

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074

MINORITY (202) 225-5051

<http://oversight.house.gov>

February 12, 2018

The Honorable Eric D. Hargan
Deputy Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Deputy Secretary Hargan:

We have been in contact with a whistleblower who has provided us with documents indicating that an extreme right-wing anti-choice group known as Alliance Defending Freedom was behind a recent effort by the Trump Administration to allow states to terminate Planned Parenthood as a healthcare provider for Medicaid beneficiaries seeking to exercise their statutory rights to obtain family planning or other health care services from a provider of their choice.

On January 19, 2018, the Trump Administration sent a letter to state Medicaid directors rescinding a 2016 letter issued by the Obama Administration informing states that it is against the law to terminate providers, particularly family planning providers like Planned Parenthood, based on unsubstantiated allegations, such as those made by David Daleiden, who circulated misleading and heavily-doctored videos in 2015. After an exhaustive investigation, our Committee concluded on a bipartisan basis that his allegations were completely false, yet some states continue to cite them as a rationale for continuing to target Planned Parenthood to this day.

The documents provided by the whistleblower indicate that Trump Administration appointees—on direct instructions from your office while you were Acting Secretary—rushed to rescind the 2016 letter as an “utmost priority” with a “very quick turnaround.”

The documents show that a first draft of this letter was provided to the Trump Administration by Alliance Defending Freedom, and it was finalized and approved a week later on January 19, 2018—in time for the March for Life rally held in Washington D.C.

According to the documents provided by the whistleblower, numerous Trump Administration appointees at the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) were directly involved in this effort, including many with a history of unfairly targeting Planned Parenthood.

The documents do not indicate whether White House or other Trump Administration officials were a part of this effort.

The documents provided by the whistleblower raise serious concerns about whether the Trump Administration is now taking orders from an extreme right-wing interest group that is trying to deny American citizens the ability to exercise their right to obtain family planning services from the provider of their choice, which is guaranteed by federal statute. In addition, the documents raise grave questions about the legitimacy of the Trump Administration's letter to state Medicaid directors on January 19, which appears to be a clandestine effort to tip the scales of justice in favor of states that are targeting Planned Parenthood in violation of federal law.

Background on “Free Choice of Provider” Provision

In 1967, Congress enacted the “free choice of provider” provision for Medicaid beneficiaries. This statute protects the right of Medicaid beneficiaries to receive medical services “from any institution, agency, community pharmacy, or person, qualified to perform the service or services required (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services.”¹ Congress has modified this guarantee in certain ways, but “the right to freely choose among qualified participating family planning providers has been explicitly preserved.”²

In 2015, radical anti-choice extremist David Daleiden released selectively edited video tapes intended to discredit Planned Parenthood. Five congressional committees, including ours, investigated these videos and identified no violations of the law by Planned Parenthood. Based on our Committee's investigation, on September 30, 2015, Chairman Jason Chaffetz conceded on national television that there was no evidence that Planned Parenthood violated any laws:

Wolf Blitzer: Is there any evidence in your opinion that Planned Parenthood has broken any law?

Chaffetz: No, I'm not suggesting that they broke the law.³

One week later, Chairman Chaffetz stated again: “Did we find any wrongdoing? The answer was no.”⁴

In addition, on February 5, 2016, a federal district court that reviewed the videos found

¹ Social Security Act, 42 U.S.C. § 1396a(a)(23).

² *Medicaid's Free-Choice-of-Provider Protections in a Family Planning Context: Planned Parenthood Federation of Indiana v. Commissioner of the Indiana State Department of Health*, Public Health Reports (Jan-Feb 2012) (online at www.ncbi.nlm.nih.gov/pmc/articles/PMC3234390/).

³ *BREAKING: Oversight Committee Chairman Admits on National Television He Has No Evidence Planned Parenthood Violated Any Laws*, House Committee on Oversight and Government Reform Democratic Press Office (Sept. 30, 2015) (online at <https://democrats-oversight.house.gov/news/press-releases/breaking-oversight-committee-chairman-admits-on-national-television-he-has-no>).

