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the application *de novo* with no deference to the original decision maker or to the applicant.

(2) If the original decision is affirmed on reconsideration, the Service Unit will be notified in writing and advised that an appeal may be taken to the Director, Indian Health Service, within 40 business days of receipt of the denial. The appeal shall be in writing and shall set forth the grounds supporting the appeal. The Service Unit may also request a telephone conference through the Division of Contract Care, which shall be scheduled with the Director or a representative designated by the Director, to further explain the grounds supporting the appeal. A decision by the Director shall be made within 180 calendar days of the request for reconsideration. The decision of the Director, Indian Health Service or designee, shall constitute the final administrative action.

§ 136.510 Severability.

If any provision of this subpart is held to be invalid or unenforceable by its terms, as applied to any person or circumstance, or stayed pending further agency action, the provision shall be construed to continue to give the maximum effect to the provision permitted by law, including as applied to those not similarly situated or to dissimilar circumstances. However, if such holding is that the provision of this subpart is invalid and unenforceable in all circumstances, the provision shall be severable from the remainder of this subpart and shall not affect the remainder thereof.

PART 136a—INDIAN HEALTH

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AUTHORITY: Sec. 3, 68 Stat. 674; 42 U.S.C. 2003, 42 Stat. 208, sec. 1, 68 Stat. 674; 25 U.S.C. 13, 42 U.S.C. 2001, unless otherwise noted.

SOURCE: 64 FR 58318, 58319, Oct. 28, 1999, unless otherwise noted. Redesignated at 67 FR 35342, May 17, 2002.

Subpart A—Purpose

§ 136a.1 Purpose of the regulations.

These regulations establish general principles and program requirements for carrying out the Indian health program.

[46 FR 40692, Aug. 11, 1981. Redesignated at 52 FR 35048, Sept. 16, 1987]

§ 136a.2 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

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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.

[46 FR 40692, Aug. 11, 1981. Redesignated at 52 FR 35048, Sept. 16, 1987]

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

§ 136a.10 Definitions.

As used in this subpart:

Appropriate ordering official means, unless otherwise specified by contract with the health care facility or provider or by a contract with a tribe or tribal organization, the ordering official for the Service Unit in which the individual requesting contract health services or on whose behalf the services are requested, resides.

Area Director means the Director of an Indian Health Service Area Office designated for purposes for administration of Indian Health Service Programs.

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 or those funded by the Service.

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.

Health Service Delivery Area means a geographic area designated pursuant to § 36.15 of this subpart.

Indian tribe means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et. seq.*, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

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 if considered reservation land by the Bureau of Indian Affairs.

Reside means living in a locality with the intent to make it a fixed and a permanent home. The following persons will be deemed residents of the Health Service Delivery Area:

(1) Students who are temporarily absent from the Health Service Delivery Area during full time attendance at programs of vocational, technical, or academic education including normal school breaks;

(2) Persons who are temporarily absent from the Health Service Delivery Area for purposes of travel or employment (such as seasonal or migratory workers);

(3) Indian children placed in foster care outside the Health Service Delivery Area by order of a court of competent jurisdiction and who were residents within the Health Service Delivery Area at the time of the court order.

Secretary means the Secretary of Health and Human Services and any other officer or employee of the Department of Health and Human Services to whom the authority involved has been delegated.

Service means the Indian Health Service.

Service Unit Director means the Director of Indian Health Service programs for a designated geographical or tribal area of responsibility or the equivalent official of a contractor administering an IHS program.

[52 FR 35048, Sept. 16, 1987, as amended at 55 FR 4609, Feb. 9, 1990]

§ 136a.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.

(d) *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.

[46 FR 40692, Aug. 11, 1981, as amended at 52 FR 35048, Sept. 16, 1987]

§ 136a.12 Persons to whom health services will be provided.

(a) Subject to the requirements of this subpart, the Indian Health Service will provide direct services at its facilities, and contract health services, as medically indicated, and to the extent that funds and resources allocated to the particular Health Service Delivery Area permit, to persons of Indian or Alaska Native descent who:

(1) Are members of a federally recognized Indian tribe; and

(2) Reside within a Health Service Delivery Area designated under § 36a.15; or

(3) Are not members of a federally recognized Indian tribe but are the natural minor children (18 years old or under) of a member of a Federally recognized tribe and reside within a Health Service Delivery Area designated under § 36a.15.

