ABORTION SERVICES.

12 M.C.A.R. § 2.047 E.2.t. The cost of abortion services shall be paid only when the conditions under (1), (2), (3), (4), or (5) are met:

(1) The abortion is necessary to prevent the death of the mother. The cost of the abortion shall be covered only if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians that it was their professional judgment that the abortion was necessary to prevent the death of the mother; and

(b) The signed written statement of the recipient that she voluntarily consented to the abortion. In the event that the recipient is physically or legally incapable of providing informed consent, consent may be obtained as is otherwise provided by law.

(2) The abortion is to terminate a pregnancy which is the result of a sexual assault. The cost of the abortion shall be covered only if a report of the assault was made to a valid law enforcement agency within 48 hours of the time the assault occurred and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. In the event the recipient was physically unable to make the report within 48 hours of the assault, the report must have been made

within 48 hours after the recipient became physically able to make the report. The statement of the law enforcement agency shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law enforcement agency; and

(d) The name and address of the person who signed the report to the law enforcement agency; and

(e) A statement by the law enforcement agency that the report alleges at least one of the following:

(i) Circumstances existing at the time of the assault caused the recipient to have a reasonable fear of imminent great bodily harm to herself or to another.

(ii) The assailant was armed with a dangerous weapon or an article used or fashioned in a manner which led the recipient to reasonably believe it to be a dangerous weapon, and used or threatened to use the weapon or article to cause the complainant to submit.

(iii) The assailant caused personal injury to the complainant and used force or coercion to accomplish sexual penetration.

(iv) The assailant was aided or abetted by one or more accomplices and either:

(aa) An accomplice used force or coercion to cause the recipient to submit; or

(bb) An accomplice was armed with a dangerous

weapon or an article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and used or threatened to use the weapon or article to cause the recipient to submit.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the sexual assault reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

(3) The abortion is to terminate a pregnancy which is the result of incest. The cost of the abortion shall be covered only if a report of incest was made to a valid law enforcement agency prior to the time of the abortion and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. The statement shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law enforcement agency; and

(d) The name and address of the person who signed the report to the law enforcement agency; and

(e) A statement by the law enforcement agency that the name of the relative who allegedly committed incest with the victim appears in its report.

The provider's invoice shall also be accompanied by a statement,

signed by the recipient, that her pregnancy resulted from the incest reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

(4) The abortion is medically necessary, to terminate a pregnancy for therapeutic reasons due to severe and long-lasting damage to physical health of the mother if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians (one of which must specify that he/she is not an "interested physician" as defined in E.2.t. (6)(e) of this rule) certifying that on the basis of their professional judgment, severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

(5) The abortion is medically necessary, ~~as certified by the same method as in (4)(a) above,~~ to terminate a pregnancy for therapeutic reasons due to other diagnosed medical conditions such as, but not limited, to the following:

(a) Chronic lung disease

(b) Essential hypertension

(c) Diabetes

(d) Kidney disease

(e) Heart disease

(f) Sickle cell anemia

(g) Pulmonary emboli

(h) Depression

(i) Hepatitis

(j) Fetal deformity

(k) Phlebitis

(l) Abnormal conditions diagnosed by anmiocentesis

(m) Obesity

Provided that the invoice submitted by the provider is accompanied by the signed written statement of two physicians (one of which must specify that he/she is not an "interested physician" as defined in E.2.t. (6)(e) of this rule) certifying that, on the basis of their professional judgment the abortion is medically necessary.

(6) For the purposes of this subsection E.2.t. only, the following definitions apply:

(a) "Abortion services": medical service performed for the purpose of terminating a pregnancy. This shall not be construed to include:

(i) drugs or devices which prevent implantation of the fertilized ovem; or

(ii) medical procedures necessary for the termination of an ectopic pregnancy.

(b) "Assailant": person who allegedly committed the sexual assault reported to the law enforcement agency.

(c) "Incest": sexual intercourse with another nearer in kin than first cousin, of the whole or half-blood.

(d) "Valid law enforcement agency": an agency charged

under applicable law with enforcement of the general penal statutes of the United States, or of any state or local jurisdiction.

(e) "Interested physician": is one:

(1) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion, or

(2) Who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

APPROVED AS TO FORM AND LEGALITY

OCT. 10 1979 19

WARREN SPANNAUS, ATTORNEY GENERAL

BY Jan E. Shudy

SPECIAL ASSISTANT ATTORNEY GENERAL

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

Office Memorandum

DEPARTMENT Attorney General

TO : Lee Sheehy
Special Assistant
Attorney General

DATE: 10/3/79

FROM : Beverly Jones Heydinger
Special Assistant
Attorney General

PHONE: 8405

SUBJECT: Proposed Temporary Rule on Medical Assistance Payments For Abortion

The proposed Temporary Rule on Medical Assistance Abortion Payments was drafted by the Department of Public Welfare in response to a recent court decision in Hodgson v. Board of County Commissioners, D.Mn. 4-78 Civ. 525, 3-79 Civ. 56, July 13, 1979. Judge Alsop ruled that Minn. Stat. § 256B.02, subd. 13 was in violation of the Social Security Act and ordered the Department to begin payment for all abortions which are "medically necessary". In response to a Motion for Stay Pending Appeal, Judge Alsop ordered the Department to accept invoices from health care providers but did not require the Department to make payment, pending a subsequent court order. Such a court order will be sought by the plaintiffs either when the proposed temporary rule becomes effective or the Eighth Circuit decides the appeal, scheduled for oral argument on October 8, 1979. A copy of the judge's Injunction, Memorandum and Stay are attached to this memo.

The proposed rule appeared in the State Register on August 27, 1979, 4 S.R. 218. It is designed to add categories for payment and documentation requirements in a manner which permits the Department to separate those abortions for which federal funding is available (subsections 1-4), from those for which the state and county will share financial responsibility (subsection 5). The federal regulations governing payment may be found at 42 C.F.R. Part 449.

The only modification from the proposed temporary rule has been made to clarify a point which has caused confusion. Apparently the reference in paragraph 5 to the method of certification set out in paragraph 4a misled some readers who thought that the substantive requirements of 4a were added to 5. Thus the change clarifies the original intent.

