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## Q&A: How Upcoming Efforts to Transform Medicaid Could Affect Abortion Coverage

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**Question:** Republican leaders have vowed to transform Medicaid from an open-ended entitlement to a block grant program. What would such a transformation mean for Medicaid coverage of abortions?

**Answer:** Without specific legislation on the table, it is difficult to determine. While the current political climate is no doubt unique, examining previous block grant proposals is instructive, as members of Congress could draw on them when crafting a bill. Ultimately, it is likely that upcoming Republican proposals will seek to further reduce the already very limited coverage of abortions in Medicaid.

The paragraphs below: (1) explain Medicaid's funding structure, general coverage requirements, and coverage of abortion services; (2) describe how the funding structure and general coverage requirements would differ under a block grant; and (3) explore how prior proposals to block grant Medicaid would have altered abortion coverage.

### Abortion Coverage Under the Current Medicaid Program

#### *Medicaid Basics: Funding and Coverage Requirements*

Medicaid is a federal-state partnership program in which all states have chosen to participate. States must operate their programs in accordance with certain federal standards, and in return, the federal government reimburses states for a percentage of their Medicaid costs.<sup>1</sup> Beyond the minimum federal requirements, states have a great deal of flexibility in how they operate their programs. The amount of the federal match (known as the Federal Medical Assistance Percentage or FMAP) is calculated every year and depends on the state's per capita income. FMAPs can range from 50% to 83%.<sup>2</sup> States receive a higher FMAP for covering particular services and populations. For example, states are reimbursed for 90% of their costs attributable to offering, arranging, and furnishing family planning services and supplies.<sup>3</sup> All states receive a 50% match rate for most of their administrative

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<sup>1</sup> 42 U.S.C. §§ 1396a, 1396b(a), 1396d(b).

<sup>2</sup> *Id.* § 1396d(b).

<sup>3</sup> *Id.* § 1396b(a)(5). States also receive an enhanced FMAP for providing Medicaid services to individuals newly eligible for Medicaid under the Medicaid expansion. *Id.* § 1396d(y)(1).

expenses.<sup>4</sup> There is no limit on the amount of federal funding that states can receive – as their health care costs rise, federal funding rises in turn.

As for the federal standards, the Medicaid Act requires states to cover specific categories of individuals and allows them to choose to cover others.<sup>5</sup> Individuals who fall within a mandatory eligibility category or a category that the state elects to cover are entitled to enroll in the program and receive services with reasonable promptness.<sup>6</sup> For most eligibility categories, states must cover certain categories of services, including inpatient and outpatient hospital, laboratory and x-ray, and physician services, when medically necessary for the enrollee.<sup>7</sup> States have the flexibility to cover a number of other services.<sup>8</sup> States must establish “reasonable standards” for determining the extent of coverage within these categories.<sup>9</sup> In addition, covered services must be “sufficient in amount, duration, and scope to reasonably achieve their purpose,” and states may not “arbitrarily deny or reduce” covered services based on an enrollee’s diagnosis or condition.<sup>10</sup> The Medicaid Act and implementing regulations establish a number of other federal standards designed to protect enrollees, such as limits on cost-sharing and requirements for states’ contracts with Medicaid managed care plans.

### *Coverage of Abortions*

After the Supreme Court decision in *Roe v. Wade* in 1973, Medicaid made no distinction between abortions and other medically necessary services. Abortions were not singled out for different treatment.<sup>11</sup> In 1976, Representative Henry Hyde introduced an amendment to the relevant appropriations bill that prohibited the use of federal Medicaid funding for abortion services unless the pregnancy endangered the life of the woman.<sup>12</sup> Every subsequent appropriations bill has included a version of the provision. The current version of the Hyde Amendment makes federal funding available for abortion services only when the pregnancy is the result of rape or incest or when the woman

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<sup>4</sup> *Id.* § 1396b(a)(7).

<sup>5</sup> *Id.* § 1396a(a)(10)(A), (C). The eligibility groups that states must cover are known as “categorically needy,” and the optional eligibility groups are known as “optionally needy” and “medically needy.” In general, the medically needy are individuals who would qualify for Medicaid, but they have too much income and/or too many resources. *See id.* § 1396a(10)(A)(C).

<sup>6</sup> *Id.* §§ 1396a(10)(A), 1396a(3).

<sup>7</sup> *Id.* §§ 1396a(a)(10)(A), 1396d. *See also id.* § 1396-1; 42 C.F.R. § 440.230(d) (acknowledging that states may decline to cover services that are not medically necessary).

<sup>8</sup> *See* 42 U.S.C. §§ 1396a(a)(10)(A), 1396d.

<sup>9</sup> *Id.* § 1396a(a)(17).

<sup>10</sup> 42 C.F.R. § 440.230(c).

