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Department of Veterans Affairs: Abortion Policy

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Department of Veterans Affairs: Abortion Policy

The primary mission of the Veterans Health Administration (VHA) of the Department of Veterans Affairs (VA) is to provide health care services to veterans. To accomplish this goal, VA has promulgated regulations to create a standard medical benefits package. The medical benefits package expressly excludes abortion services and abortion counseling in all instances, effectively prohibiting VA providers from providing those services to veteran patients. VHA provides medically necessary health care for the management of a miscarriage.

It is unclear whether this prohibition on abortion services is required by statute or solely by regulation—a result of potentially conflicting language in the Veterans Health Care Act of 1992 (P.L. 102-585) and the Veterans' Health Care Eligibility Reform Act of 1996 (P.L. 104-262). In recent years, Congress has considered bills to require VA to include abortion counseling in the medical benefits package.

VHA also provides health care to dependents, spouses, and caregivers of veterans who meet certain eligibility criteria through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA). Under CHAMPVA, VA will pay for the cost of abortion services only if a physician certifies that the life of the mother would be endangered should the fetus be carried to term. This differs from the provision of health care for veterans in which abortion services are prohibited under any circumstance.

This report describes VA's prohibition on abortion services and related counseling, including the legal authority upon which the prohibition is based. It also details considerations for Congress related to the legal authority for VA to provide abortions.

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Introduction

The Veterans Health Administration (VHA) of the Department of Veterans Affairs (VA) operates the nation's largest public integrated direct health care delivery system.¹ VHA provides care to approximately 6.5 million unique veteran patients on an annual basis.² VHA's primary mission is to provide health care services to eligible veterans.³ VHA generally provides care directly through over 1,700 sites of care, including hospitals, clinics, and health care facilities.⁴

VHA is primarily a direct provider of care. It directly operates associated facilities and employs clinicians.⁵ This model differs from the predominant health care financing and delivery model in the United States, in which there is a payer for health care services (e.g., Medicare, private health insurance plan), a provider (e.g., hospital, physician), and a recipient of care (the patient). VHA is not a health insurance financing program that provides reimbursement to providers for all or a portion of a patient's health care costs.

VA has established, through regulation, a medical benefits package to standardize care provided to patients enrolled in the system.⁶ The medical benefits package includes, among other things, inpatient care, outpatient care, and prescription drugs.⁷

VHA also provides health care to dependents, spouses, and caregivers of veterans who meet certain eligibility criteria through the Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA).⁸ Unlike the provision of health care for veterans, which follows the standard medical benefits package, CHAMPVA is required to provide benefits similar to Department of Defense (DOD's) TRICARE Standard plan.⁹ Furthermore, CHAMPVA is primarily a health insurance program where enrollees receive care from private sector health care providers and CHAMPVA pays for a portion of the cost of care. This is in contrast to the provision of health care for veterans, which is generally provided by VA clinicians.

On June 24, 2022, the U.S. Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*, a case challenging the constitutionality of Mississippi's Gestational Age Act, which generally prohibits an abortion once a fetus's gestational age is greater than 15 weeks. A majority of the Court not only upheld the Mississippi law but also overruled the Court's prior

¹ Department of Veterans Affairs, *FY2023 Congressional Submission, Medical Programs and Information Technology Programs*, vol. 2 of 4, March 2022, p. VHA-21.

² *Ibid.*, p. VHA-39.

³ 38 U.S.C. §7301.

⁴ Department of Veterans Affairs, *FY2023 Congressional Submission, Medical Programs and Information Technology Programs*, vol. 2 of 4, March 2022, p. VHA-21.

⁵ VHA does pay for care in the community (i.e., non-VA providers) under certain circumstances. The VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (VA MISSION Act; P.L. 115-182) established the Veterans Community Care Program (VCCP), which requires VHA to provide for care in the community to all enrolled veterans who meet specified criteria.

⁶ 38 C.F.R. §17.38.

⁷ For more information on VA health care in general, see CRS Report R42747, *Health Care for Veterans: Answers to Frequently Asked Questions*.

⁸ For more information on CHAMPVA, see CRS Report RS22483, *Health Care for Dependents and Survivors of Veterans*.