The persons responding with comments to the rule oppose the requirement that two doctors certify the need for the abortion. This issue was not settled by Judge Alsop. The Department believes that the requirement is reasonable because for most procedures which are performed for both medical and non-medical reasons the Department requires that the Provider get authorization for reimbursement before the procedure is performed. Requiring prior authorization for an abortion would

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delay the abortion and increase risk to the recipient. In the Department's view, this certification by two doctors is consistent with exercising control over its funds and with the requirements of the medical assistance program.

Although the judge ordered the Department to proceed to rule immediately, the stay of payment remains in effect. Therefore the Department requests that the rule be made effective, subject to further order by the Court to begin payment.

BJH/pas

computing monthly, hourly, less-than-full-time, bi-weekly, and four week salary rates.

Dated this 10th day of August, 1979.

John P. Sopsic
Commissioner

Department of Public Welfare

Proposed Temporary Rule Governing Payment for Abortions

Request for Public Comment

Notice is hereby given that the Department of Public Welfare has proposed the following temporary rule for the purpose of implementing an Order of Donald D. Alsop, Judge of United States District Court, signed on August 9, 1979.

The proposed temporary rule would amend a portion of 12 MCAR § 2.047 (Medical Assistance) — Payment for Abortion Services.

All interested persons are hereby afforded the opportunity to submit their comments on the proposed rule for 20 days immediately following publication of this material in the *State Register* by writing to Robert Baird, Assistant Commissioner, Income Maintenance Bureau, Department of Public Welfare, 4th Floor, Centennial Building, St. Paul, MN 55155. The temporary rule may be revised on the basis of comments received. Any written material received shall become part of the record in the final adoption of the temporary rule.

Temporary Rule as Proposed

12 MCAR § 2.047 E.2.t. The cost of abortion services shall be paid only when the conditions under (1), (2), ~~or~~ (3), (4), or (5) are met:

(1) The abortion is necessary to prevent the death of the mother. The cost of the abortion shall be covered only if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians that it was their professional judgment that the abortion was necessary to prevent the death of the mother; and

(b) The signed written statement of the recipient that she voluntarily consented to the abortion. In the event that the recipient is physically or legally incapable of providing informed consent, consent may be obtained as is otherwise provided by law.

(2) The abortion is to terminate a pregnancy which is the result of a sexual assault. The cost of the abortion shall be covered only if a report of the assault was made to a valid law enforcement agency within 48 hours of the time the assault occurred and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. In the event the recipient was physically unable to make the report within 48 hours of the assault, the report must have been made within 48 hours after the recipient became physically able to make the report. The statement of the law enforcement agency shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law enforcement agency; and

(d) The name and address of the person who signed the report to the law enforcement agency; and

(e) A statement by the law enforcement agency that the report alleges at least one of the following:

(i) Circumstances existing at the time of the assault caused the recipient to have a reasonable fear of imminent great bodily harm to herself or to another.

(ii) The assailant was armed with a dangerous weapon or an article used or fashioned in a manner which led the recipient to reasonably believe it to be a dangerous weapon, and used or threatened to use the weapon or article to cause the complainant to submit.

(iii) The assailant caused personal injury to the complainant and used force or coercion to accomplish sexual penetration.

(iv) The assailant was aided or abetted by one or more accomplices and either:

(aa) An accomplice used force or coercion to cause the recipient to submit; or

(bb) An accomplice was armed with a dangerous weapon or an article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and used or threatened to use the weapon or article to cause the recipient to submit.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the sexual assault reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

(3) The abortion is to terminate a pregnancy which is the result of incest. The cost of the abortion shall be covered only if a report of incest was made to a valid law enforcement agency prior to the time of the abortion and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. The statement shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law agency; and

(d) The name and address of the person the report to the law enforcement agency; and

(e) A statement by the law enforcement the name of the relative who allegedly committed the victim appears in its report.

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(4) The abortion is medically necessary, to ter- nancy for therapeutic reasons due to severe and damage to physical health of the mother if the mentation accompanies the provider's invoice gency:

(a) The signed written statement of two me of which must specify that he/she is not an ysician" (as defined in E.2.t.(6)(e) of this rule) on the basis of their professional judgment, g-lasting physical health damage to the mother if the pregnancy were carried to term.

(5) The abortion is medically necessary, as cer- same method as in (4)(a) above, to terminate a therapeutic reasons due to other diagnosed ons such as, but not limited to, the following:

(a) Chronic lung disease

(b) Essential hypertension

(c) Diabetes

(d) Kidney disease

(e) Heart disease

(f) Sickle cell anemia

(g) Pulmonary emboli

(h) Depression

(i) Hepatitis

(j) Fetal deformity

(k) Phlebitis

(l) Abnormal conditions diagnosed by amniocentesis

(m) Obesity

(6) ~~(4)~~ For the purposes of this subsection E.2.t. only, the following definitions apply:

(a) "Abortion services:" medical service performed for the purpose of terminating a pregnancy. This shall not be construed to include:

(i) drugs or devices which prevent implantation of the fertilized ovum; or

(ii) medical procedures necessary for the termination of an ectopic pregnancy.

(b) "Assailant:" person who allegedly committed the sexual assault reported to the law enforcement agency.

(c) "Incest:" sexual intercourse with another nearer in kin than first cousin, of the whole or half-blood.

(d) "Valid law enforcement agency:" an agency charged under applicable law with enforcement of the general penal statutes of the United States, or of any state or local jurisdiction.

(e) "Interested physician:" is one:

(i) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion, or

(ii) Who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

ES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from e language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike~~ deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

Robb Randle
620 N Robert

SINYKIN ASSOCIATES IN OBSTETRICS AND GYNECOLOGY P.A.

6490 Excelsior Blvd. St. Louis Park, Minnesota 55426 (612) 920-5166

Melvin B. Sinykin, M.D. - Fred A. Lyon, M.D. - Arthur J. Horowitz, M.D. - Melvin J. Frisch, M.D.
- Frederick H. Kravitz, M.D. - Mark L. Tanz, M.D.