<sup>11</sup> *See* CMS, State Medicaid Manual § 4430 (noting that states received “federal matching funds in expenditures for medically necessary abortions”); *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634, 636 (6th Cir. 1996).

<sup>12</sup> An Act Making Appropriations for the Departments of Labor, and Health, Education, and Welfare, and Related Agencies, for the Fiscal Year Ending September 30, 1977, and for Other Purposes, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 4134 (1976).

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.”<sup>13</sup>

Federal courts have found that state laws prohibiting the use of state funding to pay for abortions that qualify for Medicaid funding violate the Medicaid Act, as modified by the Hyde Amendment.<sup>14</sup> In general, courts have reasoned that the laws violate the “reasonable standards” provision and also arbitrarily deny coverage based on the enrollee’s condition.”<sup>15</sup> Similarly, CMS has issued guidance to the states explaining their obligation to cover abortions that qualify for federal funding under the Hyde Amendment.<sup>16</sup>

Conversely, federal law does not obligate states to cover abortions for which no federal funding is available.<sup>17</sup> However, courts in thirteen states have held that the state constitution requires states to cover medically necessary abortions for Medicaid enrollees.<sup>18</sup> Several additional states have elected to use state funding to pay for some or all abortions that do not qualify for federal reimbursement under the Hyde Amendment.<sup>19</sup>

<sup>13</sup> Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, §§ 506, 507, 129 Stat. 2242, 2649 (2015).

<sup>14</sup> See *Zbaraz v. Quern*, 596 F.2d 196 (7th Cir. 1979), cert. denied, 448 U.S. 907 (1980); *Roe v. Casey*, 623 F.2d 829 (3d Cir. 1980); *Hern v. Beye*, 57 F.3d 906 (10th Cir. 1995), cert. denied, 516 U.S. 1011 (1995); *Planned Parenthood Affiliates of Michigan v. Engler*, 73 F.3d 634 (6th Cir. 1996); *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), cert. denied, 441 U.S. 952 (1979); *Hodgson v. Board of County Comm’rs of Hennepin*, 614 F.2d 601 (8th Cir. 1980); *Little Rock Family Planning Servs. v. Dalton*, 60 F.3d 497 (8th Cir. 1995), rev’d in part, 116 S. Ct. 1063 (1996).

<sup>15</sup> See, e.g., *Hern*, 57 F.3d at 910-11.

<sup>16</sup> See CMS, Dear State Medicaid Director Letter (Dec. 28, 1993), CMS, Dear State Medicaid Director Letter (Feb. 12, 1998).

<sup>17</sup> *Harris v. McRae*, 448 U.S. 297 (1980) (finding that the Hyde Amendment does not violate the U.S. Constitution and that the Medicaid Act does not require states to cover abortions that do not qualify for federal funding).

<sup>18</sup> Notably, states have adopted different definitions of medically necessary. See *State, Dep’t of Health & Social Servs. v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *Simat Corp. v. Arizona Health Care Cost Containment Sys.*, 56 P.3d 28 (Ariz. 2002); *Comm. to Defend Reprod. Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *Doe v. Maher*, 515 A.2d 134 (Conn. 1986); *Doe v. Wright*, Case No. 91 CH 1958 (Ill. Cir. Ct. Dec. 2, 1994); *Moe v. Sec’y of Admin. & Fin.*, 417 N.E.2d 387 (Mass. 1981); *Women of State of Minn. by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Jeannette R. v. Ellery*, No. BDV-94-811 (Mont. Dist. Ct. May 22, 1995); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998); *Planned Parenthood Ass’n v. Dep’t of Human Resources*, 663 P.2d 1247 (Or. Ct. App. 1983), aff’d on statutory grounds, 687 P.2d 785 (Or. 1984); *Doe v. Celani*, No. S81-84CnC (Vt. Super. Ct. May 26, 1986); *Women’s Health Ctr. of W. Va., Inc. v. Panepinto*, 446 S.E.2d 658 (W. Va. 1993). See also *Humphreys v. Clinic for Women, Inc.*, 796 N.E.2d 247, 257 (2003) (requiring the state to cover a subset of medically necessary abortions for Medicaid enrollees).

