DEPARTMENT OF HEALTH & HUMAN SERVICES

Chief of Staff

Washington, D C 20201

MEMORANDUM TO: Carol Rasco, Assistant to the President for Domestic Policy

FROM: Kevin Thurm

REGARDING: Hyde Amendment Compliance -- Status Report

On May 5, I provided you with a report on the status of states' compliance with the Hyde Amendment provisions of the fiscal year (FY) 1994 DHHS Appropriations Act, which added abortion of pregnancies due to rape or incest to the list of medically necessary mandatory Medicaid services. This memorandum is to update you on the status of the states' implementation, and to apprise you of our plans to proceed with compliance activities in states that have refused to comply with the new provisions.

BACKGROUND AND CURRENT STATUS

For your information, I have attached a summary of our activities to date regarding compliance with the Hyde Amendment (Tab A), a state-by-state status report of non-complying states (Tab B), and an updated chronology of the Hyde Amendment (Tab C).

The Health Care Financing Administration (HCFA) has been working with states to assist them in resolving issues that prevent them from complying with the new provisions. This effort has been helped by decisions from six Federal District Courts upholding HHS' interpretation of the FY 1994 provisions. In addition two Federal Circuit Courts of Appeal and the Supreme Court, in an order signed by Justice Scalia, refused to stay implementation of the lower courts' orders. A copy of Justice Scalia's order is attached (Tab D).

COMPLIANCE PROCESS

As you can see from the chart at Tab B, there are 9 states that continue to be out of compliance despite our best efforts and the consensus of case law supporting our interpretation. If all efforts to get a state to comply fail, HCFA is prepared to proceed with timely compliance action as outlined in the attached document (Tab E). Also attached is draft language for a letter that would be sent to states not in compliance (Tab F).

At this point, we feel that states have had more than a reasonable opportunity to come into compliance. Some states have gone so far as to convene special legislative sessions to resolve this issue favorably. We have heard from a number of these states that their compliance is based on the belief that HCFA will be serious about enforcement action against states that continue not to comply. To accomplish this, HCFA will need to proceed expeditiously to schedule compliance conferences, when it becomes clear that a state has no intention to comply.

Prior to beginning the compliance process, HHS will contact Governors' offices and Congressional staff to alert them about the compliance status of states. An updated set of questions and answers (Tab G) has been prepared by HCFA in preparation for conversations with state officials and the Hill, and to respond to press inquiries.

SUMMARY

The Department intends to take serious and equitable action against states that refuse to come into compliance with the Hyde Amendment. We want to demonstrate our intention to enforce the existing Federal statute to assure that Medicaid beneficiaries receive the full range of medically necessary abortion services to which they are entitled.

We will inform you if it becomes necessary to proceed with formal compliance action against any particular state.

TAB A

HYDE AMENDMENT COMPLIANCE PROCESS

* In February 1994, the Health Care Financing Administration (HCFA) conducted a survey of the HCFA regional offices, the National Council of State Legislatures, and the Alan Guttmacher Institute to identify which states did not cover abortion services as required by the Fiscal Year (FY) 1994 changes to the Hyde Amendment.

* That survey identified 30 states which did not provide abortion services when the pregnancy resulted from rape or incest. These states would have been out of compliance at that time.

* We have been working with states to encourage them to come into compliance since that time. Currently, 9 states remain out of compliance. Attached is a list of these states with the reason for their noncompliance.

* The effort to bring states into compliance has been helped by a number of lawsuits which have been filed challenging HHS' interpretation of the current Hyde Amendment.

  - To date, Federal Circuit Courts in six separate states (Arkansas, Colorado, Louisiana, Michigan, Montana and Pennsylvania) have upheld HHS' position.

  - In addition, two Federal Courts of Appeals and the Supreme Court in an order signed by Justice Scalia have refused to grant stays of the District Court orders.

* Both the House and the Senate have passed versions of the FY 1995 HHS Appropriations Bill which contain Hyde Amendment language that is identical to the language included in the FY 1994 Appropriations Act. The conference committee has completed action on the bill and has retained the Hyde Amendment language from the House and Senate bills. Therefore, it is almost certain that the FY 1995 Hyde Amendment will continue the language in effect for FY 1994.

