

# United States Senate

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:

On March 25, 2021 at a hearing before the House Committee on Veterans Affairs you first claimed to have the power to allow the Department of Veterans Affairs (VA) to provide abortions merely through rulemaking. Following your remarks, I tasked the Congressional Research Service (CRS) with analyzing the legality of such an action by the VA.

In a June 4, 2021 legal memorandum, CRS determined that a regulation purporting to allow the VA to provide abortions would likely be held to be illegal under section 106 of the Veterans Health Care Act of 1992 (VHCA):

In this case, section 106(a)(3) of the VHCA would appear to demonstrate Congress's intent not to provide abortion services to female veterans. Although the section permits coverage of general reproductive health care, abortions are specifically identified as a health care service that the VA may not provide. The VHCA's legislative history provides no additional guidance about restricting abortion coverage for veterans. However, section 106(a)(3) is consistent with other abortion restrictions adopted by Congress. For example, annual appropriations legislation that provides federal funds for the Federal Employees Health Benefits Program (FEHBP) generally prohibits using such funds to pay for an abortion or to pay for administrative expenses related to a health plan in the FEHBP that provides benefits or coverage for abortions. Section 1093 of title 10, U.S. Code, similarly prohibits the Department of Defense from using appropriated funds to perform abortions, except where the life of the mother would be endangered if a fetus were carried to term or where a pregnancy is the result of an act of rape or incest. Although section 106(a)(3) does not include similar exceptions, it still appears to reflect a general congressional intent to not cover abortion services.

Because section 106(a)(3) clearly seems to restrict the VA from covering abortion services, it appears unlikely that a court would uphold regulations that had been revised to make abortion services available, if challenged.

For the reasons CRS' legal memorandum makes clear, which I am attaching here to this comment letter, the VA's Interim Final Rule (IFR), "Reproductive Health Services," 87 FR

55287, RIN: 2900-AR57, published in the *Federal Register* on September 9, 2022, violates the VA's explicit statutory prohibition on abortion that has governed the VA for more than 30 years and has never been repealed.

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

Sincerely,



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Steve Daines  
United States Senator

Attachment:

Congressional Research Service Memorandum of June 4, 2021 to Sen. Steve Daines re:  
Coverage of Abortion Services for Veterans