<sup>19</sup> Hawaii, Maryland, New York, and Washington pay for abortions for Medicaid enrollees in all or most circumstances. SEE HAW. DEP’T OF HUMAN SERVS., MED-QUEST DIV., MEMO NO. FFS-1512, REVISED GUIDELINES FOR SUBMITTAL AND PAYMENT OF INDUCED/INTENTIONAL TERMINATION OF PREGNANCY (ITOP) CLAIMS 1 (2015), <http://www.med-quest.us/PDFs/Provider%20Memos/FFS-1512.pdf>; MD. CODE REGS. 10.09.02.04; N.Y. STATE MEDICAID PROGRAM, MIDWIFE MANUAL POLICY GUIDELINES 12 (2015), [https://www.emedny.org/ProviderMANuals/Midwife/PDFs/Midwife\\_Manual\\_Policy\\_Section.pdf](https://www.emedny.org/ProviderMANuals/Midwife/PDFs/Midwife_Manual_Policy_Section.pdf); WASH. REV. CODE § 9.02.160; WASH. ADMIN. CODE

## Abortion Coverage Under a Medicaid Block Grant Program

### *Medicaid Block Grant Basics: Funding and Coverage Requirements*

Republican leaders view Medicaid transformation as a tool to reduce federal Medicaid spending and federal oversight over states' programs. Under a block grant structure, federal Medicaid funding would be capped, meaning the amount of federal funding available to states would no longer be based on their actual health care costs. Instead, each state would receive a set payment every year based on a preset formula. While the formula differs by proposal, under every proposal, federal Medicaid funding would decrease dramatically over time. As a result, states' actual health care costs would far exceed the amount of the set payment.<sup>20</sup> To account for the loss of federal funding, states face difficult choices: raise taxes or cut eligibility, covered services, and/or provider payment rates.

Any block grant proposal would give states more leeway to do exactly that. However, the extent of the leeway could vary significantly by proposal. On one end of the spectrum, Congress could preserve the basic structure of the current Medicaid Act, but loosen or eliminate certain federal standards and requirements. On the other end of the spectrum, Congress could repeal the entire Medicaid Act and replace it with a few broad parameters for states to follow when designing and operating their programs. With such a move, federal program requirements could be quite minimal, as is the case with the Temporary Assistance for Needy Families block grant, for example.

### *Coverage of Abortions Under Past Block Grant Proposals*

By examining past bills that would have turned Medicaid into a block grant program, we can offer some insight into how upcoming proposals might handle abortion coverage. During both the Reagan and Clinton administrations, legislation that would have capped Medicaid funding passed at least one house of Congress. In 1981, the Senate passed a bill that would have limited federal Medicaid funding and also reduced the minimum FMAP.<sup>21</sup> To allow states to "adjust to the reduced funding level," the bill would have modified or eliminated a number of federal Medicaid requirements.<sup>22</sup> The legislation would not have made sweeping changes to the federal standards concerning covered services. However, it would have altered the covered services provided to optional "medically needy" eligibility groups.<sup>23</sup> Whether or not these changes would have had an actual effect on coverage of abortions is

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§ 182-532-123. Wisconsin covers abortions when medically necessary to prevent grave, long-lasting physical health damage to the woman. WIS. STAT. ANN. § 20.927(b); WIS. ADMIN. CODE DHS § 107.06(4)(i). Finally, Virginia, Mississippi, and Iowa use state funds to pay for abortions when certain fetal anomalies are present. See IOWA ADMIN. CODER. 441.78.1(17)(b); 23-202 MISS. CODE R. § 5.4; VA CODE ANN. § 32.1-92.2.

<sup>20</sup> See, e.g., Jeanne M. Lambrew, *Making Medicaid a Block Grant Program: An Analysis of the Implications of Past Proposals*, 83 MILLBANK Q. 41 (2005) (showing that actual Medicaid spending far surpassed the Medicaid funding levels provided for under the 1981, 1995, and 2003 proposals).

<sup>21</sup> See S. 1377, 97th Congress (1981); S. REP. NO. 97-139, at 431 (1981).

<sup>22</sup> S. REP. NO. 97-139, at 431, 472-81, 742-57 (1981).

<sup>23</sup> *Id.* at 478-79, 742-45. For a brief description of medically needy eligibility groups, see note 5 *supra*.

not entirely clear.<sup>24</sup> The legislation did not explicitly mention abortion. Notably, however, the then-current version of the Hyde Amendment indicated that states had no federal obligation to cover any abortion services for Medicaid enrollees.<sup>25</sup>

A decade and half later, President Clinton vetoed a bill that did explicitly address abortion while completely overhauling the Medicaid program. H.R. 2491 would have repealed the Medicaid Act and established a block grant program called the Medigrant program.<sup>26</sup> The legislation would have given states broad discretion in designing and operating their programs.<sup>27</sup> As for covered services, only two services would have been mandatory – “prepregnancy family planning services and supplies” and certain immunizations for children, as determined by the state. States would have had the option to cover other services listed in the bill. Among these optional services were abortion services “only if necessary to save the life of the mother or if the pregnancy is the result of an act of rape or incest.”<sup>28</sup> Thus, the legislation would have codified the version of the Hyde Amendment in effect at the time and eliminated states’ federal obligation to cover abortion services that qualify for federal funding.

