30:4D-6.1

LEGISLATIVE HISTORY CHECKLIST

NJSA 30:4D-6.1

Laws of 1975 Chapter 261

Bill No. S 528

Sponsor(s) Merlino & others

Date Introduced Pre-filed

Committee: Assembly Judiciary, Law, Public Safety & Defense

Senate Institutions, Health & Welfare

Amended during passage [redacted] No Substituted for A 1182

Date of passage: Assembly April 14, 1975

Senate June 17, 1974

Date of approval Dec. 18, 1975

Following statements are attached if available:

Sponsor statement	Yes	[redacted]
Committee Statement: Assembly	[redacted]	No
Senate	[redacted]	No
Fiscal Note	Yes	[redacted]
Veto message	[redacted]	No
Message on signing	Yes	[redacted]
Following were printed:		
Reports	[redacted]	No
Hearings	[redacted]	No

Cited in sponsor's statement:

N.J. Attorney General's Memorandum Opinion (No. M73-0993) to the Acting Commissioner of Institutions & Agencies, dated Nov. 14, 1973.

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CHAPTER 261 LAWS OF N. J. 1975
APPROVED 12-18-75

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SENATE, No. 528

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1974 SESSION

By Senators MERLINO, HAGEDORN, RUSSO, DAVENPORT, TUMULTY, MUSTO and BEDELL and Assemblymen SHELTON, ORECHIO and RUANE

AN ACT supplementing the "New Jersey Medical Assistance and Health Services Act," approved January 15, 1969 (P. L. 1968, c. 413).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. No payments for medical assistance shall be made under the act hereby supplemented for the termination of a woman's pregnancy for any reason except where it is medically indicated to be necessary to preserve the woman's life. In any case where a pregnancy is so terminated, the act shall be performed in a hospital and the physician performing the act shall submit in writing a report to the division stating in detail his reasons for finding it necessary to terminate the pregnancy.

2. This act shall take effect immediately.

STATEMENT

This bill prohibits the use of Medicaid funds to pay for abortions except when the mother's life is at stake, in which case the physician must document in detail to the Division of Medical Assistance and Health Services the reasons for his belief that the abortion is necessary to save her life.

An opinion by the former Attorney General dated November 14, 1973, asserted that the division "must pay . . . for all 'medically indicated' abortions performed on Medicaid eligible women." The meaning of "medically indicated" is not clear, and is generally construed to cover what is sometime known as "abortion on demand."

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

However, the same opinion also noted that "the State has been advised by that Federal agency [the U.S. Department of Health, Education and Welfare] that the reimbursable nature of an abortion procedure *is a policy decision within the discretion of the State agency* administering the Medicaid program." This legislation effects that "policy decision" by determining that abortions should not be publicly funded except when the mother cannot survive her child's gestation and delivery.

COPY

FISCAL NOTE TO

SENATE, No. 528

STATE OF NEW JERSEY

DATED: DECEMBER 10, 1974

Senate Bill No. 528 prohibits the use of Medicaid funds to pay for abortions except when the mother's life is at stake.

The Division of Medical Assistance and Health Services in the Department of Institutions and Agencies estimated that of all abortions performed, approximately 3% of the pregnancies aborted would constitute cases where carrying the pregnancy to term would seriously endanger the woman's life; 8% of the pregnancies would possibly constitute a possible threat to the woman's life; 14% of the pregnancies would constitute an impairment to the woman's life; 75% of the pregnancies would affect in no way the woman's life, safety or health. Since Senate Bill No. 528 would permit termination of a woman's pregnancy only where it is medically indicated to be necessary to preserve the woman's life, 97% of the abortions paid for in Fiscal Year 1974 would not have been permitted under Senate Bill No. 528.

On this basis, the Division estimates that if this legislation were enacted, State expenditures would be reduced by $126,000.00 for the final 6 months of fiscal 1974-75 and $252,000.00 in each of the 2 succeeding fiscal years.

On the other hand, if Medicaid were prohibited from paying for 97% of the abortions sought by public assistance recipients and the women were unable to secure abortions, the State would not experience potential savings in public assistance that would result if the children were not born and raised, although it is impossible to estimate in what amount.

The fiscal note is based on an estimate of costs rather than actual cost information.

In compliance with written request received, there is hereby submitted a fiscal estimate for the above bill, pursuant to P. L. 1962, c. 27.

