

March 8, 2023

**Via Federal eRulemaking Portal**

Xavier Becerra  
U.S. Department of Health and Human Services  
Office for Civil Rights  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue SW  
Washington, DC 20201

**Re: EPPC Scholars Comment Opposing IHS’s Proposed Rule “Removal of Outdated Regulations,” RIN 0917-AA24**

Dear Secretary Becerra:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in opposition to the Department of Health and Human Services (HHS) Indian Health Service (IHS) proposed rule “Removal of Outdated Regulations.”<sup>1</sup>

Rachel Morrison is an EPPC Fellow, director of EPPC’s HHS Accountability Project, and former attorney at the Equal Employment Opportunity Commission. Eric Kniffin is an EPPC Fellow, member of the HHS Accountability Project, and a former attorney in the U.S. Department of Justice’s Civil Rights Division. Natalie Dodson is a Policy Analyst and member of EPPC’s HHS Accountability Project.

The proposed rule would eliminate regulations that prevent Indian Health Service funds from paying for abortion except to save the life of the mother. IHS claims these regulations are outdated and conflict with the Hyde Amendment.<sup>2</sup> But the Hyde Amendment merely permits federal funding for limited abortions; it does not mandate IHS fund abortion. Further, the Hyde Amendment does not support removing regulations on definitions, ectopic pregnancy, recordkeeping, and confidentiality, making the IHS’s proposal arbitrary and capricious. IHS fails to address the federalism impacts of its proposal that could preempt state laws protecting unborn children and adequately consider alternatives to its proposal. IHS should withdraw its proposed rule and maintain all of its current regulations.

---

<sup>1</sup> 89 Fed. Reg. 896 (Jan. 8, 2024), <https://www.federalregister.gov/documents/2024/01/08/2023-28948/removal-of-outdated-regulations>.

<sup>2</sup> *Id.* at 896.

**1. IHS failed to establish a need for the proposed rule.**

For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need.<sup>3</sup> IHS has failed to do so here.

The proposed rule expresses IHS’s intention to rescind seven different federal regulations, 42 C.F.R. sections 136.51 through 136.57, which are copied below.

**§ 136.51 Applicability.**

This subpart is applicable to the use of Federal funds in providing health services to Indians in accordance with the provisions of subparts A, B, and C of this part.

**§ 136.52 Definitions.**

As used in this subpart:

*Physician* means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery at an Indian Health Service or tribally run facility, or by the state in which he or she practices.

**§ 136.53 General rule.**

Federal funds may not be used to pay for or otherwise provide for abortions in the programs described in § 136.51, except under the circumstances described in § 136.54.

**§ 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.

**§ 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.

**§ 136.56 Recordkeeping requirements.**

Documents required by § 136.54 must be maintained for three years pursuant to the retention and custodial requirements for records at 45 CFR part 75.361.

---

<sup>3</sup> EO 12866, § 1(b) (establishing the principles of regulation, including that “[e]ach agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem”).

### § 136.57 Confidentiality.

Information which is acquired in connection with the requirements of this subpart may not be disclosed in a form which permits the identification of an individual without the individual's consent, except as may be necessary for the health of the individual or as may be necessary for the Secretary to monitor Indian Health Service program activities. In any event, any disclosure shall be subject to appropriate safeguards which will minimize the likelihood of disclosures of personal information in identifiable form.

IHS claims that “[t]he purpose of these IHS regulations was specifically ‘to conform IHS practices to that of the rest of [HHS] in accordance with the applicable congressional guidelines.’”<sup>4</sup>

According to IHS, the current regulations are “outdated” in light of 25 U.S.C. § 1676 and “do not align with the current statutory text.”<sup>5</sup> As such, the agency “seeks to remove these outdated regulations in their entirety.”<sup>6</sup>

25 U.S.C. § 1676 provides limitations on the use of funds appropriated to IHS. Specifically, any limitations on the use of funds for appropriations to the Department of Health and Human Services also apply to IHS, and “[a]ny limitation pursuant to other Federal laws on the use of Federal funds appropriated to the Service shall apply with respect to the performance or coverage of abortions.”

These limitations include the Hyde Amendment, which is a longstanding appropriations provision that restricts federal funding from paying for abortion.<sup>7</sup> Originally passed in 1976, the text of the Hyde Amendment was named after the sponsor, Representative Henry Hyde (R-Ill.). The Amendment covers all abortions except when the pregnancy was a result of rape or incest or where a mother “suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.”<sup>8</sup> In such cases, the federal government is permitted *but not mandated* to pay for those procedures.

Notably, the constitutionality of the Hyde Amendment was upheld, even under the now defunct *Roe* regime, by the Supreme Court in the 1980 case *Harris v. McRae*.<sup>9</sup> In his brief defending the Hyde Amendment before the Court, Representative Hyde explained that “the Hyde Amendment withholds governmental support for abortion decisions.”<sup>10</sup> Until recently, the Hyde Amendment had bipartisan support.

