



NPAIHB POLICY BRIEF

Reauthorization of IHCIA Update

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DOJ *white paper* derails reauthorization of IHCIA

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Portland, OR — Tribal leaders criticized the Bush Administration for its last minute objections to S. 1057, a bill to reauthorize the Indian Health Care Improvement Act (IHCIA) at the National Congress of American Indians (NCAI) annual conference in Sacramento,. The Senate bill was cleared for passage last month by the Senate Committees on Indian Affairs (SCIA) and Health, Education, Labor, and Pensions (HELP). Two weeks ago the bill was “hot-lined” for passage with amendments from the Finance and HELP Committees. Hot-lining is a legislative procedure in which a bill is circulated to all Senate members with a 72 hour window to raise objections; if no Senator objects, the bill passes by unanimous consent.

There were four holds placed on the bill after the hot-line call went out. The IHCIA National Steering Committee was working to clear the final hold by the Republican Steering Committee, when an unofficial Department of Justice (DOJ) white paper was provided to key Senators objecting to fundamental Indian health policy principles. The DOJ objections are inconsistent with President Bush’s policy memoranda on Tribal consultation and government-to-government relationships; and question the Federal government’s responsibility to provide health services under the federal trust relationship.

The DOJ white paper has not killed the bill, but it has served to derail passage of the IHCIA. The DOJ subterfuge occurred during the late hours on the final day before Congress recessed for the November elections; and quite possibly leaving the bill to linger and die in a lame duck session when Congress reconvenes in November.

Tribal leaders have been requested the Administration’s views on S. 556 since it was first introduced in the 108th Congress, as well as S. 1057 for well over three years. At last week’s NCAI’s meeting, Rueben Barrales, Deputy Assistant to the President and Director of the White House Office of Intergovernmental Affairs, indicated he was not aware of the DOJ white paper and was as surprised as Indian Country. Linda Holt, NPAIHB Chairwoman, challenged Mr. Barrales commenting that Administration officials have been given numerous opportunities to provide comments on the IHCIA and have never met with the National Steering Committee in a deliberative process. "They've never done that and then at the last minute they turn around and say, “We have these objections, and the bill is pulled, that is not true government-to-government relations," Holt said. Barrales defended the Administration's handling of the overall talks, "I do have to disagree with you," he said, "We were working in good faith on the issues."

Tribal leaders question the sincerity of Mr. Barrales' rebuttal. The IHCIA National Steering Committee (NSC) is on record with numerous requests to meet with the Administration. Three years ago during Tribal consultation meetings in Anchorage, the NSC requested meetings with HHS officials to discuss the IHCIA. The Tribal Technical Advisory Committee to the Centers for Medicare & Medicaid (CMS) has also requested numerous meetings with CMS officials to meet on Title IV provisions that deal with Medicare, Medicaid, and SCHIP. In a number of regional and national Tribal consultation meetings Tribal leaders have requested to meet with the Administration to discuss their concerns related to the IHCIA. Not once have members of the Administration agreed to meet with National Steering Committee representatives to discuss IHCIA concerns. This brings Tribal leaders to be skeptical of Mr. Barrales' comments.

Why it has taken DOJ so long to provide its views is anyone's guess. On Friday, September 29th, there were two remaining holds remaining from the hot-line request to pass the bill. This was also the final day for Congress to meet prior to recessing for the November elections. One objection was held by Senator Coburn (R-OK) and the other by the Republican Steering Committee. At 2:30 p.m., on September 29th, the DOJ white paper surfaced assaulting the fundamental government-to-government relationship between the United States and Indian Tribes. The Republican Steering Committee placed a two week hold on the bill to afford DOJ operatives sufficient time to issue its white paper. Because Tribes received the DOJ document late on the afternoon of September 29th, they were not afforded the opportunity for Tribal leaders to respond before Senate recessed. The DOJ document is very suspicious—in that it is not printed on DOJ letterhead, is not dated, nor signed by anyone—and does not include any information as to what office or person issued it. Even with sufficient response time, to whom would the Tribes respond? Tribes were placed in the untenable position of having to respond to the Administration's objections with no notice, no warning, and no person to be held accountable. Consequently, there was no action taken on the bill prior to Congress recessing and unless Tribal leaders can meet with DOJ representatives or the White House, the passage of the IHCIA seems doomed.