⁹ 38 U.S.C. §1781(b).

decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, concluding that the U.S. Constitution does not confer a right to an abortion.¹⁰

Shortly after the Supreme Court's decision in *Dobbs*, Adam M. Robinson, Director of the VA Pacific Islands Health Care System, stated that VA will continue to deliver reproductive health care consistent with the department's legal authority.¹¹ VA is currently prohibited from providing abortions and abortion counseling.¹² Questions have been raised regarding VA's authority to provide abortions particularly since March 2021, when VA Secretary McDonough stated that the provision of abortion services is a "regulatory matter" in a hearing before the House Committee on Veterans' Affairs.¹³ Secretary McDonough's statements on the topic have generated responses from some Members of Congress stating that VA's prohibition on abortions is required by statute.¹⁴

This report (1) describes VA's current abortion policy and authority to provide abortions, (2) presents considerations for Congress regarding VA's authority to provide abortion services, and (3) summarizes recent legislation related to VA abortion policy being considered in the 117th Congress.

VA Abortion Policy

The VA medical benefits package expressly prohibits both abortion and abortion counseling.¹⁵ VHA does not provide abortions, abortion counseling, or medication to induce an abortion (e.g., mifepristone, also known as RU-486).¹⁶

Section 106 of the Veterans Health Care Act of 1992 (P.L. 102-585; Title 38 U.S.C. 1710 note) expressly excluded abortions, among other services, from the health care services it authorized the VA Secretary to provide. Furthermore, VA explicitly excluded abortion and abortion counseling from the medical benefits package when it was initially established through the rulemaking process in October 1999.¹⁷ Medically necessary procedures for the management of a miscarriage are covered under the medical benefits package.¹⁸

¹⁰ For more information on the *Dobbs* decision, see CRS Legal Sidebar LSB10768, *Supreme Court Rules No Constitutional Right to Abortion in Dobbs v. Jackson Women's Health Organization*.

¹¹ Adam M Robinson Jr., Director, "Directors Message," press release, July 1, 2022, <https://www.va.gov/pacific-islands-health-care/stories/directors-message-july-1-2022/>.

¹² 38 C.F.R. §17.38(c)(1).

¹³ U.S. Congress, House Committee on Veterans' Affairs, *Restoring Faith by Building Trust: VA's First 100 Days*, 117th Cong., 1st sess., March 25, 2021.

¹⁴ Office of United States Senator Jerry Moran, "Sen. Moran: VA's Prohibition on Abortion Services is the Law," press release, August 4, 2021, <https://go.usa.gov/xJK4k>.

¹⁵ 38 C.F.R. §17.38(c)(1).

¹⁶ VA, VHA, Health Care Services for Women Veterans, VHA Directive 1330.01(2), February 15, 2017.

¹⁷ Department of Veterans Affairs, "Enrollment Provisions and Medical," 64 *Federal Register* 54210, October 6, 1999. <https://www.govinfo.gov/content/pkg/FR-1999-10-06/pdf/99-25871.pdf>

¹⁸ A miscarriage, or pregnancy loss, is also called a spontaneous abortion, which is "the unexpected loss of a fetus before the 20th week of pregnancy, or gestation." (Source: <https://www.nlm.nih.gov/medlineplus/miscarriage.html>.) For clinical purposes, "spontaneous abortion often is subdivided into threatened abortion, inevitable abortion, incomplete abortion, missed abortion, septic abortion, recurrent spontaneous abortion, and complete abortion." (Source: Craig P. Griebel et al., "Management of Spontaneous Abortion," *American Family Physician*, vol. 72, no. 7, October 1, 2005, pp. 1243-1250). In some cases, the procedures used for management of a miscarriage are the same as those used for an abortion (i.e., dilation and curettage). *Health Care Services for Women Veterans*, VHA Directive 1330.01(2), February

The VA prohibition is more restrictive than prohibitions required by Hyde-type amendments to appropriations measures, which generally restrict federal funds from being used to pay for abortions except in cases of rape, incest, or life endangerment of the mother.¹⁹ The VA medical benefits package does not cover abortions or abortion counseling in any circumstance.

CHAMPVA Abortion Policy²⁰

Unlike the medical benefits package for veterans, the CHAMPVA program – providing health care to certain dependents, spouses, and caregivers of veterans – covers abortions and abortion counseling in limited circumstances. Specifically, the CHAMPVA program will cover the cost of abortion counseling or abortion procedures only if a physician certifies that the life of the mother would be endangered should the fetus be carried to term.²¹ In those cases, CHAMPVA will provide coverage for (1) spontaneous, missed, or threatened abortions and abortions related to ectopic pregnancies, or (2) fetal death due to natural causes.²² Dilation and evacuation (D&E) and dilation and curettage (D&C) procedures may be covered when done surgically for a gynecological diagnosis or covered abortion.²³ CHAMPVA will not cover any abortion related to incest or rape.²⁴