⁴ House Committee on the Judiciary, *Hearing on Planned Parenthood Exposed: Examining Abortion Procedures and Medical Ethics at the Nation's Largest Abortion Provider*, 114th Cong. (Oct. 8, 2015) (online at www.gpo.gov/fdsys/pkg/CHRG-114hhrg96905/pdf/CHRG-114hhrg96905.pdf).

“no evidence of criminal activity” by Planned Parenthood and concluded that Mr. Daleiden’s videos were “not pieces of journalistic integrity, but misleading videos and unfounded assertions (at least with respect to the NAF materials) of criminal misconduct.”⁵ On July 17, 2017, the court found Mr. Daleiden and his organization in contempt of court for “multiple violations” of a preliminary injunction and fined Mr. Daleiden nearly \$200,000.⁶

In January 2016, a grand jury in Texas indicted Mr. Daleiden and his co-conspirator, Sandra Merritt, on felony charges of tampering with a governmental record with the intent to defraud.⁷

Despite these findings, multiple states still attempted to use Mr. Daleiden’s videos as justification to terminate their Medicaid provider agreements with Planned Parenthood. Their arguments were rejected in federal appellate courts, including the U.S. Court of Appeals for the Seventh, Ninth, and Fifth Circuits.⁸

Obama Administration Letter to State Medicaid Directors in 2016

With this background, on April 19, 2016, CMS sent a letter to all state Medicaid directors clarifying the “free choice of provider” provision. CMS explained that although a state could set reasonable standards to ensure the quality and qualifications of providers, “a state may not deny Medicaid beneficiaries the right to see the provider of their choice unless there is a sufficient basis.” CMS explained that a state seeking to terminate a provider must provide evidence that it failed to meet state standards, such as “fraud or criminal action.”⁹

CMS also explained that a state may not target for termination a specific provider, such as Planned Parenthood, merely because it provides services that some state officials disagree with for political or other reasons:

⁵ Order Granting Motion for Preliminary Injunction, *National Abortion Federation v. Center for Medical Progress*, No. 15-cv-03522, Dkt. 354 (N.D. CA Feb. 5, 2016) (online at <https://docs.justia.com/cases/federal/district-courts/california/candce/3:2015cv03522/289894/354>).

⁶ Order of Civil Contempt, *National Abortion Federation v. Center for Medical Progress*, No. 15-cv-03522, Dkt. 482 (N.D. CA July 17, 2017) (online at <https://docs.justia.com/cases/federal/district-courts/california/candce/3:2015cv03522/289894/482>).

⁷ *Indictment Deals Blow to G.O.P. Over Planned Parenthood Battle*, New York Times (Jan. 26, 2016) (online at www.nytimes.com/2016/01/27/us/politics/indictment-deals-blow-to-gop-over-planned-parenthood-battle.html) (charges dismissed at the prosecution’s request in July 2016, citing potential legal issue with the grand jury’s extended term).

⁸ *The Trump Administration’s Newest Strategy for Excluding Planned Parenthood from Medicaid*, Health Affairs (Jan. 25, 2018) (online at www.healthaffairs.org/doi/10.1377/hblog20180125.480978/full/).

⁹ Letter from Vikki Wachino, Director, Center for Medicaid and CHIP Services, Centers for Medicare and Medicaid Services, Department of Health and Human Services, to State Medicaid Directors (Apr. 19, 2016) (online at www.medicare.gov/federal-policy-guidance/downloads/smd16005.pdf); *Obama Officials Warn States About Cutting Medicaid Funds to Planned Parenthood*, Washington Post (Apr. 19, 2016) (online at www.washingtonpost.com/news/post-nation/wp/2016/04/19/obama-officials-warn-states-about-cutting-medicaid-funds-to-planned-parenthood/).

