



April 28, 2011

**VIA FACSIMILE: 317-233-3378**

The Honorable Mitch Daniels  
Indiana Statehouse  
Indianapolis, IN 46204

**Re: Legal Opinion on the State of Indiana's Continued Eligibility for Medicaid  
Federal Family Planning Matching Funds upon Enactment of the Schneider  
Amendment to H.B. 1210**

Dear Governor Daniels:

The Alliance Defense Fund has been asked to review and provide a legal opinion upon the potential implications that the Schneider Amendment to H.B. 1210 may pose to the State's continued eligibility for Medicaid family planning matching funds. Media reports have suggested that the Secretary of the Family and Social Services Administration may be concerned that the enactment of H.B. 1210 may cause the State to lose approximately \$3.9 million in federal Medicaid funds for family planning services. However, in our opinion, enactment of H.B. 1210 should not cause the State to forfeit eligibility for Medicaid family planning funds, since it neither contravenes federal supremacy nor targets Planned Parenthood or any other particular provider for exclusion from the Medicaid program.

Federal supremacy is unlikely to apply in this case, as the State of Indiana would merely be applying its own congruent conditions to eligibility for qualified provider status under Medicaid, and not imposing conditions inconsistent with federal guidelines. It is well established that "The mere fact that a state program imposes an additional 'modest impediment' to eligibility for federal funds does not provide a sufficient basis for preemption." *Planned Parenthood of Houston and Southeast Tex. v. Sanchez*, 403 F.3d 324, 337 (5<sup>th</sup> Cir. 2005), citing *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 661-62 (2003) (rejecting Medicaid Act preemption challenge to state statute imposing prior authorization requirement on access to prescription drugs financed by federal funds); *First Medical Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 52 (1<sup>st</sup> Cir. 2007) (Territory's modifications to Medicare Advantage plan held not a prohibited "standard" for operation under Medicare Part C, but rather a permissible eligibility requirement for an entity wishing to participate in a Puerto Rico Medicaid program).

The Schneider Amendment does not by its terms render Planned Parenthood of Indiana or any other abortion provider ineligible for Medicaid family planning reimbursements. The Amendment simply provides that no State agency shall enter into a contract with (e.g., the Medicaid Provider Agreement) or make a grant to (e.g., funds appropriated under Title X for the

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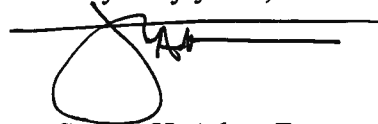
federal family planning program) “any entity that performs abortions or maintains or operates a facility where abortions are performed that involves the expenditure of state funds or federal funds administered by the state.” H.B. 1210-5 (adopted 4/18/2011). The Amendment is similar to provisions passed by the States of Texas and Missouri and upheld by federal appeals courts.

Texas’ amendment, “Rider 8,” passed in 2003, restricted distribution of federal family planning funds, including Title X and Title XIX funds, to individuals or entities that did not perform elective abortion procedures and did not contract with or provide funds to individuals or entities for the performance of elective abortion procedures. Planned Parenthood filed suit against Rider 8, claiming among other grounds that the measure violated the Supremacy Clause of the federal Constitution by imposing additional eligibility requirements on its receipt of federal funds that were inconsistent with federal funding law. The Fifth Circuit Court of Appeals rejected this argument in *Planned Parenthood v. Sanchez, supra*, holding that Rider 8 did not impose conflicting requirements on providers. Because Rider 8’s language, like the language of H.B. 1210, could be read to permit family planning agencies to continue to receive funds by creating separate affiliates, in the court’s words by “dividing into ‘Family Planning’ entities and ‘Abortion Services’ entities,” it did not run afoul of federal law. The Fifth Circuit observed that the Eighth Circuit Court of Appeals had reached the same conclusion with regard to a Missouri provision that de-funded abortion providers in *Planned Parenthood of Mid-Missouri and Eastern Kansas v. Dempsey*, 167 F.3d 458 (8<sup>th</sup> Cir. 1999).

The Texas lawsuit was subsequently dismissed after Planned Parenthood unilaterally complied with the requirements of Rider 8 by incorporating six separate, independent affiliates for the provision of abortion services, transferring the abortion licenses to those facilities and agreeing to maintain accounting, timekeeping and boards of directors separate from the family planning services providers. To our knowledge, neither Texas nor Missouri was ever threatened with discontinuance of federal matching funds for family planning under Title X or Title XIX.

In the event of a legal challenge to H.B. 1210, the Alliance Defense Fund would be pleased to provide whatever assistance Attorney General Zoeller desires to mount a successful defense.

Very truly yours,

A handwritten signature in black ink, appearing to read "S. Aden", is written over a horizontal line. Below the line is a large, stylized loop or flourish.

Steven H. Aden, Esq.  
Senior Counsel