* Proposed letters which would be sent to states which are out of compliance are attached at Tab F. The content will vary slightly, depending on the reason for non-compliance with the current Hyde Amendment.

TAB B

STATES RECEIVING HYDE COMPLIANCE LETTERS BY TYPE

STATE	TYPE OF DISALLOWANCE LETTER
Alabama	Doesn't Cover Abortions for Rape & Incest
Kansas	Final Implementation Date of 1/1/95
Kentucky	Doesn't Cover Abortions for Rape & Incest
Mississippi	Doesn't Cover Abortions for Rape & Incest
Missouri*	Doesn't Cover Abortions for Rape & Incest
Nebraska	Doesn't Cover Abortions for Rape & Incest
North Dakota	Doesn't Cover Abortions for Rape & Incest
South Dakota	Doesn't Cover Abortions for Rape & Incest
Utah	Doesn't Cover Abortions for Rape & Incest

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* Missouri did not respond to HCFA's April 12 letter. Missouri's letter will contain an alternate second paragraph which reflects the state's failure to respond.

TAB C

HYDE AMENDMENT CHRONOLOGY

FY 1978 - FY 1980:	Hyde Amendment mandated services and provided reimbursement for abortions due to risk to the life of the woman or when a pregnancy resulted from rape or incest.
FY 1981 - FY 1983:	Bauman Amendment attached to Hyde Amendment specifying "that the several states are and shall remain free not to fund abortions to the extent that they in their sole discretion deem appropriate."
FY 1982 - FY 1993:	Rape and incest coverage dropped from the Hyde Amendment.
FY 1994:	Hyde Amendment mandates services and provides reimbursement for abortions for pregnancies resulting from rape or incest, in addition to abortions due to risk to the life of the woman.
December 28, 1993:	HCFA letter sent to state Medicaid Directors notifying them of the enactment of the FY 1994 Hyde Amendment and informing them that state plans must be brought into compliance by March 31, 1994.
March 25, 1994:	HCFA letter sent to state Medicaid Directors reminding them of March 31, 1994 compliance deadline, outlining states' services obligations to Medicaid beneficiaries under the Hyde Amendment, and describing the process for states not in compliance by March 31.
April 12, 1994:	HCFA letter requesting each state to certify that it is in compliance with FY 1994 Hyde Amendment.
May 3, 1994:	Responses from states due to HCFA.
May 5, 1994	Date of previous status report to you.

May - September 1994:	Work with states identified as being out of compliance to resolve issues preventing states' coming into compliance. This effort has been helped by six Federal District Court decisions that upheld DHHS' interpretation of the FY 1994 Hyde provisions.
September, 1994:	As of September 21, 9 states remain out of compliance.
	Congress retains FY 1994 Hyde Amendment language in the HHS FY 1995 Appropriations Bill (conference committee action completed).

TAB D

SUPREME COURT OF THE UNITED STATES

No. A-134

EDWIN EDWARDS, GOVERNOR OF LOUISIANA, ET AL., *v.* HOPE MEDICAL GROUP FOR WOMEN, ET AL.

ON APPLICATION FOR STAY

[August 17, 1994]

JUSTICE SCALIA, Circuit Justice.

Applicants, officers of the State of Louisiana, ask that I stay an order entered by the United States District Court for the Eastern District of Louisiana which enjoins them from enforcing La. Rev. Stat. Ann. §40:1299.34.5 (West 1994) while at the same time accepting federal Medicaid funds pursuant to Title XIX of the Social Security Act, 42 U. S. C. §1396 *et seq.* The District Court stayed its judgment until 5:00 p.m. on August 19, 1994. Yesterday, the Court of Appeals for the Fifth Circuit unanimously denied the applicants' motion for stay pending appeal.

Section 40:1299.34.5 provides in relevant part:

> [N]o public funds . . . shall be used in any way for, to assist in, or to provide facilities for an abortion, except when the abortion is medically necessary to prevent the death of the mother.

