

October 11, 2022

The Honorable Denis McDonough  
Secretary  
Department of Veterans Affairs  
810 Vermont Avenue NW  
Washington, D.C. 20420

**RE: RIN 2900-AR57**

**Re: Reproductive Health Services**

Dear Secretary McDonough:

On behalf of our nearly 40,000 members, the American College of Emergency Physicians (ACEP) appreciates the opportunity to comment on the Reproductive Health Services interim final rule.

The U.S. Department of Veterans Affairs (VA) is proposing to amend its medical regulations to establish exceptions to the exclusion on abortions and remove the exclusion on abortion counseling in the medical benefits package for veterans who receive care set forth in that package, and to expand the exceptions to the exclusion on abortions for Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) beneficiaries and remove the exclusion on abortion counseling. VA notes it is acting to ensure that veterans who receive the care set forth in the medical benefits package and CHAMPVA beneficiaries will be able to obtain abortions, if determined needed by a health care professional when the life or the health of the pregnant veteran would be endangered if the pregnancy were carried to term, or the pregnancy is the result of an act of rape or incest.

**Health of the Veteran or CHAMPVA Beneficiary**

ACEP commends the VA's determination that it is essential that abortions be made available for veterans and CHAMPVA beneficiaries when determined necessary by a health care professional because the health of the pregnant veteran or CHAMPVA beneficiary (and not just the life) would be endangered if the pregnancy were carried to term. Emergency physicians are legally and ethically bound by the Emergency Medical Treatment and Labor Act (EMTALA), which requires that physicians at Medicare-participating hospitals provide stabilizing treatment to any patient that presents with an emergency condition that has the potential to cause serious harm to the patient or that endangers their life. EMTALA properly defers to the medical judgment of the physician(s) responsible for treating the patient to determine how best to achieve the designated objective of stabilization. That decision making, in turn, is informed by established clinical guidelines that are developed and regularly updated according to the latest advancements in medical science. Just as EMTALA does not specify particular treatments, it also does not allow for physicians to withhold specific treatments from particular patients for non-medical reasons. Because pregnancy termination is part of the medically indicated treatment to stabilize patients in certain emergency scenarios, physicians—to comply both with EMTALA and the principles of medical ethics—must, and do, consider abortion a necessary treatment option. Thus, the interim final rule's assertion that abortion is, in some cases, "medically necessary" allows physicians to uphold both their ethical and legal obligation to stabilize emergency patients.

