

OPINION NO. 77-046**Syllabus:**

1. Section 209 of Public Law 94-439, the Hyde Amendment, limits the Ohio Department of Public Welfare in providing for the cost of abortions under Title XIX of the Social Security Act (Medicaid).
2. Section 209 of Public Law 94-439, the Hyde Amendment, does not prohibit the Ohio Department of Public Welfare from using state or local funds to provide for the cost of abortions under the circumstances set forth in R.C. 5101.55(C).

To: Kenneth B. Creasy, Director, Ohio Dept. of Public Welfare, Columbus, Ohio
By: William J. Brown, Attorney General, August 17, 1977

Your request for my opinion poses the following questions:

1. Is there a conflict between the Hyde Amendment and the provisions of Section 5101.55(C) of the Ohio Revised Code?
2. If your answer to number one is in the affirmative, what is the result? In other words, which provision controls this agency's administration of the Medicaid Program and the dispersal of state and federal funds from this Department's Health Care Account?
3. May this Department claim federal financial participation for the cost of an abortion rendered pursuant to the provisions of section 5101.55(C) of the Ohio Revised Code?

42 U.S.C. 1396, *et seq.* provides for the creation and operation of the Medical Assistance Program of the Social Security Act, commonly referred to as Medicaid. Title XIX of the Social Security Act establishes a comprehensive scheme of medical care for the needy to be administered by the states and jointly funded by the federal and state governments. Although a state's involvement in the Medicaid Program is voluntary, a state will not receive federal monies unless its implementation of the program meets federal requirements. The Ohio statutes implementing the program extend medical assistance to all recipients of Aid to Families with Dependent Children (AFDC), and other programs subsumed under R.C. 5101.51 and R.C. Chapter 5107.

R.C. 5101.51, which authorizes the Department of Public Welfare to administer the Medicaid Program, provides in pertinent part as follows:

(A) "The department of public welfare may provide medical assistance under Title XIX of the Social Security Act, . . . as long as federal funds are provided for such assistance. . . ."

Congress was silent on the issue of Medicaid funding for abortions until recently. Thereafter, Public Law 94-439 (eff. 9-30-76), an appropriations law which, in part, appropriates monies for carrying out Title XIX of the Social Security Act and for making payments to the states under Title XIX of the Social Security Act, set forth restrictions on federal funding of abortions under the Medicaid Program. Section 209 of Public Law 94-439, popularly known and hereinafter referred to as the Hyde Amendment, provides as follows:

"None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term."

Thus, the federal government will provide federal financial participation in the cost of abortions under Title XIX of the Social Security Act, only where the attending physician, on the basis of his professional judgment, has certified that the abortion is necessary because the life of the mother would be endangered if the fetus were carried to term.

R.C. 5101.55, which limits the circumstances under which state and local funds may be used to subsidize an abortion, provides in part 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."
(R.C. 5101.55(C)).

Thus, the General Assembly has sought to limit the state's financial participation in providing the cost of abortions to those situations described in R.C. 5101.55(C).

For the purposes of this opinion, it is neither necessary nor appropriate to discuss in any detail the meaning of the Hyde Amendment. It is reasonably clear that its limitations on the use of federal funds for the cost of abortions is more restrictive than the limitation on the use of state and local funds for the cost of an abortion set forth in R.C. 5101.55(C).

It should be noted, however, that R.C. 5101.55(C) neither places a duty upon the Ohio Department of Public Welfare or any other state agency to provide abortions nor does it confer a right upon individuals to receive them. It merely attempts

to limit the use of state or local funds for abortions. The Hyde Amendment places a similar, but more restrictive, limitation upon the use of federal funds 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.

The effect of the Hyde Amendment upon programs involving federal participation is clear. The Hyde Amendment controls the Ohio Department of Public Welfare's administration of the Medicaid Program and the dispersal of state and federal funds from its Health Care Account.

As noted previously, Title XIX of the Social Security Act provides for comprehensive medical care for the needy which is administered by the state and jointly funded by the federal and state governments. 42 U.S.C. 1396a provides in pertinent part as follows:

(a) "A state plan for medical assistance
must---

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(2) provide for financial participation by the state equal to not less than 40 per centum of the non-Federal share of the expenditures under the plan with respect to which payments under section 1396 b of this title are authorized by this subchapter. . . "

Furthermore, the state will not receive federal monies unless its implementation of the program complies with the requirements of Title XIX of the Social Security Act. 42 U.S.C. 1396c provides in pertinent part as follows:

"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---

(1) that the plan has been so changed that it no longer complies with the provisions of section 1396 a of this title, or

(2) that in the administration of the plan there is a failure to comply substantially with any such provision;

the Secretary shall notify such state agency that further payments will not be made to the state. . . until the

secretary is satisfied that there will no longer be any such failure to comply. . . "

In addition, R.C. 5101.51 gives the state the authority to provide funds for medical assistance under Title XIX of the Social Security Act as long as federal funds are available.

In light of the foregoing, it is clear that the state may provide medical assistance under Title XIX of the Social Security Act provided it complies with each of the provisions thereof. The Hyde Amendment, which provides federal funding for abortions under Title XIX of the Social Security Act, is, therefore, controlling. The Department of Public Welfare may provide for abortion services under Title XIX of the Social Security Act provided it complies with the requirements of the Hyde Amendment. In other words, the Department of Public Welfare is entitled to federal medicaid funding for abortion services only in the situation in which the life of the mother would otherwise be endangered if the fetus were carried to term.

The Ohio Department of Public Welfare may, of course, still claim state funds for the cost of an abortion in the situations set forth in R.C. 5101.55(C). Although it cannot claim federal financial participation under Title XIX of the Social Security Act, it can claim state funds for the cost of an abortion to persons who are eligible for poor relief under R.C. Chapter 5113. The Department of Welfare has the authority to determine the kinds and amounts of obligations for poor relief on which state reimbursement will be based. R.C. 5113.09(D). Thus, were the Department of Public Welfare to determine that the cost of an abortion is an appropriate kind of poor relief, the Hyde Amendment would not prevent the use of state or local funds to pay the cost of such abortion under the circumstances set forth in R.C. 5101.55(C).

In specific answer to your question, it is my opinion and you are so advised that:

1. Section 209 of Public Law 94-439, the Hyde Amendment, controls the Ohio Department of Public Welfare in providing for the cost of abortions under Title XIX of the Social Security Act (Medicaid).
2. Section 209 of Public Law 94-439, the Hyde Amendment, does not prohibit the Ohio Department of Public Welfare from using state or local funds to provide for the cost of abortions under the circumstances set forth in R.C. 5101.55(C).