September 19, 1979





Mr. Robert Baird
Assistant Commissioner
Income Maintenance Bureau
Dept. of Public Welfare
4th Floor
Centennial Building
St. Paul, Minnesota 55155

Dear Mr. Baird,

This letter is in response to the request for public comment published in the State Register, Monday, August 27, 1979. It concerns the proposed temporary rule which amends a portion of 12MCAR2.047 (medical assistance) payment for abortion services.

Most of the proposed rule changes seem consistent with the Alsop Ruling. However section E.2t.(6) (e) of this rule was not addressed by the Federal Court and indeed is another attempt to make the delivery of this service more difficult to provide for poorer women. This portion of the proposed revision requires the written statement of two physicians, one of which must specify that he or she is not an interested physician. Interested physician is defined in this ruling as one whose income is directly or indirectly affected by the fee paid for the performance of the abortion or who is the spouse of or another relative who lives with the physician whose income is directly or indirectly affected by the fee paid by the performance of the abortion.

← Fed regs silent

I should first like to point out that this would prevent any physician who is in the same medical group as the abortion provider from giving a second opinion. As far as I am aware no other medical service besides abortion would be so restricted under rules for payment from the department of Public Welfare. For example there is generally no restriction preventing an orthopedic surgeon in practice with another surgeon from rendering an opinion concerning proposed knee surgery. I wish to point out that the structure of medical practice in the United States has evolved into group practices partly in order to make the rendering of second opinions more convenient for the patient. This section of the proposed rule change seems to be designed fo stymie the delivery of this service. The proposed rule change further more does not address itself to whether the Department of Public Welfare would pay a second uninterested physician for their opinion either pro or con concerning the necessity of the abortion procedure.

SAME AS PSYCHO-SURGERY

Lastly this proposed rule change once again penalizes poor rural women by forcing them to travel long distances for second opinions in areas where physician coverage is sparce.

For the above reasons I believe the proposed temporary rule should make no restriction concerning the written statement of the physician as long as both physicians are licensed to practice medicine in the State of Minnesota and thereby would be expected to render competent care.

Sincerely,

Mark L. Tanz

Mark L. Tanz, M.D.

MLT/jtm

LUCAS & MILLER, P.C.

COUNSELORS AT LAW

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SUITE 604
1055 THOMAS JEFFERSON STREET, N.W.
WASHINGTON, D. C. 20007
(202) 338-6955

12 September, 1979

Mr. Robert Baird, Assistant Commissioner
Income Maintenance Bureau
Dept. of Public Welfare, 4th Floor
Centennial Building
St. Paul, Minnesota 55115

Dear Mr. Baird,

The Two Physician Certification requirement in Sections (1-A) (4-A) & (5) in the temporary rule as proposed does not comply with the Federal District Court decision Hodgson v Board of Commissioners, 4-78 Civ. 525 (D.Minn. Filed July 13, 1979). The "prevent the death" definition of medically necessity contained a two physician certification requirement. The Court in Hodgson did not, however, retain this requirement; rather it struck down the entire Section as inconsistent with Title XIX of the Medicaid Act.

Second, the court specifically ruled that the Hyde Amendment does not alter Title XIX concerning funding of medically necessary abortions. Yet in requiring a signed statement by two physicians, the state now incorporates a regulation promulgated specifically under the Hyde Amendment 42 C.F.R. §§ 441.204(a).

In addition, Section (6) (e) (i) & (ii) the definition of "interested physician", tracks word for word, the language of the regulation concerning "interested physician" under Hyde, 42 C.F.R.§§ 441.204(c).

Moreover, the two doctor requirement is of doubtful validity. In Beal v. Doe 432 U.S. 438 (1977), the Pennsylvania Medical Assistance Plan required additional physicians to concur with the attending doctor's diagnosis that the abortion was medically necessary.432 U.S. at 448. The Court commented that this requirement "may conflict with Title XIX". Id. Because the record was inadequate on this issue, the Court remanded that question back to the lower Court for further consideration. Id. Pennsylvania, however, deleted the additional physician requirement. 7Penna. Bull. 2697 (Sept. 24. 1977)

Sincerely,

Lynn Miller

Lynn Miller

Gary B. Crawford
Attorney at Law

Route 1
Cannon Falls, Mn 55009
[507] 778-3279

September 14, 1979

Robert Baird, Assistant Commissioner
Income Maintenance Bureau
Dept. Public Welfare, 4th Floor
Centennial Building
St. Paul, Minnesota 55115

Dear Mr. Baird;

As the attorney for the Midwest Health Center for Women, I wish to comment on the proposed Temporary Rules Governing Abortions.

Judge Alsops order, dated August 9, 1979 required the Department to adopt rules "implementing the injunction issued" July 13, 1979 and to receive and process all claims for "medically necessary abortion servics" pursuant to such rules. In order to "implement" the Injunction the proposed rules must not be inconsistent with the Court's findings which were the basis of the injunction. The principlal finding, as stated by the Court in page 8 of its Memorandum Opinion and Order for Judgment is as follows:

> ...the court concludes on the basis of the reasoning set forth in Preterm v. Dukakis, supra, that M.S.A.§ 256B.02 Subd. B(13) and its implementing regulations are inconsistent with Title XIX and 42 C.F.R. § 440.230. The court specifically finds that that portion of the Minnesota statute is inconsistent with the objectives of Title XIX and impermissibly denies assistance on the basis of diagnosis, type of illness, or condition.

The two doctor and certification requirement in the proposed rules continue the prohibited discrimination. There is no more medical justification for insistance on two doctors opinions (one disintrested) for determining when an abortion is medically necessary than for making such determinations for other medical problems for which Title XIX assistance may be obtained without such requirement.

Gary B. Crawford
Attorney at Law

Route 1
Cannon Falls, Mn 55009
[507] 778-3279

The "conditions which may pose a risk to the pregnant womans sustained health" set forth by the Court on pages 4 and 5 of its Memorandum Opinion and Order for Judgment do not require two physicians to properly diagnose.

The two doctor and certification requirement establishes, somewhat less directly but effectively, substantial discriminatory barriers to obtaining assistance for medically necessary abortions and therefore the proposed rules conflict with the Courts mandate to "implement the injunction."

