September 4, 2015

STATE TERMINATION OF MEDICAID PROVIDERS

Planned Parenthood Federation of America ("PPFA") and its affiliates have been subjected to heightened scrutiny in the wake of a congressional investigation into its apparent fraud, waste, and abuse of taxpayer funding,[1] and the release of undercover videotapes that appear to show Planned Parenthood officers discussing illegal means of circumventing fetal tissue procurement laws.[2] As a result of these developments, Alliance Defending Freedom and its allies have received inquiries regarding whether, and under what circumstances, states possess the legal authority to disqualify Planned Parenthood affiliates from participation in state Medicaid programs. This white paper provides a brief overview of state authority for terminating a Medicaid provider, as well as the process involved in doing so and the constitutional ramifications of such an action.[3]

I. The Medicaid Program.

Medicaid is a federal-state cooperative program that subsidizes states' provision of medical services to "families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services." 42 U.S.C. § 1396-1. The federal government shares the costs of Medicaid with states that elect to participate in the program.[4] In return, participating states agree to comply with requirements imposed by the Medicaid Act.[5]

Congress has delegated the authority to regulate this complex program to the U.S. Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS"). CMS, in coordination with a state, develops and approves the state's Medicaid plan, *i.e.*, a "state approved plan" or "SAP," by which a state agency administers the program, with CMS providing oversight.[6]

The process begins with a State's proposal of a plan or plan amendment. 42 C.F.R. § 430.12(c)(1). CMS then either approves or disapproves the plan. In the event of disapproval, the State may file a request for reconsideration. 42 C.F.R. § 430.18(a). A final determination by CMS is then reviewable by the circuit court of appeals. 42 C.F.R. §§ 430.38(c), 430.102(c). Affected individuals and groups may participate in the administrative appeal process "if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." 42 C.F.R. § 430.76(b).

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[1] "ADF congressional report exposes Planned Parenthood's ongoing taxpayer abuse," Alliance Defending Freedom, Jul. 23, 2014, *available at* http://www.adflegal.org/detailspages/press-release-details/adf-congressional-report-exposes-planned-parenthood-s-ongoing-taxpayer-abuse.

[2] Center for Medical Progress, http://www.centerformedicalprogress.org/; Alliance Defending Freedom, "Planned Parenthood: The Whole Story," http://www.adflegal.org/planned-parenthood-the-whole-story.

[3] This memorandum should not be construed as legal advice. Because federal and state laws governing the funding programs discussed herein vary from state to state, legal counsel licensed in the appropriate jurisdiction should be consulted before taking any action that could affect legal relations under any program.

[4] In the family planning services area, the federal share is 90 percent.

[5] The Medicaid Act is found in Title XIX of the Social Security Act, 42 U.S.C. §§1396–1396v. Regulations relating to the Medicaid Act are contained in Chapter IV, Title 42 and subtitle A, Title 45 Code of Federal Regulations.

[6] *See* 42 C.F.R. § 431.10.

The Medicaid program guarantees states "flexibility in designing plans that meet their individual needs" and "considerable latitude in formulating the terms of their own medical assistance plans." *Addis v. Whitburn*, 153 F.3d 836, 840 (7th Cir. 1998) (citing *Dandridge v. Williams*, 397 U.S. 471, 487 (1970)). This flexibility and wide latitude reflects the fact that when a state acts within its core or natural sphere of operation, such as regulating medical care,[7] or expends its own funds as a state does in providing its cooperative share for Medicaid, attention to the principles of federalism is all the more critical.

Finally, Section 1396a(a)(23) of the Medicaid Act provides that Medicaid patients may obtain medical services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide him such services." This provision, referred to as the "free choice of qualified provider" provision, gives Medicaid patients "the right to choose among a range of qualified providers, without government interference." *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 785 (1980).

II. State Qualification of Medicaid Providers.

In keeping with this wide latitude for state authority, Medicaid regulations permit states to establish "reasonable standards relating to the qualifications of providers." 42 C.F.R. § 431.51(c)(2). The term "qualified" has been successfully interpreted by a state to mean that the provider is or has been free of any government investigatory proceeding. *See, e.g.*, *Guzman v. Shewry*, 552 F.3d 941, 949 (9th Cir. 2009) (upholding exclusion of Medicaid provider on grounds that he was under investigation for fraud or abuse).