FROM THE OFFICE OF THE GOVERNOR

DECEMBER 18, 1975 — FOR FURTHER INFORMATION

FOR IMMEDIATE RELEASE — DICK CAMPBELL

Governor Brendan Byrne today signed into law a bill which prohibits the use of Medicaid funds to pay for abortions except in cases where the mother's life is at stake.

The measure, S-528, sponsored by Senator Joseph P. Merlino, D-Mercer, would permit the use of Medicaid funds for abortions when it is necessary to preserve the mother's life. But in such cases, the abortion must be performed in a hospital, and the attending physician must submit a detailed report on the reasons it was necessary to perform the abortion.

The Governor issued the following statement upon signing the bill:

I have been committed in principle to sign this legislation. I have withheld my signature because of conflicting judicial opinions on the constitutionality of such legislation. That conflict still exists and I have had no clear indication that the Supreme Court of the United States will finally resolve it.

At a time when we are underfunding Medicaid in such areas as eye glasses and prescription drugs, it is additionally difficult to justify payment for the medical procedure described in Senate Bill 528.

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M73-0993

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL

DIVISION OF LAW
STATE HOUSE ANNEX
TRENTON 08625

STEPHEN SKILLMAN
FIRST ASSISTANT ATTORNEY GENERAL

November 14, 1973

Honorable Maurice G. Kott
Acting Commissioner
Department of Institutions and Agencies
135 West Hanover Street
Trenton, New Jersey 08625

Dear Commissioner Kott:

You have asked for legal advice on several questions concerning Medicaid reimbursement by the Division of Medical Assistance and Health Services for abortions performed within the State of New Jersey. You have specifically inquired whether the Division must pay providers of medical services for "therapeutic" and/or "elective" abortions performed on Medicaid-eligible women during any of the trimesters of pregnancy. You have additionally asked whether the Division may promulgate rules and regulations concerning the provision of abortion services based on medical considerations. For the following reasons you are hereby advised that the Division must pay providers of medical services for all "medically indicated" abortions performed on Medicaid-eligible women. You are also advised that it is permissible for the Division to promulgate appropriate rules to regulate or otherwise limit reimbursement for "medically indicated" abortions if there are considerations which would warrant a difference in treatment from other eligible services provided by the Medicaid program.

Subchapter XIX of the Social Security Act, 42 U.S.C. §1396, et seq. provides for a federally funded program of medical assistance to needy persons under which the states may provide matching funds for payments for medical care in appropriate cases. The federal statutory scheme visualizes that the medical assistance to be made available to the indigent is "necessary" medical service, 42 U.S.C. §§1396(a)(10)(B)(i). 42 U.S.C. §1396(d)

mandates the inclusion of several broad categories of medical services in a State Medicaid Plan for those eligibles whose income and resources are insufficient to meet the costs of in-patient hospital services, out-patient hospital services and physician's services, whether furnished in the office, the patient's home, a hospital or a skilled nursing home or elsewhere. The State Plan may, furthermore, provide certain optional services to the needy individuals eligible for reimbursement, including clinic services.

The State of New Jersey, through the Division, has elected to provide the full range of mandatory and optional "necessary" medical services to individuals receiving aid or assistance under the State Plan approved by the federal government. N.J.S.A. 30:40-6, Title XIX Medical Assistance Program, State Plan for Medical Assistance, State of New Jersey, §4(A)(1)(a)-(r).

Although the Social Security Act and the regulations of the United States Department of Health, Education and Welfare do not provide any explicit guidance concerning the reimbursable nature of abortion services, it is understood that the State has been advised by that federal agency that the reimbursable nature of an abortion procedure is a policy decision within the discretion of the state agency administering the Medicaid program. We have been further advised that an abortion permissible under the laws of the state is a reimbursable service under a Medicaid program as either an in-patient hospital service, out-patient hospital service, physician service, or clinic service. These administrative interpretations of the Department of Health, Education and Welfare are entitled to great weight as a persuasive indication of the intent and purpose of the Social Security Act. Dandridge v. Williams, 397 U.S. 471 (1970); Rosado v. Wyman, 377 U.S. 397 (1970), on remand 322 F. Supp. 1173 (E.D.N.Y. 1970), aff'd 437 F.2d 619 (2nd Cir. 1970), aff'd mem. 402 U.S. 991 (1971).

