

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-2450
LAA.Legal@akleg.gov
120 4th Street, Room 3

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

May 26, 2021

SUBJECT: Appropriations - Medicaid services
(CSHB 69(FIN) am: Work Order No. 32-GH1509\S.A)

TO:

[REDACTED]

FROM: Megan A. Wallace
Director

Megan Wallace

You have asked about potential legal issues with Conference Committee Department of Health and Social Services (DHSS) motion sheet items 44, 46, and 47, which remove medical assistance (Medicaid) funding for abortions. As described below, these items are unenforceable under the privacy and equal protection clauses of the Alaska Constitution.

Under Alaska law, the state must fund medically necessary abortion services for eligible women for coverage under the Medicaid program, just as the state funds pregnancy services for women covered under Medicaid. The Alaska Supreme Court has held that reproductive rights are fundamental, and fall within the scope of the right to privacy protected in the Alaska Constitution.¹ Article I, sec. 1, Constitution of the State of Alaska, provides equal protection under the law and mandates "equal treatment of those similarly situated."² Like the right to privacy, the Alaska Constitution provides more protection of individual rights to non-discriminatory treatment than does the federal constitution.³

In 2001, the Alaska Supreme Court held that denial of Medicaid coverage to poor women who medically require abortions violates the equal protection clause of the Alaska Constitution, stating, "the manner in which the State allocates public benefits is subject to constitutional limitation under Alaska's equal protection provision. The State, having undertaken to provide health care for poor Alaskans, must adhere to neutral criteria in distributing that care."⁴ The court explained:

¹ *Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 968 (1997).

² *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 909 (Alaska 2001).

³ *Id.*

⁴ *State v. Planned Parenthood of Alaska, Inc.*, 28 P.3d at 915 (Alaska 2001) (invalidating regulations that prohibited public funding for abortions except when necessary to save the life or health of the mother, or in cases of rape or incest).

[T]he State's decision to fund prenatal care and other pregnancy-related services has not been challenged. Indeed, a woman who carries her pregnancy to term and a woman who terminates her pregnancy exercise the same fundamental right to reproductive choice. Alaska's equal protection clause does not permit governmental discrimination against either woman; both must be granted access to state health care under the same terms as any similarly situated person. The State's undisputed interest in providing health care to women who carry pregnancies to term has no effect on the State's interest in providing medical care to Medicaid-eligible women who, for health reasons, require abortions.⁵

In the most recent Alaska Supreme Court case relating to legislative action restricting Medicaid funding for abortions, the court found a statute and regulation redefining which abortions qualify as "medically necessary" for the purposes of Medicaid funding violated the equal protection clause of the Alaska Constitution.⁶ The court explained the state's statute and regulation limiting Medicaid funding of abortion services to those that were medically necessary, according to the criteria of the statute and regulation, treated abortion services differently from childbirth services and other pregnancy care.⁷ The court recognized the state may limit Medicaid expenditures by employing neutral criteria such as medical necessity to prioritize funds, but held that the statute and regulation were not narrowly tailored to meet the ends of preserving Medicaid funds.⁸ In explaining how the measures singled out only one among multiple purportedly "elective" procedures available to pregnant women, the court stated abortion costs the state significantly less than a hospital delivery, and the state continued to fund other purportedly elective pregnancy-related services such as induction of labor without any special certification of medical necessity.⁹ The court found the state failed to show that the differences between the affected classes justified the discriminatory treatment, and concluded the statute and regulation violated the Alaska Constitution's guarantee of equal protection.¹⁰

In sum, the provision of HB 69 appropriating zero dollars for Medicaid funding for abortions is contrary to Alaska law and is unconstitutional.

⁵ *Id.* at 912 - 13 (footnotes omitted).


⁶ *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984 (Alaska 2019).

⁷ *Id.* at 1000 - 1005.

⁸ *Id.* at 1005.

⁹ *Id.*

¹⁰ *Id.*



May 26, 2021

Page 3

Additionally, an abortion may involve many types of services that are mandatory under federal Medicaid requirements or authorized under AS 47.07.030(b) as services that must be offered under Medicaid in Alaska: physician services, laboratory services, x-rays, medical supplies, hospital services, nursing services, prescription drugs, transportation, pregnancy-related services, family planning services, etc. "Abortions," per se, is not a category of either mandatory or optional services in Medicaid. If a state changes a federally-funded program in a way that is inconsistent with federal law, the state may lose some or all federal funding for the program. You may wish to discuss with the Department of Health and Social Services as to whether these items that remove all Medicaid funding for abortions, if enacted, would jeopardize federal funding of the state's Medicaid program.

As it relates to the structure used in items 46 and 47, if litigated, a court could strike the entire appropriation. This could potentially jeopardize all funding in that appropriation, including funding unrelated to abortions.

Please let me know if I may be of further assistance.

MAW:lmc
21-318.lmc