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Information Brief

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Public Funding of Abortion in Minnesota's Health Care Programs

This information brief discusses federal and state law relating to public funding of abortion in the Medical Assistance (Medicaid), General Assistance Medical Care, and MinnesotaCare Programs.

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Public Funding for Health Care in Minnesota Is Provided through the Medical Assistance, General Assistance Medical Care, and MinnesotaCare Programs

Medical Assistance (MA), Minnesota's Medicaid program, is a joint federal/state program providing certain health care services to low-income persons who meet the eligibility requirements. The federal government pays slightly over half the costs of Minnesota's MA program, and in return Minnesota must comply with the federal Medicaid laws and rules.

General Assistance Medical Care (GAMC) is a state-funded program that pays for certain health care services for Minnesota residents whose income and resources are insufficient to cover their health care expenses and who are not eligible for MA or other health care programs.

The MinnesotaCare Program provides subsidized health coverage to persons who meet eligibility requirements related to income, lack of health coverage, and residency. The program is funded using state dollars and enrollee premium payments.

Federal Constitutional Law and Federal Statutes Limit the State's Ability to Regulate and Fund Abortion

Decisions of the United States Supreme Court set the parameters for state regulation and funding of abortions.

Beginning in 1973 with *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court has held that the right of privacy protected under the federal constitution includes the right of a woman to have an abortion under certain circumstances without undue interference from the state. Although the Supreme Court has limited the reach of *Roe v. Wade* in some circumstances,[1] the case has not been overruled and continues to be law.

Although a woman's right to an abortion is constitutionally protected, the U.S. Supreme Court has consistently held that there is no federal constitutional right to have government funds pay for abortions. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court upheld a Connecticut regulation granting Medicaid benefits for childbirth, but denying such benefits for abortions

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[1]See e.g. *Planned Parenthood of Southeastern Pennsylvania et. al. v. Casey*, 112 S. Ct. 2791 (1992) (upholding informed consent requirements in a Pennsylvania law regulating abortions); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) and *Hodgson v. Minnesota*, 497 U.S. 417 (1990) (upholding laws requiring parental notification of a minor's abortion); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (upholding a Missouri law which prohibited public facilities and public employees from performing abortions, and which required viability testing before late term abortions).

that were not "medically necessary."[2] The Court stated that *Roe* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds."[3] The Court further stated that there "is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy." [4]

In *Harris v. McRae*, 448 U.S. 297 (1980), the Supreme Court upheld the constitutionality of the federal "Hyde Amendment," which prohibited the use of federal Medicaid funds to perform abortions except where the life of the mother would be endangered if the fetus were carried to term, or except in cases of rape or incest. The Court stated that a woman's freedom of choice does not carry with it "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."[5] According to the Court, while the government may not place obstacles in the path of a woman's exercise of her constitutional right to freedom of choice, it need not remove those not of the state's own creation, including a woman's inability to afford an abortion.[6]

Federal law specifies which abortions must be paid for under state Medicaid programs.

In 1976, Congress passed what is referred to as the "Hyde Amendment," which prohibited the use of federal Medicaid funds to pay for abortions for Medicaid recipients except when necessary to save the life of the mother.[7] Congress has since re-enacted the "Hyde Amendment" in various forms. Versions of the amendment have authorized the use of federal funds for abortions only when necessary to save the life of the mother, when necessary to prevent severe and long-lasting physical health damage to the mother, and in cases of rape or incest.[8] The current version allows federal funds to be used for abortions only when necessary to save the life of the mother, or when the pregnancy is the result of rape or

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[2]The Supreme Court reached a similar conclusion in *Beal v. Doe*, 432 U.S. 438 (1977) and *Poelker v. Doe*, 432 U.S. 519 (1977).

[3]432 U.S. at 474.

[4]*Id.* at 475.

[5]448 U.S. at 316.