III. Disqualification or Exclusion of Medicaid Providers.

Although the terms "disqualification," "exclusion" and "termination" may be used interchangeably,[8] "disqualification" usually describes a state's determination that the provider no longer meets the program's qualifications, either because of changes to the program requirements or because of a failure to meet them. Termination of a provider from the program, or "exclusion" as CMS refers to it, occurs when a state Medicaid program revokes a Medicaid provider's billing privileges and the provider has exhausted all applicable appeal rights or the timeline for appeal has expired and there is no expectation that the revocation of billing privileges is temporary. CMS ordinarily defers to state law regarding terminations.[9] At least arguably, therefore, the proper interpretation of the exclusion provisions permits a state to terminate a provider for any valid reason.[10]

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[7] *Pa. Med. Soc'y v. Marconis*, 942 F.2d 842, 847 (3d Cir. 1991) ("The licensing and regulation of physicians is a state function . . . . Thus, the state regulation is presumed valid. To rebut this presumption, appellants must show that Congress intended to displace the state's police power function.").

[8] *See* 42 U.S.C. § 1396a(p)(3) ("As used in this subsection, the term 'exclude' includes the refusal to enter into or renew a participation agreement or the termination of such an agreement.").

[9] *See* CMS, CPI-B 12-02, *Affordable Care Act Program Integrity Provisions – Guidance to States – Section 6501 – Termination of Provider Participation under Medicaid if Terminated under Medicare or other State Plan*, January 20, 2012.

[10] *See* cases cited at p.5 *infra*.

This view is supported by the decision of the Seventh Circuit in *Planned Parenthood of Ind. v. Comm'r*, 699 F.3d 962, 968 (7th Cir. 2012), *cert. den.*, 133 S.Ct. 2738 (2013). The Court distinguished disqualification of an individual provider, like Planned Parenthood, for a valid reason, from disqualification of a class of providers:

> Although Indiana has **broad authority to exclude unqualified providers** from its Medicaid program, the State does not have plenary authority to exclude a **class** of providers for any reason—more particularly, for a reason unrelated to **provider qualifications**. In this context, "qualified" means fit to provide the necessary medical services—that is, capable of performing the needed medical services in a professionally competent, safe, **legal**, and **ethical** manner.

Id. at 978.

A. Mandatory Termination.

By statute, there are enumerated circumstances under which the federal Secretary of HHS must terminate a Medicaid provider. These include conviction for program-related crimes (42 U.S.C. § 1320a-7(a)(1)); conviction related to patient abuse or neglect (42 U.S.C. § 1320a-7(a)(2)); felony conviction for health care fraud (42 U.S.C. § 1320a-7(a)(3)); felony conviction relating to controlled substances (42 U.S.C. § 1320a-7(a)(4)); conviction of two mandatory exclusion offenses (42 U.S.C. § 1320a-7(c)(3)(G)(i)); and conviction on three or more occasions of mandatory exclusion offenses (42 U.S.C. § 1320a-7(c)(3)(G)(ii)).[11]

Section 6501 of the Affordable Care Act[12] also provides that state Medicaid programs must terminate the participation of a Medicaid provider if that provider's participation has been terminated by another state. Thus, if one state successfully terminates a provider for cause, by law, each other state must likewise terminate that provider. The requirement to terminate under section 6501 only applies in cases where providers have been terminated or had their billing privileges revoked "for cause" which, the regulations add, may include, but is not limited to, "fraud, integrity, or quality." 42 C.F.R. § 455.101.[13]

B. Permissive Termination.

The Medicaid statute also provides grounds for which the federal Secretary may, in her discretion, exclude a provider.[14] These include claims for excessive charges, unnecessary services, or services which fail to meet professionally recognized standards of health care (42 U.S.C. § 1320a-

[11] *See* generally, HHS OIG, Exclusion Authorities, *available at* http://oig.hhs.gov/exclusions/authorities.asp.
[12] P.L. No. 111-148 § 6501 (Mar. 23, 2010), as amended by the Health Care and Education Reconciliation Act of 2010, P.L. No. 111-152 (Mar. 30, 2010), amending § 1902(a)(39) of Title XIX of the Social Security Act.
[13] *See* HHS OIG, OEI-06-12-00030, "Providers Terminated from One State Medicaid Program Continued Participation in Other States," August 2015.
[14] These include 42 U.S.C. §§ 1320a-7(b)(1)(A) and (B); 1320a-7(b)(2)-(8); 1320a-7(b)(8)(A); 1320a-7(b)(9)-(16); and 1320c-5. *See* HHS OIG, *Exclusion Authorities*, *supra* n13.

7(b)(6)); fraud, kickbacks, and other prohibited activities (42 U.S.C. § 1320a-7(b)(7)); entities controlled by a sanctioned individual (42 U.S.C. § 1320a-7(b)(8)); failure to disclose required information, supply requested information, or supply payment information (42 U.S.C. § 1320a-7(b)(9)-(11)); individuals controlling a sanctioned entity (42 U.S.C. § 1320a-7(b)(15)); and making false statements or misrepresentations of material fact (42 U.S.C. § 1320a-7(b)(16)). The Secretary may also exclude when a Medicaid peer review organization has determined that a provider has not complied with its obligation to ensure that services or items "will be provided economically and only when, and to the extent, medically necessary;" "will be of a quality which meets professionally recognized standards of health care;" and "will be supported by evidence of medical necessity and quality…." 42 U.S.C. § 1320c-5.