The District Court concluded that this statute was inconsistent with what it determined to be the requirement of Title XIX, as modified by the 1994 version of the Hyde Amendment, Pub. L. No. 103-112 §509, 107 Stat. 1082, 1118 (1993), that States participating in the Medicaid program fund medically necessary abortions upon fetuses conceived by acts of rape or incest.

Accordingly, it ordered applicants either to cease enforcing section 40:1299.34.5 or to withdraw from participation in the Medicaid program. *Hope Medical Group for Women* v. *Edwards*, No. 94-1129 (E.D. La. July 28, 1994).

The practice of the Justices has consistently been to grant a stay only when three conditions obtain. There must be a reasonable probability that certiorari will be granted, a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the applicant's position is correct) if the judgment below is not stayed. *Barnes* v. *E-Systems, Inc. Group Hosp. Medical & Surgical Ins. Plan*, ___ U. S. ___, ___, 112 S. Ct. 1, 2 (1991) (Scalia, J., in chambers). Moreover, when a District Court judgment is reviewable by a Court of Appeals that has denied a motion for a stay, the applicant seeking an overriding stay from this Court bears "an especially heavy burden." *Packwood* v. *Senate Select Comm. on Ethics*, ___ U. S. ___, ___, 114 S. Ct. 1036, 1037 (1994) (Rehnquist, C.J., in chambers).

Under this standard, I have no authority to stay the judgment here. The only issue potentially worthy of certiorari is the premise underlying the District Court's decision: that Title XIX requires States participating in the Medicaid program to fund abortions (at least "medically necessary" ones) unless federal funding for those procedures is proscribed by the Hyde Amendment. The Courts of Appeals to address this question have uniformly supported that premise. See *Roe* v. *Casey*, 623 F. 2d 829, 831, 834 (CA3 1980); *Hodgson* v. *Board of County Comm'rs*, 614 F. 2d 601, 611 (CA8 1980); *Zbaraz* v. *Quern*, 596 F. 2d 196, 199 (CA7 1979), cert. denied, 448 U. S. 907 (1980); *Preterm, Inc.* v. *Dukakis*, 591 F. 2d 121, 126–27, 134 (CA1), cert. denied, 441 U. S. 952 (1979). We have already denied certiorari in two of those cases, and it is in my view a certainty that four Justices will not be found to vote for certiorari on

the Title XIX question unless and until a conflict in the Circuits appears.

Accordingly, the application for a stay of the judgment of the District Court for the Eastern District of Louisiana is denied.

TAB F

DRAFT LANGUAGE FOR HYDE COMPLIANCE LETTERS TO THE STATES

For All States:

Effective October 1, 1993, as part of the Health and Human Services (HHS) Appropriations Act, Congress revised the Hyde Amendment to include Federal matching funds for abortions for pregnancies resulting from rape or incest. Federal funding is now available for abortions performed to save the life of the woman or to terminate pregnancies resulting from rape or incest when the claim for such an abortion is paid by the State on or after October 1, 1993. All states that participate in Medicaid must now cover all abortions resulting from rape or incest. The implementation of the Hyde Amendment nationwide by the Department of Health and Human Services is not discretionary. Federal law has supremacy in this instance over State constitutions and laws. The U.S. District Courts in all six states which have ruled on the matter (Arkansas, Colorado, Louisiana, Michigan, Montana and Pennsylvania) have affirmed this view. On August 17, Justice Scalia issued an order in the Louisiana case finding that there was no significant possibility that the District Court's judgement would be reversed or that the Supreme Court would grant certiorari.

For States That Responded to the April 12, 1994 letter:

Your (date) letter to the Health Care Financing Administration (HCFA) indicates that (state) has not yet implemented the congressionally-enacted revision to the Hyde Amendment. Based on your response, I must cite (state) as out of compliance on the compliance report for the quarter ending September 30, 1994. In the near future, we will be calling to schedule a time when HCFA Regional Office representatives can meet with you, or those you designate, to negotiate possible solutions to this non-compliance problem.

We will gladly assist you in any way possible. It is my sincere hope that we can work together to implement the Federal law.

