Senate Fiscal Agency
P. O. Box 30036
Lansing, Michigan 48909-7536

BILL ANALYSIS

Telephone: (517) 373-5383
Fax: (517) 373-1986

House Bill 5458 (Substitute S-2 as reported)
Sponsor: Representative Michelle McManus
House Committee: Human Services
Senate Committee: Families, Mental Health and Human Services

Date Completed: 2-22-96

RATIONALE

Public Act 59 of 1987 added Section 109a to the Social Welfare Act to prohibit the use of public funds to pay for abortions. This Act was an initiated law presented to and approved by the voters at the 1988 general election. The Act makes one exception to its prohibition: for an abortion that is necessary to save the life of the mother. (Pursuant to U.S. District Court and Court of Appeals decisions, described below in BACKGROUND, the State also must cover Medicaid-funded abortions for eligible women who are pregnant as a result of rape or incest.) Despite the language of the Act, it has been reported that some health maintenance organizations (HMOs) have engaged in a practice in which a Medicaid patient would be referred by her primary care physician to an abortion clinic under contract with the HMO. Allegedly, then, the clinic would charge the patient a nominal $50 for the abortion and subsequently bill for "family planning services" in the amount of $175 to $200, which would be paid with public funds. Some people believe that specific legislation is necessary to ensure that this activity does not take place.

CONTENT

The bill would add Section 109e to the Social Welfare Act to prohibit a health care professional or a health facility or agency from seeking or accepting reimbursement for the performance of an abortion knowing that public funds would be or had been used in whole or in part for the reimbursement in violation of Section 109a of the Act. A person who violated Section 109e would be liable for a civil fine of up to $10,000 per violation. The Department of Community Health would have to investigate an alleged violation of the bill, and the Attorney General, in conjunction with the Department, could bring an action to enforce the bill.

The bill specifies that nothing in Section 109e would restrict the right of a health care professional to discuss abortion or abortion services with a pregnant patient; that Section 109e would not create a right to an abortion; and that, notwithstanding any other provision of Section 109e, a person could not perform an abortion that was prohibited by law.

The bill would define "abortion" as the intentional use of an instrument, drug, or other substance or device to terminate a woman's pregnancy for a purpose other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus. The term would not include the use or prescription of a drug or device intended as a contraceptive. "Health care professional" would mean an individual licensed or registered under Article 15 of the Public Health Code. "Health facility or agency" would refer to a facility or agency licensed under Article 17 of the Code.

The bill also would add Section 109d, which contains the following language:

"The legislature finds that the use of medicaid funds for elective abortions has been clearly rejected by the people of Michigan through Act No. 59 of the Public Acts of 1987, initiated by the citizens under the rights of the people reserved in the Michigan constitution, approved by a majority of this legislature, affirmed by the citizens at large through a statewide referendum, and sustained by the Michigan supreme court.

"In light of evidence that abortion providers, in conjunction with third party payors, may have devised and implemented plans for reimbursing services in violation of the intent of Act No. 59..., the legislature finds the enactment of section 109e

a necessary clarification of, and enforcement mechanism for, Act No. 59...

"The legislature finds that any practice of separating or unbundling services directly related to the performance of an abortion for the purposes of seeking medicaid reimbursement, with those funds thereby subsidizing in whole or in part the cost of performing an abortion, is an inappropriate use of taxpayer funds in light of Act No. 59...

"Recognizing that certain services related to performing an abortion can also be part of legitimate and routine obstetric care, section 109e should not be construed to affect diagnostic testing or other nonabortion procedures. Only physicians who actually perform abortions, and particularly those who perform abortions but do not provide prenatal care or obstetric services, should view themselves as potentially affected by section 109e. Unacceptable requests for reimbursement include those services which would not have been performed, but for the preparation and performance of a planned or requested abortion."

Proposed MCL 400.109a & 400.109e

SENATE COMMITTEE ACTION

The Senate Families, Mental Health and Human Services Committee adopted substitute (S-2) which differs from the House-passed version in the following principal ways:

-- Under the Senate substitute, a violation would be punishable by a civil fine of up to $10,000. The House-passed bill would have made a violation a misdemeanor punishable by imprisonment for up to 90 days and/or a maximum fine of $100.
-- The Senate substitute would require the Department of Community Health to investigate alleged violations, and provide that the Attorney General, in conjunction with the Department, could bring an action to enforce the bill.
-- The Senate substitute contains the legislative findings described above.