A state Medicaid program may also exclude a health care provider from participation "for any reason for which the Secretary could exclude the [provider] from participation" (*i.e.*, the grounds for discretionary exclusion enumerated above) "[i]n addition to any other authority." 42 U.S.C. § 1396a(p)(1). The phrase "[i]n addition to any other authority" "permit[s] a state to exclude an entity from its Medicaid program *for any reason established by state law*." *First Med. Health Plan v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007) (emphasis added).[15] In essence, then, consistent with principles of federalism, states have congruent authority with the federal government to terminate providers for reasons that would satisfy the Secretary, as well as their own authority to exclude providers for violations of state law.

State statutes implementing this authority provide for exclusion based on license revocation by the state licensing agency; refusal to grant access to Medicaid-related records to the state Department or Auditor; provision of goods or services that are unnecessary or of inferior quality; false claims or statements; or being found liable for neglect of patients resulting in death or injury.[16] Numerous federal courts have upheld the exercise of this broad authority for many reasons that advance state law and policy, including fraud (*Guzman*, 552 F.3d at 950); conflicts of interest (*First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 49-50 (1st Cir. 2007)); engaging in industrial pollution (*Plaza Health*

[15] The court of appeals quoted from the legislative history of the Medicaid Act:

> The [Medicaid exclusion] statute expressly grants states the authority to exclude entities from their Medicaid programs for reasons that the Secretary could use to exclude entities from participating in Medicare. But it also preserves the state's ability to exclude entities from participating in Medicaid under 'any other authority.' The legislative history clarifies that this 'any other authority' language was intended to permit a state to exclude an entity from its Medicaid program for *any* reason established by state law. The Senate Report states:
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> The Committee bill clarifies current Medicaid Law by expressly granting states the authority to exclude individuals or entities from participation in their Medicaid programs for any reason that constitutes a basis for an exclusion from Medicare. . . . *This provision is not intended to preclude a state from establishing, under state law, any other bases for excluding individuals or entities from its Medicaid program.*

Id. (emphasis by the court) (*quoting* S. Rep. 100-109, reprinted in 1987 U.S.C.C.A.N. at 700).

[16] Alice G. Gosfield, MEDICARE AND MEDICAID FRAUD AND ABUSE § 4:15 (2015).

Laboratories, Inc. v. Perales, 878 F.2d 577, 578-79 (2d Cir. 1989)); and inadequate record-keeping (*Triant v. Perales*, 491 N.Y.S.2d 486, 488 (N.Y. App. Div. 1985)).

However, it should be noted that two federal appeals courts have held on the basis of the Medicaid "free choice of qualified provider" provision that states may not exclude an entire class of otherwise qualified family planning service providers from participation in a Medicaid program just because that class of providers performed induced abortions that were not Medicaid reimbursable.[17] These circuits held that state Medicaid programs may not disqualify a "class" of providers based on their "scope of service," namely their participation in providing elective abortion. On the other hand, when a State finds an individual provider unfit for reasons unrelated to the scope of its services, termination should be upheld.

C. Potential Bases of Termination for Cause.

As discussed above, states have "broad authority to exclude unqualified providers from [their] Medicaid program[s]," where the state lacks confidence that the provider is "capable of performing the needed medical services in a professionally competent, safe, **legal**, and **ethical** manner." *Planned Parenthood of Ind. v. Comm'r*, 699 F.3d at 978 (emphasis added). In addition to these broad mandates, below are some specific examples of bases that might support termination of a state Medicaid contract with Planned Parenthood for cause.

1. Pending Investigation.

States may terminate a medical provider during a pending investigation. *Guzman v. Shewry*, 552 F.3d 941, 949 (9th Cir. 2009).[18] *Guzman* demonstrates the broad authority which states have to set reasonable standards for participation in Medicaid, and the latitude that states enjoy to exclude providers for state law reasons. In 2006, the California Department of Health Care Services opened an investigation into certain potentially fraudulent claims. Guzman, an obstetrician/gynecologist, had submitted for payment claims for large quantities of intrauterine devices ("IUDs") from Mexico which were not approved by the FDA for use in the United States. Guzman argued that federal law prohibited States from suspending providers from a state health care program simply because the provider is "under investigation" for fraud or abuse. The Ninth Circuit Court of Appeals, however, disagreed, noting that "[t]he Medicaid statutes contain 'no explicit preemptive language' limiting the grounds upon which a state may suspend a provider from a state health care program" and that "nothing in the federal Medicaid statutes or regulations prevents a state from suspending a provider temporarily from a state health care program on the basis of an ongoing investigation for fraud or abuse." 552 F.3d at 949-50. The Court concluded that because Medicaid refers to "other authority" to exclude retained by the States, "[t]his provision plainly contemplates that states have the authority to suspend or to exclude providers