The Hyde Amendment offers no legal justification for the proposed rules because the Court specifically held, on page 11 of its Memorandum Opinion and order for Judgment, "that the Hyde Amendment did not substantively alter or amend the requirements of Title XIX."

The rules as written will only engender further litigations and will not serve the interest of the State or the medically indigent.

I urge you to strike the two doctor certificate requirements from the proposed rules, and to consider abortion claims on the same basis as other eligible Title XIX services.

Sincerely

Gary B. Crawford

MIDWEST HEALTH CENTER FOR WOMEN
...a non profit organization

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ASSISTANCE

September 7, 1979

Robert Baird, Assistant Commissioner
Income Maintenance Bureau
Dept. Public Welfare, 4th Floor
Centennial Building
St. Paul, Minnesota 55115

Dear Mr. Baird:

I wish to comment upon the proposed temporary Rule regarding payments for abortions published in the August 27 State Register. The Rule would amend a portion of 12 MCAR Section 2.047 (Medical Assistance).

After reviewing Judge Alsop's decision of July 17th, I find it hard to understand how this Rule achieves the intent of his opinion. It seems to me that the intent was to acknowledge; 1) That there are conditions or circumstances for abortion that could affect a woman's health other than death, rape or incest that could be considered by both patient and doctor as medically necessary and thus should be eligible for payment under the Medicaid Program. 2) That the current Minnesota Statute inappropriately discriminates agaist a single procedure - abortion - and 3) That physicians cannot treat patients adequately under this restrictive act. Yet the proposed rule further hinders the patient and the doctor by reiterating the Hyde standards for acceptibility - two doctor certification and prompt law enforcement reporting. Didn't Judge Alsop clearly reject the Hyde Amendment as substantively altering Title XIX?

More specifically the current rule appears to make it less likely that a woman who becomes pregnant from rape or incest can obtain an abortion paid for under Title XIX than a woman with a condition such as sickel cell anemia or depression. Surely Judge Alsop didn't intend to further punish sexual assault victims. While I understand the State's wish to receive maximum Federal reimbursements (presumably the reason to continue to employ Hyde standards), I find this especially heartless.

Second, what section of Judge Alsop's decison regarding medically necessary conditions could possibly be interpreted as requiring "the signed written statement of two physicians (one of which is not an

metropolitan medical office building, 825 south 8th street, suite 902, minneapolis,mn.55404 - 612-332-2311

interested physician) certifying that on the basis of their professional judgment severe and long lasting physical health damage to the mother would result if the pregnancy were forced to term"? (Secions 5 & 4a of the proposed Rule). At what point did he use the terminology "severe and long lasting physical health damage" to define the possible conditions eligible for reimbursement? Further, condition (L) of the Rule relates not to maternal health but to the abnormal fetus as detected through amniocentesis, so how would a doctor attest to long lasting consequences to the mother? ← Hyde Amdt

I would most sincerely urge you to 1) reconsider the plight of rape and incest victims and not make them ineligible for reimbursement because the rape victim could not gather adequate courage to face police and prosecutor within 48 hours or because the incest victim could not be induced to seek still another physician to verify that her gestation was "consistent" with her claim of assault 2) to strike the two doctor requirement for certifying medical necessity when other eligible medical services do not have a similar requirement and 3) to assess the adequacy of abortion claims in the same manner as other eligible Title XIX services, namely to use the Department of Public Welfare's Medical Advisory Unit.

Very sincerely,

Renee Ward
Co-Director

RW:vt

TEMPORARY RULE AS PROPOSED AMENDING A PORTION OF 12 M.C.A.R. § 2.047 (MEDICAL ASSISTANCE) - PAYMENT FOR ABORTION SERVICES

12 M.C.A.R. § 2.047 E.2.t. The cost of abortion services shall be paid only when the conditions under (1), (2), ~~or~~ (3), (4), or (5) are met:

(1) The abortion is necessary to prevent the death of the mother. The cost of the abortion shall be covered only if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians that it was their professional judgment that the abortion was necessary to prevent the death of the mother; and

(b) The signed written statement of the recipient that she voluntarily consented to the abortion. In the event that the recipient is physically or legally incapable of providing informed consent, consent may be obtained as is otherwise provided by law.

(2) The abortion is to terminate a pregnancy which is the result of a sexual assault. The cost of the abortion shall be covered only if a report of the assault was made to a valid law enforcement agency within 48 hours of the time the assault occurred and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. In the event the recipient was physically unable to make the report within 48 hours of the assault, the report must have been made within 48 hours after the recipient became physically able to make the report. The statement of the law enforcement agency shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law enforcement agency; and

(d) The name and address of the person who signed the report to the law enforcement agency; and

(e) A statement by the law enforcement agency that the report alleges at least one of the following:

(i) Circumstances existing at the time of the assault caused the recipient to have a reasonable fear of imminent great bodily harm to herself or to another.

(ii) The assailant was armed with a dangerous weapon or an article used or fashioned in a manner which led the recipient to reasonably believe it to be a dangerous weapon, and used or threatened to use the weapon or article to cause the complainant to submit.

(iii) The assailant caused personal injury to the complainant and used force or coercion to accomplish sexual penetration.

(iv) The assailant was aided or abetted by one or more accomplices and either:

(aa) An accomplice used force or coercion to cause the recipient to submit; or

(bb) An accomplice was armed with a dangerous weapon or an article used or fashioned in a manner to lead the complainant reasonably to believe it to be a dangerous weapon and used or threatened to use the weapon or article to cause the recipient to submit.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the sexual assault reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the

recipient's statement.

(3) The abortion is to terminate a pregnancy which is the result of incest. The cost of the abortion shall be covered only if a report of incest was made to a valid law enforcement agency prior to the time of the abortion and a signed statement from the law enforcement agency accompanies the provider's invoice to the state agency. The statement shall include the following information:

(a) The name of the victim; and

(b) The date of the alleged incident; and

(c) The date the report was made to the law enforcement agency; and

(d) The name and address of the person who signed the report to the law enforcement agency; and

(e) A statement by the law enforcement agency that the name of the relative who allegedly committed incest with the victim appears in its report.

The provider's invoice shall also be accompanied by a statement, signed by the recipient, that her pregnancy resulted from the incest reported, and a statement, signed by the recipient's physician, that in his/her professional opinion the length of the pregnancy at the time of the abortion was not inconsistent with the recipient's statement.

