

Congress of the United States
Washington, DC 20515

October 11, 2022

The Honorable Denis R. McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Ave. N.W.
Washington, D.C. 20420

RE: Comments on Interim Final Rule: Reproductive Health Services, 87 FR 55287 (September 9, 2022) (RIN: 2900-AR57, Docket ID 2022-19239)

Secretary McDonough,

We write in strong opposition to the Department of Veteran’s Affairs (VA) Interim Final Rule (IFR), “Reproductive Health Services,” 87 FR 55287, RIN: 2900-AR57, published in the Federal Register on September 9, 2022. The IFR directly violates the VA’s explicit statutory prohibition on abortion that has governed the VA for more than 30 years and has never been repealed.

As Members of Congress, we have a unique Constitutional interest in ensuring the law, as written by Congress, is followed and implemented by the Executive Branch. Rather than follow the law, the IFR purports to immediately authorize the VA to provide taxpayer-funded abortions and abortion counseling to veterans, as well as eligible spouses and dependents, in defiance of both federal and state law. Moreover, the IFR fails to demonstrate a “good cause” to forgo notice and comment procedures for rulemaking required under the Administrative Procedure Act.

The VA does not have the power to override an Act of Congress to impose its preferred policy of taxpayer-funded abortion on demand until birth. Tragically, the IFR is the latest in a long string of actions the Biden Administration has taken to promote the killing of unborn children through abortion in the aftermath of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*.

We demand that you immediately rescind the IFR and revert the VA’s policies to the long-standing prior regulation excluding abortion and abortion counseling from the VA’s medical benefits package as well as the CHAMPVA program, in conformity with the law and Congressional intent.

The IFR directly contradicts explicit statutory prohibitions on abortion services at the VA.

Section 106(a) of the Veterans Health Care Act of 1992 (VHCA) restricts the VA from providing abortions: “In furnishing hospital care and medical services under chapter 17 of title 38, United States Code, the Secretary of Veterans Affairs may provide to women . . . [g]eneral reproductive health care . . . but not including under this section . . . abortions.”¹ So while the VA claims that access to abortion is “needed,”² Congress has unequivocally prohibited it. Consistent with the 1992 law, the VA’s former regulations governing its medical benefits package

¹ Section 106(a)(3) of the Veterans Health Care Act of 1992, Public Law 103-585, November 4, 1992, 106 Stat. 4947), 38 U.S.C. 1710 note.

² 87 FR at 55291.

promulgated in 1999 stated that “the ‘medical benefits package’ does not include . . . abortions and abortion counseling.”³

While the IFR attempts to portray itself as reasonable by appearing to limit abortions to the case of rape or incest or if the life of the pregnant veteran would be endangered if the pregnancy were carried to term, the IFR also includes an incredibly broad “health”⁴ exception that allows any individual abortion provider to determine that the abortion is necessary for a woman’s health.⁵

Nothing in the IFR excludes mental or emotional health reasons from being included within the scope of a woman’s “health” to justify an elective abortion. The VA states that “[a]ssessment of the conditions, injuries, illness, or diseases that will qualify for this care will be made by appropriate health care professionals on a case-by-case basis.”⁶ This sweeping health exception therefore purports to allow the VA to provide for taxpayer-funded abortions on demand through all nine months of pregnancy up until the moment of birth. No reasonable reading of the law or assessment of legislative history of laws governing the VA related to abortion would indicate that the VA has that authority.

There are no limits in the IFR on late-term abortions or gruesome procedures like live dismemberment abortions. There are no required qualifications for health care providers who perform abortions. There are no informed consent policies, or reasonable standards for medical evaluations, such as in-person evaluations to ensure that an abortion would not lead to further medical complications or harm for women. The IFR ignores science and the law, and neglects health care for the most vulnerable. It provides no protections to unborn children with beating hearts, arms, legs, fingers, toes, ability to feel pain or even the ability to survive outside the womb.

The VA fails to explain what policies and procedures it has in place to ensure that any children born alive after attempted late-term abortions are given appropriate medical care in the same manner as other children born alive. Does the VA intend to develop life-saving neonatal services and protocols to care for infants born in such circumstances, and to ensure such infants are transferred to a hospital that will care for the baby? What will the VA do to comply with its obligations to prevent the killing of such infants in federal enclaves under federal law, by reason of the Born Alive Infants Protection Act of 2002?

