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# Medicaid Funding of Abortion: Setting the Record Straight

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There is apparently confusion regarding how the federal government enforces the Hyde Amendment prohibition on federal funding of abortion. Such confusion could result in failure to enact appropriate safeguards against government funding of abortions in the overall health care legislation currently under consideration.

**States Cannot Make Up Their Own Rules.** It has been alleged that there are no standard federal rules states must follow to account for Medicaid expenditures. Such a statement suggests that the federal government is indifferent to state accounting and reporting, federal accounting procedures are inadequate to distinguish between Medicaid and non-Medicaid claims, and state Medicaid dollars are somehow different than federal Medicaid dollars. None of these is accurate.

In the Medicaid program (Title XIX of the Social Security Act), federal funds match state funds according to the provisions of the state plan. The state plan, which is amended over time, describes the state's Medicaid program.[1] If necessary, the federal government can require a state to amend its state plan to ensure compliance with a change in federal law. Compliance can be enforced by withholding federal funds.[2]

By definition, a state Medicaid plan does not include non-Medicaid items or services. Thus, except in cases of rape, incest, and life endangerment in which federal funding is allowable, abortion is not a Medicaid service.

**Certification Not Enough.** A state may fund abortions with its own funds through a separate non-Medicaid program under a separate state account. Women who are eligible for Medicaid may be included within a state's non-Medicaid program, but the state is not funding elective abortions through Medicaid.

In an April 2007 audit of the California Department of Health Care Services, the Department of Health and Human Services (HHS) stated that "non-Medicaid claims include those for other Federal programs and State-only programs, such as the Genetically Handicapped Persons Program. Non-Medicaid claims also include those for medical services that Medicaid does not cover, such as abortions."[3]

At the federal level, the Medicaid program is administered by the Centers for Medicare and Medicaid Services (CMS) by central office and regional office staffs. States request federal matching funds through the Medicaid Budget and Expenditure System. Each state requests funds for its Medicaid program prior to each quarter of its fiscal year through the Medicaid Program Budget Report (CMS-37).[4] CMS issues a grant award in the amount of the federal share, which the state uses to draw down funds

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from the U.S. Treasury. After the quarter ends, the state reports the actual expenditures of the previous quarter by service category on the Quarterly Expense Report (CMS-64).

> CMS-64 is a statement of expenditures for which states *are entitled to Federal reimbursement* under Title XIX and which reconciles the monetary advance made on the basis of CMS-37 filed previously for the same quarter. Consequently, the amount claimed on the Form CMS-64 is a summary of expenditures derived from source documents such as invoices, cost reports, and eligibility records. All summary statements or descriptions of each claim must identify the claim and source documentation. Claims developed through the use of sampling, projections, or other estimating techniques are considered estimates and *are not allowable under any circumstances*.[5]

States report *all* Title XIX expenditures, including state expenditures, on the CMS-64. State expenditures for elective abortions are not Medicaid expenditures, so they are not included on CMS-64.

To pay claims under Title XIX, all states use automated data systems called a Medicaid Management Information System (MMIS).[6] "An MMIS is a system of software and hardware used to process Medicaid claims and manage information about Medicaid beneficiaries and services."[7]

**Claims Subject to Documentation and Audit.** Medicaid claims must be supported by sufficient documentation. The Social Security Act requires "agreements with every person or institution providing services under the State plan under which such person or institution agrees (A) to keep such records as are necessary fully to disclose the extent of the services provided to individuals receiving assistance under the State plan, and (B) to furnish the State agency or the Secretary with such information, regarding any payments claimed by such person or institution for providing services under the State plan."[8]

The prohibition on Medicaid funding of abortion extends to services provided ancillary to an abortion, and a state is obligated to have sufficient controls in its claims processing system to ensure that only allowable costs are paid by Medicaid (regardless of whether the funds are federal or state Medicaid funds).

