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M E M O R A N D U M

TO: Jeff Laszloffy, President of the Montana Family Foundation
FROM: Anita Y. Milanovich, Chief Legal Counsel
RE: Montana Medicaid Expansion Coverage of Abortion, Transgender Medical Treatments
DATE: June 24, 2019

This memorandum reviews the history of Montana's Medicaid program, including Medicaid Expansion under Obamacare, and its application in abortion and transgender medical treatment contexts to address your question: Does Medicaid cover abortions and gender reassignment surgery? As explained more fully below, the answer is yes.

Regarding abortion, fifteen states, including Montana, pay for medically necessary abortions under Medicaid, which accounts for 15.6% of all abortions performed each year. Montana pays for such abortions because a Montana district court found it was legally required to do so. Neither the 2015 nor the 2019 Medicaid expansion bills affected a change in this coverage.

With regard to Medicaid coverage of gender reassignment surgery, as of 2014, 70% of patients seeking reassignment procedures in the U.S. were covered by either Medicaid or Medicare. In May 2017, Montana's Department of Health and Human Services ("DPHHS") noticed its intent to pay for medically necessary gender reassignment surgeries under Medicaid. That policy continues under Montana's expanded Medicaid program.

I. The Creation of Medicaid

The Medicaid program was established in 1965 under Title XIX of the Social Security Act, with 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, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care, ...

42 U.S.C. § 1396-1. It is a jointly-funded federal-state program that initially provided health care coverage to Supplemental Security Income (SSI) recipients and certain elderly and disabled individuals, but was later expanded to:

- allow coverage for pregnant women and children under 5 years old with incomes at or below 100% of the federal poverty level (“FPL”) (1986);
- allow coverage for pregnant women and infants with incomes at or below 185% FPL and children 8 years old or under at 100% FPL (1987);
- require coverage for pregnant women and infants with income at or below 100% FPL (1988);
- require coverage for pregnant women and children up to age 6 with incomes at or below 133% FPL (1989); and
- require states to phase in coverage for children ages 6 to 18 with incomes at or below FPL (1990).¹

All fifty states participate in the Medicaid program, including Montana, which joined in 1967.²

Montana’s stated purpose for its Medicaid program is “providing necessary medical services to eligible persons who have need for medical assistance.” MCA § 63-6-101(1). It identifies 13 types of provided services:

- (a) inpatient hospital services;
- (b) outpatient hospital services;

¹ *A Historical Review of How States Have Responded to the Availability of Federal Funds for Health Coverage*, Kaiser Commission on Medicaid and the Uninsured at 3 (Aug. 2012), available at <https://www.kff.org/wp-content/uploads/2013/01/8349.pdf>.

² *Id.* at 6.

- (c) other laboratory and x-ray services, including minimum mammography examination as defined in 33-22-132;
- (d) skilled nursing services in long-term care facilities;
- (e) physicians' services;
- (f) nurse specialist services;
- (g) early and periodic screening, diagnosis, and treatment services for persons under 21 years of age, in accordance with federal regulations and subsection (10)(b);
- (h) ambulatory prenatal care for pregnant women during a presumptive eligibility period, as provided in 42 U.S.C. 1396a(a)(47) and 42 U.S.C. 1396r-1;
- (i) targeted case management services, as authorized in 42 U.S.C. 1396n(g), for high-risk pregnant women;
- (j) services that are provided by physician assistants within the scope of their practice and that are otherwise directly reimbursed as allowed under department rule to an existing provider;
- (k) health services provided under a physician's orders by a public health department;
- (l) federally qualified health center services, as defined in 42 U.S.C. 1396d(l)(2);
- (m) routine patient costs for qualified individuals enrolled in an approved clinical trial for cancer as provided in 33-22-153; and
- (n) for children 18 years of age and younger, habilitative services as defined in 53-4-1103.

Id. at § 63-6-101(3). It also authorizes providing 17 other services:

- (a) medical care or any other type of remedial care recognized under state law, furnished by licensed practitioners within the scope of their practice as defined by state law;
- (b) home health care services;
- (c) private-duty nursing services;
- (d) dental services;
- (e) physical therapy services;
- (f) mental health center services administered and funded under a state mental health program authorized under Title 53, chapter 21, part 10;
- (g) clinical social worker services;
- (h) prescribed drugs, dentures, and prosthetic devices;
- (i) prescribed eyeglasses;
- (j) other diagnostic, screening, preventive, rehabilitative, chiropractic, and osteopathic services;
- (k) inpatient psychiatric hospital services for persons under 21 years of age;
- (l) services of professional counselors licensed under Title 37, chapter 23;
- (m) hospice care, as defined in 42 U.S.C. 1396d(o);
- (n) case management services, as provided in 42 U.S.C. 1396d(a) and 1396n(g), including targeted case management services for the mentally ill;
- (o) services of psychologists licensed under Title 37, chapter 17;

- (p) inpatient psychiatric services for persons under 21 years of age, as provided in 42 U.S.C. 1396d(h), in a residential treatment facility, as defined in 50-5-101, that is licensed in accordance with 50-5-201; and
- (q) any additional medical service or aid allowable under or provided by the federal Social Security Act.