Such reasons may *not* include a desire to target a provider or set of providers for reasons unrelated to their fitness to perform covered services or the adequacy of their billing practices. The failure of a state to apply otherwise reasonable standards in an evenhanded manner may suggest such targeting. For instance, if a state were to take certain actions against one provider or set of providers, but not other similarly situated providers, it would raise questions as to whether the state is impermissibly targeting disfavored providers.¹⁰

CMS explained that a state may not terminate providers based solely on the fact that they “separately provide family planning services or the full range of legally permissible gynecological and obstetric care, including abortion services (not funded by federal Medicaid dollars, consistent with the federal prohibition), as part of their scope of practice.”¹¹ The letter stated:

Providing the full range of women’s health services neither disqualifies a provider from participating in the Medicaid program, nor is the provision of such services inconsistent with the best interests of the beneficiary, and shall not be grounds for a state’s action against a provider in the Medicaid program.¹²

Recent Action by the Trump Administration

On January 19, 2018, Trump Administration political appointees at CMS sent a new, two-paragraph letter to state Medicaid directors rescinding the 2016 letter. The new letter stated:

We are concerned that the 2016 Letter raises legal issues under the Administrative Procedure Act, and limited states’ flexibility with regard to establishing reasonable Medicaid provider qualification standards. For these reasons, we are rescinding the April 19, 2016 Letter (SMD #16-005).¹³

The new letter does not explain the “legal issues” relating to the Administrative Procedure Act or any concerns CMS had with limitations on states’ flexibility in establishing reasonable qualification standards.

Instead, it appears that the Trump Administration’s goal with this rescission is to make it easier for states to terminate Planned Parenthood for ideological reasons and potentially to manipulate existing reciprocity provisions to extend terminations in one state to all states across

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Letter from Brian Neale, Director, Center for Medicaid and CHIP Services, Department of Health and Human Services, and Alec Alexander, Director, Center for Program Integrity, Centers for Medicare and Medicaid Services, Department of Health and Human Services, to State Medicaid Directors (Jan. 19, 2018) (online at www.medicaid.gov/federal-policy-guidance/downloads/smd18003.pdf).

the country.

Under existing regulations, if one state terminates a Medicaid provider “for cause,” other states are required to follow suit.¹⁴ However, if a state termination is based on an impermissible factor—not “based upon fraud, integrity, or quality”—that termination is not “for cause” and is not a valid basis for terminations in other states.¹⁵ In order to ensure that only “for cause” terminations are implemented by other states, CMS reviews terminations and includes only valid terminations in a database shared with state Medicaid providers.¹⁶

The Trump Administration’s letter was sent in the context of ongoing litigation by two states, Arkansas and Louisiana, that are still attempting to terminate Planned Parenthood based on the discredited Daleiden videos. Both cases remain in litigation, with the court in Arkansas siding with the state and the court in Louisiana siding with Planned Parenthood.

Arkansas sought to terminate Planned Parenthood in August 2015, and it based its termination on the contention that “a series of undercover videos exposed agents of Planned Parenthood engaging in conduct that—at the very least—violated norms of medical ethics, and may well have violated federal law.” Arkansas cited no evidence other than the discredited Daleiden videos for its contention that “Planned Parenthood’s practices were unethical and did not conform to professional recognized standards for healthcare and, therefore, Planned Parenthood was no longer qualified to be a Medicaid provider.”¹⁷

Louisiana also attempted to terminate Planned Parenthood in August 2015 “to ensure that it was not engaging in illegal practices.”¹⁸ However, as the U.S. Court of Appeals for the Fifth Circuit underscored in its decision, neither of Planned Parenthood’s two clinics in the state “performs abortions or has ever participated in a program involving donation of fetal tissue.”¹⁹

¹⁴ 42 C.F.R. §455.416(c); *Medicaid Provider Enrollment Compendium*, Center for Program Integrity, Centers for Medicare & Medicaid Services (updated June 23, 2017) (online at www.medicare.gov/affordable-care-act/downloads/program-integrity/mpec-6232017.pdf).

¹⁵ Informational Bulletin from Pete Budetti, Director, Center for Program Integrity, and Cindy Mann, Director, Center for Medicaid and CHIP Services, *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* (Jan. 20, 2012) (online at www.medicare.gov/federal-policy-guidance/downloads/cib-01-20-12.pdf).

¹⁶ *Medicaid Provider Enrollment Compendium*, Center for Program Integrity, Centers for Medicare & Medicaid Services (updated June 23, 2017) (online at www.medicare.gov/affordable-care-act/downloads/program-integrity/mpec-6232017.pdf).