(b) Subject to the requirements of this subpart, the Indian Health Service will also provide direct services at its facilities and, except where otherwise provided, contract health services, as medically indicated and to the extent that funds and resources allocated to the particular Health Service Delivery Area permit, to people in the circumstances listed below:

(1) To persons who meet the eligibility criteria in paragraph (a) of this section except for the residency requirement, who formerly resided with-

in a Health Service Delivery area designated under § 36a.15, and who present themselves to any Indian Health Service or Indian Health Service funded facility (and to minor children of such persons if the children meet the eligibility criteria in paragraph (a) of this section except for the residency requirement). Contract health services may not be authorized for these individuals;

(2) To a non-Indian woman pregnant with an eligible Indian's child but only during the period of her pregnancy through post-partum (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;

(3) To non-Indian members of an eligible Indian's household if the medical officer in charge determines that the health services are necessary to control acute infectious disease or a public health hazard; and

(4) To an otherwise eligible person for up to 90 days after the person ceases to reside in a Health Service Delivery Area when the Service Unit Director has been notified of the move.

(c) Contract health services will not be authorized when and to the extent that Indian Health Service or Indian Health Service funded facilities are available to provide the needed care. When funds are insufficient to provide the volume of contract health services needed by the service population, the Indian Health Service shall determine service priorities on the basis of medical need.

(d) The Indian Health Service may provide direct services at its facilities on a fee-for-service basis to persons who are not beneficiaries under paragraphs (a) and (b) of this section under a number of authorities including the following:

(1) In emergencies under section 322(b) of the Public Health Service Act, 42 U.S.C. 249(b), and 42 CFR 32.111 of the regulations;

(2) To Public Health Service and other Federal beneficiaries under Economy Act (31 U.S.C. 1535) arrangements to the extent that providing services

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does not interfere with or restrict the provision of services to Indian and Alaska Native beneficiaries; and

(3) To non-beneficiaries residing within the Health Service Delivery Area when approved by the tribe or tribes located on the reservation but only to the extent that providing services does not interfere with or restrict the provision of services to Indian and Alaska Native beneficiaries.

(Approved by the Office of Management and Budget under control number 0915-0107)

[52 FR 35048, Sept. 16, 1987, as amended at 55 FR 4609, Feb. 9, 1990; 65 FR 53914, Sept. 6, 2000]

§ 136a.13 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) below 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 non-emergency cases, a sick or disabled Indian, or 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 is 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 admis-

sion 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.

[43 FR 34654, Aug. 4, 1978. Redesignated at 52 FR 35048, Sept. 16, 1987]

§ 136a.14 Reconsideration and appeals.

(a) Any person who has applied for and been denied health services or eligibility by the Indian Health Service or by any contractor contracting to administer an Indian Health Service program or portion of a program, including tribes and tribal organizations contracting under the Indian Self-Determination Act, shall be notified of the denial in writing together with a statement of all the reasons for the denial. The notice shall advise the applicant that within 30 days from the receipt of the notice the applicant.

(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 forth the grounds supporting the appeal. The decision of the Director, Indian Health Service, shall constitute final administrative action.

(Approved by the Office of Management and Budget under control number 0915-0107)

[43 FR 34654, Aug. 4, 1978. Redesignated and amended at 52 FR 35048, 35049, Sept. 16, 1987]

§ 136a.15 Health Service Delivery Areas.

(a) The Indian Health Service will designate and publish as a notice in the FEDERAL REGISTER specific geographic areas within the United States including Federal Indian reservations and areas surrounding those reservations as Health Service Delivery Areas.

(b) The Indian Health Service may, after consultation with all the Indian tribes affected, redesignate the boundaries of any Health Service Delivery Area followed by publication of a notice in the FEDERAL REGISTER. Any redesignation of a Health Service Delivery area will include the reservation, and those areas close to the reservation boundaries which can reasonably be considered part of the reservation service area based on consideration of the following factors:

(1) The number of persons residing in the off-reservation area who would be eligible under § 36a.12(a) (1) and (3).

