

## MEMORANDUM

TO: Interested Parties  
FR: National Women's Law Center  
RE: The House Judiciary Committee Report on HR 3 Reflects an Attempt to Narrow the Rape Exception Even Though the Statutory Term "Forcible" Was Removed and Misrepresents Longstanding Policy on the Rape Exception

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In January, Representative Chris Smith introduced H.R. 3, a bill that punishes private health decisions by raising taxes on individuals and small businesses with insurance plans that include coverage of abortion and makes permanent the ban on federal funding for abortion, often known as the Hyde Amendment. H.R. 3, as introduced, modified the longstanding rape exception to the Hyde Amendment by adding the term "forcible" before the word rape, thereby excluding rape that results from non-consent, or when a woman just says no, and, depending on how broadly or narrowly the term is construed, rape accomplished through threats of non-physical harm; previous violence coercing a woman to have sex, such as a serial abuser who demands sex; rape committed against an individual under the influence of drugs or alcohol at the time of the rape; and statutory rape, among others. In response to public outcry over this attempt to narrow the rape exception, the term "forcible" was deleted from the bill's text.

However, despite the fact that the term "forcible" was dropped from the bill's text, proponents of the bill still intend the term "rape" to exclude victims who were not raped "forcibly." The House Judiciary Committee Report states that "reverting to the original Hyde Amendment language should not change longstanding policy." According to proponents of H.R. 3, the intent of the bill is to narrow the rape exception to apply only to victims of "forcible" rape, whether or not the "forcible" modifier is in the bill's text.

Moreover, the House Judiciary Committee Report misrepresents the "longstanding policy" it specifically cites. According to the Report, the Hyde Amendment language does "*not* allow the Federal Government to subsidize abortions in cases of statutory rape. The Hyde Amendment has not been construed to permit Federal funding of abortion based solely on the youth of the mother ..." <sup>1</sup> This is false. A 1978 regulation implementing the Hyde Amendment made clear that the term "rape" included statutory rape. <sup>2</sup> In addition, states include statutory rape in their interpretations of the "rape" exception. <sup>3</sup> Every state that cites to a specific part of its criminal code to identify which crime victims are entitled to Medicaid funding for pregnancy termination *specifically includes* victims of statutory rape. <sup>4</sup> And in the states that just use the term "rape" or "sexual assault" and do not include explicit statutory references in their State Medicaid manuals, statutes or administrative codes to define rape for Medicaid purposes, the terms can be interpreted as being coterminous with state criminal code, and "most states have statutory rape and other sex offense statutes which criminalize sexual activity with minors who fall within a specified age range or are under a specified age." <sup>5</sup>

**In sum, though the proponents of H.R. 3 deleted the term "forcible" from the bill's text, the House Judiciary Committee Report restores the proponents' intended meaning: that only victims of "forcible" rape can be included in the bill's rape exception, thereby narrowing longstanding policy and excluding some of the most vulnerable victims from the abortion care they need.**

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<sup>1</sup> H.R. Rep. No. 112-38, at 28, *available at* [http://democrats.rules.house.gov/112/text/112\\_hr3\\_rpt.pdf](http://democrats.rules.house.gov/112/text/112_hr3_rpt.pdf).

<sup>2</sup> A 1978 regulation implementing the Hyde Amendment included discussion in the Federal Register about whether statutory rape is included in the term “rape.” In its response to Comments, the Department of Health, Education and Welfare addressed comments that “criticized the regulations for including statutory rape within the exception permitting Federal funding of abortions for victims of rape.” The Department, in relevant part, responded:

This interpretation was clearly mandated by section 101 ... Nothing in these words limits such funding to victims of forced rape. In addition, Congress considered, and failed to enact, a proposal that would have expressly limited the availability of Federal funding of abortions to victims of “forced” rape ....

Thus, the failure to use the word “forced” in section 101 when referring to rape is conclusive evidence that Congress intended funding to be available for victims of statutory, as well as forced, rape ....

*See* Federal Financial Participation in State Claims for Abortions, 43 Fed. Reg. 31,873 (July 21, 1978).

<sup>3</sup> The Health Care Financing Administration (HCFA) issued guidance to State Medicaid Directors, shortly after the rape and incest exceptions were restored to the Hyde Amendment in 1993, that “The definition of rape and incest should be determined in accordance with each State’s own law” in the Medicaid program. Letter from Sally K. Richardson, Director, Medicaid Bureau, Dep’t Health & Human Servs. to State Medicaid Director 2 (Dec. 28, 1993). As such, state interpretations of “rape” in laws and regulations implementing bans on public funding for abortion and in Medicaid provider manuals govern here.

<sup>4</sup> There are four states that refer to specific criminal statutes to define which rape victims are entitled to Medicaid funding for abortion. Each state includes those who are victims due to their age. Alaska’s regulations state that medical assistance funding is available where pregnancy resulted from “a crime of sexual abuse of a minor under AS-11.41.434-11.41.440.” Alaska Admin. Code tit. 7, § 47.290 (2010). Arkansas’s Medicaid manual states that coverage is available “for victims of rape ... defined under Ark. Code Ann. § 5-14-103.” Memorandum from the Div. of Med. Servs., Ark. Dep’t Human Servs. to Ark. Medicaid Provider 3 (Aug. 1, 2004). The Arkansas code referenced by the Medicaid manual defines rape as including sexual intercourse with another person who is less than 14 years of age. Ark. Code Ann. § 5-14-103 (2010). Florida’s Medicaid manual states that Medicaid reimburses “When the pregnancy is the result of rape as defined in section 794.011, F.S.” Fl. Medicaid, Agency for Health Care Admin., Hospital Services Coverage and Limitations Handbook 2-3 (June 2005). The Florida statute referenced by the manual includes penetration by a person 18 years of age or older of a person less than 12 years of age. Fla. Stat. § 794.011 (2011). Wyoming’s statute provides funding when the pregnancy is the result of “sexual assault as defined by W.S. 6-2-301.” Wyo. Stat. Ann. § 35-6-117 (2011). The statute defines sexual assault as including “sexual abuse of a minor” crimes. Wyo. Stat. Ann. § 6-2-301 (2010) (“‘Sexual assault’ means any act made criminal pursuant to W.S. 6-2-302 through 6-2-319”); Wyo. Stat. Ann. § 6-2-314 through 317 (degrees of “Sexual abuse of a minor.”).

<sup>5</sup> Susan M. Kole, Statute Protecting Minors in a Specified Age Range from Rape or Other Sexual Activity as Applicable to Defendant Minor Within Protected Age Group, 18 A.L.R.5th 856 (1994).