DOJ Objections

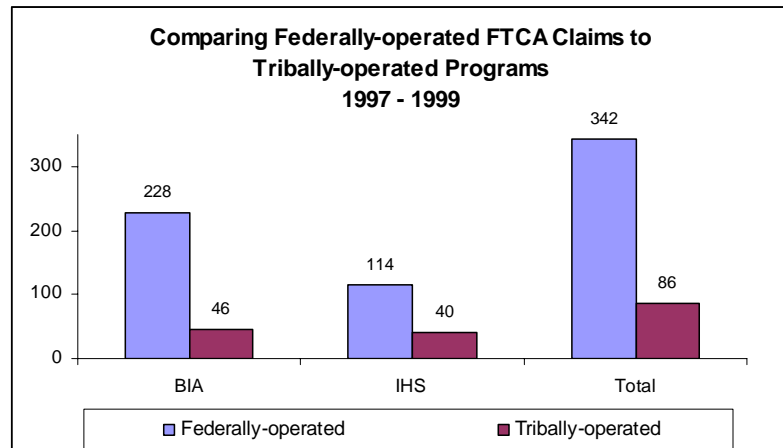
The basis of DOJ objections implies that there is an increased potential for liability of the United States through coverage of Tribal and urban Indian program employees under the Federal Tort Claims Act (FTCA). However, as noted by the DOJ, Tribes and Tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA) are covered by the FTCA for activities carried out within the scope of an ISDEAA contract, compact or funding agreement. While the DOJ writes that it opposes legislation that would make the American taxpayers liable for torts of persons who are not Federal employees, S. 1057 does not amend existing law that currently provides for FTCA coverage to tribal employees acting under the authority of the ISDEAA.

**FTCA Coverage to Indian Programs
Years 1997 - 1999**

Agency	Number of Claims for All Tribal Programs	Number of Claims Federally Operated Programs	Number of Claims Tribally Contracted Programs	Percent of Tribally Operated Claims	Amount Claimed (millions)
BIA	228	182	46	20%	\$219
IHS	114	74	40	35%	\$487
<i>Total</i>	<i>342</i>	<i>256</i>	<i>86</i>	<i>55%</i>	<i>\$706</i>

Source: General Accounting Report GAO/RCED-00-169: "FTCA Issues Affecting Coverage for Tribal Self-Determination Contracts", p. 8-9, July 2000.

In July 2000, the General Accounting Office (GAO) issued a report, *Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts*, in which it describes the process for implementing FTCA coverage for Tribal Self-determination contracts. The GAO reports on FTCA claims history for Tribal self-determination contracts and discusses other FTCA issues that are unique to Tribal contractors. The report indicates that from 1997-1999, a total of 342 FTCA claims were filed involving Tribal contractors from the Bureau of Indian Affairs and IHS. The claims involved a small number of tribes with total claimed damages of approximately \$700 million. Less than 17 percent of these claims involved patient care issues associated with Indian health programs and involved only 40 tribal contractors (25 tribes and 15 tribal organizations out of 556 federally-recognized tribes). The median claim amount was \$1 million. Clearly, the GAO report demonstrates that the number of tribal FTCA claims and the damages paid is minimal.



The DOJ has objections to section 213, a provision that expands categories of treatment to hospice care, assisted living, long-term health care, and home and community based care. The IHS and Tribes are currently providing many of these services through its Community Health Representative and Long Term Care Programs. The DOJ is concerned that expansion of services under section 213 will increase potential liability under the FTCA. However, to the extent that these services are within the scope of current ISDEAA contracts or compacts, FTCA coverage currently applies. The purpose of

section 213 is to clarify existing authorities and describe services that may be carried out by IHS and Tribes. The DOJ objects to the reference to FTCA coverage under section 807(d) which again, is in existing law at 813(d). This is a very limited application of FTCA coverage that applies to non-IHS health practitioners who have hospital privileges in an IHS or Tribal hospital and provide services to eligible Indians.

