Native American Women's Health Education Resource Center

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Indigenous Women's Reproductive Rights

The Indian Health Service and Its Inconsistent Application of the Hyde Amendment

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Abortion Among Native American Women: Is It an Issue?

Traditionally, in Native American communities, matters pertaining to women have been the business of women. All decisions concerning a woman's reproductive health were left up to her as an individual, and her decision was respected. Oftentimes a woman would turn to other women within her society for advice, mentoring, and assistance concerning reproductive health. Within traditional societies and languages, there is no word that is equivalent to "abortion." Traditional elders knowledgeable about reproductive health matters would refer to a woman's knowing which herbs and methods to use "to make her period come."

Today, however, Native American women are no longer free to make decisions concerning their reproductive health and rights. Instead, these decisions are regulated by the federal government and by legislation that limits the reproductive health services provided by the Indian Health Service (IHS).

Native American women are as affected by legislation limiting their reproductive rights as non-Native women are. In fact, statistical data show that in several states, Native American women are over-represented among women seeking abortion services[i] at non-Indian-Health-Service abortion providers.

This report attempts to address the following issues: What are the legal policies on abortion in the United States? What services are Native American women entitled to receive from the Indian Health Service (IHS)? What limitations on Native American women's access to abortion exist? What is the impact of the Hyde Amendment on Native American communities?

Legislation, Laws, and Rights: Abortion in the United States

Abortion was legalized in the United States in 1973. At that time, the U.S. Supreme Court decision in the case of *Roe v. Wade* guaranteed women the right to choose to have an abortion. The Supreme Court argued that the constitutional right to privacy, as specified in the Fourteenth Amendment, also applied to a woman's decision to end her pregnancy. A woman was allowed to choose to have an abortion during the time before the fetus became able to live outside the woman's womb, which occurs in the third trimester of pregnancy, and thereafter only if the woman's life or health was at risk. "Health" was broadly defined to include both the physical and mental conditions of the woman.

The Supreme Court's ruling in *Roe v. Wade* remains the definitive decision on the legality of abortion, and it applies to all areas under federal jurisdiction. However, the U.S. Constitution grants states a significant amount of power in deciding local abortion policies. States are permitted to pass laws regulating abortion, provided that these laws do not infringe on the rights guaranteed by the 1973 U.S. Supreme Court decision.

The legalization of abortion has improved the lives and health of women throughout the United States. Data from Planned Parenthood show that in 1965, 17% of

women's deaths due to pregnancy and childbirth were the result of illegal abortions. Today, legal abortion procedures are 11 times safer than giving childbirth.[ii]

Legal Abortion – Who Pays for It?

The legalization of abortion was one important step in improving women's rights. However, ensuring that low-income women can financially realize this right is another issue, and one that often has been neglected. For instance, the pro-choice movement in the 1970s was primarily led by white feminists and did not address the issue of providing funding for abortion. Therefore, the cost of abortion services remains a major barrier for many women, in particular for low-income, immigrant, minority, and Indigenous women. These women are at risk of not being able to exercise their right to abortion services because they lack the financial means. As long as funding for abortion is not ensured, the right to choose remains a privilege only for those who can afford it.

The Hyde Amendment and Public Funding of Abortion

Policies on public funding of abortion affect all women who receive their health services through federally funded programs, such as Medicaid or the Indian Health Service.[iii] When abortion was legalized in 1973, federal money became available to pay for abortion services for all women relying on federal healthcare programs. These funds for abortion services initially were not subject to restrictions.

Public funding for abortion was provided until 1976, when the U.S. Congress passed the Hyde Amendment. This amendment forbade the expenditure of federal funds for abortion services, except in cases where the pregnancy threatened the woman's life. The Hyde Amendment affected all federally funded health programs that were administered under what is now the Department of Health and Human Services. This includes the Indian Health Service.

Every year since 1976, the Congress has renewed the Hyde Amendment, although some modifications have been made. In its current version, enacted in 1997, the Hyde Amendment allows public funding for abortion only if the pregnancy is the result of an act of rape or incest or if the mother's life is physically endangered by the pregnancy. The definition of life endangerment is narrowly defined as a physical disorder, physical injury, or physical illness, including life-endangering physical condition, caused by or arising from the pregnancy itself.[iv]

The Hyde Amendment has restricted federal funding for abortion significantly compared to the pre-Hyde years before 1976. The impact of the Hyde Amendment was documented in a recent study in North Carolina, which showed that when public funding for abortion disappeared, 37% of the women who said that they would have had an abortion if the state had paid for it carried their pregnancy to term.[v]

The Hyde Amendment: The Same Rights for Every Woman?