Signed - HCFA Regional Administrator

HCFA's Planned Approach to Ensure Compliance with the Hyde Amendment

Title XIX of the Social Security Act (§ 1904) and regulations (42 CFR 430.35) provide that Federal Medicaid funds, or some part thereof, be withheld from states that are finally determined to have failed to comply with their state Medicaid obligation.

The steps to be taken in the compliance process are as follows:

1. The HCFA Regional Office formally notifies the Medicaid State Agency of apparent non-compliance and needed corrective action.

2. The HCFA Regional Office schedules meetings with the state to discuss means for resolving the issue. This may include discussions, negotiations, technical assistance, etc.

3. Meetings may be held with higher level state officials. These meetings may include an informal compliance conference with the Director of the Medicaid Bureau.

4. If all these efforts fail, a compliance hearing is scheduled. The state, the HHS Regional Office, and the HHS Office of the General Counsel participate at the hearing which may be held before a hearing officer designated by the Administrator.

5. The hearing officer makes a recommendation regarding the state's compliance to the Administrator, who makes the final decision on compliance and the amount of the state's Medicaid funds to be withheld, and informs the state. The Administrator's decision is the final decision of the Department of Health and Human Services.

6. States may appeal the HCFA Administrator's decision to the U.S. Court of Appeals for the circuit in which the state is located. The appeal request must be filed within 60 days after the state receives the HCFA Administrator's decision.

HCFA's intent is not to place further fiscal stress on state budgets, but rather to show firmly that we intend to enforce the law.

It is important to note that, historically, virtually all compliance issues have been resolved by the HCFA regional office without the need for a compliance conference or hearing. Only two informal compliance conferences have been held in recent years. Further, only two compliance hearings have ever been held. HCFA has never had to impose a fiscal penalty on a state for a compliance problem because states have always come into compliance before such action was necessary.

For Missouri (Which Failed to Respond):

Although Missouri did not respond to the Health Care Financing Administration's (HCFA) letter of April 12 requesting the status of Missouri's implementation of the new provisions of the Hyde Amendment, information available to HCFA indicates that Missouri has not implemented the congressionally-enacted revision to the Hyde Amendment. The new provisions mandate that states provide coverage for Medicaid abortions to terminate pregnancies resulting from an act of rape or incest. I am therefore, reporting Missouri as being out of compliance with the new Hyde Amendment provisions on the compliance report for the quarter ending September 30. If this is incorrect, please contact me immediately. In the near future, we will be calling to schedule a time when HCFA Regional Office representatives can meet with you, or those you designate, to negotiate possible solutions to this noncompliance problem.

We will gladly assist you in any way possible. It is my sincere hope that we can work together to implement the Federal law.

Signed - HCFA Regional Administrator

Revised Paragraph Two for Inclusion in the Kansas Letter:

Although the response from Kansas to the Health Care Financing Administration's letter of April 12 stated that Kansas has implemented the congressionally-enacted revision to the Hyde Amendment, we believe that the timetable for coming into compliance provided in the State's letter prohibits the Health Care Financing Administration from finding Kansas in full compliance at this time. Our specific concern relates to the following statement in the Kansas letter: "Consumer and provider notices and claims payment processes should be in place no later than January 1, 1995." Since this date is more than a year after the FY 1994 Hyde provision was enacted, it appears that the States may not be in compliance during any part of FY 1994. I am, therefore, reporting Kansas as being out of compliance with the new Hyde Amendment provisions for the quarter ending September 30, 1994. If you believe our interpretation of your letter is incorrect, please contact me immediately.

We will gladly assist you in any way possible. It is my sincere hope that we can work together to implement the Federal law.

Signed - HCFA Regional Administrator

TAB G

HYDE AMENDMENT QUESTIONS & ANSWERS

Interpretation of the Language

Question: **How does the Hyde Amendment (1994 Appropriations Act) affect Medicaid?**

Answer: Congress revised the Hyde Amendment under the 1994 Appropriations Act to include Federal matching funds for abortions for pregnancies resulting from rape or incest. (For several years, the Hyde Amendment had prohibited the use of Federal funds for all abortions except when the life of the mother would be threatened taking the pregnancy to term.)

With the availability of Federal matching, state Medicaid plans are required to cover all abortions for pregnancies resulting from rape or incest.

