

March 19, 2001
Opinion No. 00-421

Mr. Frank H. Perez
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Louisiana Department of
Health and Hospitals
Office of the Secretary,
Bureau of Legal Services
P. O. Box 3836
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22-2	DRUGS - Narcotics, etc.
49-A	HEALTH - Abortion
61	LAWS - General
107-1	SOCIAL SECURITY [Medicaid Program]
167-1	UNITED STATES - in general, Federal aid, etc.

SYLLABUS:

La. R.S. 40:1299.34.5, specifically directed at the matter of Medicaid funding for abortions, controls over the more general Medicaid-related statutes dealing with the broader categories of "medical services" as a whole and "prescription drugs" as a whole (including La. R.S. 46:153.3) and, therefore, governs the payment for abortion procedures regardless of whether the physician performs a surgical abortion or provides a patient with RU-486 (Mifepristone).

Re: Medicaid funding of abortions effected by administration of
RU-486 (Mifepristone) [MIFEPREX™]

Dear Mr. Perez:

On behalf of David W. Hood, Secretary of the Louisiana Department of Health and Hospitals, you requested our legal opinion on the question whether the recent approval of RU-486 (Mifepristone) by the U.S. Food and Drug Administration (FDA) creates a conflict between La. R.S. 46:153.3 and La. R.S. 40:1299.34.5. In our opinion, whatever conflict exists in this situation is merely an apparent one, and the question is resolved by adherence to La. R.S. 40:1299.34.5 as the law specifically applicable to Medicaid funding of abortions.

La. R.S. 46:153.3 is found under the headings and subheadings of "Public Assistance," "Adult Services," and "Elderly, Blind and Disabled." The pertinent part of the statute itself, quoted with surrounding context revealing its overall legislative purpose, reads as follows:

“§153.3. Medical vendor reimbursements; allowable restrictions; peer-based
prescribing and dispensing practice patterns; Medicaid Drug
Program Committee

“A. The Louisiana Legislature recognizes the need to ensure that the
state delivers a medical assistance program which is cost effective and
prudently administered. The legislature acknowledges that rising health care
costs are creating an increased demand on the state's limited revenues.

Further, the legislature finds that cost effective programs such as the medical assistance drug program optimize existing fiscal resources while improving the quality of patient care and reducing the need for more expensive health care services.

“B. (1) The department may limit reimbursement for multi-source prescription drugs in accordance with state and federal law, except as provided in R.S. 46:153.3(B)(2).

“(2) The department shall provide reimbursement for any drug prescribed by a physician that, in his professional judgment and within the lawful scope of his practice, he considers appropriate for the diagnosis and treatment of the patient.

“(3) The department shall not establish a drug formulary that, except as otherwise provided in Subparagraph (4)(a), restricts by any prior or retroactive approval process a physician's ability to treat a patient with a prescription drug that has been approved and designated as safe and effective by the Food and Drug Administration. Drugs for cosmetic purposes and nonprescription drugs, anorexic drugs, drugs used solely for the treatment of infertility when prescribed for that purpose, cough and cold preparations, and minor tranquilizers are exempt from the provisions of this Paragraph. However, the department may include these categories for reimbursement based upon recommendations from the Medicaid Drug Program Committee.

* * *

[Acts 1989, No. 403, § 1, eff. June 30, 1989; Acts 1995, No. 991, § 1; Acts 1999, No. 795, § 1; Acts 1999, No. 802, § 7, eff. July 2, 1999; Acts 1999, No. 1245, § 1.]

As you explained in your letter, the pertinent part of the statute that you are concerned about is La. R.S. 46:153.3(B)(3), *supra*, which you refer to as the “open formulary law.” You further relate that this provision requires Medicaid generally to pay for any FDA-approved drug for which the drug company signs a rebate agreement with the federal government and explain that Medicaid pays for prescription drugs in Louisiana through the Louisiana Medicaid Prescription Drug Services Program, which provides pharmacy benefit management services to Medicaid-enrolled pharmacies. In contrast, as you noted in your

opinion request letter, RU-486 (Mifepristone) will not be available to the public through pharmacies, even by prescription, because the FDA-approval of this drug is restricted (through the FDA-approved labeling requirements) to its being administered individually to a patient only in a clinic, medical office, or hospital and then only by or under the supervision of a physician who meets certain criteria. A copy of the substance of the FDA letter of approval and label (obtained from the FDA website) is enclosed with this opinion for your convenience.

