

DEPARTMENT OF HEALTH AND HUMAN SERVICES

42 CFR Parts 36 and 36a

RIN 0917-AA03

Currently Effective Indian Health Service Eligibility Regulations

AGENCY: Indian Health Service, HHS.

ACTION: Republication of currently effective Indian Health Service eligibility regulations.

SUMMARY: The HHS is publishing in the **Federal Register**, final regulations governing eligibility for services from the Indian Health Service. The eligibility regulations currently codified at 42 CFR part 36 are under a congressional moratorium. Republishing the regulations that are currently in effect while the codified regulations are under moratorium is being done for the convenience of the public and in conformance with the requirement of the Administrative Procedure Act, 5 U.S.C. 552(a)(1), that the Code of Federal Regulations (CFR) must contain currently effective regulations.

DATES: Effective October 28, 1999.

FOR FURTHER INFORMATION CONTACT: Leslie M. Morris, Director, Division of Regulatory and Legal Affairs, Suite 450, 12300 Twinbrook Parkway, Rockville, Maryland 20852, telephone: (301) 443-1116. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On September 16, 1987, HHS published new final regulations governing eligibility for IHS services at 52 FR 35044. These regulations were to supplant eligibility for IHS services at 52 FR 35044. These regulations were to supplant eligibility regulations effective prior to that date but were never implemented.

In the Fiscal Year 1988 Appropriations Act, Section 315, Public Law 100-202, Congress delayed

implementation of the new regulations for one year and has imposed a moratorium on the use of appropriated funds for implementation of the new regulations in subsequent fiscal years. In Section 719(a) of the Indian Health Care Amendments of 1988, Public Law 100-713, Congress directed the IHS “* * * during the period of this moratorium * * * to provide services pursuant to the criteria for eligibility for such services that were in effect on September 15, 1987.”

In Section 719(b), Congress also directed the IHS to conduct a study to determine, among other things, the financial impact of the rules published September 16, 1987. The study has been completed (*Impact of the Final Rule “Health Care Services of the Indian Health Service” 42 CFR Part 36—Final Report*, contract No. 282-910065) and sent to the tribes for comment, but it has not yet been submitted to Congress. The IHS has not submitted a budget request reflecting increased costs associated with the new regulations as directed by the various appropriations acts.

The regulations in effect on September 15, 1987, which Congress has made applicable during the moratorium, were last published in the CFR in 1986. The new regulations have been published in each edition of the CFR after 1986 but have not been implemented. This has caused considerable confusion because a reader of the current CFR would assume that the eligibility regulations published therein are currently applicable, which is not the case.

Because the moratorium continues in effect, for the convenience of the public, the HHS is republishing the eligibility regulations in effect on September 1, 1987, so these regulations may appear in the CFR printed in regular type, followed by the suspended regulations in small type.

The suspended regulations are redesignated as part 36a for clarity of

citation purposes because two distinct regulations cannot use the same regulation number.

The following eligibility rules that were in effect on September 1, 1987, along with 42 CFR subpart G, 36.61, payor of last resort, (published February 9, 1990, at 55 FR 4609) are currently in effect for the IHS. Subpart G has replaced §§ 36.21(a) and 36.23(f) of the rules in effect on September 15, 1987.

List of Subjects in 42 CFR Parts 36 and 36a

Alaska Natives, Contract health services, Employment, Government contracts, Government procurement, Grant programs—education, Grant programs—health, Grant programs—Indians, Health care, Health facilities, Health service delivery areas, Indians, Penalties, Reporting and recordkeeping requirements, Scholarships and fellowships, Student aid.

Dated: September 2, 1999.

Michael E. Lincoln,

Acting Director, Indian Health Service.

Approved: September 29, 1999.

Donna E. Shalala,

Secretary of Health and Human Services.

For the reasons set forth in the preamble, 42 CFR chapter I is amended as follows:

PART 36—[REDESIGNATED AS PART 36a]

1. Part 36 is redesignated as Part 36a.
2. In newly redesignated § 36a.212, paragraphs (h)(i) through (h)(iv) are redesignated as paragraphs (h)(i) through (h)(4).
3. In newly redesignated Part 36a, in the redesignated section and paragraph listed in the first column below, references to the sections listed in the second column are revised to read as shown in the third column:

Redesignated section	Old section reference	New section reference
36a.12(a)(2), (a)(3), and (b)(1)	36.15	36a.15
36a.15(b)(1)	36.(a)(1) and (3)	36a.(a)(1) and (3)
36a.16(a)	36.12(a)	36a.12(a)
36a.33(a)	36.32(a)	36a.32(a)
36a.33(b)	36.14	36a.14
36a.34(b)	36.14	36a.14
36a.42(a)	36.41	36a.41
36a.43	36.41	36a.41
36a.53	36.51	36a.51
36a.53	36.54	36a.54
36a.56	36.54	36a.54
36a.106(a)(4)	36.105	36a.105
36a.116	36.114	36a.114
36a.120(a)	section 102(g) of this subpart	36a.102(g)
36a.205(b)(18)	36.216	36a.216
36a.208(b)(4)	36.206	36a.206
36a.212(h)(iv)	36.214	36a.214

Redesignated section	Old section reference	New section reference
36a.230(b)	36.208	36a.208
36a.230(b)	36.214	36a.214
36a.232	36.233(a)	36a.233(a)
36a.302(v)(4)	36.350(a)	36a.350(a)
36a.303 (a) and (d)	36.302	36a.302
36a.321(d)	36.320	36a.320
36a.322(a)(2)	36.332	36a.332
36a.350(a) introductory text	36.351	36a.351
36a.351(b)(5), (b)(6), (b)(7), (b)(9)	36.350(a)	36a.350(a)
36a.353	36.350(a) (7) and (8)	36a.350(a) (7) and (8)
36a.371(c), (d)	36.370	36a.370
36a.372(a)(2)	36.332	36a.332

4. Redesignated part 36a is suspended indefinitely.

5. A new part 36 is added to read as follows:

PART 36—INDIAN HEALTH

Subpart A—Purpose and Definitions

- Sec.
- 36.1 Definitions.
- 36.2 Purpose of the regulations.
- 36.3 Administrative instructions.

Subpart B—What Services Are Available and Who Is Eligible To Receive Care

- 36.11 Services available.
- 36.12 Persons to whom services will be provided.
- 36.13 [Reserved]
- 36.14 Care and treatment of ineligible individuals.

Subpart C—Contract Health Services

- 36.21 Definitions.
- 36.22 Establishment of contract health service delivery areas.
- 36.23 Persons to whom contract health services will be provided.
- 36.24 Authorization for contract health services.
- 36.25 Reconsideration and appeals.

Subpart D—[Reserved]

Subpart E—Preference in Employment

- 36.41 Definitions.
- 36.42 Appointment actions.
- 36.43 Application procedure for preference eligibility.

Subpart F—Abortions and Related Medical Services in Indian Health Service Facilities and Indian Health Service Programs

- 36.51 Applicability.
- 36.52 Definitions.
- 36.53 General rule.
- 36.54 Life of the mother would be endangered.
- 36.55 Drugs and devices and termination of ectopic pregnancies.
- 36.56 Recordkeeping requirements.
- 36.57 Confidentiality.

Subpart G—Residual Status

- 36.61 Payor of last resort.
- Authority:** 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C., 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

Subpart A—Purpose and Definitions

§ 36.1 Definitions.

When used in this part: *Bureau of Indian Affairs* (BIA) means the Bureau of Indian Affairs, Department of the Interior.

Indian includes Indians in the Continental United States, and Indians, Aleuts and Eskimos in Alaska.

Indian health program means the health services program for Indians administered by the Indian Health Service within the Department of Health and Human Services.

Jurisdiction has the same geographical meaning as in Bureau of Indian Affairs usage.

Service means the Indian Health Service.

§ 36.2 Purpose of the regulations.

The regulations in this part establish general principles and program requirements for carrying out the Indian health programs.

§ 36.3 Administrative instructions.

The service periodically issues administrative instructions to its officers and employees, which are primarily found in the *Indian Health Service Manual* and the Area Office and program office supplements. These instructions are operating procedures to assist officers and employees in carrying out their responsibilities, and are not regulations establishing program requirements which are binding upon members of the general public.

Subpart B—What Services Are Available and Who Is Eligible To Receive Care?

§ 36.11 Services available.

(a) *Type of services that may be available.* Services for the Indian community served by the local facilities and program may include hospital and medical care, dental care, public health nursing and preventive care (including immunizations), and health examination of special groups such as school children.

(b) *Where services are available.* Available services will be provided at hospitals and clinics of the Service, and at contract facilities (including tribal facilities under contract with the Service).

(c) *Determination of what services are available.* The Service does not provide the same health services in each area served. The services provided to any particular Indian community will depend upon the facilities and services available from sources other than the Service and the financial and personnel resources made available to the Service.