[6]*Id.*

[7]Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

[8]See e.g. Pub. L. No. 102-170, § 203, 105 Stat. 1126 (1991); Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979); Pub. L. No. 95-205 § 101, 91 Stat. 1460 (1977).

incest.[9] (The current version of the Hyde amendment and other relevant statutes are summarized in the chart in Appendix A and reprinted in Appendix B.)

Federal courts have held that states that participate in the Medicaid program must cover all abortions for which federal funds are authorized.[10] States may choose to cover other abortions in their Medicaid programs, but they must pay for these abortions solely out of state dollars.

Minnesota Laws Limit the Public Funding of Abortion

Following the U.S. Supreme Court's decision in *Roe v. Wade*, the Minnesota Department of Public Welfare (now the Department of Human Services-DHS) issued a policy bulletin authorizing reimbursement of abortions under the Medical Assistance program. In 1977, the Minnesota Supreme Court held that this was improper rulemaking by the department, and stated that the issue was best left to the legislature to decide.[11]

In 1978, the Minnesota Legislature enacted several laws relating to the public funding of abortion. The 1978 Legislature adopted a state policy that, between normal childbirth and abortion, "normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens." Minn. Stat. §256B.011.

The 1978 Legislature prohibited the use of Medical Assistance funds in connection with an abortion unless:

- the abortion is medically necessary to prevent the mother's death based upon the signed written statement of two physicians, and the woman or her legal representative has consented to the abortion;

- the pregnancy is the result of forcible criminal sexual conduct in the first degree and the crime is reported within 48 hours of its occurrence or within 48 hours of the time the victim became physically able to report it; or

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[9]Pub. L. No. 103-333. § 509, 108 Stat. 2573 (1994); Pub. L. No. 103-112, §509, 107 Stat. 1113 (1993).

[10]For the most recent decisions on this issue, see *Little Rock Family Planning Services v. Dalton*, 60 F.3d 497 (8th Cir. 1995); *Elizabeth Blackwell Health Center for Women v. Knoll,* No. 94-1954, 1995 WL 434708, (3rd Cir. July 25, 1995)

[11]*McKee v. Likins*, 261 N.W.2d 566, 578 (Minn. 1977) (quoting *Maher v. Roe*, 432 U.S. 464, 479 (1977)).

- the pregnancy is the result of incest and the incident and relative were reported to a valid law enforcement agency for investigation before the abortion.

Minn. Stat. §256B.0625, subd. 16.

The legislature extended this prohibition against use of public funds for abortion to: the General Assistance Medical Care program; county welfare boards that provide Medical Assistance grants and reimbursements; all political subdivisions of the state that participate in the Medical Assistance program; and federal Medicaid funds that come into the state treasury.[12]

These prohibitions on the use of public funds for abortion have remained in Minnesota Statutes since 1978 and were implemented with little change until 1994. In 1994, DHS learned that it could no longer enforce some aspects of MA restrictions on abortion services due to federal directives; later that same year all statutory restrictions on the public funding of abortion in Minnesota were suspended by a statewide injunction issued by the state district court in Hennepin County. These 1994 changes are described in the next two sections.

Federal Health Care Financing Administration (HCFA) Directives Specify When State Medicaid Programs Must Pay for Abortions

In December of 1993 and March of 1994, the federal Health Care Financing Administration (HCFA) sent two letters to all state Medicaid directors. Those letters explained how the October 1993 version of the Hyde Amendment was to be implemented and advised states they were required to adhere to all federal requirements and conditions to receive federal Medicaid funding.

The 1993 Hyde Amendment, as interpreted by HCFA in those letters, has no reporting requirements for rape or incest and requires only one physician to certify that the life of the woman is in danger. To conform to the federal directives, the Minnesota Department of Human Services adopted a policy of paying for abortions when one physician certified that the life of the woman was in danger. In addition, the DHS policy permitted a "physician bypass" of the reporting requirements, whereby MA would pay for the abortion if the physician certified that the woman was physically or psychologically unable to report the rape or incest.

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[12]Minn. Stat. §§ 256B.40; 256D. 03, subd. 4(h); 393.07, subd. 11.