Id. at § 63-6-101(4).

II. Montana Medicaid Expansion

As part of Obamacare, the States were required to expand their recipient pool to anyone with incomes at or under 133% FPL.³ The United States Supreme Court struck down this requirement as unconstitutionally coercive, as it predicated receipt of any and all Medicaid funds on expansion of coverage.⁴ This court ruling made Medicaid expansion optional.

In 2015, Montana's legislature, through SB 405, chose to participate in this expansion with the creation of the HELP Act program, which provided Medicaid coverage for newly eligible recipients under 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).⁵ The expansion was set to take effect upon federal approval and to terminate June 30, 2019.⁶ Montana's application was approved by the U.S. Department of Human Services in November 2015 and took effect in January 2016.⁷

³*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 576 (2012).

⁴ *Id.* at 585.

⁵ SB 405, 64th Legislature, at 3 (2015) (enrolled), available at <https://leg.mt.gov/bills/2015/billpdf/SB0405.pdf>.

⁶ *Id.* at 18- 19.

⁷ Matt Volz, *Montana becomes 30th state to expand Medicaid*, Great Falls Tribune (Nov. 5, 2012), available at <https://www.greatfallstribune.com/story/news/2015/11/02/montana-becomes-th-state-expand-medicaid/75048148/>.

A ballot initiative to make the expansion permanent was rejected by Montana voters in 2018.⁸ Nevertheless, in 2019, the Montana legislature renewed the expansion of Medicaid and the HELP Act program with HB 658, adding community engagement requirements for participants.⁹ The expansion is set to terminate June 30, 2025.¹⁰

III. Medicaid and Abortion

In 1976, a bipartisan Congress passed the Hyde Amendment, a line item provision in the annual Health and Human Services (“HHS”) appropriations that precludes federal funding of abortions.¹¹ The provision is a rider to the HHS appropriations bill that must be passed each year.¹² It was upheld by the United States Supreme Court in 1980, where the Court held that:

regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.¹³

The Hyde Amendment was modified in 1993 to make exceptions for abortion in the instances of rape, incest, and life of the mother.¹⁴

⁸ Matt Volz, *Montana voters reject paying for Medicaid expansion with tobacco tax*, Independent Record (Nov. 7, 2018), available at https://helenair.com/news/state-and-regional/montana/montana-voters-reject-paying-for-medicaid-expansion-with-tobacco-tax/article_f2273f8e-0e06-5a34-b1b9-c050ba7cbe95.html

⁹ HB 658, 66th Legislature, at 1-4 (2019) (enrolled), available at <https://leg.mt.gov/bills/2019/billpdf/HB0658.pdf>.

¹⁰ *Id.* at 40.

¹¹ *Four Things You Need To Know About the Hyde Amendment & Federally Funded Abortion*, American Center for Law and Justice, <https://aclj.org/pro-life/four-things-you-need-to-know-about-the-hyde-amendment-federally-funded-abortion> (last visited June 23, 2019).

¹² *Id.*

¹³ *Harris v. McRae*, 448 U.S. 297, 316 (1980) (citing *Maher v. Roe*, 432 U.S. 464 (1979), which held that a woman does not have a right to a free abortion).

¹⁴ See *supra* note 1.

Thirty-four states administer their Medicaid program consistent with the Hyde Amendment.¹⁵ But fifteen states have a policy that directs their Medicaid program “to pay for all or most medically necessary abortions.”¹⁶ As a result, Medicaid pays for approximately 15.6% of abortions nationwide each year.¹⁷

Montana is among the fifteen that pays for medically necessary abortions. This is because in 1995, a Montana district court struck down a state administrative regulation that restricted Montana’s Medicaid coverage of abortions to coincide with the scope of the Hyde Amendment, concluding that the rule exceeded the power of the DPHHS because it restricted coverage to less than that which was “medically necessary,” as directed in statute.¹⁸ Although this holding resolved the case, the court then went on to address the constitutional implications of the rule¹⁹ to conclude that the rule also violated the Montana Constitution. Rejecting the application of the United States Supreme Court’s decision in *Harris v. McRae*,²⁰ the court reasoned that since the regulation was not limited to those situations where Montana has a

¹⁵ *State Funding of Abortion Under Medicaid*, Guttmacher Institute, <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> (last visited June 23, 2019).