Out of CFR

(4) The abortion is medically necessary, to terminate a pregnancy for therapeutic reasons due to severe and long-lasting damage to physical health of the mother if the following documentation accompanies the provider's invoice to the state agency:

(a) The signed written statement of two physicians (one of which must specify that he/she is not an "interested

physician" as defined in E. 2.t. (6)(e) of this rule) certifying that on the basis of their professional judgment, severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

plus-s ct. order (5) The abortion is medically necessary, as certified by the same method as in (4)(a) above, to terminate a pregnancy for therapeutic reasons due to other diagnosed medical conditions such as, but not limited, to the following:

(a) Chronic lung disease

(b) Essential hypertension

(c) Diabetes

(d) Kidney disease

(e) Heart disease

(f) Sickle cell anemia

(g) Pulmonary emboli

(h) Depression

(i) Hepatitis

(j) Fetal deformity

(k) Phlebitis

(l) Abnormal conditions diagnosed by amniocentesis

(m) Obesity

~~(4)~~ (6) For the purposes of this subsection E.2.t. only, the following definitions apply:

(a) "Abortion services": medical service performed for the purpose of terminating a pregnancy. This shall not be construed to include:

(i) drugs or devices which prevent implantation of the fertilized ovem; or

(ii) medical procedures necessary for the

termination of an ectopic pregnancy.

(b) "Assailant": person who allegedly committed the sexual assault reported to the law enforcement agency.

(c) "Incest": sexual intercourse with another nearer in kin than first cousin, of the whole or half-blood.

(d) "Valid law enforcement agency": an agency charged under applicable law with enforcement of the general penal statutes of the United States, or of any state or local jurisdiction.

(e) "Interested physician": is one: Fed. Statutes

(1) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion, or

(2) Who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

ADMIN 1000 (Rev. 1/78)
SF-00006-01

STATE OF MINNESOTA

DEPARTMENT Attorney General

Office Memorandum

TO : Lee Sheehy
Special Assistant
Attorney General

DATE: 10/15/79

FROM : Pat Silberbauer PAS
Secretary, DPW

PHONE: 6671

SUBJECT: Proposed Adoption of Amendments to Rule 47

The Commissioner of Public Welfare has now signed the Order giving approval to the temporary rule covering abortion payments. Attached is a copy for your file.

pas
cc: Warren Nyhus
Bob Hamper
Bill Marshall

Ben:
Please file

RECEIVED
OCT 16 1979
ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

PRINTED ON RECYCLED PAPER

STATE OF MINNESOTA

COUNTY OF RAMSEY

Before Arthur E. Noot
Commissioner of Public Welfare

In the Matter of the
Proposed Adoption of
Amendments to Rule 47 (Medical
Assistance) of the Department of
Public Welfare for Payment of
Abortion Services

ORDER ADOPTING
AMENDMENTS TO
RULE 47

The above-entitled rule amendments were promulgated pursuant to court order of The Honorable Donald D. Alsop, Judge of United States District Court, issued in Hodgson v. Board of County Commissioners, D. MN, 4-78 Civ. 525, 3-79 Civ. 56, July 13, 1979, order signed August 9, 1979. The proposed rule was printed in the State Register on August 27, 1979, 4 S.R. 218.

Pursuant to Minn. Stat. § 15.0412, subd. 5 (1978) the Department accepted comments from the public for twenty days following publication of the proposed rule. Written comments were received from Mark L. Tanz, M.D., Lynn Miller, Esq., Gary B. Crawford, M.D., and Ms. Renee Ward, Co-Director, Midwest Health Center for Women. The Department reviewed all the comments and recommendations.

In response to apparent confusion over the substance of the two-doctor certification in section E.2.t.(5), one modification was made to the proposed rule in order to clarify what was originally intended. Therefore, section E.2.t.(5) shall read:

> "The abortion is medically necessary, ~~as-certified-by-the same-method-as-in-(4)(a)-above~~, to terminate a pregnancy for therapeutic reasons due to other diagnosed medical conditions such as, but not limited, to the following:
>
> (a) Chronic lung disease
> (b) Essential hypertension
> (c) Diabetes
> (d) Kidney disease
> (e) Heart disease
> (f) Sickle cell anemia

(g) Pulmonary emboli
(h) Depression
(i) Hepatitis
(j) Fetal deformity
(k) Phlebitis
(l) Abnormal conditions diagnosed by anmiocentesis
(m) Obesity

Provided that the invoice submitted by the provider is accompanied by the signed written statement of two physicians (one of which must specify that he/she is not an "interested physician" as defined in E.2.t. (6)(e) of this rule) certifying that, on the basis of their professional judgment the abortion is medically necessary."

The rule as adopted is otherwise identical to the rule as proposed.

The proposed rule was submitted to the Attorney General for review on October 8, 1979 as required by Minn. Stat. § 15.0412 subd. 5 (1978) and approved by Lee Sheehy, Special Assistant Attorney General on October 10, 1979.

NOW THEREFORE IT IS ORDERED that these rule amendments, identified as Amendments to Rule 47 (Medical Assistance) for Payment of Abortion Services are adopted this tenth day of October, 1979 and shall be read as part of Rule 47.

Because of the Stay entered by Judge Alsop, this rule will not become effective until such time as the Court shall so order. Until such time, the Department will continue to accept claims from providers and process such claims, but no payments will be made to the providers.

Dated: October 10, 1979

State of Minnesota
Department of Public Welfare

ARTHUR E. NOOT
Commissioner

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

JANE E. HODGSON, M.D.; MIDWEST HEALTH CENTER FOR WOMEN, INC.; PAULA POE; SANDRA LACKEY; and all others similarly situated,

Plaintiffs,

v. 4-78 Civ. 525

BOARD OF COUNTY COMMISSIONERS, COUNTY OF HENNEPIN; JOHN E. DERUS, Chairman; JEFF SPARTZ; THOMAS E. TICEN; RICHARD E. KREMER; E. F. ROBB, JR.; SAM S. SIVANICH; NANCY OLKON; ROBERT RANDLE, Director, Medical Assistance Program, Department of Public Health; THOMAS JOLICOEUR, Supervisor, Medical Advisory Unit; EDWARD J. DIRKSWAGER, JR.; Commissioner, Department of Public Welfare; DEPARTMENT OF PUBLIC WELFARE FOR THE STATE OF MINNESOTA,

Defendants.