Since 1995, Republican leaders have crafted a number of proposals to block grant Medicaid. Most of these proposals are very general, making it difficult to determine how they would affect Medicaid coverage of abortions.<sup>29</sup> Notably, as Chairman of the House Budget Committee, Representative Paul Ryan repeatedly released budget proposals that called for converting Medicaid into a block grant program.<sup>30</sup> The proposals did not describe the federal parameters that would govern such a program,

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<sup>24</sup> At the time, the Medicaid Act required states to cover the following services for all medically needy groups: (1) all of the required services for the categorically needy; or (2) any seven of the mandatory or optional services for the categorically needy. States electing the second option also had to cover: (1) inpatient physician services to individuals in the hospital or a nursing facility; (2) home health services for individuals entitled to nursing facility care; and (3) some institutional and non-institutional care and services. The legislation would have removed almost all of these requirements and would have allowed states to offer different services to different medically needy groups. *Id.* In theory, states would have the ability to decline to cover hospital or physician services for some or all medically needy eligibility groups, leaving individuals in those groups without coverage for abortion services that qualify for federal Medicaid funding. However, it seems somewhat unlikely that states would elect to cover medically needy individuals and then not provide them with hospital or physician services. The committee report noted: “[t]he committee expects that States will continue to offer to those medically needy they elect to cover a range of essential medical services with an appropriate balance between institutional and noninstitutional care.” *Id.* at 479.

<sup>25</sup> Supplemental Appropriations and Rescissions Act, 1981, Pub. L. No. 97-12, § 402, 95 Stat. 14, 96 (1981).

<sup>26</sup> H.R. 2491, 104th Cong. § 7001, 7002.

<sup>27</sup> *Id.* at § 7002.

<sup>28</sup> *Id.*

<sup>29</sup> For example, President Bush’s FY 2004 budget would have given states the option to accept block grant funding for Medicaid. Bush’s budget proposal did not lead to a bill. See Lambrew, *supra* note 21, at 47.

<sup>30</sup> See, e.g., HOUSE BUDGET COMMITTEE, THE PATH TO PROSPERITY, RESTORING AMERICA’S PROMISE, FY 2012 BUDGET RESOLUTION 39-41 (April 5, 2011), <https://budget.house.gov/uploadedfiles/pathtoprosperityfy2012.pdf>; HOUSE BUDGET COMMITTEE, THE PATH TO PROSPERITY, A BLUEPRINT FOR AMERICAN RENEWAL, FY 2013 BUDGET RESOLUTION 42-43 (March 20, 2012), <http://budget.house.gov/uploadedfiles/pathtoprosperity2013.pdf>; HOUSE BUDGET

but they did claim that federal program requirements and enrollment criteria would no longer “shackle” states.<sup>31</sup> The House Republican leaders’ 2016 health care plan (“A Better Way”), which would force states to choose between receiving a block grant or a fixed amount of federal funding for each Medicaid enrollee (known as a per capita cap), contains somewhat greater detail. The plan promises that “states would receive maximum flexibility for the management of eligibility and benefits” for some eligibility categories, but would have to provide particular services for other eligibility categories, including the elderly and individuals with a disability.<sup>32</sup> While it is not clear exactly how any of these recent proposals would alter general Medicaid coverage requirements, they do reflect Republican leaders’ well-established views on abortion. The 2016 health care plan promises to enforce existing restrictions on the use of federal funding for abortions and to amend current federal law to allow states to exclude abortion providers from Medicaid.<sup>33</sup> As a result, upcoming proposals to block grant Medicaid are likely to go at least as far as the 1995 bill in reducing Medicaid abortion coverage.

## Conclusion

Under the Medicaid Act, as modified by the Hyde Amendment, states must cover abortions when the pregnancy is the result of rape or incest or when necessary to save the life of the woman. Given prior block grant proposals, as well as current Republican leaders’ opposition to both federal regulation and abortion, it is probable that their upcoming Medicaid proposals will seek to eliminate this requirement and instead give states the option to cover abortions that meet these narrow criteria. If Congress were to enact such a bill, a handful of states may choose not to cover any abortions for Medicaid enrollees, while other states may opt to cover abortions that qualify for federal Medicaid funding. A third group of states will likely continue to use state funding to pay for some or all abortions for Medicaid-eligible women.

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COMMITTEE, THE PATH TO PROSPERITY, FISCAL YEAR 2015 BUDGET RESOLUTION 54-56, [http://budget.house.gov/uploadedfiles/fy15\\_blueprint.pdf](http://budget.house.gov/uploadedfiles/fy15_blueprint.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> GOP, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 28 (2016), [http://abetterway.speaker.gov/\\_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf](http://abetterway.speaker.gov/_assets/pdf/ABetterWay-HealthCare-PolicyPaper.pdf).

<sup>33</sup> *Id.*