Office of the General Counsel
3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Submitted Electronically

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Joshuah Marshall
Senior Advisor to the Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

Subj: Removal of Outdated Regulations
RIN 0917-AA24

Dear Mr. Marshall:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the proposal, published by the Indian Health Service (IHS) at 89 Fed. Reg. 896 (Jan. 8, 2024), to rescind IHS regulations on abortion currently codified at 42 C.F.R. §§ 136.51 through 136.57.

The sole rationale provided by IHS for rescinding the regulations is that they do not mirror current law regarding the funding of abortion. 89 Fed. Reg. at 897. For several reasons, this rationale does not justify the wholesale rescission of section 136.51 through 136.57, or even the one regulation (section 136.54) that treats the issue of abortion funding most specifically. The proposal's targeted focus on abortion also seems to us to miss the forest for the trees. The American Indian and Alaska Native maternal mortality and morbidity and infant mortality rates continue to be disproportionately high.[1] In our view, IHS's focus should be on continuing to improve maternal and infant *health*, not eliminating regulatory provisions that ensure compliance with conditions that Congress has established for the funding of abortions.

[1] Maternal mortality and severe morbidity rates among American Indian and Alaska Native women are more than twice as high as among white women. *See* Kozhimannil KB, Interrante JD, Tofte AN, Admon LK, *Severe Maternal Morbidity and Mortality Among Indigenous Women in the United States*, Obstet. Gynecol. 2020 Feb;135(2):294-300, at www.ncbi.nlm.nih.gov/pmc/articles/PMC7012336/; Petersen EE, Davis NL, Goodman D, et al., *Racial/Ethnic Disparities in Pregnancy-Related Deaths — United States, 2007-2016*, MMWR Morb Mortal Wkly Rep 2019;68:762-765, at www.cdc.gov/mmwr/volumes/68/wr/mm6835a3.htm?s_cid=mm6835a3_w#T1_downc; *see also* Brian Patterson, *Native American Maternal and Child Health Crisis: American Indian and Alaskan Native Health Disparities in Ohio*, The IHS Primary Care Provider (March 2016), at www.ihs.gov/sites/provider/themes/responsive2017/display_objects/documents/2010_2019/PROV0316.pdf. The infant mortality rate is almost twice as high for American Indian and Alaska Native infants than for white infants. *See* Dept. of Health & Human Services, Office of Minority Health, *Infant Mortality and American Indians/Alaska Natives*, at https://minorityhealth.hhs.gov/infant-mortality-and-american-indiansalaska-natives.

1. **<u>IHS should not eliminate funding limitations for abortion or the related requirement of physician certification</u>.**

Congress has directed that IHS funds may be used for abortion under certain specified conditions. 25 U.S.C. § 1676. Section 1676 permits IHS funds to be used for abortion subject to the same limitations on funding set out in the applicable appropriations for the Department of Health and Human Services (that is, the Hyde Amendment) or elsewhere in federal law.

The applicable IHS regulation (42 C.F.R. § 136.54) states:

> 136.54. LIFE OF THE MOTHER WOULD BE ENDANGERED.
>
> Federal funds are available for an abortion when a physician has found and so certified in writing to the appropriate tribal or other contracting organization, or Service Unit or Area Director, that "on the basis of my professional judgment the life of the mother would be endangered if the fetus were carried to term." The certification must contain the name and address of the patient.

To be sure, there is a difference between section 136.54 and the current version of the Hyde Amendment. The former does not allow funding for abortion in cases of rape and incest, and the latter does. We believe that section 136.54 should be retained, however, because the Hyde Amendment does not *require*, it only *permits*, funding of abortion in cases of rape and incest.[2] As a policy matter, the federal government should not fund the direct taking of innocent human life, even in the most difficult of circumstances. What is needed is not a revised policy expanding abortion funding among indigenous populations, but steps to improve their maternal and infant health and to support their well-being. For these reasons, the preferred course would be to retain section 136.54 in its current form.

If, however, IHS decides to formalize its practice of funding abortion[3] in cases of rape and incest, this can be accomplished without rescinding section 136.54 in its entirety. In lieu of rescission, section 136.54 could be amended to read as follows:

> 136.54. RESTRICTIONS ON USE OF FEDERAL FUNDS FOR ABORTION.
>
> Federal funds are available for an abortion when a physician has found and so certified in writing to the appropriate tribal or other contracting organization, or Service Unit or Area Director, that "on the basis of my professional judgment, a statutory condition for such funding, referenced in 25 U.S.C. § 1676, is satisfied." The certification must contain the name and address of the patient.

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[2] "[A]lthough the IHS is obligated under the Snyder Act [25 U.S.C. § 13] to spend its funds to promote 'Indian health,'" the Department of Health and Human Services (HHS), of which IHS is a part, recognizes that the Act "does not create an independent legally enforceable right to compel the IHS to provide abortion services." 47 Fed. Reg. 4016, 4017 (Jan. 27, 1982) (preamble to HHS final rule on the provision of abortion services by IHS). Thus, IHS has no statutory obligation to pay for abortions.

[3] IHS's current funding of abortions in cases of rape and incest is unlawful because the existing IHS regulations permit abortion funding only in cases where the mother's life is at risk. There is no conflict between the existing regulations and the Hyde Amendment because, as noted above, Hyde does not require abortion funding.