Additionally, the IFR claims that Section 106’s limitations on abortion apply narrowly to just that section of law, which it claims “simply is no longer operative.” However, the IFR fails to note that Section 106 points back to the underlying authorization for the VA⁷, which is home to other statutes, including the provisions of the Veteran’s Health Care Eligibility Reform Act of 1996 upon which the VA claims to find its authority to provide and pay for abortions⁸. The IFR contends that the 1996 law “overtook” the 1992 prohibition, but such a claim has no foundation.⁹ When Congress delegated more authority to the VA to determine the scope of the medical benefits package as a general matter, it in no way rescinded the VA’s specific prohibition on the provision of abortions, and the IFR fails to present any evidence that Congress intended the 1996 law, which does not mention abortion whatsoever, to repeal or nullify the 1992 law’s prohibition on abortion, or to demonstrate that the laws are expressly in conflict.

³ 38 CFR § 17.38(c)(1), 64 Fed. Reg. 54217, Oct. 6, 1999.

⁴ 87 FR at 55288.

⁵ *Id.*

⁶ *Id.* at 55294.

⁷ 38 U.S.C. Chapter 17.

⁸ 38 U.S.C. 1710(a)(1)-(3).

⁹ 87 FR at 55289.

The Supreme Court has repeatedly reiterated what it has called “[t]he cardinal rule ... that repeals by implication are not favored”¹⁰ and that “[w]here there are two acts upon the same subject, effect should be given to both, if possible.”¹¹ Similar prohibitions on abortion for other agencies, such as the Hyde Amendment, have for decades operated in harmony with, and as a limitation on, broad agency mandates to provide health care services, such as that of the 1996 law.

Congress has in fact reaffirmed its commitment to excluding abortions from the medical benefits package. The Deborah Sampson Act of 2020 codified VA’s current medical benefits package, as in effect on January 5, 2021, including the ban on providing abortions and abortion counseling.¹² The enactment of this provision in overwhelmingly bipartisan legislation reflected a consensus that VA’s prohibition on the provision of abortion and abortion counseling, in statute and regulation, is a matter of settled law. In the IFR, the VA agrees that abortion was explicitly excluded from coverage as of January 5, 2021.¹³ Astonishingly, however, the VA suggests in the preamble to the IFR that this very provision of the Deborah Sampson Act of 2020 authorizes the VA to add abortion to the medical benefits package.

Beyond directly providing abortions, the IFR also expands access to abortion counseling, without any limitations. It is incredibly telling, and concerning, that the IFR does not explicitly state anywhere that such counseling should be *nondirective*, and instead appears to only encourage abortion.¹⁴ Instead of caring for the health and wellbeing of both moms and babies, the IFR focuses only on promoting abortion.

The IFR also violates the CHAMPVA program’s statutory requirement that coverage for medical care be subject to the same or similar limitations as TRICARE.¹⁵ As discussed, the IFR amends the CHAMPVA program’s regulations to allow eligible spouses and dependents of veterans to obtain abortion on demand for any “health” reason, in addition to cases of rape, incest, and to save the of the mother.¹⁶ However, TRICARE lacks the broad “health” exception included in the IFR.¹⁷ This sweeping change is not “the same or similar” as the limits that apply to TRICARE. Moreover, while TRICARE prohibits abortion counseling and referrals except for abortions covered under the three exceptions in the Hyde Amendment,¹⁸ the IFR would make CHAMPVA cover abortion counseling without any limitations, further deviating from the limitations that apply to TRICARE.

The IFR lacks necessary conscience protections.

The First Amendment explicitly protects religious freedom. There are no protections in the IFR for VA employees or contractors who object to performing or promoting abortion against their religious beliefs or moral convictions, many of whom have never been faced with the dilemma of whether to participate in abortion.

¹⁰ *Posadas v. National City Bank*, 296 U.S. 497 (1936).