[17] *Planned Parenthood of Az., Inc. v. Betlach*, 727 F.3d 960 (9th Cir. 2013), cert. den., 134 S.Ct. 1283 (2014); *Planned Parenthood of Indiana, Inc. v. Commr., Indiana State Dept. of Health*, 699 F.3d 962 (7th Cir. 2012), cert. den., 133 S.Ct. 2738 (2013).

[18] Notably, both the District Court and the Ninth Circuit Court of Appeals in *Planned Parenthood Az., Inc. v. Betlach*, concluded that "[s]tates retain the authority to set standards for participation in the Medicaid program, but only reasonable standards related to the ability of the provider to perform Medicaid services," *e.g.*, "'for reasons bearing on the individual's or entity's professional competence, professional performance, or financial integrity.'" 922 F.Supp.2d 858, 864 (2013).

from state health care programs for reasons other than those upon which the Secretary of HHS has authority to act." *Id.* "[N]ot only does the applicable federal statute fail to prohibit states from suspending providers from state health care programs for reasons other than those upon which the Secretary of HHS may act, the governing regulation specifically instructs that states have such authority." *Id.* at 950.

Planned Parenthood affiliates and clinics are, of course, the subject of ongoing investigations in numerous states.[19] Additionally, the U.S. House Committees on Energy and Commerce, Judiciary, and Oversight and Government Reform are currently conducting their own Congressional investigations of Planned Parenthood Federation of America.[20]

2. Fiscal Fraud, Waste and Abuse.

In addition to ongoing investigations of Planned Parenthood affiliates in numerous states, the House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, has been investigating Planned Parenthood's alleged fraud for several years. Alliance Defending Freedom's report to that subcommittee on Planned Parenthood waste, abuse, and potential fraud involving taxpayer funding[21] details the several dozen public audits of Planned Parenthood affiliates that have uncovered waste, abuse, and potential financial fraud, and concludes that Planned Parenthood and its affiliates are engaged in a pattern of practices designed to maximize their bottom-line revenues through billings to complex, well-funded federal and state programs that are understaffed and rely on the integrity of the provider for program compliance. Seven former Planned Parenthood employees informed the committee conducting the investigation that "PPFA failed to properly account for and maintain separation between government funds prohibited from use for elective abortions and [other, unrestricted] funds…."[22] Further, "PPFA failed to engage in appropriate financial controls and billing practices to ensure compliance with applicable state and federal laws."[23] If these allegations prove true, they may provide the basis for a state Medicaid department determination that affiliates failed to comply with their obligation to ensure that services or items "will be provided economically and only when, and to the extent, medically necessary;" 42 U.S.C. § 1320a-7(b)(6), and that services be "supported by evidence of medical necessity and quality…." 42 U.S.C. § 1320c-5.

3. Failure to Make Mandatory Reports of Minor Sexual Abuse.

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[19] *See* http://www.lifenews.com/2015/09/03/arizona-attorney-general-investigating-planned-parenthood-which-sells-aborted-baby-parts/.

[20] *See*, *e.g.*, http://judiciary.house.gov/index.cfm/press-releases?id=F60D7BB6-C1CD-4361-9745-C71239B792FF, http://energycommerce.house.gov/press-release/committee-expands-planned-parenthood-investigation, and https://oversight.house.gov/?s=Planned+PArenthood.

[21] *Profit. No Matter What. Alliance Defending Freedom's Annual Report on Publicly Available Audits of Planned Parenthood Affiliates and State Family Planning Programs*, July 23, 2014, available at http://www.adflegal.org/detailspages/press-release-details/adf-congressional-report-exposes-planned-parenthood-s-ongoing-taxpayer-abuse.

[22] Letter from Catherine Adair et al., Former Employees of Planned Parenthood Affiliates, to Fred Upton, Chairman, U.S. House of Representatives Energy and Commerce Committee, & Henry Waxman, Ranking Member, U.S. House of Representatives Energy and Commerce Committee (Dec. 7, 2011), *available at* http://www.sba-list.org/suzy-b-blog/former-planned-parenthood-employees-speak-out.