(2) The number of persons residing in the off-reservation area who have traditionally received health services from the Indian Health Service and whose eligibility for services would be affected;

(3) The geographic proximity of the off-reservation area to the reservation; and

(4) Whether the Indians residing in the off-reservation area can be expected to need and to use health services provided by the Indian Health Service given the alternate resources (health facilities and payment sources) available and accessible to them.

(c) Notwithstanding paragraphs (a) and (b) of this section, the Indian Health Service may designate States, subdivisions of States such as counties or towns, or other identifiable geographic areas such as census divisions or zip code areas, as Health Service Delivery Areas where reservations are nonexistent, or so small and scattered and the eligible Indian population so widely dispersed that it is inappropriate to use reservations as the basis for defining the Health Service Delivery Area.

(d) Any Indian tribal government may request a change in the boundaries of the Health Service Delivery Area. Such a request should be sup-

ported by documentation related to the factors for consideration set out in paragraph (b) of this section and shall include documentation of any consultation with or notification of other affected or nearby tribes. The request shall be submitted to the appropriate Area Director(s) who shall afford all Indian tribes affected the opportunity to express their views orally and in writing. The Area Director(s) shall then submit the request, including all comments, together with the Area's recommendation and independent findings or verification of the factors set out in paragraph (b) of this section, to the Indian Health Service Director or to the Director's designee for the Indian Health Service decision. The decision of the Indian Health Service Director or the Director's designee shall constitute final agency action on the tribe's request. Changes in the boundaries of Health Service Delivery Areas will be published in the FEDERAL REGISTER.

(Approved by the Office of Management and Budget under control number 0915-0107)

[52 FR 35049, Sept. 16, 1987, as amended at 65 FR 53914, Sept. 6, 2000]

§ 136a.16 Beneficiary Identification Cards and verification of tribal membership.

(a) The Indian Health Service will issue Beneficiary Identification Cards as evidence of beneficiary status to persons who are currently eligible for services under § 36a.12(a). Persons requesting Beneficiary Identification Cards must submit or have on file evidence satisfactory to the Indian Health Service of tribal membership and residence within a Health Service Delivery Area. The absence of a Beneficiary Identification Card will not preclude an otherwise eligible Indian from obtaining services though it may delay the administrative determination that an individual is eligible for services on a no charge basis.

(b) For establishing eligibility or obtaining a Beneficiary Identification Card, applicants must demonstrate that they are members of a federally recognized tribe. Membership in a federally recognized tribe is to be determined by the individual tribe or the Bureau of Indian Affairs. Therefore,

the Indian Health Service will recognize two methods of demonstrating tribal membership:

(1) Documentation that the applicant meets the requirements of tribal membership as prescribed by the charter, articles of incorporation, or other legal instruments or traditional processes of the tribe and has been officially designated a tribal member by an authorized tribal official or body; or

(2) Certification of tribal enrollment or membership by the Secretary of the Interior acting through the Bureau of Indian Affairs.

(c) Demonstrating membership in a federally recognized tribe is the responsibility of the applicant. However, the Indian Health Service may consult with the appropriate tribe or the Bureau of Indian Affairs on outstanding questions regarding an applicant's tribal membership if the Indian Health Service has some documentation that it believes may be helpful to the tribe or the Bureau of Indian Affairs in making their determination.

(Approved by the Office of Management and Budget under control number 0915-0107)

[50 FR 35050, Sept. 16, 1987, as amended at 65 FR 53914, Sept. 6, 2000]

Subpart C [Reserved]

Subpart D—Transition Provisions

SOURCE: 52 FR 35050, Sept. 16, 1987, unless otherwise noted.

§ 136a.31 Transition period.

(a) The transition period for full implementation of the new eligibility regulations consists of three parts;

(1) A six month delayed implementation;

(2) A six month grace period; and

(3) A health care continuity period determined by medical factors.

§ 136a.32 Delayed implementation.

(a) The eligibility requirements in subparts A and B of this part become effective March 16, 1988.

(b) During the six month delayed implementation period the former eligibility regulations will apply.

§ 136a.33 Grace period.

(a) Upon the effective date referred to in § 36a.32(a), individuals who would lose their eligibility under the new eligibility regulations published on September 16, 1987, and who have made use of an Indian Health Service of Indian Health Service funded service within three years prior to September 16, 1987 (date of publication of the new eligibility regulations) shall retain their eligibility for a six month grace period ending September 16, 1988. During this grace period such individual's eligibility will continue to be determined under the former regulations except that the new residency requirements established by subparts A and B must be met for the individual to be eligible.