The State District Court Decision in *Doe v. Gomez* Required Minnesota to Pay for Abortions in Medical Assistance and Other Public Health Care Programs

During the time that the issues surrounding the federal Hyde Amendment were being worked out, the Minnesota abortion funding statutes were challenged in state court on state constitutional grounds. In 1993, a class action lawsuit was filed against the Minnesota Commissioner of Human Services, Hennepin, Ramsey, and St. Louis counties,[13] alleging that the abortion funding provisions in Minnesota law relating to the MA, GAMC, and County Poor Relief programs violate several provisions of the Minnesota Constitution. On June 16, 1994, the Hennepin County District Court held that the abortion funding restrictions in Minnesota Statutes violate the privacy and equal protection provisions of the Minnesota Constitution and enjoined the state from enforcing these provisions.[14] The court determined that the Minnesota Constitution provides greater protection for individual liberties than does the federal constitution.[15] The state's appeal of this decision is currently pending before the Minnesota Supreme Court, and a decision is expected at any time.[16] This case is generally referred to as the *Gomez* case.[17]

As a result of the district court's order in *Gomez*, Minnesota's MA and GAMC programs now cover abortions for "health" reasons, as well as when necessary to save the life of the mother and in cases of rape or incest. The court did not define what constitutes a "health" reason, and DHS is leaving this determination to the physician. As the federal "Hyde Amendment" allows for the use of federal funds to pay for abortions only when necessary to save the mother's life and in cases of rape or incest, abortions performed for health reasons are being paid for solely out of state funds.

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[13]Hennepin County has agreed with the plaintiffs throughout this litigation. Ramsey County also supported the plaintiffs' position before the Minnesota Supreme Court. St. Louis County announced that it concurred in the state's position.

[14]*Doe v. Steffen*, No. MC 93-3995, (Hennepin County D. Ct. Minn. June 16, 1994). The district court rejected the plaintiffs' arguments that the statutes discriminate on the basis of sex and that they are unconstitutionally vague in violation of the due process clause of the Minnesota Constitution. The court also ruled that the plaintiffs lacked standing to raise a freedom of religion claim. When this case was initiated, Natalie Haas Steffen was the Commissioner of Human Services. The title of the case has since been changed to reflect the name of the current Commissioner of Human Services, Maria Gomez.

[15]Since the *Gomez* court relied on the Minnesota Constitution for its decision, the court was not limited by earlier U. S. Supreme Court decisions on this issue. See discussion of the federal cases, pages 2 and 3.

[16]The Minnesota Court of Appeals denied the state's motion for an order staying the district court's injunction, but did not examine the merits of the case. The case was then heard on the merits by the Minnesota Supreme Court on a Petition for Accelerated Review, bypassing the intermediate court of appeals.

[17]See note 14 for an explanation of the name of the case.

The 1995 Legislature Enacted Language Establishing a Separate MinnesotaCare Abortion Provision

From 1992 until 1995, abortion coverage under the MinnesotaCare Program was identical to the abortion coverage provided by the Medical Assistance program. The 1995 Legislature enacted a provision to separate MinnesotaCare abortion coverage from abortion coverage under the MA program. The legislation was prompted by the fact that MA coverage for abortion had been greatly expanded by the *Gomez* court order in 1994, and the legislature did not wish to extend the expanded coverage to the MinnesotaCare Program. The 1995 limitations on MinnesotaCare abortion coverage may not greatly limit the number of abortions provided to MinnesotaCare enrollees. The reason is that pregnant women enrolled in MinnesotaCare are eligible to enroll in MA and thereby obtain abortions for health reasons that are not available under MinnesotaCare.