Furthermore, there is no reason to rescind the certification requirement in section 136.54, nor does IHS provide any reason for rescinding it. The certification requirement is important because it ensures compliance with the funding limitations prescribed by Congress. *See* 42 C.F.R. §§ 441.203, 441.206 (requiring physician's certification that mother's life would be endangered as a condition for the receipt of federal funds for an abortion). It therefore should be retained, not rescinded.[4]

2. <u>IHS should not rescind the other regulations</u>.

IHS also proposes to rescind six other regulations (sections 136.51, 136.52, 136.53, 136.55, 136.56, and 136.57). There is no reason, and IHS provides none, to rescind these regulations. In one case, noted below, the regulation should be revised. In all other respects, the regulations should be retained in their current form.

Section 136.51 simply states what the regulations apply to. Rescission of section 136.51 would create an ambiguity as to the other regulations' applicability. If IHS accepts our recommendation to retain the regulations, then Section 136.51 should likewise be retained, not rescinded.

Section 136.52 defines the word "physician," thus explaining what that term means as used in section 136.54. Rescission of section 136.52 could create an ambiguity as to the meaning of that term as used in section 136.54 as long as the latter is retained in some form. Therefore, if section 136.54 is retained in some form, then section 136.52 should likewise be retained, not rescinded.

Section 136.53 states that none of the funds in programs described in section 136.51 may be used for purposes prohibited under section 136.54. In this fashion, section 136.53 goes hand in hand with section 136.54 and, like section 136.54, should be retained, not rescinded.

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[4] Indeed, if IHS decides to pay for abortions in cases of rape and incest, it should, in our view, require compliance with the reporting requirements that were put into place under the Clinton administration, requirements that remained in place from 1996 until their rescission in 2022. *See* Director of IHS to Area Directors and Associate Directors, Special General Memorandum 96-01 (Aug. 12, 1996) (requiring, among other things, that the rape or incest be reported within prescribed time frames to a law enforcement agency, a health care facility, or a health care program, as a condition of funding for an abortion), at www.ihs.gov/ihm/sgm/1996/sgm-9601/. IHS should also require, as the Clinton administration guidelines did, that the abortion provider "comply with State law regarding the provision of services to minors without parental consent" as a condition of funding. *Id*. All of these requirements should be written into the regulations, and not relegated to sub-regulatory guidance.

Although the issue is not taken up in this particular regulatory proposal, it should be noted that *funding* limitations on abortion that are established by Congress do not trump state or tribal laws as to what abortions are *permissible*. By way of example, the Hyde Amendment, which currently allows abortion funding in cases of rape or incest, has never been interpreted to permit post-viability abortions even in cases of rape of incest in states that forbid post-viability abortions. Thus, the Hyde Amendment is a funding provision; it is not an abortion regulation. Contrary to this longstanding understanding of the Hyde Amendment, IHS Circular 22-15 (June 30, 2022) incorrectly states that "state law does not apply to IHS authority to *perform* abortions" (emphasis added). Separate from this rulemaking, the Circular should be revised to eliminate that incorrect statement and any similar suggestion. Failure to make this correction would be a violation of state and (by potential extension) tribal sovereignty and would infringe upon their authority to protect mothers and children by limiting abortion.

Section 136.55 states as follows:

> § 136.55 DRUGS AND DEVICES AND TERMINATION OF ECTOPIC PREGNANCIES.
>
> Federal funds are available for drugs or devices to prevent implantation of the fertilized ovum, and for medical procedures necessary for the termination of an ectopic pregnancy.

There are licit treatments for ectopic pregnancy. Such treatments do not constitute an abortion and therefore are not subject to Hyde limitations. Because such treatments are available for ectopic pregnancy, federal funds may not be used for interventions for such pregnancies that constitute a direct abortion. In addition, section 136.55 states that federal funds may be used for drugs or devices to prevent implantation of a fertilized ovum. That language, in our view, is appropriately rescinded on policy grounds because its inclusion permits funding for the taking of an innocent human life. For the above reasons, section 136.55 should be revised to read as follows:

> § 136.55 DRUGS AND DEVICES AND TREATMENT FOR ECTOPIC PREGNANCIES.
>
> Federal funds are available for medical treatments for an ectopic pregnancy.

Section 136.56 requires retention for three years of the certification records required by section 136.54. Section 136.56 furthers the important interest of ensuring access to records that relate to, thereby ensuring compliance with, conditions prescribed by Congress for use of federal funds for abortion. Therefore, if section 136.54 is retained in some form, then section 136.56 should likewise be retained, not rescinded.

Section 136.57 ensures the confidentiality of records required under this Part. Its rescission would compromise the confidentiality of those records. Section 136.57 should therefore be retained, not rescinded, as long as other regulations are left in place that require the creation or maintenance of records under this Part.

Conclusion

We urge IHS to take the following steps:

- ***Retain section 136.54 in its current form.***
- ***Revise section 136.55 as indicated above.***
- ***Retain the other regulations in their current form.***

If IHS decides, however, to permit the funding of abortions in cases of rape and incest, then section 136.54 should be revised to track the statute (i.e., 25 U.S.C. § 1676).

In any event, IHS should require compliance with (a) the reporting requirements put into place by the Clinton administration and (b) state and other laws that prohibit abortion or place conditions on the performance of an abortion, including laws that require parental involvement. *See* note 4 *supra*. These conditions should be written into the regulations.

Respectfully submitted,

William J. Quinn
General Counsel

Michael F. Moses
Director, Legal Affairs