Under this congressional amendment, poor women who are victims of rape or incest and impregnated as a result of these crimes can now receive abortion services.

States may continue to require reasonable reporting standards verifying rape or incest.

Question: **What is the basis for HCFA's interpretation of the Hyde Amendment (1994 Appropriations Act) as requiring all states to cover abortions resulting from rape or incest?**

Answer: Effective October 1, 1993, as part of Public Law 103-112, the Department of Health and Human Services Appropriation bill contained a revision of the Hyde Amendment pertaining to Federal funding of abortions under the Medicaid program.

The Department's conclusion that state Medicaid programs are required to match the terms of the Hyde Amendment in providing funds for abortions was made in light of the terms of the Medicaid statute, unanimous case law directly on point, and the legislative history of the Hyde Amendment.

The issue: A potential conflict in state and Federal law exists because a number of state statutes or regulations limiting the use of state funds to pay for abortions are more restrictive than the terms of the Hyde Amendment.

The answer -- past and present: This situation has arisen before. Under pre-1981 versions of the Hyde Amendment, several lawsuits were brought to challenge state funding limits that were more restrictive than the then-current version of Hyde.

In those cases, every U.S. Court of Appeals that considered the issue ruled that the Federal statute, as modified by Hyde, mandated coverage of those abortions for which Federal reimbursement was provided. The case law is clear and unanimous on this point.

These rulings were based on the principle that under the Supremacy Clause of the Constitution, Federal law preempts state law when there is a direct conflict. Stated otherwise, if a state law is more restrictive than Federal law regarding medically necessary abortions, the Federal law must prevail.

Similarly a number of lawsuits have been filed challenging HHS' interpretation of the current Hyde Amendment. To date, Federal District Courts in six separate states (Arkansas, Colorado, Louisiana, Michigan, Montana and Pennsylvania) have upheld HHS' position. In addition, two Federal Courts of Appeals and Justice Scalia of the Supreme Court have refused to grant stays of the Circuit Court orders.

The Bauman Amendment: There was a time when Congress intended to allow States the option not to match the terms of the Hyde Amendment. It acknowledged that specific statutory language was necessary and enacted such language.

For 3 years, from FYs 1981 to 1983, Congress adopted what became known as the Bauman Amendment which said that states were free not to fund abortions to the extent that they in their sole discretion deemed appropriate. The congressional initiative to append this language for 3 years was significant. But the act of not including it in the years that followed sends an unmistakable message of congressional intent that the Federal law take precedence.

Question: Since the Hyde Amendment has always been viewed as legislation restricting the variety of abortion cases which can qualify for Federal funding, why does the Administration believe that this language now dictates the variety of abortion cases which states must pay for?

Answer: The Hyde Amendment is legislation that, in concept, prohibits Medicaid funding for any abortions. It then sets out exceptions to the funding prohibition, and these exceptions continue to be mandatory Medicaid services. In the absence of Hyde, all medically necessary abortions would be mandatory Medicaid services as part of medically necessary physician services.

Question: **A number of members of the Congress claim to have been misled into voting for this amendment having been assured this provision would be optional. Can you speak to that?**

Answer: I can not speak to what private discussions may or may not have occurred during the deliberations on the amendment. I can only say that the written legislative history fully supports HHS' position.

In addition, both the House and the Senate have passed versions of the FY 95 HHS Appropriations Bill, and both versions contain Hyde Amendment language identical to the FY 94 language. This language was retained by the conference committee. Therefore, it is almost certain that the FY 95 Hyde Amendment will retain the language of the FY 94 amendment.

Guidance to States

Question: **When your letter indicates that states are required to cover medically necessary abortions for victims of rape and incest, are you saying that even if state law prohibits payments for these abortions, the state must pay anyway through its Medicaid program?**

Answer: Yes. We believe this is consistent with the requirement of the Federal law.

Question: What makes you think that every case of rape or incest meets the criteria of "medically necessary?"

Answer: Our policy to mandate payment for these services is based on the language of this year's Hyde Amendment and on the written history of congressional debate. The congressional record clearly shows congressional intent that abortions of pregnancies resulting from rape or incest are medically necessary under the law as medically necessary physician services.