* * * *

MEMORANDUM OPINION AND ORDER FOR JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CAROLYN COE, individually and on behalf of all others similarly situated; and MARK TANZ, M.D., individually and on behalf of all others similarly situated,

Plaintiffs,

v. 3-79 Civ. 56

EDWARD J. DIRKSWAGER, JR., individually and in his capacity as Commissioner, Minnesota Department of Public Welfare and STATE OF MINNESOTA, Department of Public Welfare, HOWARD KELLY, individually and in his capacity as Division Director, Hennepin County Department of Economic Assistance, Adult Medical Division, individually and on behalf of all other Directors of County Department of Economic Assistance, Adult Medical Division for all other counties in the State of Minnesota,

Defendants.

Roy Lucas, P.C., by LYNN I. MILLER, Esq., Washington, D. C., and Robins, Davis & Lyons, by SIDNEY S. FEINBERG, Esq., Minneapolis, Minnesota, appeared for plaintiffs.

Minnesota Civil Liberties Union, by RONALD GOLDSER, Esq. and LINDA OJALA, Esq., Minneapolis, Minnesota, appeared for Coe plaintiffs.

Warren Spannaus, Attorney General, State of Minnesota, by WILLIAM P. MARSHALL, Special Assistant Attorney General, St. Paul, Minnesota, appeared for state defendants.

Thomas L. Johnson, Hennepin County Attorney, by CHARLES F. SWEETLAND, Assistant County Attorney, Minneapolis, Minnesota, appeared for county defendants.

The above-entitled actions are companion cases which, pursuant to the agreement of all parties, have been consolidated for all purposes save and except the void for vagueness claim asserted in the Coe action. That claim is not before the court at this time.

These actions come before the court on the cross-motions for summary judgment by the plaintiffs and the defendants in the Hodgson case and the motion for summary judgment by the defendants in the Coe case. Memoranda were submitted, and oral argument was made by counsel for all parties in both actions. It appears to the court that no material facts are in dispute and the issues presented are ripe for summary judgment.

The issue presented in these cases is whether the State of Minnesota's denial of Medical Assistance benefits to otherwise eligible women who are seeking therapeutic abortions for reasons other than to prevent their death or to terminate a pregnancy resulting from criminal sexual conduct or incest violates the constitutional rights of due process or equal protection of the woman, her physician, or the health care facility and/or federal law. Plaintiffs seek declaratory and injunctive relief as well as attorney's fees. The issue of attorney's fees is not before the court at this time.

Pursuant to the stipulation of the parties and this court's order of February 20, 1979, the following classes have been certified in the Hodgson case:

1. Plaintiff Paula Poe represents a class of indigent Minnesota women who have sought, are seeking, or will seek Medical Assistance reimbursement for induced abortions performed for health and medical reasons other than to prevent their death or terminate a pregnancy resulting from criminal assault or incest.

2. Plaintiff Jane E. Hodgson, M.D., represents a class of all physicians in Minnesota who, on a regular and recurring basis, treat Medical Assistance patients seeking therapeutic abortions for reasons other than to save their lives or terminate a pregnancy resulting from criminal assault or incest.

3. Plaintiff Midwest Health Center for Women, Inc. represents a class of all clinics and medicaid providers who offer professional, administrative, facility space, and/or other services to physicians and/or patients in either of the above two classes.

Defendants in both actions are state and county officials who are responsible for the administration of the Medical Assistance program in Minnesota.

Plaintiffs challenge the constitutionality and validity of Minn. Stat. § 256B.02, Subd. B(13), (1978), which provides that Medical Assistance may be available to eligible individuals whose income and resources are insufficient to meet the cost of

> (13) Abortion services, but only if one of the following conditions is met:

(a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law;

(b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to report the criminal sexual conduct, in which case the report shall be made within 48 hours after the victim becomes physically able to report the criminal sexual conduct; or

(c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

Also challenged are the regulations promulgated by the Minnesota Department of Public Welfare (DPW) in accordance with § 256B.02, Subd. B(13). These regulations became effective September 18, 1978 as an amendment to DPW Rule 47.

Plaintiffs Paula Poe, Sandra Lackey, and Carolyn Coe each have sought an abortion for health or medical reasons outside the scope of M.S.A. § 256B.02, Subd. B(13). Each has been informed that she cannot obtain reimbursement for such an abortion by way of Medical Assistance.

Doctors Jane E. Hodgson, Mark L. Tanz, Fred Lyon, Jean Eckerly, Gordon Ditmarson, and Frederick Mosley are physicians who, in the ordinary course of their professions, provide therapeutic abortions which they consider to be medically necessary but which are outside the scope of M.S.A. § 256B.02, Subd. B(13). Some conditions which may pose a risk to the pregnant woman's sustained health, but which may not be considered life-threatening, are chronic lung disease, essential hypertension, diabetes, kidney disease, heart disease, sickle cell anemia, pulmonary emboli, depression,

hepatitus, fetal deformity, phlebitis, abnormal conditions diagnosed by amniocentesis, and obesity.

The court will address itself first to the statutory claim. See Hagans v. Lavine, 415 U.S. 528 (1974). Plaintiffs seek to invalidate Minnesota's abortion funding policy as being inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, et seq. Title XIX establishes the cooperative federal/state program known as medicaid. States are not required to participate in the program, but if they choose to do so, they must comply with the federal statute and regulations to be entitled to grants of federal funds in partial reimbursement for their expenditures in providing specific types of medical assistance to eligible individuals. Nursing Home Residents' Advisory Council v. Kelly, ___ F. Supp. ___ (D. Minn. filed May 29, 1979); West v. Cole, 390 F. Supp. 91, 97 (N.D. Miss. 1975).

Plaintiffs claim that the Minnesota statute and regulations are inconsistent with the following federal provisions:

1. 42 U.S.C. § 1396 (1973):

> For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, . . . there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter.