---

<sup>4</sup> 89 Fed. Reg. at 897 (quoting 47 Fed. Reg. 4,016 (Jan. 27, 1982)).

<sup>5</sup> *Id.* at 896.

<sup>6</sup> *Id.* at 897.

<sup>7</sup> Hyde Amendment, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. H., Tit. V, §§ 506–07 (Dec. 29, 2022), 136 Stat. 4908. (Current text of the Amendment).

<sup>8</sup> *Id.*

<sup>9</sup> 448 U.S. 297 (1980).

<sup>10</sup> Reply Brief of Intervening Defendants-Appellees James L. Buckley, Jess A. Helms, Henry J. Hyde, and Isabella Pernicone in Support of Appellant Harris, *Harris v. McRae*, 448 U.S. 297 (1980), available at <https://aul.org/wpcontent/uploads/2019/03/1980-Harris-v.-McRae-Reply-Brief.pdf>.

IHS claims that because Hyde *permits* federal funding of abortion in the cases of rape or incest, IHS regulations *must* fund abortions in such cases consistent with its obligations under 25 U.S.C. § 1676. But IHS fails to properly understand the requirements of § 1676. Section 1676 requires that any abortion limitations on federal funds likewise apply to IHS. What § 1676 does not say is that IHS cannot apply additional abortion limitations not required under federal law, such as the Hyde Amendment.

Despite IHS’s claim, there is no confusion because current IHS regulations do not violate the Hyde Amendment. Hyde is only a floor, not a ceiling. Hyde does not *require* funding for abortion; it merely limits funding for most abortions. Current IHS regulations are consistent with the Hyde Amendment and comply with its limitations. As such, the current regulatory text is not outdated, undermining the purported need for this rulemaking.

## **2. IHS’s proposal to remove all regulations is arbitrary and capricious.**

In the proposed rule, IHS claims that because 42 C.F.R. § 136.54 does not permit abortion in cases of rape and incest as permitted under the Hyde Amendment, *all* of the regulations—including those for definitions, ectopic pregnancy, recordkeeping, and confidentiality—are outdated and must be removed in their entirety. This is arbitrary and capricious.

Even if IHS justifies why § 136.54 is outdated, which it hasn’t, IHS fails to justify why *all* the regulations are outdated, making its claim that it is “simply remov[ing] the existing, outdated regulations” arbitrary and capricious.<sup>11</sup>

## **3. The proposed rule raises federalism concerns.**

IHS asserts, without any analysis or argument, that the proposed rule “would not impose such costs or have any federalism implications.”<sup>12</sup> This is difficult to understand. While many IHS facilities are on tribal lands, it appears that many facilities are located on state land. In fact, the 2022 circular that IHS issued shortly after the Supreme Court’s *Dobbs* decision anticipates that IHS facilities would be performing abortions that are illegal in the states where these facilities are located. The circular reads in part:

[S]tate law does not apply to IHS authority to perform abortions, pursuant to 25 U.S.C. § 13, 42 U.S.C. § 2001, or the use of federal funds to perform abortions. Given the authority that Congress vested in the HHS and the IHS, the position of the IHS is that states cannot take actions that are preempted by federal law, including but not limited to: 1.) compelling IHS federal staff to take any action inconsistent with the scope of their official duties; 2.) prohibiting the use of IHS funds for authorized Purchased/Referred Care (PRC) services; 3.) prohibiting IHS patients from accessing authorized services; and 4.) compelling access to IHS records.<sup>13</sup>

---

<sup>11</sup> 89 Fed. Reg. at 897.

<sup>12</sup> *Id.* at 898.

<sup>13</sup> Indian Health Service Circular No. 22–15, Use of Indian Health Service Funds for Abortions (June 30, 2022), <https://www.ihs.gov/ihs/circulars/2022/use-of-indian-health-service-funds-for-abortions/>.

Those conflicts would seem to multiply under this proposed rule. Of the 22 states that have laws limiting abortions, 10 of them also advance the states' interests in protecting unborn children conceived through rape or incest.<sup>14</sup> States, including those that permit abortion consistent with IHS's proposal, also have health and safety abortion regulations, including on informed consent, parental notification, reflection periods, ultrasounds, in-person evaluations, and abortion provider's medical training, qualifications, and certification. A recent final rule by the Department of Veterans Affairs on reproductive health services indicated that such state health and safety abortion regulations would be preempted by VA regulations providing abortion benefits for veterans and certain beneficiaries.<sup>15</sup>

In light of the above, we remind IHS of its obligation to perform a federalism analysis as required under Executive Order 13132. That executive order defines "[p]olicies that have federalism implications" to include "actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." The same order also states that the "national government should be deferential to the States when taking action that affects the policymaking discretion of the States."

