



Nelson Provisions in Affordable Care Act Stigmatize Women's Access to Abortion Services

In a last-minute deal, anti-choice Sen. Ben Nelson (D-NE) won inclusion of a number of abortion-related provisions in the Affordable Care Act (ACA), the national health-reform law passed by Congress and signed by President Barack Obama in March 2010.¹

The pro-choice community believes that the right to choose should not be dependent on one's income level and that all coverage bans on abortion are discriminatory and unfair. The Nelson restrictions unfairly stigmatize abortion coverage by treating it differently than coverage for other health services. Following is a summary of the Nelson language, other provisions regarding abortion coverage in the Affordable Care Act, and the executive order issued by the Obama administration regarding implementation of these provisions.

The Nelson Provisions Require Strict Segregation of Funds

To separate federal funds from private dollars used for abortion-care expenses, the Nelson language requires plans offering abortion coverage in state health-insurance exchanges to establish two distinct accounting systems to process premium payments.² Health plans that offer abortion coverage must create one account solely for the deposit of private premium dollars used to pay for abortion coverage—an account into which *no* federal dollars may be deposited. Plans must create a second, separate account to process premium dollars paid for all other covered benefits. Health plans are required to use accepted accounting procedures to maintain these separate allocation accounts, confirming full segregation of funds.

In addition to mandating strict separation of funds, the Nelson provisions require plans in the exchange that offer abortion coverage to collect separate payments from enrollees.³ According to a U.S. Government Accountability Office (GAO) report, the administration informed health insurers that they could comply with this requirement in two ways, either by sending enrollees a single bill that separately itemizes the premium amount for abortion coverage or by sending a separate bill for abortion coverage.⁴ As an indication of the administrative burden of this requirement, GAO found that most insurers they spoke with did not bother to send an itemized or separate bill.

Anti-Choice Lawmakers in States Seized the Opportunity to Block Abortion Coverage

While anti-choice legislators were not able to get a full Stupak-like ban on abortion coverage at the federal level, their state counterparts seized the opportunity to impose such restrictions in

the aftermath of the ACA. At the time the Nelson restrictions were adopted, six states already prohibited abortion coverage in the private insurance market: ID, KY, MO, ND, OK, RI.⁵ (Rhode Island had two separate insurance prohibition laws; courts have declared one unconstitutional and unenforceable and the other partially unconstitutional and unenforceable.) And, as feared, anti-choice lawmakers focused their attention on states as millions of Americans newly entered the insurance marketplace after the ACA passed. As a result, since the law's enactment, 23 more states have enacted abortion-coverage bans: AL, AZ, AR, CO, FL, GA, IL, IN, KS, LA, MA, MS, MI, NE, NC, OH, PA, SC, SD, TN, UT, VA, WI.⁶ Additionally, Idaho, Missouri, and Oklahoma passed laws expressly extending their private-market bans to their state's health-insurance exchange. All told, now 29 states ban abortion coverage either in their health-insurance exchange or in the statewide private insurance market, or for public employees.⁷

Other Abortion-Coverage Provisions in the Health-Reform Law

The Nelson Provisions Ban Federal Insurance Coverage for Abortion

The Affordable Care Act explicitly bans federal funds from being used to pay for abortion services, except where the pregnancy threatens the life of the woman or the pregnancy is the result of rape or incest.⁸ Section 1303(b)(1)(B)(i) of the law states: "The services described in this clause are abortions for which the expenditure of Federal funds appropriated for the Department of Health and Human Services is not permitted, based on the law as in effect as of the date that is 6 months before the beginning of the plan year involved."⁹ This direct reference to the Hyde amendment means that the same restrictions on federal funds in Medicaid and other federal health programs will be applied to the health-insurance exchange.¹⁰ Indeed, in August 2011, a federal court ruled in *Susan B. Anthony List v. Driehaus* that the Affordable Care Act does not impermissibly fund abortion services, finding that "[t]he express language of the PPACA does *not* provide for tax-payer funded abortion. That is a fact, and it is clear on its face."¹¹

NARAL Pro-Choice America opposes current-law bans on federal insurance coverage for abortion care. Abortion is basic health care for many women, and it deserves coverage—both public and private. Restricting funding for abortion coverage, jeopardizes women's health and disproportionately impacts low-income women, obstructing their access to comprehensive health care. Again, the right to choose should not be dependent on one's income level or source of health insurance.

The Nelson Provisions Include Other Abortion-Related Restrictions

The health-reform law has the following additional abortion-related provisions:

- *Sets conditions on abortion coverage in the exchange :*

- Insurance plans participating in the exchange may determine whether or not to provide abortion coverage.¹²
- Additionally, the Office of Personnel Management will administer two or more plans for the federally facilitated exchange. One of these plans must not provide abortion coverage. The other(s) may, at their choice.¹³
- *Includes refusal provisions:* The law grants broad license to individuals and facilities to refuse to provide, pay for, or refer for abortion services.¹⁴

Executive Order and Regulations Regarding Abortion-Coverage Provisions in the Health-Reform Law

In order to win the support of several anti-choice lawmakers in the House, the Obama administration issued an executive order confirming that the Hyde amendment, which denies abortion care to millions of low-income Americans, remains in force under the Affordable Care Act.¹⁵ Such an order was unnecessary, since the law would not have affected the enforceability of the Hyde amendment. The order also discusses plans for implementing the Nelson restrictions, including a requirement that the secretary of the Department of Health and Human Services (HHS) develop model implementation guidelines within 180 days.