¹¹ *Ibid.*

¹² Section 5101(b)(2) of the Deborah Sampson Act of 2020 (Title V of Public Law 116-315, January 5, 2021, 134 Stat. 5026, 38 U.S.C. 7310 (note)): “[t]he references to health care and the references to services in sections 7310 and 7310A of title 38, United States Code, as added by paragraph (1), are references to the health care and services included in the medical benefits package provided by the Department *as in effect on the day before the date of the enactment of this Act* [January 5, 2021]” (emphasis added).

¹³ 87 FR at 55288, “some care is specifically excluded from the medical benefits package ... among other services, “[a]bortions and abortion counseling” are currently excluded from the medical benefits package, with no exceptions.”

¹⁴ *Id.* at 55292.

¹⁵ 38 U.S.C. 1781(b).

¹⁶ The prior CHAMPVA regulation already had an exception for abortion in cases where the mother’s life is endangered.

¹⁷ 10 U.S.C. 1093(a).

¹⁸ 32 CFR § 199.4(e)(2).

In addition to the Free Exercise Clause of the First Amendment, Congressionally-enacted laws such as the Religious Freedom Restoration Act¹⁹ ensure that the government cannot substantially burden religious exercise without a compelling government interest. Any such purported governmental interest in veterans obtaining abortions cannot justify substantially burdening a health care provider's religious beliefs.

Also, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on religion, which includes refusing to accommodate an employee's sincerely held religious beliefs.²⁰ Such a violation would include failing to accommodate the objections of health care personnel at the VA who have a religious objection to participating in abortion services.

Further, the Coates–Snowe amendment, prohibits the federal government from discriminating against any “health care entity” (which “includes an individual physician”) on the basis that “(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions; or (2) the entity refuses to make arrangements for any of [such] activities.”²¹ This protection requires no religious conviction and therefore can and should be applied to providers with religious, moral and medical objections. It also applies to the whole of the federal government, not just one particular agency, and therefore the VA must comply with it.

While we maintain that the IFR as a whole should be withdrawn, at a minimum, the VA must clearly define in the regulation that VA employees and contractors will not be compelled to perform, assist in performing, counsel, refer for, or promote abortions. Such conscientious objectors must be fully exempt from the expectations that will fall into place under the IFR. The VA is already behind on adequately serving the patients in its care. Losing qualified medical staff because the VA forces them to participate in (including referral for and counseling toward) a procedure with which they disagree will only bring further delay to veterans in need of real health care.

The IFR wrongfully purports to preempt state law, with no clear limitations, as well as federal law.

VA's contention in the preamble to the IFR that State laws restricting abortion are preempted by the IFR is plainly incorrect as a matter of law, and worse, extremely dangerous. The VA cannot by regulatory fiat, and the Department of Justice (DOJ) cannot by a mere advisory opinion,²² immunize VA employees from civil or criminal penalties incurred by committing abortions that are illegal under State law.

The IFR's claims of preemption also run contrary to VA's own regulations governing its facilities that rule out abrogation of “State or local laws and regulations applicable to the area in which the [VA] property is situated.”²³

Federal law does not and cannot immunize VA employees from State laws restricting abortions, at minimum, because as explained above, Federal law expressly prohibits VA from providing abortions under Section 106. Under the Assimilative Crimes Act of 1948,²⁴ a VA health care provider who performs an abortion at a VA facility that is a Federal enclave in violation of a valid State criminal law on abortion, could be subject to federal criminal penalties.²⁵

¹⁹ 42 U.S. Code § 2000bb–1.

²⁰ Title VII, 29 CFR Part 1605.

²¹ 42 U.S.C. § 238n.

²² *Intergovernmental Immunity for the Department of Veterans Affairs and Its Employees When Providing Certain Abortion Services*, 46 Op. O.L.C. ___ (Sept. 21, 2022), available at <https://www.justice.gov/olc/file/1537431/download>.

²³ 38 C.F.R. § 1.218(c)(3).

²⁴ 18 U.S.C. § 13.

²⁵ 18 U.S.C. 3282.

The IFR also violates the Antideficiency Act,²⁶ as the VA estimates that the IFR would incur expenses in excess of \$25 million over the next decade to pay for more than 10,000 abortions,²⁷ and such action is in violation of Section 106. Federal employees who knowingly violate the Antideficiency Act are subject to administrative and potentially criminal penalties under the law.