[23] *Id.*

All fifty states and U.S. territories and the District of Columbia require reporting of suspected neglect or abuse of children, including sexual abuse.[24] These reporting laws typically include statutory rape.[25] Medical professionals are almost always specifically included in statutory lists of mandatory reporters of suspected abuse or neglect of children.[26]

Despite these legal mandates, Planned Parenthood affiliates across the country have repeatedly demonstrated a willful refusal to protect children from sexual predators. Alliance Defending Freedom's report, "How Planned Parenthood 'Cares' for Child Victims of Sexual Abuse: A Summary of Planned Parenthood Failing to Report Sexual Abuse,"[27] documents numerous reports of civil and criminal actions in seven states that involve Planned Parenthood apparently covering up or enabling statutory rape. Live Action, through its undercover investigations, has repeatedly caught Planned Parenthood employees deliberately ignoring age disparities between young girls and the men who prey on them, or advising the girls not to tell Planned Parenthood the age of the men, or how to circumvent parental notification laws.[28] Several years ago, Life Dynamics also conducted undercover calls to Planned Parenthood affiliates with similar shocking results.[29]

Sex trafficking also appears to be a nationwide problem that Planned Parenthood has washed its hands of. Statistics from the Department of Justice indicate that over 100,000 children in the U.S. fall victim to sex-trafficking each year, and 300,000 to 400,000 American children are involved in some form of sex-trafficking annually.[30] Live Action videos documented seven Planned Parenthood clinics in four different states willing to aid and abet the sex-trafficking of minor girls by supplying confidential birth control, STD testing, and secret abortions to underage girls and their traffickers.[31]

4. Violations of Federal Laws Relating to Fetal Tissue Procurement.

As previously noted, a state's finding that a Planned Parenthood affiliate has failed to act in an ethical manner may also support a state's exclusion of that provider. Numerous recent reports of Planned Parenthood affiliates engaged in the practice of post-abortion fetal organ harvesting, the involvement of national Planned Parenthood officials in this practice, and misleading government officials regarding this conduct may provide the basis for exclusion.

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[24] *See* http://www.ncsl.org/research/human-services/redirect-mandatory-rprtg-of-child-abuse-and-neglect-2013.aspx.

[25] The Lewin Group, *Statutory Rape: A Guide to State Laws and Reporting Requirements*, prepared for the Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services, Dec. 15, 2004, p.14.

[26] According to the National Conference of State Legislatures, the laws in 48 states, in addition to U.S. territories, list groups of individuals who are required to report include health-care providers; New Jersey and Wyoming do not provide a specific list of professionals required to report. *See* http://www.ncsl.org/research/human-services/child-abuse-and-neglect-reporting-statutes.aspx.

[27] *See* http://www.adfmedia.org/News/PRDetail/9746.

[28] *See* http://www.lifesitenews.com/news/vindicated-live-action-busted-indy-planned-parenthood-for-covering-up-statu. Several videos of these undercover operations can be viewed at http://www.liveaction.org/monalisa/.

[29] Life Dynamics maintains copies of the recorded calls and transcripts from its investigation on its website, as well as an excellent report on this subject, including examples from Planned Parenthood and other abortion businesses. *See* http://www.childpredators.com/the-child-predator-report/.

[30] *See* http://ojp.gov/newsroom/factsheets/ojpfs_humantrafficking.html.

[31] Live Action, "Trafficking Project," *available at* http://liveaction.org/download-live-action-videos/.

42 U.S.C. §274e bans any person from knowingly acquiring, receiving, or otherwise transferring "any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." This ban is limited to "human transplantation." "Valuable consideration" does not include "reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ." And although 42 U.S.C. §289g-1 allows the federal government to "conduct or support research on the transplantation of human fetal tissue for therapeutic purposes," this statute specifically requires informed consent by the woman for whom the abortion is being performed, as well as all of the researchers who receive the fetal tissue. And it strictly prohibits any "alteration of the timing, method, or procedures used to terminate the pregnancy . . . solely for the purposes of obtaining the tissue."[32]

While Planned Parenthood claims that it sells organs strictly for medical research and that it only receives reimbursement for expenses in return, the CMP videos suggest otherwise. For example, in the second CMP video, Dr. Mary Gatter, president of PPFA's Medical Directors' Council and Medical Director of Planned Parenthood Pasadena & San Gabriel Valley, haggles over the price of fetal tissues, stating "[L]et me just figure out what others are getting, if this is in the ballpark, it's fine, if it's still low then we can bump it up. I want a Lamborghini." Dr. Gatter strongly implies the price of fetal tissue is set by the market and by negotiations – not by the reasonable costs incurred.