§ 36.12 Persons to whom services will be provided.

(a) *In general.* Services will be made available, as medically indicated, to persons of Indian descent belonging to the Indian community served by the local facilities and program. Services will also be made available, as medically indicated, to a non-Indian woman pregnant with an eligible Indian's child but only during the period of her pregnancy through postpartum (generally about 6 weeks after delivery). In cases where the woman is not married to the eligible Indian under applicable state or tribal law, paternity must be acknowledged in writing by the Indian or determined by order of a court of competent jurisdiction. The Service will also provide medically indicated services to non-Indian members of an eligible Indian's household if the medical officer in charge determines that this is necessary to control acute infectious disease or a public health hazard.

(2) Generally, an individual may be regarded as within the scope of the Indian health and medical service program if he/she is regarded as an Indian by the community in which he/she lives as evidenced by such factors as tribal membership, enrollment, residence on tax-exempt land, ownership of restricted property, active participation in tribal affairs, or other relevant factors in keeping with general

Bureau of Indian Affairs practices in the jurisdiction.

(b) *Doubtful cases.* (1) In case of doubt as to whether an individual applying for care is within the scope of the program, the medical officer in charge shall obtain from the appropriate BIA officials in the jurisdiction information that is pertinent to his/her determination of the individual's continuing relationship to the Indian population group served by the local program.

(2) If the applicant's condition is such that immediate care and treatment are necessary, services shall be provided pending identification as an Indian beneficiary.

(c) *Priorities when funds, facilities, or personnel are insufficient to provide the indicated volume of services.* Priorities for care and treatment, as among individuals who are within the scope of the program, will be determined on the basis of relative medical need and access to other arrangements for obtaining the necessary care.

§ 36.13 [Reserved]

§ 36.14 Care and treatment of ineligible individuals.

(a) In case of an emergency, as an act of humanity, individuals not eligible under § 36.12 may be provided temporary care and treatment in Service facilities.

(b) *Charging ineligible individuals.* Where the Service Unit Director determines that an ineligible individual is able to defray the cost of care and treatment, the individual shall be charged at rates approved by the Assistant Secretary for Health and Surgeon General published in the **Federal Register**. Reimbursement from third-party payors may be arranged by the patient or by the Service on behalf of the patient.

Subpart C—Contract Health Services

§ 36.21 Definitions.

(a) *Alternate resources* is defined in § 36.61(c) of subpart G of this part.

(b) *Appropriate ordering official* means, unless otherwise specified by contract with the health care facility or provider, the ordering official for the contract health service delivery area in which the individual requesting contract health services or on whose behalf the services are requested, resides.

(c) *Area Director* means the Director of an Indian Health Service Area designated for purposes of administration of Indian Health Service programs.

(d) *Contract health service delivery area* means the geographic area within

which contract health services will be made available by the IHS to members of an identified Indian community who reside in the area, subject to the provisions of this subpart.

(e) *Contract health services* means health services provided at the expense of the Indian Health Service from public or private medical or hospital facilities other than those of the Service.

(f) *Emergency* means any medical condition for which immediate medical attention is necessary to prevent the death or serious impairment of the health of an individual.

(g) *Indian tribe* means any Indian tribe, band, nation, group, Pueblo, or community, including any Alaska Native village or Native group, which is federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(h) *Program Director* means the Director of an Indian Health Service "program area" designated for the purposes of administration of Indian Health Service programs.

(i) *Reservation* means any federally recognized Indian tribe's reservation, Pueblo, or colony, including former reservations in Oklahoma, Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), and Indian allotments.

(j) *Secretary* means the Secretary of Health and Human Services to whom the authority involved has been delegated.

(k) *Service* means the Indian Health Service.

(l) *Service Unit Director* means the Director of an Indian Health Service "service unit area" designated for purposes of administration of Indian Health Service programs.

§ 36.22 Establishment of contract health service delivery areas.

(a) In accordance with the congressional intention that funds appropriated for the general support of the health program of the Indian Health Service be used to provide health services for Indians who live on or near Indian reservations, contract health service delivery areas are established as follows:

- (1) The State of Alaska;
- (2) The State of Nevada;
- (3) the State of Oklahoma;
- (4) Chippewa, Mackinac, Luce, Alger, Schoolcraft, Delta, and Marquette Counties in the State of Michigan;
- (5) Clark, Eau Claire, Jackson, La Crosse, Monroe, Vernon, Crawford, Shawano, Marathon, Wood, Juneau, Adams, Columbia, and Sauk Counties in

the State of Wisconsin and Houston County in the State of Minnesota;

(6) With respect to all other reservations within the funded scope of the Indian health program, the contract health services delivery area shall consist of a county which includes all or part of a reservation, and any county or counties which have a common boundary with the reservation.

