

MEMORANDUM

TO: Jeff Laszloffy, President of the Montana Family Foundation
FROM: Anita Y. Milanovich, Chief Legal Counsel
RE: Montana Medicaid Expansion and Abortion Availability
DATE: April 1, 2020

This memorandum addresses whether Montana's Medicaid Expansion program increases abortion availability under Medicaid. Although as shown below the analysis requires considerable scrutiny to unpack, the ultimate answer is yes.

I. Medicaid and Abortion

Thirty-four states administer their Medicaid program consistent with the Hyde Amendment,¹ which precludes federal funding of abortions,² with the exception for abortion in the instances of rape, incest, and life of the mother.³ But fifteen states have a policy that directs

¹ *State Funding of Abortion Under Medicaid*, Guttmacher Institute, <https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid> (last visited April 1, 2020).

² *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 April 1, 2020).

³ *See supra* note 1.

their Medicaid program “to pay for all or most medically necessary abortions.”⁴ Montana is among those fifteen.⁵

II. Medicaid Expansion in Montana

In 2015, Montana’s legislature, through SB 405, expanded Medicaid under the HELP Act program, which provided Medicaid coverage for newly eligible recipients under 42 U.S.C. 1396a(a)(10)(A)(i)(VIII).⁶ The expansion took effect in January 2016,⁷ and was renewed in 2019 under HB 658,⁸ with a termination date of June 30, 2025.⁹

III. Analysis

To determine whether Montana’s Medicaid Expansion extends abortion availability beyond that already available under Medicaid, a close review of SB 405 (2015) and HB 658 (2019) and the laws they implicate is required.

A. Who Does Medicaid Expansion Cover?

Both SB 405 (2015), Section 4, and HB 658 (2019), Section 32, expanded Medicaid to include those identified in federal law under 42 U.S.C. 1396a(10)(A)(i)(VIII).¹⁰ 42 U.S.C. 1396a(10)(A)(i)(VIII) establishes Medicaid Expansion eligibility criteria as individuals:

beginning January 1, 2014, who are under 65 years of age, not pregnant, not entitled to, or enrolled for, benefits under part A of subchapter XVIII, or enrolled

⁴ See *supra* note 1.

⁵ *Jeannette R. v. Ellery*, 1995 Mont. Dist. LEXIS 795, *17-*18 (Mont. Dist. Ct. May 22, 1995).

⁶ SB 405, 64th Legislature, at 3 (2015) (enrolled), *available at* <https://leg.mt.gov/bills/2015/billpdf/SB0405.pdf>.

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/>.

⁸ HB 658, 66th Legislature, at 1-4 (2019) (enrolled), *available at* <https://leg.mt.gov/bills/2019/billpdf/HB0658.pdf>.

⁹ *Id.* at 40.

¹⁰ *Supra* note 6 at at 3; *supra* note 8 at 33-34.

for benefits under part B of subchapter XVIII, and are not described in a previous subclause of this clause, and whose income (as determined under subsection (e)(14)) does not exceed 133 percent of the poverty line (as defined in section 1397jj(c)(5) of this title) applicable to a family of the size involved, subject to subsection (k).

While this might appear on its face to preclude pregnant women from receiving benefits under Medicaid Expansion, this provision simply establishes *eligibility* criteria. A nonpregnant woman who enrolls through Medicaid Expansion and then later becomes pregnant is not “kicked off” Medicaid Expansion and bumped to Medicaid coverage: she stays on, with Montana receiving reimbursement at the higher, federal matching rate of 90% rate (vs. the lower, federal matching rate for traditional Medicaid of 65%).¹¹ So Medicaid Expansion affords additional pregnancy-related coverage beyond that provided under Medicaid.

B. What Medicaid Services Does Medical Expansion Extend?

Medicaid Expansion requires individuals identified under 42 U.S.C. 1396a(10)(A) to be provided “at least the care and services listed in paragraphs (1) through (5), (17), (21), (28), and (29) of section 1396d(a) of this title.” Turning then to this additional federal statute, the relevant coverage sections of 42 U.S.C. 1396d(a) are:

- (1) inpatient services (generally defined),
- (3) labs and X-rays,
- (4) family planning services and counselling for cessation of tobacco for pregnant women;
- (5) physician's services (generally defined),
- (17) nurse-midwife services, and
- (28) free-standing birth centers.

¹¹ See Montana Legislative Services Letter (March 11, 2020) (on file with author).

These services include within them “family planning services,” which abortion providers like Planned Parenthood provide.¹² So Medicaid Expansion increases the availability of abortion to eligible nonpregnant women who later become pregnant.

C. Indirect Ways Medicaid Expansion Increases Abortion Availability.

In addition to directly increasing the availability of abortion, Medicaid Expansion indirectly facilitates it, in several ways:

First, it places significant numbers of women of childbearing age directly onto a Medicaid program that covers abortion.¹³ As discussed above, pregnancy is no longer the threshold for eligibility, making the program available to more women who may later become pregnant.

Second, it removes the incentive for women to remain pregnant. Again, Medicaid previously was only available because of pregnancy.¹⁴ Now it’s available pre-pregnancy and remains available to women whether they keep or abort their children.

Third, it indirectly subsidizes more abortion by providing more taxpayer funding to Planned Parenthood. Planned Parenthood is a provider of “family planning services” covered by Medicaid.¹⁵ By increasing funding Planned Parenthood, Medicaid Expansion increases resources to pay for abortions.

¹² *Medicaid Expansion 101*, Planned Parenthood, https://www.plannedparenthoodaction.org/files/2913/6269/3475/Medicaid_Expansion_030613_vF.pdf (last visited April 1, 2020) (stating that under Medicaid Planned Parenthood provides 36% of Medicaid’s family planning care).

¹³ Michael J. New, *An Analysis of How Medicaid Expansion in Alaska Will Affect Abortion Rates*, Charlotte Lozier Institute at 7 (May 2015), <https://lozierinstitute.org/an-analysis-of-how-medicaid-expansion-in-alaska-will-affect-abortion-rates/>.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 8-9.

Last, it reinforces considerable academic research that shows that subsidizing abortions through Medicaid increases state abortion rates. Fifteen studies have shown that abortion rates increased when Medicaid funding increased.¹⁶ Conversely, “18-37 percent of pregnancies that would have ended in Medicaid funded abortions were carried to term when funding was no longer available.”¹⁷ So Medicaid Expansion has the effect of increasing abortion availability,

Though not self-evident on the face of the laws passed, Montana Medicaid Expansion increases, both direct and indirect, abortion availability in Montana.

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 6 (quoting Stanley K. Henshaw, *et al.*, *Restrictions on Medicaid Funding for Abortions: A Literature Review*, Guttmacher Institute (2009), https://www.guttmacher.org/sites/default/files/report_pdf/medicaidlitreview.pdf).