Additionally, Planned Parenthood's actions may violate the "dead donor rule," a longstanding ethical norm that protects the integrity of human organ donation by providing (a) that organ donors must be deceased before procurement of organs begins, and (b) that organ procurement itself must not cause the death of the donor.[33] The harvesting of organs, tissues and cells from unborn children whose deaths are directly caused by induced abortion violates the dead donor rule in both respects because (a) the unborn children are alive when the fetal repositioning and crushing point decisions are being made by the abortion provider with the goal of procuring intact fetal heart, lungs, livers, brains and other tissues and organs; and (b) the repositioning of the fetus and crushing above and below the thorax to procure intact fetal organs, tissues and cells is itself the cause of death of the human being from whom the organs are harvested.

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[32] See Hans von Spakovsky, "The Justice Department Needs to Investigate Planned Parenthood, National Review Online, Jul. 31, 2015, *available at* http://www.nationalreview.com/article/421870/ planned-parenthood-videos-criminal-investigation-loretta-lynch.

[33] James M. DuBois, *Is Organ Procurement Causing the Death of Patients*?, 18 ISSUES L. & MED. 21 (2002); John A. Robertson, *The Dead Donor Rule*, HASTING CENTER REP. 6-13 (Nov./Dec. 1999)*;* James L. Bernat, M.D., *Life or Death for the Dead Donor Rule?*, 369 N. ENGL. J. MED. 1289 (2013) ("The DDR is not a law but an informal, succinct standard highlighting the relationship between the two most relevant laws governing organ donation from deceased donors: the Uniform Anatomical Gift Act and state homicide law. The DDR states that organ donation must not kill the donor; thus, the donor must first be declared dead. It applies only to organ donation from deceased donors, not to living donation, such as that of one kidney or a partial liver."). It is important to note that federal law does not preempt the area of law regarding research on fetal tissue, as evidenced in part by the provisions of 42 U.S. Code 289g-1(e)(1)-(2) ("The Secretary may conduct research under subsection (a) of this section only in accordance with applicable state and local law.").

5. Disqualification Based Upon Shared Enterprise.

PPFA and its affiliates function as a unity, so that the acts of one affiliate may be attributed to every other affiliate. PPFA is organized as a membership corporation with national offices headquartered in Washington, D.C. and New York City.[34] PPFA possesses characteristics of a franchise operation, with affiliates paying an annual dues premium to the national office that is scaled to the size of the affiliate's budget, in return for which affiliates are entitled to the use of the Planned Parenthood brand, representation at PPFA membership meetings, and access to the services provided by the national office.[35] Each local affiliate is organized as an independent, charitable nonprofit corporation governed by a local board.[36] The national office sets mandatory medical standards for the affiliate network for reproductive health care delivery; provides technical, managerial, legal, and advocacy training and support for affiliates; and offers a central medical malpractice insurance policy for affiliates through a captive offshore insurer and other private insurers.[37] Affiliates commit to operate according to PPFA standards for affiliation, which include medical standards and operating guidelines covering governance, managerial, and financial matters.[38]

PPFA directs all the activities, programs, services, and pronouncements of each of its affiliates.[39] PPFA by-laws mandate that each affiliate "conform[] to the purposes, written policies and standards of PPFA;" "publicly support[] the purposes and policies of PPFA;" include the trade name "Planned Parenthood" in its name; "provide services consistent with the purposes of PPFA;" "participate in the Risk Management and Quality Management Programs approved by the Membership;" participate in public affairs activities; pay National Program Support; provide medical services in conformity with the PPFA Medical Standards and Guidelines. PPFA reviews annual audits and management letters of each affiliate, and may impose administrative probation if an affiliate's audited financial statements report a deficit in expendable net assets. In turn, PPFA "provide[s] the leadership required for policy and program initiatives," "administers the standards maintained by the Membership," "provides a structure that encourages Affiliates to participate in the planning and executing of policies and plans," "provid[es] leadership, support, and services," fundraises in the name of affiliates, and "provide[s] guidance and counsel on [some] legal matters."[40]

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[34] V. Kasturi Rangan and Elaine V. Backman, Planned Parenthood Federation of America, Harv. Bus. Sch. Case Study No. 9-598-001 (1997; rev'd. 2002) at 3, Ex. 1—"Planned Parenthood History."

[35] *Id*. at 2; *see generally* Howard Yale Lederman, Franchising and Franchise Law: An Introduction, 92 MICH. B. J. 34, 34 (2013) ("The franchisor licenses to the franchisee, for a defined period, the right to use the franchisor's business model and intellectual property—such as signs and logos, trademarks and service marks, business plans, and operations manuals—necessary to operate the business. The franchisor also provides marketing and sales assistance, training, and other support to promote and grow the brand.").

[36] Rangan & Backman, *supra* n34 at 1–2.

[37] *Id*. at 2.

[38] *Id*. at 2.