BACKGROUND

Section 109a of the Social Welfare Act contains the following language: "Notwithstanding any other provision of this act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance, general assistance, or categorical assistance or through any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother."

The validity of this language was the subject of an action filed in April 1994 by Planned Parenthood Affiliates of Michigan against Governor Engler and others in the U.S. District Court for the Western District of Michigan. This case was consolidated with a similar action brought by Summit Medical Center, Michiana Abortion Clinic, and Northland Family Planning Clinic. The plaintiffs claimed that Section 109a conflicted with the "Hyde Amendment" that Congress has passed since 1976 to the Department of Health, Education, and Welfare appropriation. In essence, the Hyde Amendment prohibits Federal reimbursement to states participating in the Medicaid program for abortions except in circumstances Congress deems medically necessary. The Hyde Amendment has been more expansive in some years than in others. In fiscal year 1994, the year in question, the Hyde Amendment allowed Federal funding for abortions of pregnancies resulting from rape or incest, as well as abortions necessary to save the mother's life.

The U.S. District Court held that Section 109a conflicted with the Medicaid Act as modified by the 1994 Hyde Amendment. The Court issued a permanent injunction prohibiting Michigan from enforcing Section 109a "insofar as it prohibits state funding for abortions to terminate pregnancies resulting from acts of rape or incest". On January 16, 1996, the U.S. Court of Appeals for the Sixth Circuit also concluded that Section 109a conflicted impermissibly with Federal law, but modified the injunction to prevent Section 109a from operating "insofar as it is more narrow than permitted by the Hyde Amendment in effect during the relevant fiscal year".

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The voters of Michigan have made it clear that it is against the State's public policy to fund abortions with tax dollars. Apparently, however, some

HMOs devised a scheme in which abortion procedures essentially were subsidized with public funding. This practice subverts the spirit, if not the letter, of the Social Welfare Act. While the Act expresses the policy of the State, the bill would make individual health care providers and facilities accountable for violating that policy and the prohibition against publicly funded abortions.

Opposing Argument

The bill could have an adverse impact on Medicaid clients' access to health care. Physicians could be discouraged from accepting pregnant Medicaid recipients, regardless of whether they were seeking an abortion, from fear of being accused of violating the law. For example, if a pregnancy test or an ultrasound were ordered for a patient prior to the time she decided to abort, the physician might not be able to prove that the test had nothing to do with the abortion. Additional restrictions on access to care could make it more likely that women would be forced to continue a potentially health-threatening pregnancy or undergo abortion procedures that could endanger their health.

Response: The bill addresses these concerns by stating, "Recognizing that certain services related to performing an abortion also can be part of legitimate and routine obstetric care, section 109e should not be construed to affect diagnostic testing or other nonabortion procedures. Only physicians who actually perform abortions...should view themselves as potentially affected by section 109e."

Opposing Argument

The bill is unnecessary. Current law already bans the use of Medicaid funds for abortions, and there is a Michigan law regulating fraud and abuse in the Medicaid program that would cover any billing violations. If alleged violations are suspected, they can and should be investigated and prosecuted under existing law. In a letter to Right to Life of Michigan, the Director of the Department of Social Services did confirm allegations of abuse in some managed care organizations, but also stated, "Accordingly, a letter...has been sent to the organizations advising them that these practices are contrary to law and Medicaid policy." A letter from the Insurance Commissioner also indicates that the use of billing codes to misrepresent the types of services delivered may be violations of the Health Care False Claim Act, punishable by imprisonment and a fine of up to $50,000.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have an indeterminate fiscal impact. While there appears to be anecdotal information that some Medicaid-eligible women receive abortions by having providers bill the Medicaid program for related "pregnancy" services and then paying a nominal fee for the actual abortion, there are no definitive data as to how often these events actually occur.

One, however, can compare the approximate cost, for a single case, of abortion versus delivery. Charges for first trimester abortions run between $250 and $300. Second trimester abortions will cost around $400 through the 16th week and any abortions thereafter become progressively more expensive. The total (professional pre- and post-delivery, ancillary and facility) charges will run from $5,700 for an uncomplicated vaginal delivery to $9,200 for an uncomplicated caesarian delivery. Obviously, any complications will only increase the total delivery charges. Likewise, a live delivery produces additional costs to the government in terms of the incremental additional costs in welfare grant payments, food stamps, and ongoing medical costs. All cost estimates are gross, meaning that the State would only be liable for about 44% of "pregnancy" related costs followed by an abortion (for which the State has no financial obligation), as well as delivery and subsequent public assistance costs.

Fiscal Analyst: J. Walker

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.