



THE CATHOLIC UNIVERSITY OF AMERICA
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Washington, DC 20064

March 20, 2010

The Honorable Bart Stupak
2268 Rayburn House Office Building
Washington, D.C. 20515

Re: Abortion Coverage in the Senate Health Care Bill

Dear Mr. Stupak:

Questions have surfaced in the past few weeks about whether the billions of dollars the Senate health care reform bill appropriates for Community Health Centers (CHCs) will be used to pay for abortions. I have been asked by several interested parties to give my opinion on Secretary Sebelius' recent statement asserting that abortions will not be covered.

It's not even a close question. *Abortions will be covered.*

For nearly forty years, the courts have held that there are no medical or economic reasons to distinguish elective abortions from any other medical service. The basic argument is that health care coverage for women cannot be truly "comprehensive" unless – and until – elective abortions are covered just like any other medical procedure.

Federal appeals courts have been unanimous in their holdings that when Congress provides funding for "comprehensive" services, it must *explicitly* prohibit the use of federal dollars to pay for abortions. If there is no explicit prohibition, the courts will order the federal government to pay.

This is why we needed the Hyde Amendment in 1976. This is also why the Senate bill, unamended, will provide a very large appropriation that can – and most assuredly will – be used to fund elective abortions.

CHCs and other federally funded primary health care providers such as migrant, tribal, rural, and public housing health centers are required by law to provide "comprehensive" primary care services. The statutory term "comprehensive health care services" is broad enough to include reproductive health services, family planning services, and gynecology services. And the courts are unanimous in holding that – in the absence of the Hyde Amendment – this statutory term *necessarily* includes federal funding for elective abortions.

Without the Hyde Amendment, abortions not only *may* be covered, abortions *must* be covered.

This has been the law for over thirty years. In *Beal v. Doe*, 432 U.S. 438, 443 (1977), Pennsylvania women denied coverage for elective abortions under state law sued in federal court, arguing that "Title XIX [Medicaid] requires Pennsylvania to fund under its Medicaid program the cost of all abortions that are permissible under state law." In *Beal*, the argument was that Congress' *failure* to exclude abortion from the definition of "family planning

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services” in the 1972 amendments to Title XIX required the *states* to cover abortion. The courts have always assumed that, without the Hyde Amendment, federal law requires that the federal government must pay for abortions.

Neither the argument and nor the precedents have changed.

Read together with the case law and Section 1303 of the Senate Bill (which *assumes* that abortions are a part of a “comprehensive” health care insurance program), we can be virtually certain that the first lawsuit arguing that the Senate Bill *requires* funding for abortions under the CHC appropriation will be filed before the ink is dry on President Obama’s signature.

I know that Secretary Sebelius has written that HHS regulations would exclude federal funding of most abortions in CHCs, but this is not the law. The HHS regulations are valid *as applied to appropriated funds that carry the Hyde restriction*, but §10503 of the Senate bill creates a *new* “Community Health Center Fund” that is not clearly subject to the Hyde Amendment. Put differently, the history of abortion funding litigation since *Roe v. Wade* in 1973 demonstrates conclusively that the Secretary will be forced *by the courts* to pay for abortions with the CHC money appropriated by the Senate health care bill

You may wonder why I am so certain about these conclusions. The answer is simple: I have been involved in the funding fights over abortion since 1977, and helped to write the *amicus* brief filed by 218 Members of the House of Representatives in *Harris v. McRae*.

Based on that experience – and on the clear “pro-funding” positions taken on abortion in the Senate Bill, the “bottom line” is that unless the Senate Bill explicitly forbids using federal dollars to pay for abortions, the courts will force the Secretary to use the CHC appropriation in the Senate Bill to pay for them.

Thank you for your attention. Please let me know if you have any questions.

Sincerely,



Robert A. Destro
Professor of Law