The only purpose for which RU-486 (Mifepristone) [MIFEPREX™] is approved by the FDA is as an abortifacient for early pregnancies (through 49 days of pregnancy). Because its only purpose is to effect abortions, it is governed, for Medicaid funding purposes, by the federal Hyde Amendment¹ and La. R.S. 40:1299.34.5, which was last amended to comply with the current Hyde Amendment and *Hope Medical Group for Women, etc., et al. v. Edwards, etc., et al.*, 63 F.3d 418 (U.S. App. 5th Cir. 1995). “Title XIX does not require a participating State to include in its plan any services for which a subsequent Congress has withheld federal funding,” *Harris v. McRae*, 448 U.S. 297, 309, 100 S.Ct. 2671, 2684, 65 L.Ed.2d 784 (1980) [as quoted and cited in *Hope Medical Group for Women, supra*, 63 F.3d at 424].²

¹The current Hyde Amendment’s prohibition against the use of federal funds for abortions except to save the life of the mother or in cases of rape or incest, appears to have remained unchanged since the *Hope Medical Group for Women* case. See, for example, P.L. 106-113 (Appendix “D,” HR 3424, Secs. 508-509).

²Even if RU-486 had been FDA-approved for some other purpose as well, the La. R.S. 40:1299.34.5 Medicaid funding provision would be applicable to the occasions when its actual use was to effect an abortion, as defined in R.S. 40:1299.35.1. Indeed, inasmuch as otherwise appropriate to the particular factual circumstances, each one of Louisiana’s abortion laws applies to such use of RU-486.

It is a well-settled rule of statutory construction in Louisiana that where two statutes deal with the same subject matter, they should be harmonized if possible; however, if there is a conflict, the statute specifically directed to the matter at issue must prevail as an exception to the statute more general in character. *LeBreton v. Rabito, et al.*, 97-2221 (La. 7/8/98), 714 So.2d 1226 [citing *State ex rel. Bickman v. Dees*, 367 So.2d 283 (La.1978) and *Esteve v. Allstate Ins. Co.*, 351 So.2d 117 (La.1977)].

In this situation, La. R.S. 40:1299.34.5 is specifically directed at the matter of Medicaid funding for abortions and controls over the more general Medicaid-related statutes dealing with the broader categories of “medical services” as a whole and “prescription drugs” as a whole (including La. R.S. 46:153.3, *supra*). Thus, we agree with your conclusion that La. R.S. 40:1299.34.5 governs the payment for abortion procedures regardless of whether the physician performs a surgical abortion or provides a patient with RU-486 (Mifepristone). Both methods cause the deliberate termination of a human pregnancy with the intention other than to produce a live birth, remove an ectopic pregnancy, or to remove a dead unborn child caused by spontaneous abortion, missed abortion, or inevitable abortion (the statutory definition of abortion contained in La. R.S. 40:1299.35.1).

R.S. 40:1299.34.5, the governing statute, reads as follows:

“§1299.34.5. Use of public funds

“A. Notwithstanding any other provision of law to the contrary, no public funds, made available to any institution, board, commission, department, agency, official, or employee of the state of Louisiana, or of any local political subdivision thereof, whether such funds are made available by the government of the United States, the state of Louisiana, or of a local governmental subdivision, or from any other public source shall be used in any way for, to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother.

“B. Notwithstanding any other provision of law to the contrary, no public funds made available to any institution, board, commission, department, agency, official, or employee of the state of Louisiana, or of any local political subdivision thereof, whether such funds are made available by the government of the United States, the state of Louisiana, or a local governmental subdivision, or from any other public source, shall be used in any way for, to assist in, or to provide facilities for an abortion, except for any of the following:

“(1) Whenever the abortion is necessary to save the life of the mother.

“(2) Whenever the abortion is being sought to terminate a pregnancy resulting from an alleged act of rape and all of the requirements of R.S. 40:1299.35.7(A)³ are met.