Even though the Hyde Amendment restricts the policies of all federally funded healthcare programs, it is not applied consistently. For instance, Medicaid policies depend on the individual state laws, as Medicaid is jointly funded by the federal and state governments. Therefore, the states are capable of expanding Medicaid's abortion policies, as long as the Hyde Amendment's provisions for federal funding of abortions are maintained as a minimum of service.

In 2000, 17 states supplemented the federal funds for Medicaid with their own funds and paid for medically necessary abortions in addition to abortions in cases of rape or incest. "Medical necessity" was broadly defined to include cases where either the physical or mental health of the woman was threatened by the pregnancy. Thirty-one states provided funding for women on Medicaid in concordance with the Hyde Amendment's requirements. Two states, Mississippi and South Dakota, only provide funding for abortion services in cases where the woman's life is physically endangered. These two states are in violation of federal Medicaid law and the Hyde Amendment, which also require coverage in cases of rape and incest.[vi]

Indian Health Service: Mission, Funding, and Policy

The Indian Health Service (IHS) serves all members of federally recognized Native American tribes and their descendants, and it is their principal healthcare provider and health advocate. Over the years, free provision of health services has been guaranteed to Native American people through a number of treaties between the United States and federally recognized Native American tribes. The Snyder Act of 1921 is the principal piece of legislation that approves the use of federal funds for the provision of health services to recognized Native American tribes.[vii]

The IHS is an agency of the U.S. Public Health Service and operates under the Department of Health and Human Services. As a federally funded agency, the IHS is subject to federal health policies and funding regulations decided by the U.S. Congress. These federal regulations include those established by the Hyde Amendment.

In August 1996, IHS Director Michael H. Trujillo issued a memorandum in which he clarified the three circumstances under which IHS provides abortion services (either performance of abortion or funding) as follows:[viii]

(1) To save the mother's life.

(2) When the pregnancy is the result of an act of rape.

(3) When the pregnancy is the result of an act of incest.

Thus, while in 17 states Medicaid recipients have access to paid abortion under more liberal circumstances than ruled by the Hyde Amendment, Native American women throughout the United States remain subject to the restrictions of the Hyde Amendment.

IHS Abortion Policies in Practice

In June and July 2002, the Native American Women's Health Education Resource Center (NAWHERC) conducted a survey to assess Native American women's access to legal abortions through the Indian Health Service.[ix] The survey findings showed that 85% of the surveyed Service Units were noncompliant with the official IHS abortion policy and thus in violation of the Hyde Amendment. In 62% of the surveyed Service Units, personnel stated that in cases where the woman's life is endangered by the pregnancy, they do not provide either abortion services or funding.

The results additionally demonstrated that IHS personnel at individual Service Units have assumed a significant degree of autonomy in their handling of abortion cases. The standard of abortion counseling, the information provided to a women interested in abortion, and the referrals to alternative abortion providers are often left to the discretion of the IHS personnel in charge. In many IHS Service Units, no standardized protocol is followed, and Service Units often show significant variance from one to another in their provision of abortion services.

Another finding of the NAWHERC survey was that IHS personnel frequently demonstrated uncertainty as to which services Native American women are legally entitled. IHS personnel stated several times that Native American women are also covered by Medicaid and therefore have access to abortion services through Medicaid. This assumption is incorrect, as not every Native American woman is financially eligible to receive Medicaid coverage. This has especially been the case in recent years, as several casinos have been built on reservation land, providing many Native American women with minimum wage jobs. Many of these women are ineligible for Medicaid coverage, but are still without the financial means to pay for private insurance coverage. For many women, IHS is the sole provider of health services. The assumption that Native American women are covered by Medicaid undermines the status of IHS as the principal healthcare provider for Native American people.