(b) All individuals who receive services during the grace period based on paragraph (a) of this section and whose eligibility will terminate on September 16, 1988, shall be notified in writing that after September 16, 1988 they will no longer be eligible for services as Indian Health Service beneficiaries. Such written notice should include an explanation of their appeal rights as provided in § 36a.14 of the part. These patients shall be offered assistance in locating other health care providers and medical assistance programs.

[52 FR 35050, Sept. 16, 1987, as amended at 65 FR 53914, Sept. 6, 2000]

§ 136a.34 Care and treatment of people losing eligibility.

(a) Individuals who lose their eligibility on September 16, 1988, (end of the grace period) and on that date are actively undergoing treatment may still be provided services for a limited period in the following circumstances;

(1) Inpatients in IHS and IHS funded facilities and those receiving inpatient care under contract, including contract health services, may continue to receive such care and necessary follow-up services at Indian Health Service expense until the need for hospitalization and follow-up services has ended as determined by the responsible Indian Health Service or tribal physician, all other conditions being met including medical priorities;

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(2) Those actively undergoing a course of outpatient treatment either in Indian Health Service and Indian Health Service funded facilities or through contract health services, termination of which would impair the health of the individual patient, may continue to receive the treatment at Indian Health Service expense for a reasonable length of time, until the course of treatment reaches a point where it may safely be terminated or the patient transferred to other providers as determined by the responsible Indian Health Service or tribal physician, all other conditions being met including medical priorities.

(3) Those under treatment for chronic degenerative conditions may be provided additional treatment at Indian Health Service expense for no longer than 1 year beyond the end of the grace period notwithstanding any determination that it was otherwise safe to transfer treatment to other providers, all other conditions being met including medical priorities.

(b) All patients receiving care under paragraph (a) of this section shall be notified in writing that, after discharge from care provided under any of the above circumstances, they will no longer be eligible for services as Indian Health Service beneficiaries. Such notice shall include an explanation of their appeal rights as provided in § 36a.14 of this part. These patients shall be offered assistance in locating other health care providers and medical assistance programs.

[52 FR 35050, Sept. 16, 1987, as amended at 65 FR 53914, Sept. 6, 2000]

Subpart E—Preference in Employment

AUTHORITY: 25 U.S.C. 44, 45, 46 and 472; Pub. L. 83–568, 42 U.S.C. 2003.

§ 136a.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.

[43 FR 29783, July 11, 1978, as amended at 54 FR 48246, Nov. 22, 1989]

§ 136a.42 Appointment actions.

(a) Preference will be afforded a person meeting any one of the definitions of § 36a.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.

[43 FR 29783, July 11, 1978, as amended at 65 FR 53914, Sept. 6, 2000]

§ 136a.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 § 36a.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.

[43 FR 29783, July 11, 1978, as amended at 65 FR 53914, Sept. 6, 2000]

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, 68 Stat. 674, 42 U.S.C. 2001; sec. 3, 68 Stat. 674, 42 U.S.C. 2003.

SOURCE: 47 FR 4018, Jan. 27, 1982, unless otherwise noted.

§ 136a.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, C, H, I and J of this part.

§ 136a.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.

§ 136a.53 General rule.

Federal funds may not be used to pay for or otherwise provide for abortions in the programs described in § 36a.51, except under the Circumstances described in § 36a.54.

[47 FR 4018, Jan. 27, 1982, as amended at 65 FR 53914, Sept. 6, 2000]

§ 136a.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 judgement 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.

§ 136a.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.

§ 136a.56 Recordkeeping requirements.

Documents required by § 36a.54 must be maintained for three years pursuant to the retention and custodial requirements for records at 45 CFR 74.20 *et seq.*

[47 FR 4018, Jan. 27, 1982, as amended at 65 FR 53914, Sept. 6, 2000]

§ 136a.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

§ 136a.61 Payor of last resort.

(a) The Indian Health Service is the payor of last resort of persons defined as eligible for contract health services under these regulations, 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), 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

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title XVIII and XIX of the Social Security Act (*i.e.*, Medicare, Medicaid), State or local health care programs and private insurance.

[55 FR 4609, Feb. 9, 1990]

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