2. 42 U.S.C. § 1396a(10)(c)(i):

> A state plan for medical assistance must provide for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits . . . and who have insufficient . . . income and resources to meet the costs of necessary medical and remedial care and services . . ..

3. 42. U.S.C. § 1396a(a)(17):

> A state plan for medical assistance must include reasonable standards . . . for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter . . ..

4. 42 U.S.C. § 1396a(a)(22)(D):

> A state plan for medical assistance must include descriptions of other standards and methods that the State will use to assure that medical or remedial care and services provided to recipients of medical assistance are of high quality . . ..

5. 42 U.S.C. § 1396a(a)(19):

> A state plan for medical assistance must provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided in a manner consistent with simplicity of administration and the best interests of the recipients . . ..

6. 42 C.F.R. § 440.230:

> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
>
> (c)(1) The medicaid agency may not deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 [Required services for the Categorically Needy and for the Medically Needy] to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition.
>
> (2) The agency may place appropriate limits on a service based on medical necessity or on utilization control procedures.

7. 42 C.F.R. § 440.260:

> The plan must include a description of methods and standards used to assure that services are of a high quality.

This issue has been presented to several courts in different districts and has been analyzed and discussed exhaustively. Challenged statutes in other states have restricted Medical Assistance for abortion services either to those situations in which the woman's life is endangered by carrying the pregnancy to term or to both the life-endangering situation and situations of pregnancy resulting from rape or incest.

The leading opinion from a U. S. Court of Appeals is Preterm v. Dukakis, 591 F.2d 121 (1st Cir. 1979), cert. denied sub nom. Baird v. Pratt, 47 U.S.L.W. 3745 (May 15, 1979). In a well-reasoned opinion, the First Circuit held that (1) 42 U.S.C. § 1396 does not require states to fund all "necessary medical services," but (2) the challenged legislation is not reasonable or consistent with the objectives of Title XIX as required by 42 U.S.C. § 1396a(a)(17), impermissibly discriminates on the basis of the diagnosis, type of illness or condition, and is inconsistent with the doctor's role in determining proper treatment for his patient.

The Seventh Circuit has adopted the reasoning of the First Circuit in concluding that Title XIX requires the states to fund all medically necessary abortions. Zbaraz v. Quern, ___ F.2d ___ (7th Cir,, filed on February 13, 1979). The federal district court which has addressed this issue most recently likewise has followed this part of the First Circuit's opinion. Doe v. Busbee, No. C79-786A (N.D. Ga., filed on June 5, 1979). It also was followed by another federal district court in Frieman v. Walsh, No. 77-4171-CV-C (W.D. Mo., filed on January 26, 1979).

Some earlier state court and federal district court opinions had held that pursuant to the provisions of Title XIX states were required to fund all necessary medical services. Right to Choose v. Byrne, No. C-3817-77 (N.J. Superior Court filed on January 10, 1979); Roe v. Casey, No. 78-2215 (E.D. Penn., filed on December 21, 1978); Emma G. v. Edwards, No. 77-1342 (E.D. La., filed on November 27, 1978); Smith v. Ginsberg, No. 75-0380CH (S.C.W.Va., filed on May 9, 1978). In Doe v. Busbee, supra, the court reached this conclusion based on 42 C.F.R. § 440.230(c)(2). One federal district

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court, in an exhaustive opinion, reached the absolutely contrary conclusion that at most Title XIX mandates funding only for the performance of those abortions which were generally legal when Title XIX was enacted. D.R. v. Mitchell, 456 F. Supp. 609 (D. Utah 1978).

This court does not feel it is necessary to add further to the discussion and analysis of this issue. Upon a thorough review of Title XIX, the federal regulations, and the opinions cited above as well as others not referred to, the court concludes on the basis of the reasoning set forth in Preterm v. Dukakis, supra, that M.S.A. § 256B.02, Subd. B(13) and its implementing regulations are inconsistent with Title XIX and 42 C.F.R. § 440.230. The court specifically finds that that portion of the Minnesota statute is inconsistent with the objectives of Title XIX and impermissibly denies assistance on the basis of diagnosis, type of illness, or condition.

The next issue raised is the effect of the so-called Hyde Amendment, Section 210 of Pub. L. No. 95-480, 92 Stat. 1586 (Oct. 18, 1978), a rider to the 1978 fiscal year budget for the United States Department of Health, Education, and Welfare, which provides:

> None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape, or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

Again, this issue has been addressed frequently in the opinions cited above. The First Circuit in Preterm v. Dukakis, supra, concluded through an analysis of its legislative history that the Hyde Amendment was intended as substantive legislation, amending the Title XIX requirements.

The court held that the Hyde Amendment left states free to fund abortions other than those for which federal funds would be available, but does not require them to do so.

The portion of the Preterm opinion dealing with the Hyde Amendment was dissented from by Judge Bownes who stated that (1) nothing in the language of the Hyde Amendment suggests that Congress intended to repeal the Medicaid Act in part and (2) even assuming that legislative history is relevant, there is nothing in that history that clearly indicates that Congress was doing more than limiting the use of federal funds.

The Seventh Circuit again adopted the First Circuit's analysis with respect to the Hyde Amendment. Zbaraz v. Quern, supra. Both courts concluded that the state need fund only those abortions for which federal funding would be available.

Both Preterm and Zbaraz were remanded to their respective district courts for a determination of the constitutionality of the Hyde Amendment. On remand, the United States District Court for the Northern District of Illinois, applying the rational basis test, found that the Hyde Amendment violates the woman's equal protection rights during the previability time period. Zbaraz v. Quern, No. 77C4522 (N.D. Ill. filed on April 29, 1979).

Other courts which have addressed the Hyde Amendment issue have reached contrary conclusions. In Frieman v. Walsh, supra, the district court avoided deciding whether the Hyde Amendment was substantive legislation but held that it would be inequitable to require the state to fund procedures for which it would not be reimbursed. However, the Department of Health, Education, and Welfare in a brief filed with the United States Supreme Court in October of 1976 took the

position that the states' duty to fund medical procedures is wholly independent of their right to subsequent federal reimbursement and, therefore, the Hyde Amendment has no effect on abortion funding by the states. Buckley v. McRae, U.S. Sup. Ct. No. A-346 (1976).

