April 11, 1994

OPINION NO. 94-017

Arnold R. Tompkins, Director
Department of Human Services
30 East Broad Street
Columbus, Ohio 43266-0423

Dear Director Tompkins:

You have requested an opinion concerning Ohio's compliance with federal provisions governing abortion under the Medicaid program. A state's participation in the Medicaid program is voluntary, but once a state elects to participate it must comply with federal requirements. *See* 42 U.S.C.A. §§1396-1396c (West 1992 & Supp. 1993). If a state that participates in the Medicaid program does not continue to comply with all federal requirements, the state may lose part or all of its federal funding.[1]

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[1] 42 U.S.C.A. §1396c grants the Secretary of Health and Human Services discretion to determine whether all payments of federal Medicaid funds will be terminated if a state fails to comply with particular federal requirements, or whether partial funding will be maintained. It states:

> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds--
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> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
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> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
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> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

42 U.S.C.A. §1396c (West 1992).

Federal provisions governing the funding of abortions appear in Section 509 of Pub. L. No. 103-112, which states:

> None of the funds appropriated under this Act shall be expended for any abortion except when it is made known to the Federal entity or official to which funds are appropriated under this Act that such procedure is necessary to save the life of the mother or that the pregnancy is the result of an act of rape or incest.

Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, §509, 107 Stat. 1082, 1113 (1993). Under Section 509 of Pub. L. No. 103-112, federal funding is available for abortions performed to save the life of the mother or to terminate pregnancies resulting from rape or incest.

Prior to the enactment of Section 509, a corresponding provision known as the Hyde Amendment permitted federal funds to be used for abortions only if the life of the mother would be endangered if the fetus were carried to term, and stated expressly that individual states were "free not to fund abortions to the extent that they in their sole discretion deem appropriate." Department of Health and Human Services Appropriation Act, 1983, Pub. L. No. 97-377, §204, 96 Stat. 1830, 1894 (1982). Several different versions of the Hyde Amendment have been in effect at various times. *See, e.g.*, Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, §209, 90 Stat. 1418, 1434 (1976).

Ohio's Participation in the Medicaid Program

The Ohio statutes authorizing participation in the Medicaid program appear in R.C. Chapter 5111. The Ohio Department of Human Services is authorized to implement the program within the state. R.C. 5111.01. Ohio's statutory provisions governing the use of public funds for abortions appear in R.C. 5101.55(C), as follows:

> State or local public funds shall not be used to subsidize an abortion, unless the abortion is necessary to preserve the life or physical or mental health of the pregnant woman and this fact is certified in writing by the performing physician to the state or local agency providing the funds.

A state Medicaid program must provide for financial participation by the state. 42 U.S.C.A. §§1396a, 1396d(b) (West Supp. 1993). Thus, a state cannot carry out its obligations under the Medicaid program unless it can expend state funds for those purposes that are required to be covered by the federal program. R.C. 5111.01(A) helps to implement this requirement by authorizing the Ohio Department of Human Services to provide medical assistance under the Medicaid program, as long as federal funds are provided for such assistance, to various classes of persons, including "[p]ersons to whom federal law requires, as a condition of state participation in the medicaid program, that medical assistance be provided." R.C. 5111.01(A)(3). The failure of a state to include in its Medicaid program elements that are required by federal law will result in lack of compliance by the state and may lead to the loss of some or all of the state's federal Medicaid funding. *See* note

1, *supra*.

You are seeking to insure that Ohio complies with both federal and state requirements governing abortion funding. To that end, you have raised the following questions:

1. Does Section 5101.55(C) of the Ohio Revised Code conflict with the change mandated by the Federal government to cover, under the Medicaid program, abortions that are performed to terminate pregnancies resulting from rape or incest?
2. If Section 5101.55(C) of the Ohio Revised Code conflicts with the Federal mandate, does Federal pre-emption under the Supremacy Clause to the U.S. Constitution apply, so as to make it unnecessary to amend Section 5101.55(C) in order to comply with Federal law?

Health Care Financing Administration Letter of December 28, 1993

By letter dated December 28, 1993, the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Services issued guidance to states on how the abortion language appearing in Section 509 of Pub. L. No. 103-112 was to be interpreted. The letter, which was published to all regional administrators, indicates that states are mandated to include in their Medicaid programs coverage for all the abortions mentioned in Section 509. The letter states, in part:

> As with all other mandatory medical services for which Federal funding is available, States are required to cover abortions that are medically necessary. By definition, abortions that are necessary to save the life of the mother are medically necessary. In addition, Congress this year added abortions for pregnancies resulting from rape and incest to the category of medically necessary abortions for which funding is provided. Based on the language of this year's Hyde Amendment and on the history of Congressional debate about the circumstances of victims of rape and incest, we believe that this change in the text of the Hyde Amendment signifies Congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors. Therefore, abortions resulting from rape or incest should be considered to fall within the scope of services that are medically necessary.