In this case, as *Dobbs* makes clear, "the States may regulate abortion for legitimate reasons."<sup>16</sup> These "legitimate state interests" include "respect for and preservation of prenatal life at all stages of development; the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."<sup>17</sup>

It is arbitrary and capricious for IHS to claim that its proposal does not have federalism implications while claiming to preempt state abortion laws. In any final rule, we ask IHS to clarify whether it believes its regulations can preempt state law and, if so, address the federalism implications of its rule. This federalism analysis must be performed consistent with Executive Order 13132, which requires "strict adherence to constitutional principles. Agencies shall closely examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and shall carefully assess the necessity for such action." Additionally, "Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute."

IHS must justify its attempt to authorize abortions that violate state laws under these and each of the other criteria set out in Executive Order 13132. A final rule that fails to perform a

---

<sup>14</sup> See Mary E. Harned & Ingrid Skop, Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All State, Charlotte Lozier Inst. (July 26 2022), <https://lozierinstitute.org/pro-life-laws-protect-momand-baby-pregnant-womens-lives-are-protected-in-all-states/>.

<sup>15</sup> 89 Fed. Reg. 15,451, 15,462 (Mar. 4, 2024), <https://www.federalregister.gov/documents/2024/03/04/2024-04275/reproductive-health-services>.

<sup>16</sup> *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300 (2022). !

<sup>17</sup> *Id.* at 301.

federalism analysis that satisfies this executive order would be contrary to law and arbitrary and capricious.

#### **4. The proposed rule violates IHS's obligation to conserve health.**

IHS's program authority originates in part from the Snyder Act, 25 U.S.C. § 13, which allows the agency to provide and fund health services. This statutory language stipulates that funds may be used "for the benefit, care, and assistance of the Indians throughout the United States for the following purposes," which include the "conservation of health."<sup>18</sup> But killing innocent children conceived in an act of rape or incest does not support "conservation of health."<sup>19</sup>

Women who are victims of sexual assault should be supported, and the perpetrator should be prosecuted. But the answer to violence is not more violence. Abortion is not neutral that will erase the harm of a sexual assault. IHS should not add the trauma of abortion to any sexual trauma they already experienced. The federal government should take steps to stop sexual assault before it happens rather than trying to gloss it over with abortion as a solution. Indeed, Indian communities face disproportionate rates of maternal and infant mortalities.<sup>20</sup> Instead of focusing on abortion, IHS should be concerned with improving maternal health, including physical and mental health.

Further, suggesting that unborn children conceived in rape or incest should be aborted is insulting to those living who were conceived in such a way. That child's life is worth no less than another child's based on his or her parentage or the act in which the child was conceived. As a society, we have rightly moved away from viewing children conceived out of wedlock as inferior to those conceived by married parents. Likewise, we should not view children conceived in an act of rape or incest as inferior to those not so conceived. Neither should we heap upon the children the punishment for the sin of a parent. IHS regulations should conserve the health of all Indians, including those conceived in difficult circumstances.

#### **5. IHS should consider alternatives to the proposed rule.**

Rather than updating 42 C.F.R. § 136.54 to reflect the current text of the Hyde Amendment, IHS proposes to eliminate all the regulations in the section because they are allegedly not necessary to implement IHS authority or to comply with statutory requirements. IHS claims that it cannot update the regulatory text to mirror the Hyde Amendment in case the Hyde Amendment's text changes again. But as we explained above, the Hyde Amendment is permissive, not mandatory, and does not require IHS to update its regulations.

---

<sup>18</sup> 25 USC § 13.

<sup>19</sup> *Id.*

<sup>20</sup> 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>; 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/](http://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](http://www.cdc.gov/mmwr/volumes/68/wr/mm6835a3.htm?s_cid=mm6835a3_w#T1_downc); 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](http://www.ihs.gov/sites/provider/themes/responsive2017/display_objects/documents/2010_2019/PROV0316.pdf).

IHS should consider the following alternatives:

- Not eliminating any of the regulations.
- Eliminating only 42 C.F.R. § 136.54, not all of the regulations.
- Updating the text of 42 C.F.R. § 136.54 to reflect the current exceptions in the Hyde Amendment.
- Incorporating a reference to the Hyde Amendment in 42 C.F.R. § 136.54.
- Updating the text of 42 C.F.R. § 136.54 to include a qualifier that if the limitations in the Hyde Amendment change, the regulations will as well.

## **Conclusion**

IHS should withdraw its proposed rule and maintain all of its current regulations.

Sincerely,

Rachel N. Morrison, J.D.  
Fellow & Director  
HHS Accountability Project  
Ethics & Public Policy Center

Eric N. Kniffin, J.D.  
Fellow  
HHS Accountability Project  
Ethics & Public Policy Center

Natalie Dodson  
Policy Analyst  
HHS Accountability Project  
Ethics & Public Policy Center