The Compliance Process

Question: **What is the authority for the Medicaid compliance process?**

Answer: Section 1904 of the Social Security Act (the Act) authorizes the Secretary, after reasonable notice and opportunity for a hearing, to limit or deny payments to the state when it is determined that:

(1) the state plan no longer complies with the provisions of 1902 of the Act, or

(2) that in the administration of the plan there is a failure to comply substantially with any of those provisions.

The implementing regulations are at 42 CFR 430.35.

The new Hyde provision expands abortion services under §1902(a)(10) to include abortions performed to terminate pregnancies resulting from rape or incest.

Question: **How many compliance issues has HCFA pursued to a Bureau conference? A formal hearing?**

Answer: Historically, virtually all compliance issues have been resolved by the HCFA regional office without the need for a compliance conference or hearing. In recent years, two informal compliance conferences have been held. Only two formal compliance hearings have ever taken place.

Question: **How many times has HCFA imposed a fiscal penalty?**

Answer: None; it has never been necessary. States have always come into compliance before such action was necessary.

Question: If there is a finding of failure to comply after a notice and opportunity for a hearing, must the Administrator impose a fiscal penalty?

Answer: Yes, 42 CFR 430.35 provides that if the Administrator makes a finding of noncompliance that the state is notified:

(1) that no further payments will be made to the state (or that payments will be made only for those portions or aspects of the program that are not affected by the noncompliance); and

(2) that the total or partial withholding will continue until the Administrator is satisfied that the state's plan and practice are, and will continue to be, in compliance with Federal requirements.

42 CFR 430.104 provides for the scope of the decision, allows for consultations, and gives requirements on the effective date of the decisions.

Question: **Does the state have a right to appeal the Administrator's decision?**

Answer: Yes. The Administrator's decision is the final decision of the agency. However, if a state chooses to appeal the decision, it must file a petition in the U.S. Court of Appeals for the appropriate circuit within 60 days.

Question: **If Federal Medicaid funds are withheld, is there provision for retroactive restoration of those funds after the state comes into compliance?**

Answer: No provision is made for retroactive restoration of withheld Federal funds to a state (unless, of course, the Court of Appeals subsequently overturns our compliance decision).

Question: **What amount of money is commensurate with the failure to comply in this case?**

Answer: The Administrator, acting for the Secretary, has broad discretion to determine the penalty amount (should it be necessary to impose a penalty). The Administrator would determine the amount to be withheld based on the circumstances of each case and the seriousness of the effects of the noncompliance on the implementation of the program.

Question: **How long will it be before HCFA takes the first action against a State that is out of compliance?**

Answer: HCFA has completed the process of verifying that States have made the necessary changes required to implement the FY '94 Hyde Amendment language. HCFA regional offices are prepared to release notices to states which have not yet come into compliance officially notifying them of their noncompliance. We will then continue to work with states to help them resolve problems they are having in implementing the new provisions.

Question: **How long will it take HCFA to actually withhold money from any state?**

Answer: First, I would like to emphasize that our purpose is not to withhold funds, but rather to encourage states to comply with the new provisions. If any state refuses to comply with the new provisions and is unwilling to negotiate a means for coming into compliance, we would have no choice but to proceed to a formal compliance hearing. No money would be withheld from states without full due process.

Question: **Will HCFA target certain states for beginning compliance action?**

Answer: Our most immediate interest is in seeing that women who seek abortions due to rape or incest receive that service. We will first direct our efforts to enforce compliance in those states refusing to fund abortions required by the Hyde Amendment from any source, whether Medicaid funds or all State funds. For states that are not in compliance but are working to come into compliance, HCFA will provide assistance they request.

Question: **Isn't taking health-care funding back from states contrary to your stated goals of helping the nation's most vulnerable populations?**

Answer: It is HCFA's responsibility to use all methods available to us to assure that our most vulnerable populations receive the services to which they are entitled. This includes abortions for rape and incest for women who have been abused. We will work with states to try to avoid the need to take fiscal penalties.

Question: What is the status of the FY '95 HHS Appropriations Bill?