When the MinnesotaCare Program was first enacted in 1992, coverage for abortions was very limited, since the service was provided only under circumstances permitted by the MA program. In 1992, the MA program covered abortions only when the mother's life was in danger or in cases of rape or incest (subject to certain reporting requirements). After the 1994 court order in *Gomez*, which required that MA pay for all health-related abortions, DHS began to pay for abortions for "health" reasons under the MinnesotaCare Program. The MinnesotaCare statute defined covered health services as "the health services reimbursed under Chapter 256B" (the chapter governing MA; see Minn. Stat. §256.9353, subd. 1). The MinnesotaCare statute had some specific exceptions to MA coverage, but since there was no exception for abortion, MinnesotaCare coverage of abortion was identical to that under MA. DHS therefore considered MinnesotaCare to be subject to the *Gomez* court order.[18]

The 1995 Legislature separated MinnesotaCare abortion coverage from MA abortion coverage by passing language specifically delineating MinnesotaCare abortion coverage.[19] This provision (see Laws 1995, Chap. 234, art. 6, §4) states:

> No public funds shall be used for coverage of abortion under MinnesotaCare except where the life of the female would be endangered or substantial and irreversible impairment of a major bodily function would result if the fetus were carried to term; or where the pregnancy is the result of rape or incest.

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[18]The district court's decision and injunction did not specifically refer to the MinnesotaCare Program.

[19]MinnesotaCare is a state-funded program and thus is not subject to all of the federal statutes and regulations with which the MA program must comply.

Under this language, coverage for abortions in the MinnesotaCare Program is now more limited than the coverage for abortions currently required in the MA program (because of the *Gomez* decision). MA now covers abortion for "health" reasons generally, whereas the MinnesotaCare abortion coverage for health reasons is now more specific—abortion is covered only in cases of "substantial and irreversible impairment of a major bodily function."

However, the new MinnesotaCare language provides broader coverage for abortions than was permitted under MA prior to the court order in *Gomez*. As discussed earlier, prior to the court order, the MA program limited abortion coverage to cases of danger to the mother's life, rape, and incest, subject to certain reporting requirements (as modified to conform to the federal directives on compliance with the Hyde amendment). The MinnesotaCare language passed in 1995 also limits abortion to cases of danger to the mother's life, rape, or incest, but does not have a reporting requirement and also provides coverage for abortion in cases of "substantial and irreversible impairment of a major bodily function. "

The Separate MinnesotaCare Abortion Provision Does Not Prevent MinnesotaCare Enrollees from Obtaining Abortion Coverage under MA

> The enactment of the separate MinnesotaCare abortion provision may not greatly limit the number of abortions provided to MinnesotaCare enrollees. The reason is that pregnant women enrolled in MinnesotaCare are eligible for MA and can obtain abortions for health reasons not available through MinnesotaCare by enrolling in MA. Although the health care reform waiver received by the state in 1995 would have made these (and other) MinnesotaCare enrollees automatically eligible for MA services, DHS, to give effect to the 1995 legislative limitation on MinnesotaCare abortion coverage, is requiring separate enrollment in MA as a condition for payment of health-related abortions not covered by MinnesotaCare.

Pregnant women with family incomes up to 275 percent of the federal poverty guidelines are potentially eligible for both MinnesotaCare and MA.[20] The MA income limit for pregnant women was raised by the legislature in 1993 from 185 percent to 275 percent of the federal poverty guidelines (Laws 1993, Chap. 345, art. 9, §11). Pregnant women have been eligible for MinnesotaCare at the 275 percent level since January 1, 1993. Pregnant women enrolled in MinnesotaCare are therefore eligible for MA, and can obtain health-related abortions not available through MinnesotaCare by enrolling in MA. It is difficult to predict the proportion

[20]The MinnesotaCare Program determines eligibility based upon the gross income of applicants. DHS staff have stated that all pregnant women eligible for MinnesotaCare should also be eligible for MA, because the MA program has recently switched to a gross income test to determine eligibility for pregnant women.

of pregnant women on MinnesotaCare seeking an abortion for health reasons who will enroll in MA. For example, some pregnant women may choose not to enroll in MA.[21]