[39] *See* Amended and Restated Bylaws of the Planned Parenthood Federation of America, Inc., as Amended by the Membership at Its Meeting on March 29, 2008, Article XI, sections noted below. A copy of these by-laws is attached to the 2008 PPFA Federal Form 990 and can be accessed at www.guidestar.org.

[40] See PPFA by-laws, n39 *supra*. PPFA Annual Reports document the total flow of funds between PPFA and its affiliates:

The 2007-2008 Annual Report shows:
Support from affiliates to PPFA ……. $11.0 million

According to CMP's investigation and videos, the overall scheme for the transfer of body parts of aborted babies was known to and coordinated by PPFA and was carried out by certain PPFA affiliates, *i.e.*, Planned Parenthood of Orange and San Bernardino Counties, CA; Planned Parenthood of the Rocky Mountains, CO; Planned Parenthood Gulf Coast, Texas and Louisiana; and Planned Parenthood Mid-South Michigan. These CMP videos show the involvement of high level PPFA executives, including Dr. Deborah Nucatola, Senior Director of Medical Services for PPFA, who oversees the abortion practices of PPFA affiliates across the country, in the practice of trafficking in fetal body parts and apparently altering abortion procedures in order to do so. Likewise, Cecile Richards, President and CEO of PPFA, has been the spokesperson for alleged wrongdoing by separate affiliates.

The interrelationship between PPFA and its affiliates is evidence that, even though separately incorporated, PPFA and its affiliates do not operate as independent entities. Rather, PPFA and its affiliates are part of an overarching enterprise of which PPFA is the central manager. The legal doctrine of enterprise liability permits individual entities to be held jointly liable for some actions as a result of being a part of a shared enterprise. Some of the factors considered in this analysis include: (1) the interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership and/or financial control. *See*, *e.g.*, *Ferrell v. Harvard Indus. Inc*., 2001 WL 1301461 (E.D.Pa. 2001); *Dunn v. Tutera Group*, 181 F.R.D. 653 (D.Kan. 1998). Based upon PPFA's control over operations and finances of its affiliates, as detailed above, it appears that several of these criteria are met in the case of the Planned Parenthood network.

Conversely, PPFA may be held accountable for the acts of its subsidiaries under certain circumstances. When a subsidiary acts as an agent for the parent corporation, the parent corporation may be held legally accountable. *See*, *e.g.*, *Solar Int'l Shipping Agency, Inc. v. E. Proteins Export, Inc.*, 778 F.2d 922 (2d Cir. 1985); *Publicker Indus. V. Roman Ceramics Corp*., 603 F.2d 1065 (3d Cir. 1979). According to Justice Cardozo, "[d]ominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent." *Berkey v. Third Ave Ry. Co.*, 155 N.E.58, 61 (1926). Generally speaking, the "right to control the work of another 'carries with it the correlative obligation to see to it that no torts shall be committed' by the other in the course of the work." *Allen v. Choice Hotels*, 942 So.2d 817, 821 (Miss.Ct.App. 2006) (internal citation omitted).

In light of the closely knit PPFA-affiliate structure and the coordination between them, state Medicaid programs reviewing the eligibility of Planned Parenthood affiliates should consider whether

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Support from PPFA to affiliates ……. $32.1 million
Includes a $5.5 million grant to the Planned Parenthood Action Fund
The 2008-2009 Annual Report shows:
Support from affiliates to PPFA ……. $12.2 million
Support from PPFA to affiliates ……. $48.1 million
Includes a $4.5 million grant to the Planned Parenthood Action Fund
The 2009-2010 Annual Report shows:
Support from affiliates to PPFA ……. $13.3 million
Support from PPFA to affiliates ……. $44.0 million
Includes a $2.1 million grant to the Planned Parenthood Action Fund

and to what extent the actions or omissions of affiliates are the product of policies and decisions by PPFA that are legally attributable to its affiliates.

E. Recourse for Termination.

1. Federal Agency Recourse.

The remedy for a state's non-compliance with a spending-power act generally is not a private right of action, but rather an action by the federal government to terminate funds provided to the state. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). Consequently, it is the Secretary who must ensure that States substantially comply with plan requirements before approving federal matching grants. 42 U.S.C. § 1396c. If the Secretary finds that a State plan "has been so changed that it no longer complies" with the requirements of Section 1396a or that "in the administration of the plan there is a failure to comply substantially with any such provision," then the Secretary "shall notify [the] State [] . . . that further payments will not be made to the State."[41] Payments will be discontinued "until the Secretary is satisfied that there will no longer be any such failure to comply."[42] Or, rather than cutting off payments completely, the Secretary may, in her discretion, "limit payments to categories under or parts of the State plan not affected by [the] failure [to comply]."[43]

CMS's disapproval notwithstanding, a state may nonetheless carry out a non-compliant Medicaid plan. But CMS may then decide not to pay the state some or all of the federal matching funds payable with regard to a non-compliant plan. 42 U.S.C. § 1396c. That decision, too, is subject to judicial review. See 42 C.F.R. § 430.38. Alternatively, the Secretary may waive compliance with requirements of the Medicaid Act. 42 U.S.C. § 1396n(b)(4). Thus, a state's non-compliance with specific requirements of the Medicaid Act simply creates waivable requirements for states to receive federal Medicaid reimbursement. *M.A.C. v. Betit*, 284 F.Supp.2d 1298, 1306 (D. Utah 2003).

