

United States Senate

WASHINGTON, DC 20510

June 9, 2011

Donald Berwick, Administrator
Center for Medicare and Medicaid Services
200 Independence Avenue, S.W.
Washington, DC 20201

Dear Dr. Berwick:

We write with concern about your June 1, 2011 decision not to approve the State of Indiana's Medicaid State Plan Amendment (SPA) 11-011 to limit funding to Medicaid providers that perform abortions or operate facilities where abortions are performed. We disagree with your narrow interpretation of Title XIX of the Social Security Act and believe this represents a significant departure from Medicaid's longstanding practice of having the states – not the federal government – set reasonable standards for qualified providers. Unfortunately, your decision is simply the latest example of this Administration's alarming pattern of usurping states' authority to manage their Medicaid programs in ways that best meet the needs of their citizens.

As you may know, Indiana's law HEA 1210, which was passed with bipartisan support by the Indiana General Assembly, prevents taxpayer dollars from being given to "any entity that performs abortions or maintains or operates a facility where abortions are performed" except licensed hospitals or ambulatory surgical centers. While the Indiana law does not change the family planning benefits offered to beneficiaries, it may change where certain services can be received – and with good reason. According to a recent legal memorandum filed by Indiana's Attorney General, "[Planned Parenthood of Indiana's] audited financial statements for 2009 and 2010 give rise to a reasonable inference that it commingles Medicaid reimbursements with other revenues it receives..." Indiana's HEA 1210 effectively closes a concerning loophole that has allowed taxpayer dollars to support operational costs for abortions; and furthermore, HEA 1210 ensures full compliance with the longstanding federal policy of the Hyde Amendment. It is important to note that family planning providers, such as Planned Parenthood, in Indiana may receive Medicaid funds for family planning services, if they choose not to perform abortions.

Your recent letter to the State of Indiana noted that you cannot determine that Indiana's SPA 11-011 is allowable under Section 1902(a)(23) of the Social Security Act, which provides that beneficiaries can obtain covered services from any qualified provider willing to provide such services. We disagree with your determination. Section 1902(a)(23) clearly states that providers must be "qualified to perform the service or services required," and the federal regulations implementing this statute (42 C.F.R. section 431.51) allow *states* to set "reasonable standards relating to the qualifications of providers." Furthermore, Section 1902(p)(1) of the Social Security Act infers that states may exclude certain providers for *any* reason. This is clear from this provision's legislative history found in Senate Report 100-109 stating, "This provision is not intended to preclude a State from establishing, under State law, any other bases for excluding individuals or entities from its Medicaid program." Additionally, the First Circuit found in *First Medical Health Plan, Inc. v. Vega-Ramos* that Section 1902(p)(1) "permit[s] a state to exclude

an entity from its Medicaid program for any reason established by state law.” We believe that Indiana’s HEA 1210 and SPA 11-011, which sets reasonable standards for qualified family planning services providers to ensure no taxpayer funds are used for abortions, are clearly consistent with the letter and the spirit of Section 1902 of the Social Security Act. We hope this review of longstanding federal law and legal precedent is helpful to you.

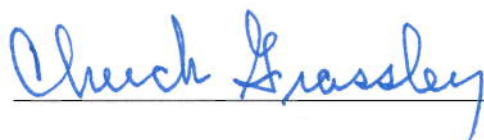
Additionally, while we recognize that your reasons for denying SPA 11-110 did *not* include concerns about compliance with Section 1902(a)(30)(A), we do wish to highlight the fact that Indiana has taken steps to ensure “equal access” for Medicaid family planning services. We are advised that the Indiana Family and Social Services Administration (FSSA) believes that HEA 1210 will impact 21 counties in Indiana, but FSSA has identified approximately 800 qualified provider locations in those same counties where Medicaid patients may receive family planning services. Since hundreds of facilities will still offer these services, we believe that Indiana will continue to meet its obligation to provide care to the extent that such care is available to the general population in these affected geographic areas.

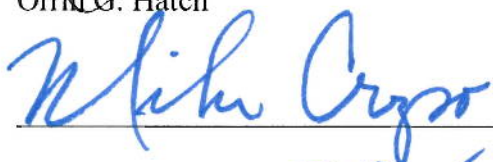
Finally, we are concerned about press reports indicating that the Center for Medicare and Medicaid Services (CMS) is considering cutting the entirety of Indiana’s federal Medicaid match over this issue. While the Obama Administration’s view on the appropriateness of sending taxpayer dollars to Medicaid providers that perform abortions may differ from the view of the State of Indiana, we trust that you will not jeopardize care for more than a million Hoosiers over this ideology. Given CMS’ recent informational bulletin issued to all states on this issue, we certainly hope that you are not actually considering jeopardizing care for the nation’s 70 million Medicaid beneficiaries over this ideological difference.

We ask for your swift reconsideration of Indiana’s SPA 11-110. Indiana’s proposal should not only be approved, we believe it serves as an important model for every state. We fully support the intent of HEA 1210 to prevent taxpayer dollars from subsidizing the operational costs of abortions; and more broadly, we support the right of states to administer their Medicaid programs in a manner consistent with the values and needs of their citizens.

Sincerely,


Orrin G. Hatch


Chuck Grassley


Mike Crapo


Kentucky


Minnesota


Jim Hahn

Rand Paul

Ray Hunt

Ron Paul

John Hoover

Jerry Moran

Li An

Dean Heller

Bob

Boucark

John Cornyn

Mike Johnson

Jim Chabot

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Jefferson

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