¹⁶ *Id.*

¹⁷ Rachel K. Jones, Ushma Upadhyay, Tracy A. Weitz, *At What Cost? Payment for Abortion Care by U.S. Women*, WOMEN’S HEALTH ISSUES 23-3, at e177 (2013), available at <https://www.guttmacher.org/sites/default/files/pdfs/pubs/journals/j.whi.2013.03.001.pdf>.

¹⁸ *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, *17 (Mont. Dist. Ct. May 22, 1995).

¹⁹ *Id.* at *17-18 (“this Court feels that this issue is of such importance that these constitutional matters must be decided by the courts of the state of Montana at one time and not over a period of time. To do otherwise would only encourage a ping pong effect where this regulation might be changed by the legislature or by an administrative agency and come back to this Court or some other court for further review. This process could take years and would not be in the public interest.”).

²⁰ *Id.* at *20 (“This Court feels that the Montana Constitution affords a greater degree of protection to the right of privacy than does the federal constitution as interpreted by *Harris v. McRae*.”).

compelling interest, i.e., when fetal viability exists, it violated Montana's constitutional right to privacy: "although the state is under no obligation to fund an individual's choice to a right of privacy, once it has entered an area that is covered by the zone of privacy, the state must be neutral."²¹ It then further reasoned that because the regulation impinged on fundamental right to privacy and discriminated among women who can receive "medically necessary treatments"—funding those who need childbirth services but not those needing abortion services.²² This, it concluded, violates Montana's equal protection provision.²³

As a result of this court opinion, Montana's Medicaid program covers all medically necessary abortions. Neither the 2015 nor 2019 Medicaid expansion bills affected a change in this coverage.

IV. Medicaid and Transgender Medical Treatments

As of 2014, 70% of patients seeking sex reassignment procedures were covered by either Medicaid or Medicare, an increase from 25% the two years before.²⁴

In May 2016, the U.S. Department of Health and Human Services Office of Civil Rights published a federal rule "implementing Section 1557 of the Affordable Care Act (ACA)," which "prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in

²¹ *Id.* at *23, *25.

²² *Id.* at *27.

²³ *Id.* at *27.

²⁴ *Study shows rise in sex-reassignment surgeries in the US*, Advisory Board (Mar. 5, 2018), <https://www.advisory.com/daily-briefing/2018/03/05/gender-affirming> (last visited June 23, 2019).

certain health programs and activities.”²⁵ The Rule prohibits Medicaid insurers and medical providers from:

- (3) Deny[ing] or limit coverage, deny or limit coverage of a claim, or impose additional cost sharing or other limitations or restrictions on coverage, for any health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available;
- (4) Hav[ing] or implement a categorical coverage exclusion or limitation for all health services related to gender transition; or
- (5) Otherwise deny[ing] or limit[ing] coverage, deny[ing] or limit[ing] coverage of a claim, or impos[ing] additional cost sharing or other limitations or restrictions on coverage, for specific health services related to gender transition if such denial, limitation, or restriction results in discrimination against a transgender individual.

45 CFR 92.207(b).²⁶

Montana’s Department of Public Health and Human Services (“DPHHS”) noticed its intent to follow the federal rule in May 2017, advising that, effective July 18, 2016, “[s]ervices related to gender transition that otherwise fall within a members covered benefit plan (e.g., physician's services, inpatient and outpatient hospital services, prescribed drugs, etc.) will be reimbursable under Montana Medicaid when medically necessary.”²⁷ In light of this notice,

²⁵ *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,375 (May 18, 2016) (codified at 45 C.F.R. pt. 92), available at <https://www.federalregister.gov/documents/2016/05/18/2016-11458/nondiscrimination-in-health-programs-and-activities>. A federal court has preliminarily enjoined this rule, finding that “the text, structure, and purpose [of Title IX] reveal that the definition of sex in Title IX’s prohibition of sex discrimination unambiguously prevented discrimination on the basis of the biological differences between males and females.” *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660, 688 (N.D. Tex. 2016). Consequently, the federal rule exceeds the scope of the law. *Id.* at 689. A circuit split exists as to whether Section 1557 includes gender identity.

²⁶ The United States Supreme Court has pending before it the legality of interpreting the term “sex” in federal law to include “gender identity” for discrimination purposes. See *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm’n*, No. 18-107 (certiorari granted Apr. 22, 2019).

²⁷ *Montana Healthcare Programs Notice*, Montana DPHHS, available at <https://medicaid.provider.mt.gov/Portals/68/docs/providernoticedocs/2017/provnoticenondiscriminationgendertransition05252017.pdf> (last visited June 23, 2019). DPHHS advises medical providers “to consult the

Montana's Medicaid program includes medical coverage for transgender medical treatments, including gender reassignment surgeries. Neither the 2015 nor 2019 Medicaid expansion bills affected a change in this coverage.

'Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People,' published by the World Professional Association for Transgender Health for contemporary medical necessity criteria." *Id.*