In D.R. v. Mitchell, supra, the court found the Hyde Amendment consistent with its interpretation of Title XIX as requiring funding only for those abortions which were legal at the time it was enacted. The district court in Emma G. v. Edwards, supra, noting that the constitutionality of the Hyde Amendment was the subject of current litigation, refused to impose its provisions on the state of Louisiana, saying that if the court were to do so, it would be legislating for the state.

In both Roe v. Casey, supra, and Right to Choose v. Byrne, supra, the courts found that the Hyde Amendment does not conflict with Title XIX, but merely clarifies the term "necessary medical services" as applied to abortions and reaffirms the Supreme Court's holding in Beal v. Doe, 432 U.S. 438 (1977), that the states need not fund nontherapeutic medical services.

In Woe v. Califano, 460 F. Supp. 234 (S.D. Ohio 1978), the 1977 Hyde Amendment was challenged on constitutional grounds. Although that earlier version of the Amendment limited federal funds to only those abortions performed because the mother's life was endangered, it was found constitutional.

Finally, in Doe v. Busbee, supra, the district court explicitly rejected the majority opinion in Preterm v. Dukakis, supra. The Doe court first found it unnecessary to explore the legislative history since the words of the amendment are not unclear and its plain meaning does not

produce a result plainly at variance with the legislation as a whole. The court then found that even assuming that exploration of the legislative history were justified, there is no support therein for a finding that the Hyde Amendment represented a clear, substantive limitation on Title XIX.

This court is persuaded by the reasoning of the dissent in Preterm v. Dukakis, supra, and of the district court in Doe v. Busbee, supra, that the Hyde Amendment did not substantively alter or amend the requirements of Title XIX. To effectuate this court's conclusion that the Minnesota statute and regulations are inconsistent with the objectives of Title XIX and its regulations, the court will enjoin further enforcement of the second sentence of M.S.A. § 256.02, Subd. B(13)(a). The court specifically makes no finding or conclusion with respect to the constitutionality of the Hyde Amendment.

In view of the court's determination of the statutory issue, it is unnecessary for it to reach the constitutional challenges presented.

Upon the foregoing,

IT IS ORDERED That the motion of the plaintiffs in 4-78 Civ. 525 for summary judgment be and hereby is granted and the motions of the defendants in 4-78 Civ. 525 and 3-79 Civ. 56 for summary jdugment be and hereby are in all things denied.

IT IS FURTHER ORDERED That judgment be entered in favor of the plaintiffs in 4-78 Civ. 525 and 3-79 Civ. 56 as follows:

> M.S.A. § 256B.02, Subd. B(13) (1978) and its implementing regulations are inconsistent with the objectives of Title XIX of the Social Security Act and the regulations promulgated thereunder.

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IT IS FINALLY ORDERED That a permanent injunction in the form attached shall issue.

DATED: July 13, 1979.

Donald D. Alsop
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

JANE E. HODGSON, M.D., et al.

Plaintiffs,

v. 4-78 Civ. 525

BOARD OF COUNTY COMMISSIONERS,
COUNTY OF HENNEPIN, et al.,

Defendants.

* * * * INJUNCTION

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CAROLYN COE, et al.,

Plaintiffs,

v. 3-79 Civ. 56

EDWARD J. DIRKSWAGER, JR., et al.,

Defendants.

Pursuant to the memorandum opinion and order for judgment in the above-entitled actions dated July 13, 1979,

IT IS ORDERED That defendants and their agents and successors in office be and hereby are enjoined from enforcing that portion of M.S.A. § 256B.02, Subd. B(13)(a) (1978) which reads "'Medical necessity' means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law" and its implementing regulations.

DATED: July 13, 1979.

Donald D. Alsop
United States District Judge

FFI-SS-12-8-78

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

JANE E. HODGSON, M.D.; MIDWEST HEALTH CENTER FOR WOMEN, INC.; PAULA POE; SANDRA LACKEY; and all others similarly situated,

Plaintiffs,

vs.

4-78 Civ. 525

BOARD OF COUNTY COMMISSIONERS, COUNTY OF HENNEPIN; JOHN E. DERUS, Chairman; JEFF SPARTZ; THOMAS E. TICEN; RICHARD E. KREMER; E. F. ROBB, JR.; SAM S. SIVANICH; NANCY OLKON; ROBERT RANDLE, Director, Medical Assistance Program, Department of Public Health; THOMAS JOLICOEUR, Supervisor, Medical Advisory Unit; EDWARD J. DIRKSWAGER, JR.; Commissioner, Department of Public Welfare; DEPARTMENT OF PUBLIC WELFARE FOR THE STATE OF MINNESOTA,

Defendants.

ORDER

* * * * * * * * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

CAROLYN COE, individually and on behalf of all others similarly situated; and MARK TANZ, M.D., individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

3-79 Civ. 56

EDWARD J. DIRKSWAGER, JR., individually and in his capacity as Commissioner, Minnesota Department of Public Welfare and STATE OF MINNESOTA, Department of Public Welfare, HOWARD KELLY, individually and in his capacity as Division Director, Hennepin County Department of Economic Assistance, Adult Medical Division, individually and on behalf of all other Directors of County Department of Economic Assistance, Adult Medical Division for all other counties in the State of Minnesota,

Defendants.

1. The Minnesota Department of Public Welfare is ordered pursuant to Minn. Stat. § 15.0412, subd. 5 (1978) to adopt temporary and permanent rules implementing the Injunction issued by this Court on July 13, 1979.

2. The Department of Public Welfare shall receive all claims for medically necessary abortion services performed after July 23, 1979 and shall process such claims in accordance with the rules adopted pursuant to paragraph 1 of this Order.

3. All obligations of the Minnesota Department of Public Welfare as set forth in the July 13, 1979 Order to reimburse such claims for medically necessary abortions are hereby stayed indefinitely until further Order of the Court.

4. Upon lifting of the Stay, the Department of Public Welfare shall reimburse such claims in accordance with this Court's July 13, 1979 Order subject to modification by this Court or by Court of controlling jurisdiction.

DONALD D. ALSOP, Judge