For example, in July 2007, HHS found that the state of New York needed to "strengthen MMIS edit routines to make use of all appropriate claim information to properly identify abortion-related laboratory services that are ineligible for Federal funding."[9] The state agreed to do so to prevent unallowable claims from being paid.

So the presumption that funding for abortion can be commingled then sorted out at a later date is inaccurate. To the contrary, the state has an obliga-

1. Social Security Act, Public Law 74-271, Section 1902.
2. *Ibid.*, Section 1904.
3. U.S. Department of Health and Human Services, Office of Inspector General, "Review of California's Medicaid Management Information System Expenditures for the Period July 1, 2003, through June 30, 2005 (A-09-06-00032)," pp. 1–2, at *http://oig.hhs.gov/oas/reports/region9/90600032.pdf* (October 30, 2009).
4. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "Medicaid Program Budget Report (CMS-37)," at *http://www.cms.hhs.gov/MedicaidBudgetExpendSystem/03_CMS37.asp#TopOfPage* (October 29, 2009).
5. U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services, "CMS-64 Quarterly Expense Report," at *http://www.cms.hhs.gov/MedicaidBudgetExpendSystem/02_CMS64.asp#TopOfPage* (October 29, 2009), emphasis added.
6. See 1903(r).
7. Joseph E. Vengrin, Deputy Inspector General for Audit Services, letter to Kerry Weems, Acting Administrator, Centers for Medicare and Medicaid Services, December 4, 2007, p.1, at *http://oig.hhs.gov/oas/reports/region9/90600032.pdf* (October 30, 2009).
8. Social Security Act, Section 1902(a)(27).
9. U.S. Department of Health and Human Services, Office of Inspector General, "Review of Abortion-Related Laboratory Claims Billed Under the New York State Medicaid Program (A-02-05-01009)," July 19, 2007, p. 2, at *http://oig.hhs.gov/oas/reports/region2/20501009.pdf* (October 29, 2009).

tion to prevent such a claim from being paid by Medicaid in the first place.

**No Medicaid Funds for Administrative Costs of Abortion.** The prohibition on the use of Medicaid funds for abortion extends to the administration of the Medicaid program as well. A state may use its MMIS to process claims for non-Medicaid programs, but the administrative costs of non-Medicaid programs cannot be charged to Medicaid.

For example, in April 2007, HHS found that the California Department of Health Care Services failed to properly allocate administrative costs between Medicaid and non-Medicaid programs. The state agreed to refund monies that were inappropriately claimed.

**The House Health Bill and the Capps Amendment.** The Capps Amendment deals with abortion funding in the current House bill. Two statements intended to support the Capps Amendment about abortion and the government health plan are constructed to mislead:

First, according to Congressman Michael Doyle (D–PA), "the U.S. Treasury does not issue checks to physicians or health facilities. All payments to physicians and health facilities are made by the health benefit plan or a contractor."[10]

Of course, the Treasury does not directly pay physicians or health facilities, just as the Treasury does not directly pay physicians or health facilities under Medicare or Medicaid. But that hardly means government funding is not involved.

Second, Doyle says that "under the Capps compromise, health plans—including the public option—that choose to cover abortion care beyond the Hyde limitations must provide assurances to the Commissioner that no federal funds are used for that care."[11]

The current bills propose to both administer a health plan and regulate its competitors. For abortion and other decisions, this creates inevitable tensions, and it is not sufficient for the government official in charge of the program to give assurances to himself. This lack of accountability invites more questions than it answers.

**Not Very Assuring.** The health care bills currently before Congress do not contain adequate safeguards to prevent federal funding of elective abortion, assurances by their supporters notwithstanding. Unless a specific prohibition on abortion funding—with strong enforcement and accountability—is contained in the final bill that is signed by the President, the government will end up funding the procedure.

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10. Representative Michael F. Doyle (D–PA), "Misconceptions about the Capps Amendment in HR 3200," Dear Colleague letter to Members of Congress, October 6, 2009.
11. *Ibid.*