**WASHINGTON, DC OFFICE**

901 New York Ave, NW  
Suite 515E  
Washington DC 20001-4432

202-728-0610  
800-320-0610  
www.acep.org

**BOARD OF DIRECTORS**

Christopher S. Kang, MD, FACEP  
*President*

Aisha T. Terry, MD, MPH, FACEP  
*President-Elect*

L. Anthony Cirillo, MD, FACEP  
*Chair of the Board*

John T. Finnell, MD, MSc, FACEP  
*Vice President*

James L. Shoemaker, Jr., MD, FACEP  
*Secretary-Treasurer*

Gillian R. Schmitz, MD, FACEP  
*Immediate Past President*

Jeffrey M. Goodloe, MD, FACEP

Alison J. Haddock, MD, FACEP

Gabor D. Kelen, MD, FACEP

Rami R. Khoury, MD, FACEP

Heidi C. Knowles, MD, FACEP

Kristin B. McCabe-Kline, MD, FACEP

Ryan A. Stanton, MD, FACEP

Arvind Venkat, MD, FACEP

**COUNCIL OFFICERS**

Kelly Gray-Eurom, MD, MMM, FACEP  
*Speaker*

Melissa W. Costello, MD, FACEP  
*Vice Speaker*

**EXECUTIVE DIRECTOR**

Susan E. Sedory, MA, CAE

As the IFR notes, following the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization*, some states have begun to enact or enforce abortion bans and restrictions on care, including bans that provide an exception only when the life of the pregnant patient is in danger without any allowances for when the health of the patient is at risk. Such laws disregard standard medical practice and can force emergency physicians to delay care until a patient's medical condition deteriorates to the point of becoming life-threatening. Emergency physicians must act quickly, often with limited information, to treat and stabilize the patient, and the patient's condition can deteriorate rapidly and often with little or no warning. For example, in a state with such a law that provides no exception for the health of the pregnant patient, those who present to the ED with an ectopic pregnancy will be at risk for rupture and massive internal bleeding because physicians may not feel they can prescribe methotrexate—the most commonly indicated drug for treating ectopic pregnancy—to expel the nonviable pregnancy and must therefore wait until the patient's condition has deteriorated to requiring urgent surgery and risking death. There is no clinical bright line to define when a patient's condition becomes life-threatening, further exacerbating the uncertainty.

There are numerous other such clinical scenarios for which physicians in these states will be forced to delay or forego care that they have been trained and are ethically required to provide, creating substantial risks for their patients and their own livelihood, putting them in violation of federal law for which they could receive fines or be subjected to other civil penalties. The IFR's expansion of abortion access to when the health of the pregnant veteran or CHAMPVA beneficiary is endangered will bring their care in line with existing obligations for emergency physicians under federal EMTALA law and our code of ethics under the American College of Emergency Physicians.

### **Counseling**

We appreciate the IFR actions that will allow for physicians to engage in appropriate counseling with their patients when possible when these scenarios arise. It is important for pregnant veterans and CHAMPVA beneficiaries in medical emergencies to understand and be aware of all medically appropriate treatment options and their implications, including pregnancy termination. This requires shared decision making between patients and their physician regarding discussion of reproductive health care, performance of indicated clinical assessments, evaluation of the viability of pregnancy and safety of the pregnant patient, and availability of appropriate resources to perform indicated procedure(s). By removing the exclusion for such counseling, the IFR ensures that the integrity of the physician-patient relationship and legality of clinical decision-making, performed in compliance with EMTALA, are protected.

### **State Preemption**

ACEP also appreciates that the IFR clarifies that State and local laws and regulations that would prevent VA health care professionals including emergency physicians from providing medically necessary abortion-related care in emergencies are preempted. Earlier this summer, HHS put out clarifying guidance on EMTALA and the care of pregnant patients that reaffirmed that the federal law protects providers when offering legally mandated, life- or health-saving abortion services in emergency situations. This was accompanied by a letter from HHS Secretary Becerra stating that EMTALA preempts state law restricting access to abortion in emergency situations.

Yet physicians who follow EMTALA when presented with a pregnancy-related medical emergency in a state with restrictive abortion policies may still be at risk of a felony charge under state law. If charged, the EMTALA preemption only provides them with an affirmative defense, forcing them to risk the reputational, professional, and financial burdens of being arrested, indicted, and prosecuted for following federal law and their professional obligations in saving the patient's life. As the VA IFR notes, this threat "may result in a chilling effect on the provision of care, including abortions, to veterans and CHAMPVA beneficiaries. Denial of care because of uncertainty about the scope of changing State laws has already been evidenced outside of the Federal health system in certain States."<sup>1</sup>

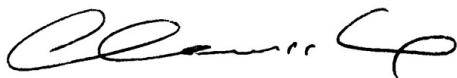
ACEP supports clear legal protections for emergency physicians providing federally mandated emergency care, particularly in cases of conflict between federal law and state reproductive health laws. We therefore appreciate the VA's actions to ensure the ability of VA clinicians to practice high quality, objective, evidence-based medicine is protected from legislative, regulatory, or judicial interference.

---

<sup>1</sup> Reproductive Health Services Interim Final Rule with Request for Comments. 87 Fed. Reg. 55293. (September 9, 2022).

We appreciate the opportunity to share our comments and encourage VA to finalize the interim final rule, as it authorizes VA physicians to uphold their legal obligation under EMTALA. If you have any questions, please contact Laura Wooster, ACEP's Senior Vice President of Advocacy & Practice Affairs at [lwooster@acep.org](mailto:lwooster@acep.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Kang". The signature is fluid and cursive, with a large initial "C" and a long, sweeping tail.

Christopher S. Kang, MD, FACEP  
ACEP President