Also included in the survey by the NAWHERC was an assessment of the usage of Mifeprex™ (RU-486) in IHS Service Units. In 2000, Chief Medical Officer of the IHS Kermit C. Smith, D.O., M.P.H. issued a statement to all IHS clinical and administrative staff, stating that "RU486 may be considered as a reasonable therapeutic choice" for abortion in cases of life endangerment, rape, or incest[x]. However, the survey by the NAWHERC found that none of the Service Units contacted had Mifeprex™ in stock. Nine percent of the pharmacists said that they would be able to make Mifeprex™ available if a doctor would prescribe it. Nine percent of the pharmacists stated that Mifeprex™ would not be considered a reasonable treatment option for patients at their clinics.

Mifeprex™ is a drug that ends early-stage pregnancies by blocking a hormone necessary for pregnancy to continue. The drug works in combination with another medicine, misoprostol. Mifeprex™ can be used to induce abortion during the first seven weeks of pregnancy, and it is effective in 92-95% of cases.[xi] A woman using this option makes three visits to a doctor's office or clinic over a two-week period. Mifeprex™ is an uncomplicated way to end a pregnancy, as facilities for surgery are not needed. Statistical data from the Centers for Disease Control and Prevention (CDC) show that in 1998, 36% of all legal abortions throughout the United States were performed during the first 7 weeks

of pregnancy.[xii] These data from the CDC suggest that Mifeprex™ could be a viable option for a significant number of Native American women seeking abortion services. In particular, the use of Mifeprex™ might improve Native American women's access to abortion services in areas where IHS facilities are not equipped for surgical abortion procedures.[xiii]

In the survey conducted by the NAWHERC, only 5% of the IHS Service Units contacted performed abortion procedures at their facilities. The survey additionally demonstrated that none of these Service Units had Mifeprex™ readily available for patients' use. Given the fact that Mifeprex™ is relatively easy to administer to patients, as it does not require surgical facilities, the use of this drug by IHS Service Units could give more Native American women access to the abortion services to which they are legally entitled under the Hyde Amendment.

IHS Statistics on Abortion

The NAWHERC contacted the IHS headquarters in Rockville, Maryland in order to obtain statistical information about the number of Native American women who sought abortions through the IHS during the last 30 years. The IHS was unable to provide the NAWHERC with this information in a timely manner. Senator Daschle's office has also requested that the IHS provide statistical information for this report, but the IHS was unable to comply by the publishing deadline. In contrast, 10 out of 13 contacted State Departments of Health were able and willing to provide statistical information on Native American women who had obtained abortions at independent non-IHS providers.[xiv]

A Time to Raise Our Voices

The Hyde Amendment restricts a woman's reproductive rights, and it prevents many low-income women and Native American women, among others, from accessing safe, legal abortion services.

Local IHS Service Units often refuse to provide Native American women even the limited access to abortion services to which they are legally entitled under the Hyde Amendment. As our survey has shown, 85% of the IHS Service Units contacted were not in compliance with the official IHS abortion policy, which states that IHS will provide abortion services in cases where the woman's life is physically endangered, or where the pregnancy is the result of an act of rape or incest. This failure to provide services is not only a violation of federal law, under the Hyde Amendment, but also a human rights violation.

The Native American Women's Health Education Resource Center understands the historical markers that have worked to erode our identity, culture, spirituality, language, scientific and technical knowledge, and power as we struggle to survive and live a decent life. With full realization of our status in today's society, we understand our rights as Indigenous women. They include the right to all legal reproductive alternatives, which must be provided to us by our primary healthcare provider, the Indian Health Service, at all of its funded facilities. These legal reproductive alternatives include, but are not limited to, the provision of: abortion services (as provided under the Hyde Amendment) and

counseling, RU-486, Emergency Contraceptives, and other alternatives that are within compliance of the law. Failure to provide these services to Indigenous women is a violation of our fundamental human rights.

Timeline of Abortion Legislation in the United States

before 1973	Abortion is illegal nationwide except in cases of life endangerment.
1973	In the case of *Roe v. Wade*, the U.S. Supreme Court legalizes abortion in the United States after striking down a Texan law from 1859 that prohibits abortion. Abortions are funded under all federal health programs. In the case of *Doe v. Bolton*, the U.S Supreme Court rules that in the context of abortion, the definition of a woman's health must include both physical and mental health.
1976	The Hyde Amendment is passed by the U.S. Congress. It forbids the expenditure of federal funds for abortions except when the continuation of the pregnancy threatens a woman's life. This amendment affects all programs administered by the Department of Health, Education and Welfare (now the Department of Health and Human Services).
1997	The most recent modification of the Hyde Amendment is passed. It allows federal funding for abortion services only in cases of rape, incest, or life endangerment by a physical disorder, injury, or illness.