³R.S. 40:1299.35.7(A) refers to certain rape reporting requirements.

“(3) Whenever the abortion is being sought to terminate a pregnancy resulting from an alleged act of incest and all of the requirements of R.S. 40:1299.35.7(B)⁴ are met.

“C. The secretary of the Department of Health and Hospitals shall promulgate rules to insure that no funding of any abortion shall be made based upon a claim of rape or incest until the applicable requirements of R.S. 40:1299.35.7 have been complied with and written verification has been obtained from the physician performing the abortion and from the law enforcement official to whom the report is made, if applicable.

“D. Subsection A of this Section shall be superseded and Subsections B and C and R.S. 40:1299.35.7 shall become effective only when the circumstances in Subparagraph (1)(a) or in Subparagraph (2)(a) occur:

“(1) (a) A decision or order of a court of competent jurisdiction is rendered declaring the provisions of Subsection A unconstitutional, inconsistent with federal law, or otherwise unenforceable based on inconsistency with the Hyde Amendment, or enjoins the state or any of its officials from enforcing Subsection A while at the same time accepting federal funds pursuant to Title XIX, as modified by the Hyde Amendment, and then only if, as, and when a stay pending all appeals of the decision or order is denied, or, if a stay is granted, such stay expires or is no longer effective.

“(b) If such a decision or order is rendered, the state Department of Justice, on behalf of the state, shall vigorously and expeditiously pursue judicial remedies seeking to obtain a stay pending all appeals of the decision or order and its reversal.

“(2) (a) An order or decision of a court of competent jurisdiction is rendered affirming a finding of the administrator of the Health Care Financing Administration of the United

⁴R.S. 40:1299.35.7(B) refers to certain incest reporting requirements.

States Department of Health and Human Services that Subsection A fails to substantially comply with the Hyde Amendment or denying a stay of the finding of the administrator and then only if, as, and when the state receives formal notification from the administrator that Medicaid funds, including but not limited to the federal percentage of Medicaid assistance payments pursuant to 42 U.S.C. 1396 et seq. allocated to the state from the United States government, will be withheld or terminated on a specified date.

“(b) If the administrator finds that the state is in noncompliance with the Hyde Amendment as it relates to funding certain abortions, the governor, the state Department of Justice, and the state Department of Health and Hospitals, on behalf of the state, shall vigorously and expeditiously pursue administrative and judicial remedies to obtain a stay of the finding and its reversal.

“(c) If such a decision or order is rendered by a court, the state Department of Justice, on behalf of the state, shall vigorously and expeditiously pursue judicial remedies seeking to obtain a stay of the decision or order and to seek its reversal.

“E. If Subsections B and C and R.S. 40:1299.35.7 become effective and subsequently the federal requirement for acceptance of Medicaid funds, that public funds be made available for abortions resulting from pregnancy due to rape or incest, is no longer applicable to the state of Louisiana, then on the same day, the provisions of Subsections B and C and R.S. 40:1299.35.7 shall be superseded and the provisions of Subsection A shall be effective to the fullest extent allowed by law.”

As a legal matter, the current circumstances at this time are such that the criteria specified in Subsection D of the above quoted statute cause Subsections B and C thereof to supersede Subsection A of the statute. As indicated in footnote 1, *supra*, the Hyde Amendment appears to continue to provide for the rape and incest exceptions, and the *Hope Medical Group* case, *supra*, has effected a definitive federal court judgment that under the current federal Medicaid statutes and regulations, Louisiana must provide a rape and incest exception in addition to its life-preservation exception.

Consequently, administration of RU-486 by a qualified physician in compliance with the FDA requirements in the circumstances described by the rape, incest, and life-preservation exceptions contained in §1299.34.5(B)(1), (2), and (3), above, would appear to us to fall

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into the same category as a surgical abortion done in those same circumstances and would qualify for public Medicaid funding if all the other conditions therefore were otherwise fulfilled. However, in our opinion, administration of this drug under any other circumstance would not qualify for Medicaid reimbursement under currently prevailing law.

Trusting this opinion has sufficiently answered your inquiry, we remain

Very truly yours,

RICHARD P. IEYOUNG
Attorney General

By: THOMAS S. HALLIGAN
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Encl.

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