¹⁷ Brief of Defendant-Appellant Arkansas, *Planned Parenthood Arkansas v. Selig*, No. 15-3271 (8th Cir. Dec. 1, 2015).

¹⁸ Brief of Defendant-Appellant Kathy Kliebert, Secretary, Louisiana Department of Health and Hospitals, *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, No. 15-30987 (5th Cir. Jan. 8, 2016).

¹⁹ *Planned Parenthood of Gulf Coast v. Gee*, 962 F.3d 445 (5th Cir. 2017) (online at www.ca5.uscourts.gov/opinions/pub/15/15-30987-CV0.pdf).

Under current law, these states would have a difficult time prevailing, and an even more difficult time extending their termination decision to all other states. However, it appears that the Trump Administration's rescission of the 2016 letter is designed to assist these states. In fact, on January 30, 2018, less than two weeks after the Trump Administration's action, Louisiana filed a motion in the state Supreme Court seeking a 60-day extension based on the Trump Administration's new letter. Louisiana asserted that this extension would "allow additional time for DHH [HHS] to issue guidance that may clarify its positions as to issues pending in this matter."²⁰

Documents Provided by Whistleblower

A whistleblower has now provided us with information and documents indicating that a right-wing advocacy group known as Alliance Defending Freedom was behind the Trump Administration's recent effort to rescind the 2016 letter and to seek to eliminate protections for Medicaid beneficiaries who exercise their rights to seek family planning or other health care services.²¹

According to the information provided by the whistleblower, on the morning of January 11, 2018, several high-level Trump Administration political appointees at HHS and CMS discussed a draft letter they would soon be receiving from an undisclosed source that would rescind the 2016 letter.

Directly after this discussion, at 10:07 a.m., your Chief of Staff, Kristin Skrzycki, sent an email to Brady Brookes, the Deputy Chief of Staff at CMS, explaining that processing this letter was an urgent priority:

After conversations with Paula and Kelly this morning, CMS should be receiving the SMD [State Medicaid Director] letter today. Per our discussion yesterday, please make sure your clearance process is ready to go on this. We will need a very quick turnaround. Consider an utmost priority.

Later that same day, at 2:22 p.m., HHS Deputy General Counsel Kelly Cleary sent an email attaching the draft letter from the undisclosed source. Now that we have obtained a copy of that draft letter, it appears to have originated from Alliance Defending Freedom. The metadata for the draft letter identifies Casey Mattox as the author and Alliance Defending Freedom as the company that created the document.

²⁰ Application to Extend Time to File a Petition for Writ of Certiorari, *Gee v. Planned Parenthood Gulf Coast* (S. Ct. Jan. 30, 2018).

²¹ Hal C. Lawrence, MD and Debra L. Ness, MS, *Planned Parenthood Provides Essential Services That Improve Women's Health*, *Annals of Internal Medicine* (Feb. 7, 2017) (online at <http://annals.org/aim/fullarticle/2601395/planned-parenthood-provides-essential-services-improve-women-s-health>) ("In a single year, Planned Parenthood health centers conduct more than 270,000 Pap tests and more than 360,000 breast examinations-essential services for detecting cancer.").

The Alliance Defending Freedom has been designated a hate group by the Southern Poverty Law Center.²² Mr. Mattox's biography describes him as a Senior Counsel with Alliance Defending Freedom who is "eager to put an end to the evil of abortion" and "active in defending the sanctity of life and holding the abortion industry accountable for its fraudulent use of taxpayer dollars."²³ Mr. Mattox has authored articles promoting state efforts to terminate Planned Parenthood as a Medicaid provider.²⁴

Mr. Mattox's draft letter included more than three pages of rhetoric expressing "considerable deference to States" to pursue "other legitimate objectives" in addition to simply ensuring provider qualifications. The draft highlighted "the States' longstanding authority to regulate matters affecting the health, safety, morals, and general welfare of their citizens." It also argued that states could deny requests if providers are "subject to ongoing investigation," including potentially partisan investigations that demonstrate no wrongdoing.