Endnotes

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[i] In North Dakota, the percentage of abortions that were sought by Native American women (8.5%) was more than twice as high as the percentage of residents in North Dakota who were Native American (4.1%) in 2000. In South Dakota, the percentage of abortions that were sought by Native American women (10.6%) was 145% higher than the percentage of residents in South Dakota who were Native American (7.3%) in 2000. All of these abortions were performed at non-IHS abortion providers.
Source: North Dakota Department of Health; South Dakota Department of Health; U.S. Census Bureau: Census 2000 Summary File.

[ii] Planned Parenthood (2000): Medical and Social Health Benefits Since Abortion Was Made Legal in the U.S. http://www.saveroe.com/roefacts/healthbenefits.asp

[iii] Today, military personnel and their dependants, federal employees and their dependants, teenagers participating in the State Children's Health Insurance Program, low-income residents of the District of Columbia, members of the Peace Corps, and federal prison inmates, among others, are affected by the same policies.
Source: The Allan Guttmacher Institute (2000): Issues in Brief. Revisiting Public Funding of Abortion for Poor Women. http://www.agi-usa.org/pubs/ib_funding00.html

[iv] The Alan Guttmacher Institute (2000): Issues in Brief. Revisiting Public Funding of Abortion for Poor Women. http://www.agi-usa.org/pubs/ib_funding00.html

[v] Billings, Laura (2002): Proposed Abortion Amendments – a Wake-up Call. Planned Parenthood Press Release. http://www.ppmsd.org.news/news.asp

[vi] The Alan Guttmacher Institute (2002): State Policies in Brief: State Funding of Abortion Under Medicaid. July 1st 2002.

[vii] Indian Health Service (2002): Indian Health Service Fact Sheet. http://www.ihs.gov/AboutIHS/ThisFacts.asp Last modified February 19th 2002.

[viii] Trujillo, Michael H. (1996, August 16th): Memorandum: Current Restrictions in Use of Indian Health Service Funds for Abortions. Indian Health Service, Department of Health and Human Services.

[ix] Native American Women's Health Education Resource Center (2002): A Survey on the Indian Health Service Abortion Policy and Its Application by the Indian Health Service Units. July 2002.

[x] Smith, Kermit C. (2000, October 26th): Guidance regarding RU486. Indian Health Service, Department of Health and Human Services.

[xi] Mifeprex™ The Early Option Pill. How Mifeprex™ works. http://www.earlyoptionpill.com/howphp3

[xii] Centers for Disease Control and Prevention (2002): Morbidity and Mortality Weekly Report. Abortion Surveillance – United States, 1998. Surveillance Summaries. June 7 2002, Vol. 51, No. SS-3.

[xiii] However, smokers over the age of 35 or women with the following conditions are advised not to choose early drug-induced abortion: pregnancy over 49 days, suspected ectopic pregnancy, long-term steroid use, chronic adrenal failure, kidney and liver disorders, severe asthma or hypertension, blood clotting disorders, or anemia.
Source: The Boston Women's Health Book Collective (1998): Our Bodies, Ourselves for the New Century. A Book by and for Women. Touchstone, NY. Page 402.

[xiv] The State Departments of Health of Arizona, Colorado, North Carolina, North Dakota, New Mexico, Oklahoma, Oregon, South Dakota, Nevada, and Texas made statistical data available on Native American women who received abortions at non-IHS providers. The State Departments of Health of Utah, Washington, and Alaska did not provide these statistical data.

The following are the statistical data provided by the Indian Health Service regarding the number of abortions performed at or funded by IHS clinics in cases of rape, incest, or endangerment of the woman's life, as stipulated under the provisions of the Hyde Amendment. Data prior to 1981 could not be provided. In the 21 years with adequate record keeping, only 25 abortions were performed or funded by the IHS. Of those 25 abortions, only 9 were performed in IHS clinics; the other 16 were performed at contracted facilities.