The IFR circumvents the rulemaking process and lacks good cause.

The IFR makes partisan, unsubstantiated claims that state action to protect life presents “urgent risks to the lives and health of pregnant veterans and CHAMPVA beneficiaries.”²⁸

The VA claims it is taking this action “because it has determined that providing access to abortion-related medical services is needed to protect the lives and health of veterans.” But the VA never had the opportunity to formally hear from veterans since this rule was published and implemented without prior opportunity for public comment.

The VA has always provided care to pregnant women in life-threatening circumstances, including treatment for ectopic pregnancies or miscarriages, which were covered under the VA’s medical benefits package prior to the IFR.²⁹ As you have stated, providing such lifesaving care to a pregnant women is not an abortion and is already allowed.³⁰

IFRs are not common practice for a reason. They are to be relied upon sparingly and only when good cause can actually be demonstrated. Disagreeing with an opinion of the Supreme Court is not good cause. It is Congress’ job to legislate and the VA’s job to implement such laws. Beyond the lawless contents of the IFR, the process by which it was put in place is reason enough for its rescission.

Conclusion

Abortion is not and will never be health care. Health care protects life. Abortion takes life. Under this IFR, the VA estimates it will perform at least 1,000 abortions each year—which is to say, 1,000 precious, innocent unborn children will be brutally and illegally killed by the VA, using the taxpayer dollars of the American people.³¹ In fact, at least one innocent child has already lost his or her life due to this policy.³² The IFR violates the plain text and Congressional intent of Section 106 of the Veterans Health Care Act, and in addition, threatens the conscience rights of VA health care professionals.

We demand that you immediately rescind the IFR and restore the prior regulations excluding abortion and abortion counseling from the VA’s medical benefits package and the CHAMPVA program, in conformity with the law and Congressional intent.

It is the responsibility of the Congress to write the laws, and Executive Branch to enforce them, not to rewrite them as it pleases. Through this IFR, the VA has usurped powers belonging to the legislative branch of

²⁶ 31 U.S.C. § 1341(a)(1)(A).

²⁷ Regulatory Impact Analysis for RIN 2900 - AR57 (August 29, 2022) available at <https://www.regulations.gov/document/VA-2022-VHA-0021-0002>.

²⁸ 87 FR at 55288.

²⁹ VA, VHA, Maternity Health Care and Coordination, VHA Directive 1330.03, (November 3, 2020) available at https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=9095.

³⁰ Secretary Denis McDonough, Press Conference, (July 20, 2022), available at <https://www.youtube.com/watch?v=UpFKk5NFhF0> at 52:00:00.

³¹ Regulatory Impact Analysis for RIN 2900 - AR57 (August 29, 2022) available at <https://www.regulations.gov/document/VA-2022-VHA-0021-0002>.

³² Testimony of Secretary Denis McDonough. U.S. Congress. Senate Committee on Veterans’ Affairs. “Ensuring Veterans’ Timely Access to Care in VA and the Community.” (Date: 9/21/22).

government, in both summarily issuing an emergency regulation in direct contradiction of a Federal statute, and then claiming to confer immunity on VA personnel from violating constitutionally valid criminal laws.

We urge you, and others within the VA, to respect the dignity of our veterans and all of their family members, including unborn children, and to respect the will of the American people as reflected in Acts of Congress, by ensuring services provided and funded by the VA are focused on true healthcare consistent with federal law.

Sincerely,



James Lankford
United States Senator



Michael Cloud
Member of Congress



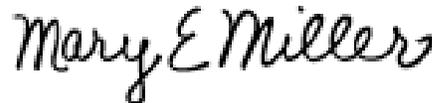
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Christopher H. Smith
Member of Congress

Robert B. Aderholt
Member of Congress

Ben Cline
Member of Congress

Eric A. "Rick" Crawford
Member of Congress

Mike Johnson
Member of Congress

A handwritten signature in blue ink that reads "Rick W. Allen". The signature is written in a cursive style with a large initial "R" and a long horizontal stroke at the end.

Rick W. Allen
Member of Congress