Thus, HCFA construes Section 509 to require a state that participates in the Medicaid program to include in its program coverage for abortions of pregnancies resulting from rape or incest.[2]

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[2] It is well settled in the federal courts that a federal agency charged with the responsibility for administration and enforcement of particular statutes is entitled to deference in its interpretation and application of those statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). And it is well settled that this deference is properly extended to such interpretations whether rendered in regulations, *e.g., Chevron*, 467 U.S. at 845, or in other documents such as circulars and letters, *e.g., Lukhard v. Reed*, 481 U.S. 368, 378 (1987) (relying on

Your first question asks whether R.C. 5101.55(C) conflicts with the federal mandate that Medicaid funds be made available for abortions performed to terminate pregnancies resulting from rape or incest. The answer is that it does not.

In 1977, the Hyde Amendment authorized the expenditure of federal Medicaid funds for abortion only when necessary to save the life of the mother. In 1977 Op. Att'y Gen. No. 77-046, one of my predecessors compared this earlier version of the Hyde Amendment to R.C. 5101.55(C) and concluded:

> The Hyde Amendment places a ... more restrictive ... limitation upon the use of [public moneys] for abortions. Therefore, the two provisions are not actually in conflict. The confusion arises not over a genuine conflict between the two provisions, but because federal law places a limitation upon the use of federal funds that is considerably narrower than the limitation pertaining to state and local funds.

Op. No. 77-046, at 2-161. Although the current version of the Hyde Amendment has been expanded to permit the expenditure of federal funds not only for abortion to save the life of the mother, but also for abortion where the pregnancy results from rape or incest, it appears that the language of R.C. 5101.55(C) remains broader in scope than its federal counterpart because abortion of a pregnancy resulting from rape or incest falls within the category of abortions "necessary to preserve ... the physical or mental health of the pregnant woman." R.C. 5101.55(C).

This concept that abortion of a pregnancy resulting from rape or incest is necessary to preserve the physical or mental health of the mother is the focus of the December 28, 1993, letter from HCFA. In its letter HCFA determined, based on the revised language of the Hyde Amendment and the history of Congressional debate addressing Medicaid funding for abortion, that all abortions of pregnancies resulting from rape or incest are "medically necessary in light of both medical and psychological health factors." It is apparent that "medically necessary in light of both medical and psychological health factors" and "necessary to preserve ... physical or mental health" express restrictions similar in scope. R.C. 5101.55(C) thus does not conflict with the change mandated by the federal government in Section 509 of Pub. L. 103-112, as construed in HCFA's letter of December 28, 1993, to cover, under the Medicaid program, abortions that are performed to terminate pregnancies resulting from rape or incest.

Federal Preemption and Supremacy Clause

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letters of the Department of Health and Human Services as evidence of the Secretary's interpretation of federal law); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565-66 (1980) (in interpreting federal law, giving deference to the interpretation of the Federal Reserve Board staff as expressed in official staff memoranda and in public information letters); *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920-23 (D.C. Cir. 1991) (rejecting argument that interpretive letter of agency cannot be accorded deference), *cert. denied*, 112 S. Ct. 1584 (1992).

As discussed above, this opinion concludes that there is no conflict between R.C. 5101.55(C) and federal law that would prevent Ohio from complying with existing law governing federal funding of abortions. It is, therefore, unnecessary to address your second question.

Conclusion

For the reasons discussed above, it is my opinion and you are advised as follows:

1. As construed in the letter of December 28, 1993, from the Health Care Financing Administration of the United States Department of Health and Human Services, which is the federal agency charged with the administration and enforcement of the relevant federal statute, Congress has determined that abortions of pregnancies resulting from rape or incest are medically necessary in light of both medical and psychological health factors.

2. R.C. 5101.55(C) does not conflict with the change mandated by the federal government in Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113 (1993), as construed in the letter of December 28, 1993, from the Health Care Financing Administration of the United States Department of Health and Human Services, to cover, under the Medicaid program, abortions that are performed to terminate pregnancies resulting from rape or incest.

Respectfully,

LEE FISHER
Attorney General

April 11, 1994

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Department of Human Services
30 East Broad Street
Columbus, Ohio 43266-0423

SYLLABUS: 94-017

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2. R.C. 5101.55(C) does not conflict with the change mandated by the federal government in Section 509 of the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, 107 Stat. 1082, 1113 (1993), as construed in the letter of December 28, 1993, from the Health Care Financing Administration of the United States Department of Health and Human Services, to cover, under the Medicaid program, abortions that are performed to terminate pregnancies resulting from rape or incest.