The state's recently approved health care reform waiver[22] permits the state, beginning July 1, 1995, to make pregnant women on MinnesotaCare automatically eligible for all MA covered services, including abortion coverage, without first enrolling in MA.[23] This waiver was approved by the federal government in April 1995. Prior to receipt of this waiver, all pregnant women in MinnesotaCare were eligible to switch to MA and were in fact required to do so. The waiver does not therefore affect the ability of a woman to obtain an abortion; it does permit the state to pay for MA services without the additional administrative step of disenrolling the person from MinnesotaCare and enrolling the person in MA. However, the Department of Human Services, to give effect to the 1995 legislation that limits MinnesotaCare coverage of abortions, is requiring pregnant women enrolled in MinnesotaCare who wish to obtain abortions for health-related reasons not permitted under the new MinnesotaCare standard to enroll in MA. Pregnant women who remain in MinnesotaCare and do not enroll in MA receive all MA covered services except abortions not permitted under MinnesotaCare. Abortion coverage for these women who do not enroll in MA is governed by the narrower MinnesotaCare program language enacted in 1995.

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[21]MA enrollment may involve more of the stigma of a welfare program than does MinnesotaCare. MinnesotaCare enrollees pay premiums and do not have to go to county social services offices to enroll.

[22]Waivers allow state Medicaid programs to cover certain populations or services, or use certain methods of health care delivery, that would not normally be allowed by federal Medicaid law without the waiver. In July 1994, in response to a directive by the 1994 Legislature, the Commissioner of Human Services applied to the federal government for a demonstration project waiver under section 1115 of the Social Security Act. This waiver, referred to as the health care reform waiver (sometimes also called the "cosmic" waiver), was approved by the federal government on April 27, 1995. Language implementing the waiver was enacted as part of the 1995 MinnesotaCare Act. (Laws 1995, Chap. 234, art. 6, §19) The primary goal of the waiver is to give the state greater flexibility to expand access to health care through the MA and MinnesotaCare programs. For example, the waiver allows the state to receive federal contributions at the MA rate for the cost of health care services provided to pregnant women and children who are enrolled in MinnesotaCare.

[23]Prior to July 1, 1995, DHS, in compliance with Minn. Stat., §256.9354, subd. 6, required pregnant women dually eligible for both MA and MinnesotaCare to enroll in MA. This reduced state costs because the federal government pays for about 54 percent of MA expenditures, while the MinnesotaCare Program is totally state funded (except for enrollee premiums). Pregnant women enrolling in MA receive a richer package of covered services (e.g., unlike MinnesotaCare, MA does not have an annual $10,000 limit on inpatient hospital services for adults) and do not have to pay MinnesotaCare premiums and cost-sharing.

Summary

Public funding of abortion in Minnesota's health care programs has been affected by the joint result of several largely unrelated events that have occurred within the past two years. They are:

- The 1993 Legislature's expansion of MA eligibility for pregnant women to 275 percent of the federal poverty level
- The directives from HCFA in late 1993 and early 1994
- The June 1994 state district court decision in *Doe v. Gomez*
- The 1995 Legislature's enactment of a MinnesotaCare abortion coverage provision separate from that of MA
- The April 1995 approval by HCFA of the state's health care reform waiver request and its implementation by the 1995 Legislature

Understanding public funding of abortion in Minnesota's health care programs requires an understanding of the interaction of these events.