Answer: Both the House and the Senate have passed versions of the FY '95 HHS Appropriations Bill. Both the House and Senate versions of the bill contain Hyde Amendment language which is identical to the language included in the FY '94 Act. The conference committee has completed action on the bill and has retained the Hyde language as passed by both houses. Therefore, it is almost certain that the FY 95 Hyde Amendment contain the same language as in effect in FY 94.

Monitoring

Question: **What methods will you use to ensure that only the cases described in the new Hyde Amendment language will be paid for with Federal funds?**

Answer: HCFA is asking that the states develop their own methods to assure that all claims for Federal funding qualify under the Hyde Amendment requirements. HCFA will then use its audit authority if it becomes necessary to review particular claims for Federal matching.

Question: **Do you have any estimates of how many additional abortions will be paid for by Medicaid as a result of this policy?**

Answer: That is a very difficult estimate to make. Some states already pay for Medicaid beneficiaries' abortions with 100% state funds and do not report those numbers. These states are likely to begin submitting claims for the Federal funding share for abortions for rape or incest. We expect that under the revised Hyde Amendment, Medicaid would provide coverage of up to 1,000 additional abortions annually nation-wide.

Question: **How many more abortions are going to be performed because of this policy?**

Answer: Again, that's a hard question to answer, but since some states are already paying claims for this service, we don't believe the numbers will be significant.

Question: What makes you think that physicians and beneficiaries won't abuse the latitude given on reporting for victims of rape or incest?

Answer: We are not overturning any requirement that the physician or patient needs to report in accordance with state law. Physicians must document in the medical record the circumstances which caused them to use the waiver provision. This documentation is subject to review should the issue of improper use of the waiver arise.

Question: How would you define when it is appropriate to waive the reporting requirements?

Answer: That is a judgment for the physician to make in light of the individual's mental and physical circumstances. We would not supersede that judgment.

MEMORANDUM

TO: The Small Lobby Task Force
FROM: Jo Blum and Allison Herwitt, NARAL
Diana Zuckerman, Planned Parenthood Federation of America
RE: Medicaid Funding of Abortions in Cases of Rape and Incest

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Please find attached the proposed "compromise" on the issue of Medicaid funding of abortions in cases of rape and incest.

There is some confusion about what this provision will do. It appears that this provision will still allow states to opt not to provide abortion services in cases of rape and incest. It does not appear to maintain current law which makes Medicaid coverage of abortions in these circumstances mandatory.

The key to this provision is the introduction, which states:

> After the section in the bill permitting States not to fund abortions (as amended by the Istook amendment), insert the following new section . . . .

As you know, the Istook provision allows states not to fund abortions except in cases of life endangerment. By maintaining and not striking the Istook amendment, this provision allows states to opt out. Only states that choose to provide Medicaid services for abortion in cases of rape and incest will receive reimbursement from the federal government for 100% of the cost. Nothing would require states to provide the Medicaid services.

Given this reading of the proposed language, we do not believe that it is acceptable. Simply put, this compromise appears to be no compromise at all. States will apparently still be able to opt not to provide abortions in cases of rape and incest under Medicaid.

P:\NLW\MEDICAID\FMAP.APP
[Labor, HHS FY96]

H.L.C.

Amendment to H.R. ____, as Reported (Labor, HHS, and Education Appropriations, 1996)

Offered by ____

After the section in the bill permitting States not to fund abortions (as added by the Istook amendment), insert the following new section:

SEC. ____. Notwithstanding any other provision of title XIX of the Social Security Act, for quarters beginning on or after October 1, 1993, the Federal medical assistance percentage applicable under such title with respect to medical assistance which consists of abortions furnished where the pregnancy is the result of an act of rape or incest shall be 100 percent.