The DOJ has objections to the definition of—and various references to—Traditional Health Care Practices. The revised hotline version of S. 1057 does not contain a definition of Traditional Health Care, and was scaled back to current law in an effort to address previous concerns expressed by the Administration.

The DOJ has objections to the definition of “urban Indians” and “Indians” to the extent that definition encompasses persons other than members of federally recognized tribes. The DOJ is concerned that the definitions might present a litigation risk that if challenged; a ruling could find the statute subject to “strict scrutiny”. Strict scrutiny is the highest standard of judicial review used by courts in the United States along with the lower standards of rational basis review and intermediate scrutiny. It is a hierarchy of standards courts employ to weigh an asserted government interest against a constitutional right or policy that conflicts with the manner in which an interest is being pursued. The definitions of “urban Indians” and “Indians” in S. 1057 are consistent with current law established by regulations dating back to the Transfer Act of 1954 and the IHCA of 1976. Over the last 50 years these definitions have never been challenged by any Administration!

The DOJ writes that section 512 and 515 of the revised bill extends FTCA coverage to employees of urban Indian programs. However, in deference to previous concerns expressed by the Administration, any provision extending FTCA coverage to urban Indian programs was deleted from the bill. The DOJ objections are not appropriate because the provisions objected to have been removed from the bill.

The DOJ expressed concerns regarding section 705 of the bill regarding licensure of mental health care professionals. The HELP Committee, revised this section to clarify that mental health professionals who are not licensed (i.e., graduate students working in a clinical setting) are required to have direct supervision from a licensed mental health professional with evaluations and case work reviews conducted as deemed necessary by the Secretary. The amendments by HELP are contained in the revised hotline version of the bill. Again, the DOJ has raised an unnecessary objection by incorrectly referring to a provision of the bill that has already been revised to address the Administration’s concerns.

The DOJ objects to section 708 authorizing an Indian Youth Tele-mental Health Demonstration Project to prevent youth suicide. Indian youth have the highest rates of suicide of any other U.S. population and is third leading cause of death for Indian youth. This provision was written in an effort to address the high rates of Indian youth suicide and any potential tort liability risks to the Federal government are minimal compared to the benefits derived from this program. The DOJ infer that the lives of Indian youth are not worth saving because of potential liability, which has clearly been demonstrated by DOJ’s own FTCA claims data to be trivial.

Throughout the 108th and 109th Congresses, Tribes have negotiated in good faith to revise and delete certain provisions of the bill in order to accommodate the Administration's concerns. For example, all significant Medicare provisions have been stripped from the bill, removal of FTCA coverage for urban programs, revisions to Medicaid and SCHIP provisions with the Senate Finance Committee, and other compromises with the HELP Committee. Despite our willingness to cooperate, the IHCIA has been high-jacked by an anonymous DOJ white paper and gave two Senators reason to hold up passage of the bill.

Tribal leaders, regional, and national Indian organizations are now calling upon the White House to intervene and request that the DOJ retract its position outlined in its white paper. Clearly, the President's commitment outlined in his September 23, 2004, *Memorandum for Heads of Executive Departments and Agencies*, supporting Tribal consultation and Tribal sovereignty will be tested in the coming days. This test will be whether the President intervenes to assist Tribes to pass the IHCIA?

NPAIHB Policy Update is a publication of the Northwest Portland Area Indian Health Board, 527 S.W. Hall, Suite 300, Portland, OR 97140. For more information visit www.npaihb.org or contact Jim Roberts, Policy Analyst, at (503) 228-4185 or by email jroberts@npaihb.org. Special thanks to Kitty Marx at the NIHB for preparing the DOJ objections section.