(b) The Secretary may from time to time, redesignate areas or communities within the United States as appropriate for inclusion or exclusion from a contract health service delivery area after consultation with the tribal governing body or bodies on those reservations included within the contract health service delivery area. The Secretary will take the following criteria into consideration:

(1) The number of Indians residing in the area proposed to be so included or excluded;

(2) Whether the tribal governing body has determined that Indians residing in the area near the reservation are socially and economically affiliated with the tribe;

(3) The geographic proximity to the reservation of the area whose inclusion or exclusion is being considered; and

(4) The level of funding which would be available for the provision of contract health services.

(c) Any redesignation under paragraph (b) of this section shall be made in accordance with the procedures of the Administrative Procedure Act (5 U.S.C. 553).

§ 36.23 Persons to whom contract health services will be provided.

(a) *In general.* To the extent that resources permit, and subject to the provisions of this subpart, contract health services will be made available as medically indicated, when necessary health services by an Indian Health Service facility are not reasonably accessible or available, to persons described in and in accordance with § 36.12 of this part if those persons:

(1) Reside within the United States and on a reservation located within a contract health service delivery area; or

(2) Do not reside on a reservation but reside within a contract health service delivery area and:

(i) Are members of the tribe or tribes located on that reservation or of the tribe or tribes for which the reservation was established; or

(ii) Maintain close economic and social ties with that tribe or tribes.

(b) *Students and transients.* Subject to the provisions of this subpart, contract health services will be made available to students and transients who would be

eligible for contract health services at the place of their permanent residence within a contract health service delivery area, but are temporarily absent from their residence as follows:

(1) Student—during their full-time attendance at programs of vocational, technical, or academic education, including normal school breaks (such as vacations, semester or other scheduled breaks occurring during their attendance) and for a period not to exceed 180 days after the completion of the course of study.

(2) Transients (persons who are in travel or are temporarily employed, such as seasonal or migratory workers) during their absence.

(c) *Other persons outside the contract health service delivery area.* Persons who leave the contract health service delivery area in which they are eligible for contract health service and are neither students nor transients will be eligible for contract health service for a period not to exceed 180 days from such departure.

(d) *Foster children.* Indian children who are placed in foster care outside a contract health service delivery area by order of a court of competent jurisdiction and who were eligible for contract health services at the time of the court order shall continue to be eligible for contract health services while in foster care.

(e) *Priorities for contract health services.* When funds are insufficient to provide the volume of contract health services indicated as needed by the population residing in a contract health service delivery area, priorities for service shall be determined on the basis of relative medical need.

(f) *Alternate resources.* The term "alternate resources" is defined in § 36.61(c) of Subpart G of this part.

§ 36.24 Authorization for contract health services.

(a) No payment will be made for medical care and services obtained from non-Service providers or in non-Service facilities unless the applicable requirements of paragraphs (b) and (c) of this section have been met and a purchase order for the care and services has been issued by the appropriate ordering official to the medical care provider.

(b) In nonemergency cases, a sick or disabled Indian, an individual or agency acting on behalf of the Indian, or the medical care provider shall, prior to the provision of medical care and services notify the appropriate ordering official of the need for services and supply information that the ordering official deems necessary to determine the

relative medical need for the services and the individual's eligibility. The requirement for notice prior to providing medical care and services under this paragraph may be waived by the ordering official if:

(1) Such notice and information are provided within 72 hours after the beginning of treatment or admission to a health care facility; and

(2) The ordering official determines that giving of notice prior to obtaining the medical care and services was impracticable or that other good cause exists for the failure to provide prior notice.

(c) In emergency cases, a sick or disabled Indian, or an individual or agency acting on behalf of the Indian, or the medical care provider shall within 72 hours after the beginning of treatment for the condition or after admission to a health care facility notify the appropriate ordering official of the fact of the admission or treatment, together with information necessary to determine the relative medical need for the services and the eligibility of the Indian for the services. The 72-hour period may be extended if the ordering official determines that notification within the prescribed period was impracticable or that other good cause exists for the failure to comply.

§ 36.25 Reconsideration and appeals.