`1970 - 2001 Data requested for termination of pregnancy due to rape, incest, or life threatening condition if carried to term, by year, area and with totals. (IHS and fiscal intermediary data sets used to research request followed by chart audit where available)`

YEAR	aberdeen	ALASKA	ALBUQUEQUE	BEMIDJI	BILLINGS	CALIFORNIA	NASHVILLE	NAVAJO	OKLAHOMA	PHOENIX	PORTLAND	TUCSON	TOTAL
1973													
1974													
1975													
1976													
1977													
1978													
1979													
1980													
1981	0	0	0	0	0	0	0	0	0	0	0	0	
1982	0	0	0	0	0	0	0	0	0	0	0	0	
1983	0	0	0	0	0	0	0	0	0	0	0	0	
1984**	0	0	**1c**	0	0	0	0	0	0	0	0	0	**1**
1985	0	**1i**	0	0	0	0	0	**1i**	0	**1i**	**1c**	0	**4**
1986	0	0	0	0	0	0	0	0	0	0	0	0	
1987	0	0	0	0	0	0	0	**1c**	**1c**	**1i**	0	0	**3**
1988	0	0	0	0	0	0	0	0	0	0	0	0	
1989	0	0	0	0	0	0	0	0	**1c**	0	0	0	**1**
1990	0	0	0	0	0	0	0	0	0	0	0	0	
1991	0	0	0	**1c**	0	0	0	0	0	0	0	0	**1**
1992	0	0	0	0	0	0	0	**2c**	0	0	0	0	**2**
1993	0	0	0	**1c**	0	0	0	**1i**	0	0	0	0	**2**
1994	0	0	**1c**	0	0	0	0	**1i**	0	0	0	0	**2**
1995	0	0	0	0	0	0	0	0	0	0	0	0	
1996	0	0	0	0	0	0	0	0	0	0	0	0	
1997	**1c**	0	0	0	0	0	0	**1i**	0	0	0	0	**2**
1998	**1c**	0	0	0	0	0	**1c**	0	0	0	0	0	**2**
1999	0	0	0	0	0	0	0	**1c**	0	0	0	0	**1**
2000	0	0	0	0	0	**1c**	0	**1i**	0	0	0	0	**2**
2001**	**1c**	0	0	0	0	0	0	**1i**	0	0	0	0	**2**
Total	**3**	**1**	**2**	**2**	**0**	**1**	**1**	**10**	**2**	**2**	**1**	**0**	**25**

i = IHS inpatient c = contract care facility

* 1984 IHS facility births = 12,453 **2001 IHS facility births = 6,854

Native American Women and Children:

The Incidence of Pregnancy, Poverty, and Violence

Here we are presenting a sampling of statistical data from various sources, touching on the issues of sexual activity, violence, unemployment, lack of education, and poverty within Native American communities. These data are not intended to represent a thorough examination of these complex issues, but rather they bring up a number of issues regarding how poor access to legal abortion services affects Native American women on multiple levels.

- 46% of Native American mothers are under the age of 20 when they have their first child, compared with 25% of mothers of all races and 22% of white mothers.[xiv]
- In the 1994 South Dakota Native American Youth Behavior Survey, 87% of the females in the 12th grade reported having had sexual intercourse.
- In the same 1994 survey, 92% of the girls who had had sexual intercourse reported having been forced against their will to have sexual intercourse on a date.
- Half of all American Indian / Alaska Native adolescents live in poor or near-poor families.[1]
- 43.1% of Native American children under the age of 5 live below the poverty level.[1]
- In 1990, 13% of American Indian women were unemployed, compared with 6% of women of all races.[xiv]
- In 1992, the high school drop-out rate in the Aberdeen Area was reported to be as high as 75% among Native American students.[xiv]
- In 1996, the incidence of rape among Native American women was 3 ½ times the incidence of rape among women of all races.[xiv]
- In 1996, more than twice as many violent crimes were committed against Native American women, compared with white women.[xiv]
- Violence is report in 16% of all marital relationships among American Indians / Alaska Natives, with severe violence reported in 7% of these relationships.[xiv]
- In 1992 in South Dakota, 50% of all reported cases of domestic violence and sexual abuse came from Native Americans, although Native Americans comprised only 6.7% of the overall population of the state. [3]
- Between 1992 and 1995, the rate of abuse or neglect of Native American children rose 18%.[1]