This State's program is a comprehensive program of medical assistance for needy persons, and it embraces all of the general medical in-patient and out-patient hospital care, physician and clinic services provided as eligible services by the federal Medicaid program. N.J.S.A. 30:4D-2, 6. The New Jersey statutory and regulatory scheme for the administration of

its Medicaid Program similarly comprehends that the medical assistance to be made available within the defined categories of eligible services must be for necessary medical service and care to qualified applicants. N.J.S.A. 30:4D-5, N.J.A.C. 10:49-1.1, et seq. The Division of M.A.H.S. Health Services Program Hospital Manual, in its list of authorized services set forth in the New Jersey Administrative Code, specifies that the items and services provided to covered persons will be consistent with the medical necessity of the patient's condition as determined by the attending physician or other practitioner in accordance with generally recognized standards and procedures of the Division. N.J.A.C. 10:49-1.3(a). The limitations and exclusions imposed by the Medicaid program on payment primarily relates to "any service, admission or item which is not medically required for diagnosis or treatment of a disease, injury or condition." N.J.A.C. 10:49-1.9(a)(1). The general coverage of hospital services set forth in the Hospital Manual furthermore excludes in-patient hospital services rendered prior to the day it is medically necessary for the diagnostic services and/or surgical or medical treatment for which the patient is admitted. Section 202.8. In-patient hospital services rendered after the day they are medically necessary are similarly excluded from the general coverage of hospital services eligible for reimbursement. (It is therefore clear from the foregoing that except for certain fundamental non-reimbursable exclusions related to rest care, custodial or convalescent care, mental disorders, and private duty nursing, the Program provides for reimbursement for all necessary eligible medical care and services which are required for the diagnosis or treatment of a disease, injury or condition.)

We have, furthermore, been advised that the administrative review procedures of the Division of M.A.H.S. are structured essentially to determine whether the service or item provided is medically necessary or indicated for the treatment of the condition involved. In this regard, we understand that in general there is no overall administrative attempt prior to the payment of a claim to conduct an in-depth investigation of individual claims for the purpose of reviewing or looking behind a physician's judgment that a particular item or procedure was "medically necessary." Claims are merely subjected to screening procedures to determine whether a particular claim involves a covered or non-covered item or service, to determine if prior authorization is indicated by the rules and regulations of the Division, to determine if the length of confinement or treatment was medically indicated, to

determine whether a disease or condition could be treated in a lesser care facility, to determine "overutilization" of the program and to determine and discover fraudulent claims and providers. Only in limited instances does a review of a claim result in an intensive review of the medical and clinical judgment of the treating physician regarding the necessity of the service performed. You have advised that if the physician provider has certified that the items and services provided are in compliance with the regulations of the New Jersey Medical Assistance and Health Services Program, the Division will defer to the medical judgment of the provider that the eligible services rendered were in fact "medically necessary and indicated." The procedures for the review and evaluation of reimbursable claims consequently realistically defer to a large extent to the attending physician and his clinical judgment on the need for required medical services.

Prior to the Supreme Court decisions in Roe v. Wade and Doe v. Bolton, discussed below, the Division administratively handled reimbursement for abortions in a similar fashion. Where it appeared to the satisfaction of the Division based upon the certification of a hospital provider that an abortion was medically indicated in accordance with the standards then prevailing within this State, the abortion would be reimbursable as any other item or surgical procedure reimbursable by the Medicaid Program. As a general rule, the abortions certified by the provider apparently were related to those abortion procedures performed to alleviate a threat to the life or health of the pregnant woman.* The Division or its fiscal intermediaries did not in those instances look behind or examine the medical justification for the procedure in individual cases.

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* Reimbursement for abortions performed in other states which have different medical standards or legislation dealing with this subject of course involves different considerations and is not encompassed by this opinion.

During the past year and a half, you have advised that claims have been submitted for abortions deemed by providers to be medically required for many reasons other than for the protection of the life or health of the expectant mother. This trend has been occasioned by recent United States Supreme Court decisions in Roe v. Wade, 93 S. Ct. 705 (1973) and Doe v. Bolton, 93 S. Ct. 739 (1973), which expanded the scope of legitimate medical procedures to encompass any "medically indicated" abortion. The Court held that a pregnant woman enjoys a constitutionally protected right of privacy to obtain an abortion, subject to a state's interest in the regulation of abortion procedures in ways that are reasonably related to maternal health. It was determined that at the termination of the first trimester of gestation, the state's interest as to protection of health, medical standards and prenatal life become dominant. 93 S. Ct. at 731.

> ". . . [O]n the other hand . . . for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the state." 93 S. Ct. at 732.