Following the direction of the executive order, in September 2010, HHS and the Office of Management and Budget released model guidelines for state insurance commissioners to use in monitoring insurance-company compliance with the new law's abortion-funding restrictions.¹⁶ The guidelines were intended specifically to help state insurance commissioners ensure that insurance companies separate federal funds from all private dollars that are used for abortion care.

In March 2012, HHS issued a final rule adopting the model guidelines, which advises state insurance commissioners to require all health plans participating in state insurance exchanges to:

- submit plans that detail the accounting processes they intend to use to segregate funds;
- submit annual assurance statements declaring that they have segregated funds; and
- include the segregation requirement as part of plans' regular, periodic financial audits.¹⁷

Many Health Plans Forgo Abortion Coverage Under Nelson

Under the restrictive Nelson provisions, many health insurers offering plans in the exchanges chose not to cover abortion care. According to GAO, nearly half of health-insurance plans sold on exchanges in states that allow abortion coverage do not offer such coverage.¹⁸ Even worse, eight states that allow abortion coverage on the exchange still had *no* plans providing such coverage. Absent such discriminatory policies, most private employer-based health insurance

plans cover abortion services – so clearly, political interference in insurance has had the intended effect of influencing insurers to drop abortion coverage.

Conclusion

The Affordable Care Act takes significant steps toward bringing more than 30 million Americans into a health-care system that will include coverage for many reproductive-health services. However, the Nelson language imposes unacceptable new restrictions on abortion coverage and in doing so, makes it harder for women to get the coverage they may need. Improving health-care coverage for all Americans should not come at the price of restricting women’s access to reproductive-health services.

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Notes

¹ P.L.111-148, 111th Cong. (2010).

² P.L. 111-148, 111th Cong. (2010), at § 10104(c).

³ P.L. 111-148, 111th Cong. (2010), at § 1303(b)(2)(B).

⁴ U.S. Government Accountability Office, *Health Insurance Exchanges: Coverage of Non-Excepted Abortion Services by Qualified Health Plans* (Sept. 2014) at <http://www.gao.gov/products/GAO-14-742R> (last visited Dec. 16, 2015).

⁵ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women’s Reproductive Rights in the United States* (25th ed. 2016), at www.WhoDecides.org.

⁶ Guttmacher Institute (GI), *State Policies in Brief: Restricting Insurance Coverage of Abortion* (Dec. 2015) at http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf (last visited Dec. 16, 2015).

⁷ NARAL Pro-Choice America & NARAL Pro-Choice America Foundation, *Who Decides? The Status of Women’s Reproductive Rights in the United States* (25th ed. 2016), at www.WhoDecides.org.

⁸ P.L. 111-148, 111th Cong. (2010), at § 1303(b)(2).

⁹ P.L. 111-148, 111th Cong. (2010), at §1303(b)(1)(B)(i).

¹⁰ P.L. 94-439, 94th Cong. (1976). Congress enacted the Hyde amendment, which restricts federal funding for abortion, in 1976, but the policy was litigated and did not go into effect until 1980. The Hyde amendment has blocked federal funds from covering abortion services for low-income women receiving Medicaid for more than 30 years.

¹¹ *Susan B. Anthony List v. Driehaus*, 805 F. Supp. 2d 423, 431 (S.D. Ohio 2011).

¹² P.L. 111-148, 111th Cong. (2010), at § 1303(b)(1)(a).

¹³ P.L. 111-148, 111th Cong. (2010) at § 1334(a)(6).

¹⁴ P.L. 111-148, 111th Cong. (2010), at § 1303(b)(4).

¹⁵ Press Release, White House, *Ensuring Enforcement and Implementation of Abortion Restrictions in the Patient Protection and Affordable Care Act* (March 21, 2010).

¹⁶ Pre-Regulatory Model Guidelines Under Section 1303 of the Affordable Care Act (PL-111-148): Issued Pursuant to Executive Order 13535 (March 24, 2010) (Sep. 20, 2010) *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/financial_pdf/segregation_2010-09-20.pdf (last visited Dec. 16, 2015).

¹⁷ 45 C.F.R. § 156.280.

¹⁸ U.S. Government Accountability Office, *Health Insurance Exchanges: Coverage of Non-Excepted Abortion Services by Qualified Health Plans* (Sept. 2014) at <http://www.gao.gov/products/GAO-14-742R> (last visited Dec. 16, 2015).