Legal Authority for VA Abortion Prohibition

It is unclear whether VA abortion services are strictly prohibited by statute or solely limited through the regulations establishing the standard medical benefits package. The lack of clarity stems from two laws enacted in the 1990s: (1) Section 106 of the Veterans Health Care Act of 1992 (P.L. 102-585; Title 38 U.S.C. 1710 note), which expressly excluded abortion services, among other services, from the health care services it authorized VA to provide,²⁵ and (2) the Veterans' Health Care Eligibility Reform Act of 1996 (P.L. 104-262), which requires the VA Secretary to provide medical services determined to be “needed.”²⁶

Section 106 of the Veterans Health Care Act of 1992 (P.L. 102-585; 38 U.S.C. 1710 note) authorizes the VA Secretary to provide certain specified health care services for women, including general reproductive health services. The section excludes the provision of infertility services,

15, 2017.

¹⁹ For more information, see CRS In Focus IF12167, *The Hyde Amendment: An Overview*. Annual VA appropriations measures generally have not included a Hyde-type amendment restricting funds from being used for providing abortion services.

²⁰ This section was written by Sidath Viranga Panangala, CRS Specialist in Veterans Policy.

²¹ 38 CFR §17.272(a)(67),(68). Also see Department of Veterans Affairs, Office of Community Care, *CHAMPVA Operational Policy Manual*, Chapter: 2 Section: 14.2 Title: Abortions, available at <https://www.vha.cc.va.gov/>

²² 38 C.F.R. §17.270(a). 38 C.F.R. §17.272(a).

²³ Department of Veterans Affairs, Office of Community Care, *CHAMPVA Operational Policy Manual*, Chapter: 2 Section: 14.2 Title: Abortions, available at <https://www.vha.cc.va.gov/>.

²⁴ TRICARE covers the cost of abortion when there is a threat to the life of the mother or in cases of rape or incest, as directed by 10 U.S.C. §1093 (a) and (b). For more information, see CRS Insight IN11960, *FY2023 NDAA: Military Abortion Policies*.

²⁵ Section 106 authorized general reproductive health care, including the management of menopause, but did not include infertility services, abortions, or pregnancy care (including prenatal and delivery care), except for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition. 38 U.S.C §1710 note.

²⁶ P.L. 104-262 §101, 38 U.S.C. §1710(a).

abortions, and most pregnancy care.²⁷ VA has since included pregnancy care in the standard medical benefits package. VA has also included infertility services to a certain extent.²⁸

The Veterans' Health Care Eligibility Reform Act of 1996 (P.L. 104-262) provided new eligibility criteria for VA hospital care and medical services. Previously, VA's general authority limited the Secretary to providing hospital and outpatient care deemed "needed for the care of a 'disability.'" The 1996 law removed this barrier and allows the Secretary to provide health care determined to be "medically needed."

The medical benefits package was created through rulemaking following enactment of the Veterans' Health Care Eligibility Reform Act of 1996 (P.L. 104-262). VA included some fertility services and maternity care in the original iteration of the standard medical benefits package. There is little in-depth discussion or rationale as to why VA included or excluded certain services from the medical benefits package when it was established. However, VA provided the following rationale for the inclusion of pregnancy and infertility services:

The Secretary has authority to provide healthcare as determined to be medically needed. In our view, medically needed constitutes care that is determined by appropriate healthcare professionals to be needed to promote, preserve, or restore the health of the individual and to be in accord with generally accepted standards of medical practice. The care included in the proposed 'medical benefits package' is intended to meet these criteria.

Commenters asserted that infertility services, pregnancy and delivery, surgical implantation of penile prostheses, and membership in spas and health clubs should be included in the medical benefits package. As noted above, the medical benefits package would include care that is determined by appropriate healthcare professionals to be needed to promote, preserve, or restore the health of the individual and to be in accord with generally accepted standards of medical practice. Upon reconsideration, we conclude that pregnancy and delivery services (to the extent we have legal authority to provide such services) meet these criteria and should be included in the medical benefits package. We also conclude that membership in spas and health clubs does not meet these criteria and should not be included. Further, under these criteria, we have determined that reproductive sterilization, surgery to reverse voluntary sterilization, infertility services (other than in vitro fertilization), and surgical implantation of penile prostheses should not be excluded. Appropriate changes are made to the medical benefits package to reflect these determinations.²⁹

This excerpt explains that VA included services prohibited under Section 106 of the 1992 law because it deemed those services to be "care that is determined by appropriate healthcare professionals to be needed to promote, preserve, or restore the health of the individual and to be in accord with generally accepted standards of medical practice."