The Court thereby vindicated "the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision and the basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available." 93 S. Ct. at 733. The Court further stated that legitimate medical judgment may be exercised in the light of all factors: "physical, emotional, psychological, familial, and the woman's age-relevant to the well being of the patient." 93 S. Ct. at 747.

There is, consequently, no so-called "elective" abortion or abortion on demand guaranteed by the United States Constitution. Doe v. Bolton, 93 S. Ct. at 756 (Burger, C.J., concurring). An abortion is legally permissible only when it is "medically indicated" to be a recommended procedure, based upon the best clinical judgment of the treating physician. Therefore, it is unnecessary to engage in any distinction between "elective" or "therapeutic" abortions subsequent to the determination of the United States Supreme Court in the above cited cases.

A fair appraisal of the existing regulatory and administrative framework of the Division reveals an established policy to defer to the examining physician's judgment on the medical need for care and services as a precondition to Medicaid reimbursement. Therefore, the Medicaid Program must continue to reimburse for "medically indicated" procedures as it has in the past, including those eligible services provided for the purpose of termininating a pregnancy by abortion, unless and until it takes appropriate legal action to change the existing regulatory and administrative framework.

In the event a decision is made to restrict or otherwise limit financial assistance for "medically indicated" abortion procedures in the future, it is incumbent upon the Division to adopt appropriate rules and regulations in accordance with the requirements of the Administrative Procedure Act to properly effectuate such a purpose. It is well established that rules and regulations of an administrative agency must be promulgated before the fact to properly justify a change in the particular field of governmental regulation. The need for definite agency rules was noted in Boller Beverages v. Davis, 38 N.J. 138, 151, 152 (1962):

> "The object is not legislation ad hoc after the fact, but rather the promulgation, through the basic statute and the implementing regulations taken as a unitary whole, of a code governing action and conduct in the particular field of regulation so those concerned may know in advance all the rules of the game, so to speak, and may act with reasonable assurance. Without sufficiently definite regulations and standards administrative control lacks the essential quality of fairly predictable decisions. Persons subject

> to regulation are entitled to something more than a general declaration of statutory purpose to guide their conduct before they are restricted or penalized by an agency for what it then decides was wrong from its hindsight conception of what the public interest requires in the particular situation."

Thus, Medicaid eligibles must be sufficiently apprised in advance of any policy to limit or otherwise regulate the financial assistance available for the broad range of abortion services now in effect mandated for reimbursement by the current procedures of the Division.

Where special circumstances justify a basis for different treatment, you have the option to regulate or limit the broad range of abortion services eligible for reimbursement under the present regulatory scheme of the Division. N.J.S.A. 30:4D-12 authorizes the Division to develop methods, procedures and standards to ensure and safeguard against unnecessary utilization and excessive charges consistent with efficiency, economy and quality of care. The statute further provides that the Division may prescribe standards that participating providers must meet. In fulfillment of this statutory responsibility, the Division might conclude that certain considerations relating to fraudulent utilization of the Medicaid Program by providers or fiscal limitations mandate a reasonable cutback in all or some of the eligible services now reimbursable for abortions. In fact, where the concerns of the Division relate to these statutory responsibilities and not to the concerns of other agencies, such as the Department of Health and Board of Medical Examiners, the Division may even possibly restrict reimbursable abortions to hospitals and thereby preclude other health care facilities engaged in termination of pregnancy procedures from eligibility for reimbursement as providers. The Division has previously implemented the above cited statutory authorization to exert fiscal and quality controls over the nature of the health care facility eligible to perform the specific medical service submitted for Medicaid reimbursement. Specific examples include the denial of reimbursement for in-patient hospital care for the cauterization of a wart and for drug addiction treatment.

It should be reiterated, however, that such limitations only may be imposed prospectively by duly adopted rules and regulations, which provide fair notice to Medicaid recipients that reimbursement for this class of services will be modified or eliminated. Furthermore, any such limitation must be consistent with applicable federal and state legislation and must be reasonably related to the statutory purposes of the Medicaid program.

For all of these reasons, the Division of Medical Assistance and Health Services must pay providers of medical services for all "medically indicated" abortions performed on Medicaid eligible women. You are also advised that it is discretionary with the Division to adopt appropriate rules to deal with "medically indicated" abortions, where special circumstances warrant a difference in treatment from other eligible services provided by the Medicaid Program.

Sincerely yours,

GEORGE F. KUGLER, JR.
ATTORNEY GENERAL OF NEW JERSEY

By Stephen Skillman
Stephen Skillman
First Assistant Attorney General

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