(a) Any person to whom contract health services are denied shall be notified of the denial in writing together with a statement of the reason for the denial. The notice shall advise the applicant for contract health services that within 30 days from the receipt of the notice the applicant:

(1) May obtain a reconsideration by the appropriate Service Unit Director of the original denial if the applicant submits additional supporting information not previously submitted; or

(2) If no additional information is submitted, may appeal the original denial by the Service Unit Director to the appropriate Area or program director. A request for reconsideration or appeal shall be in writing and shall set forth the grounds supporting the request or appeal.

(b) If the original decision is affirmed on reconsideration, the applicant shall be so notified in writing and advised that an appeal may be taken to the Area or program director within 30 days of receipt of the notice of the reconsidered decision. The appeal shall be in writing and shall set forth the grounds supporting the appeal.

(c) If the original or reconsidered decision is affirmed on appeal by the

Area or program director, the applicant shall be so notified in writing and advised that a further appeal may be taken to the Director, Indian Health Service, within 30 days of receipt of the notice. The appeal shall be in writing and shall set the grounds supporting the appeal. The decision of the Director, Indian Health Service, shall constitute final administrative action.

Subpart D—[Reserved]

Subpart E—Preference in Employment

Authority: 25 U.S.C. 44, 45, 46 and 472; Pub. L. 83-568, 68 Stat 674, 42 U.S.C. 2003.

§ 36.41 Definitions.

For purposes of making appointments to vacancies in all positions in the Indian Health Service, a preference will be extended to persons of Indian descent who are:

(a) Members of any recognized Indian tribe now under Federal jurisdiction;

(b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;

(c) All others of one-half or more Indian blood of tribes indigenous to the United States;

(d) Eskimos and other aboriginal people of Alaska; or

(e) Until January 4, 1990, or until the Osage Tribe has formally organized, whichever comes first, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

§ 36.42 Appointment actions.

(a) Preference will be afforded a person meeting any one of the definitions of § 36.41 whether the placement in the position involves initial appointment, reappointment, reinstatement, transfer, reassignment, promotion, or any other personnel action intended to fill a vacancy.

(b) Preference eligibles may be given a schedule A excepted appointment under 5 CFR 213.3116(b)(8). If the individuals are within reach on a Civil Service Register, they may be given a competitive appointment.

§ 36.43 Application procedure for preference eligibility.

To be considered a preference eligible, the person must submit with the employment application a Bureau of Indian Affairs certification that the person is an Indian as defined by § 36.41 except that an employee of the Indian Health Service who has a certificate of preference eligibility on file in the Official Personnel Folder is not required to resubmit such proof but

may instead include a statement on the application that proof of eligibility is on file in the Official Personnel Folder.

Subpart F—Abortions and Related Medical Services in Indian Health Service Facilities and Indian Health Service Programs

Authority: Sec. 1, 42 Stat. 208, (25 U.S.C. 13); sec. 1, Stat. 674, (42 U.S.C. 2001); sec. 3, 68 Stat. 674, (42 U.S.C. 2003).

§ 36.51 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.

§ 36.52 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.

§ 36.53 General rule.

Federal funds may not be used to pay for or otherwise provide for abortions in the programs described in § 36.51, except under the circumstances described in § 36.54.

§ 36.54 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.

§ 36.55 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.

§ 36.56 Recordkeeping requirements.

Documents required by § 36.54 must be maintained for three years pursuant to the retention and custodial requirements for records at 45 CFR part 74, subpart C.

§ 36.57 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.

Subpart G—Residual Status

§ 36.61 Payor of last resort.

(a) The Indian Health Service is the payor of last resort for persons defined as eligible for contract health services under the regulations in this part, notwithstanding any State or local law or regulation to the contrary.

(b) Accordingly, the Indian Health Service will not be responsible for or authorize payment for contract health services to the extent that:

(1) The Indian is eligible for alternate resources, as defined in paragraph (c) of this section, or

(2) The Indian would be eligible for alternate resources if he or she were to apply for them, or

(3) The Indian would be eligible for alternate resources under State or local law or regulation but for the Indian's eligibility for contract health services, or other health services, from the Indian Health Service or Indian Health Service funded programs.

(c) *Alternate resources* means health care resources other than those of the Indian Health Service. Such resources include health care providers and institutions, and health care programs for the payment of health services including but not limited to programs under titles XVIII or XIX of the Social Security Act (*i.e.*, Medicare, Medicaid), State or local health care programs, and private insurance.

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