Regarding infertility services, which the 1992 law also expressly prohibited, Congress has included funds for the provision of in vitro fertilization in annual appropriations language since

²⁷ Section 106 of P.L. 102-585 authorized pregnancy care for such care relating to a pregnancy that is complicated or in which the risks of complication are increased by a service-connected condition.

²⁸ Pregnancy care: Title 38 C.F.R. § 17.38(a)(1)(xii). In vitro fertilization is excluded in the medical benefits package [38 C.F.R. § 17.38(c)(2)] but Congress has authorized a narrow exception has in annual appropriations measures since FY2017 (38 C.F.R. § 17.380).

²⁹ Department of Veterans Affairs, "Enrollment Provisions and Medical," 64 *Federal Register* 54210, October 6, 1999. <https://www.govinfo.gov/content/pkg/FR-1999-10-06/pdf/99-25871.pdf>

FY2017.³⁰ This service is provided with narrow eligibility related to a service-connected disability that prevents procreation.

VA's justification for including pregnancy care and infertility services in its medical benefits package suggests that VA could potentially interpret the 1996 law as similarly allowing VA to provide "medically needed" abortion coverage.³¹ However, some maintain that the 1992 law continues to prohibit abortion coverage.³²

Legislative Activity in the 117th Congress

The Reproductive Health Information for Veterans Act (H.R. 345, 117th Congress), if enacted, would require the VA Secretary to provide abortion counseling to a veteran who has an unwanted pregnancy. As noted above, abortion counseling is currently prohibited by the standard medical benefits package, though it is not specifically prohibited by the 1992 law.

The legislation would specify that abortion counseling must include (1) options for veterans with unwanted pregnancies, including abortion; (2) accurate health information based on the health of the veteran regarding those options; and (3) information regarding the nearest location where a veteran can safely receive an abortion.

The House Veterans' Affairs Committee held a hearing on H.R. 345 on June 22, 2022.³³ In written testimony, VA expressed support for the bill with technical amendments. VA noted that VA providers currently face an ethical challenge, as they must adhere to professional standards and clinical practice guidelines regarding abortion counseling while also complying with VA's regulations prohibiting such counseling.³⁴

³⁰ Section 260 of the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2017, and the Zika Response and Preparedness Act (P.L. 114-223) permitted the VA to use funds from the Medical Services account for this purpose for FY2017. Section 236 of Division J of the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2018 (P.L. 115-141), continued this policy for FY2018 and FY2019. Section 235 of the Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019 (P.L. 115-244), continued this policy for FY2019 and FY2020. Section 235 of the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2020 (Division F of the Further Consolidated Appropriations Act, 2020; P.L. 116-94), allows the VHA to use FY2020 appropriations and FY2021 advance appropriations to continue providing IVF services to certain veterans and their spouses. Section 234 of Division J of the Consolidated Appropriations Act, 2021 (P.L. 116-260), continued allowing the use of FY2021 appropriations and FY2022 advance appropriations for this purpose. Section 234 of Division J of the Consolidated Appropriations Act, 2022 (P.L. 117-103) continued allowing the use of FY2022 appropriations and FY2023 advance appropriations for this purpose.

³¹ VA Secretary McDonough states that the abortion counseling prohibition is a regulatory matter. U.S. Congress, House Committee on Veterans' Affairs, *Restoring Faith by Building Trust: VA's First 100 Days.*, 117th Cong., 1st sess., March 25, 2021.

³² Office of United States Senator Jerry Moran, "Sen. Moran: VA's Prohibition on Abortion Services is the Law," press release, August 4, 2021, <https://go.usa.gov/xJK4k>.

³³ U.S. Congress, House Committee on Veterans' Affairs, Subcommittee on Health, *Legislative Hearing*, 117th Cong., 2nd sess., June 22, 2022.

³⁴ Testimony of VA representatives, in U.S. Congress, House Committee on Veterans' Affairs, Subcommittee on Health, *Legislative Hearing*, 117th Cong., 2nd sess., June 22, 2022, p.2. <https://docs.house.gov/meetings/VR/VR03/20220622/114857/HHRG-117-VR03-Wstate-MillerM-20220622-U1.pdf> VA raised four technical issues with the bill as written: (1) the language does not limit counseling to veterans enrolled in VA health care; (2) the bill does not define "unwanted pregnancy" and VA suggests revising the language as to not limit counseling to certain types of pregnancies; (3) VA suggests revising the language to authorize VA to provide counseling on the full range of options regarding pregnancy; and (4) it is unclear how it would obtain information on the nearest location where a veteran can receive an abortion.

An identical bill was introduced in the 116th Congress (H.R. 5568).

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