Within one minute of receiving the draft letter, Brady Brookes, the Deputy Chief of Staff at CMS, forwarded it on to additional political appointees within CMS.

On January 19, 2018, only eight days after the draft letter was first received, the final CMS letter was sent to state Medicaid directors. The final letter cut down the length of the first draft significantly and removed nearly all of the rhetoric explaining the true purpose behind allowing states to terminate unwanted providers. However, it achieved the same result—it rescinded the 2016 letter to try to limit protections for Medicaid beneficiaries seeking access to family planning services.

Request for Documents

For the reasons set forth above, we request that you produce, by February 26, 2018, all documents relating to:

²² *Alliance Defending Freedom*, Southern Poverty Law Center (accessed Feb. 7, 2018) (online at www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom).

²³ *Casey Mattox Biography*, Alliance Defending Freedom (accessed Jan. 22, 2018) (online at <https://web.archive.org/web/20171006234326/https://adflegal.org/detailspages/biography-details/casey-mattox>). Current HHS Deputy General Counsel Matthew Bowman was also employed by the Alliance Defending Freedom and partnered with Mr. Mattox in attempts to discredit Planned Parenthood and limit coverage for voluntary abortions. See, e.g., *Press Release: Planned Parenthood, Univ. of Wis. Lied About Baby Parts, Public Records Reveal*, Alliance Defending Freedom (Jan. 22, 2016) (online at <http://www.adfmedia.org/News/PRDetail/9845>) (including "attorney soundbites" from Bowman and Mattox). Letter from Matthew Bowman and Casey Mattox, Alliance Defending Freedom, et al. to Department of Health and Human Services (June 21, 2016) (online at www.adfmedia.org/files/CDMHCIInvestigationClosureLetter.pdf).

²⁴ *States Leading Washington, D.C. on Defunding Planned Parenthood*, Alliance Defending Freedom (Aug. 14, 2015) (online at www.adflegal.org/detailspages/blog-details/allianceedge/2015/08/14/states-leading-washington-d.c.-on-defunding-planned-parenthood). See also *State Termination of Medicaid Providers*, Alliance Defending Freedom (Sept. 4, 2015) (online at <http://flfamily.org/wp-content/uploads/2015/10/Medicaid-Defunding-Memo-FINAL-1.pdf>).

1. all communications between any employee of HHS and Casey Mattox or any employee of the Alliance Defending Freedom since January 20, 2017;
2. all communications involving any employee of HHS related to the “any willing provider” or “free choice of provider” provisions since January 20, 2017;
3. all meetings between employees of HHS and any nongovernmental individual or entity related to the “any willing provider” or “free choice of provider” provisions since January 20, 2017, including any calendar entry for the meeting, communications about the meeting, and documents exchanged at the meeting;
4. the January 19, 2018, letter from Brian Neale and Alec Alexander to State Medicaid Directors, including all communications regarding the drafting and editing of the letter, all drafts of the letter, as well as any draft of the letter provided to HHS from any nongovernmental individual or entity;
5. all formal or informal reviews by individuals at HHS, CMS, or the Office of Management and Budget to obtain sign-off for the January 19, 2018, letter;
6. all communications, discussions, consultations, or briefings with career HHS or CMS staffers relating to the January 19, 2018, letter;
7. the decisions by Arkansas and Louisiana to deny Planned Parenthood qualification to provide Medicaid Services or the ongoing litigation related to those decisions; and
8. documents and communications related to the proposed rule on “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.”

Finally, I remind you that disclosures from federal employees to Congress are protected by federal law, including 5 U.S.C. § 7211 and 5 U.S.C. § 2302. Congress enacted these statutes to ensure that federal employees could disclose information to Congress without fear of reprisal.²⁵ It is unlawful for HHS or any other federal agency to take any adverse personnel action against a whistleblower in retaliation for a protected disclosure such as the disclosure made to my office in this matter. Thank you for your prompt attention to this request.

Sincerely,



Elijah E. Cummings
Ranking Member

cc: The Honorable Trey Gowdy, Chairman

²⁵ See, e.g., H. Rept. 95-1717 (Conference Report) (1978).