Appendix A

Summary of Laws Governing Public Funding of Abortion in Minnesota*

Law	Federal Law	State Law		
	"Hyde Amendment"	MA Statute	MinnesotaCare Statute	Minnesota Constitution (D. Ct. *Gomez* decision)
Circumstances in which abortion is covered by public funding	(1) when necessary to save the life of the mother; (2) rape; and (3) incest	(1) medically necessary to save the life of the mother based on written statements of two physicians; (2) first degree rape reported within 48 hours; and (3) incest reported before the abortion	(1) life of female would be endangered; (2) rape; (3) incest; and (4) substantial and irreversible impairment of major bodily function if carried to term	Requires (in addition to coverage required by federal law) coverage of abortions for "health" reasons
Application	Federal law requires state Medicaid programs to cover abortions that meet the requirements of this amendment. The amendment prohibits use of federal funds for abortion under any other circumstances.	Not currently operational; enjoined by the *Gomez* case. If revived, will be subject to "Hyde Amendment" requirements.	Applies to abortions covered by MinnesotaCare. (Federal law does not apply, since exclusively state funds involved, and *Gomez* does not apply because of the 1995 MinnesotaCare legislation.) All pregnant women in MinnesotaCare are also eligible for and may enroll in MA, qualifying for its abortion coverage.	Applies to MA and GAMC covered abortions. Trial court decision is on appeal to state Supreme Court. Federal law requires abortions funded under this standard to be paid with state funds only.

*Current as of September 1, 1995

Appendix B

Federal and State Law Relating to Public Funding of Abortion

Federal Law

Pub.L. 103-112, §509, 107 Stat. 1113 (1993). The "Hyde Amendment."

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.

Minnesota Law (Medical Assistance and GAMC)

M.S.[§256B.011] POLICY FOR CHILDBIRTH AND ABORTION FUNDING.

Between normal childbirth and abortion it is the policy of the state of Minnesota that normal childbirth is to be given preference, encouragement and support by law and by state action, it being in the best interests of the well being and common good of Minnesota citizens.

M.S.[§256B.0625] COVERED SERVICES.

Subd. 16. **Abortion services.** Medical assistance covers abortion services, but only if one of the following conditions is met:

(a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law;

(b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to report the criminal sexual conduct, in which case the report shall be made within 48 hours after the victim becomes physically able to report the criminal sexual conduct; or

(c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

M.S.[§256B.40] SUBSIDY FOR ABORTIONS PROHIBITED.

No medical assistance funds of this state or any agency, county, municipality or any other subdivision thereof and no federal funds passing through the state treasury or the state agency shall be authorized or paid pursuant to this chapter to any person or entity for or in

connection with any abortion that is not eligible for funding pursuant to sections 256B.02, subdivision 8, and 256B.0625.

M.S.[§256D.03] RESPONSIBILITY TO PROVIDE GENERAL ASSISTANCE.

Subd. 4. **General assistance medical care; services....** (h) The conditions of payment for services under this subdivision are the same as the conditions specified in rules adopted under chapter 256B governing the medical assistance program, unless otherwise provided by statute or rule.

M.S.[§261.28] SUBSIDY FOR ABORTIONS PROHIBITED.

No funds of this state or any subdivision thereof administered under this chapter shall be authorized for or in connection with any abortion that is not eligible for funding pursuant to sections 256B.02, subdivision 8, and 256B.0625.

M.S.[§393.07] POWERS AND DUTIES.

Subd. 11. **Abortion services; policy and powers.** In keeping with the public policy of Minnesota to give preference to childbirth over abortion, Minnesota local social services agencies shall not provide any medical assistance grant or reimbursement for any abortion not eligible for funding pursuant to sections 256B.02, subdivision 8, and 256B.0625.

Minnesota Law (MinnesotaCare)

M.S.[256.9353] COVERED HEALTH SERVICES.

Subdivision 1. **Covered health services.** "Covered health services" means the health services reimbursed under Chapter 256B, with the exception of inpatient hospital services, special education services, private duty nursing services, adult dental care services other than preventive services, orthodontic services, nonemergency medical transportation services, personal care assistant and case management services, nursing home or intermediate care facilities services, inpatient mental health services, and chemical dependency services. Outpatient mental health services covered under the MinnesotaCare program are limited to diagnostic assessments, psychological testing, explanation of findings, medication management by a physician, day treatment, partial hospitalization, and individual, family, and group psychotherapy.

No public funds shall be used for coverage of abortion under MinnesotaCare except where the life of the female would be endangered or substantial and irreversible impairment of a major bodily function would result if the fetus were carried to term; or where the pregnancy is the result of rape or incest.

Covered health services shall be expanded as provided in this section.

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