Amendment to H.R. ____, as Reported (Labor, HHS, and Education Appropriations, 1996)

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E X E C U T I V E O F F I C E O F T H E P R E S I D E

02-Aug-1996 05:29pm

TO: Carol H. Rasco
TO: Martha Foley
TO: Nancy-Ann E. Min
TO: Jennifer L. Klein

FROM: Lyndell Hogan
Domestic Policy Council

SUBJECT: Hyde Amendment Background/Response Requested

To: Carol Rasco
Martha Foley
Nancy-Ann Min
Jennifer Klein

From: Jeremy Ben-Ami
Lyn Hogan

Date: August 2, 1996

We are writing this to ensure we have an accurate shared understanding of the Administration's record regarding the Hyde amendment. Please review the following and let us know if any changes need to be made.

Thank you.

Hyde Amendment Background

First passed in 1977, the Hyde amendment barred the use of federal Medicaid money to pay for abortions for the poor except in cases where the life of the mother was threatened. The Hyde amendment does not prevent states from using their own funds for abortions. From FY 1978 to FY 1981 the Hyde amendment provided for reimbursement for abortions when a pregnancy resulted from rape or incest. The rape or incest provision was dropped from the Hyde amendment from FY 1982 until 1993.

In May 1993, the President supported a repeal of the Hyde amendment by deleting from the FY 1994 budget (and all budgets following) the Hyde language of past years prohibiting federal funding for abortion. Instead, the Administration committed itself to working with the Congress to develop a response to this problem consistent with federal and state law.

The Administration planned on offering compromise language that would in effect set a floor for states by guaranteeing Medicaid funding in cases of rape, incest, or in cases where the life of the mother was threatened, but permit states, at their option, to use federal and state dollars to fund abortions in other circumstances.

However, such language was rebuffed by both pro-choice and pro-life forces, so the Administration chose not to offer it. Pro-choice advocates believed they could win a total repeal of the Hyde amendment, while pro-life advocates believed they might eliminate the rape and incest exceptions.

Instead, effective October 1, 1993, as part of P.L. 103-112, Congress enacted a more limited expansion of the Hyde amendment requiring states to cover abortions in the case of rape, incest and when the life of the woman is in danger, and provided no

option for federal reimbursement for broader coverage.

On December 28, 1993, the Director of the Medicaid Bureau of the Health Care Financing Administration (HCFA) wrote to state Medicaid directors notifying them of the terms of the Hyde amendment in the FY 1994 appropriations bill as interpreted by HHS. The HHS letter said to states that, "...state Medicaid programs are compelled to match the terms of the Hyde amendment...."

In August 1995, the House attempted to repeal this change by allowing states to deny Medicaid funding for abortions for victims of rape and incest. An August 2, 1995 SAP said, "The Administration strongly opposes any effort to curtail the ability of poor women to choose abortion in cases of rape or incest and urges the House to delete this provision."

The most recent Administration statement on the Hyde amendment is in title V of the general provisions of the FY '97 budget. It says the following: "The continuing resolution funding the Department of Health and Human Services through March 15, 1996, applies the terms and conditions of the FY 1995 appropriations bill to the Medicaid program, including a provision restricting funding for abortions. As with its 1996 Budget, the Administration proposes to delete this provision and will work with Congress to address this issue."

In sum, the Administration's official position is that the Hyde amendment should be repealed, and that the Administration would work with Congress to develop a response to develop a response to this problem consistent with federal and state law. However, until Hyde is repealed, the Administration's current policy requires states to fund abortions in the case of rape, incest and when the life of the woman is in danger. (Are we characterizing the Administration's position correctly? Is current policy a requirement for states to fund abortions in the case of rape, incest and when the life of the woman is in danger?)

Reference documents:

--Budget of the United States Government, Appendix, FY 1995, p. 631.
--Budget of the United States Government, Appendix, FY 1996, p. 687.
--Letter to Secretary Shalala from Rep. Henry Hyde, May 7, 1993.
--Draft letter to Rep. Henry Hyde from Secretary Shalala, August 10, 1993.
--Memo to George Stephanopoulos from Nancy-Ann Min, April 1, 1993.
--Memo to the President from Bill Galston, May 20, 1993.
--Memo to the President from Bill Galston, September 17, 1993.
--Memo to Christine Varney from Kevin Thurm, December 23, 1993.
--Memo from the office of the Secretary of Health and Human

Services to Nan D. Hunter, January 18, 1994.
--Memo to the President from Bill Galston, January 28, 1994.