2. Provider and Beneficiary Recourse.

Ordinarily, a provider who is deemed "unqualified" according to legal criteria has no recourse. *See generally O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 785 (1980); *Kelly Kare, Ltd. v. O'Rourke*, 930 F.2d 170, 178 (2d Cir. 1991). There is no constitutional "liberty" or property interest under the Fifth and Fourteenth Amendments to a public contract. *See Bd. of Cty. Comm'rs, Waubansee Cty. v. Umbehr*, 518 U.S. 668 (1996); *New Vision Photography Program, Inc. v. District of Columbia*, 54 F.Supp.3d 12 (Dist. D.C. 2014), quoting 2 Richard J. Pierce Jr., ADMINISTRATIVE LAW TREATISE 764 (5th ed. 2010) (The Supreme Court "has never held that government contracts for goods and services create property interests protected by due process"). States may, of course, provide state administrative proceedings to challenge "at will" terminations, and where such proceedings are offered, they ordinarily will constitute the claimant's sole recourse. Additionally, a claimant who enjoys the right to appeal a state administrative decision in a state venue must exhaust this avenue before filing claims in federal court. *Alvin v. Suzuki*, 227 F.3d 107, 116 (3d Cir. 2000) ("[i]f there is a process on the books that

[41] *Id.*
[42] *Id.*
[43] *Id.*

appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants."); *Riggins v. Bd. of Regents*, 790 F.2d 707, 711-12 (8th Cir. 1986).

While historically federal courts have held that beneficiaries of Spending Clause programs such as Medicaid may sue to enforce provisions of the applicable statutes,[44] the U.S. Supreme Court in *Armstrong v. Exceptional Child Center, Inc.*, 135 S.Ct. 1378 (2015) ruled earlier this year that the Supremacy Clause does not confer a private right of action on Medicaid providers, and that section 1396a(a)(30)(A) of the Medicaid Act (the "equal privileges clause," 42 U.S.C. § 1396a(a)(30)(A)) does not give rise to an implied right of action for providers to sue for equitable relief.[45] The sole remedy Congress has provided for a state's failure to comply with Medicaid's requirements, the Court reasoned, is the withholding of Medicaid funds by the federal Secretary, and that, by expressly providing the one method of enforcing a substantive rule, Congress clearly "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decision-making," and avoiding 'the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action." *Armstrong*, *supra*, 135 S.Ct. at 1385 (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 292 (2002) (Breyer, J., concurring in judgment)). Because the "free choice of qualified provider" provision, 42 U.S.C. § 1396a(a)(23), is a parallel provision to the "equal privileges clause" and employs similar vague and hortatory language, it appears likely that federal courts applying *Armstrong* to future challenges involving the free choice of qualified provider provision and similar provisions will hold that no cause of action pertains.

For more information on the legal options discussed in this memorandum, please contact Alliance Defending Freedom at 480-444-0020 or visit ADF.legal.org.

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[44] *See, e.g., Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987); *Betlach*, *supra*, and cases cited therein; *Planned Parenthood v. Comm'r*, *supra*, and cases cited therein. But *cf. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S.Ct. 1204, 1212–1213 (2012) (Roberts, C.J., dissenting) (questioning whether the Supremacy Clause provides a right of action to enforce a Medicaid provision).

[45] Note that some state courts have found that the liberty interest in continued contracting, or the contractor's reputational interest, may be held to give a contractor a right of action to challenge the "for cause" exclusion. *See, e.g., Trifax Corp. v. District of Columbia*, 314 F.3d 641, 643 (D.C. Cir. 2003*); Patchogue Nursing Ctr. v. Bowen*, 797 F.2d 1137, 1144-45 (2d Cir. 1986); and *Ramanadhan v. Wing*, 174 Misc.2d 11 (Sup.Ct. New York Cty. 1997). However, there are also jurisdictions that hold to the contrary. *See, e.g., Umbrella Family Waiver Servs., LLC v. Ind. Family and Social Servs. Admin.*, 7 N.E.3d 272 (2014); *Diaz v. Florida*, 65 So.3d 78 (3d Dist.Ct.App. 2011).