National Indian Health Board

National Congress of American Indians

April 27, 2018

The Honorable Alex Azar, Secretary, United States Department of Health and Human Services
Ms. Seema Verma, Administrator, Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Request for Tribal Consultation on Indian Exemption

Dear Secretary Azar and Administrator Verma:

The National Indian Health Board and the National Congress of American Indians writes to request that you engage in tribal consultation during the upcoming Secretary's Tribal Advisory Committee meeting regarding our request that the Centers for Medicare and Medicaid Services approve an exemption for American Indians and Alaska Natives from state-created Medicaid community engagement and work requirements. The meeting is set to take place on May 9 & 10, 2018 at the U.S. Department of Health and Human Services.

Attached is a briefing paper outlining your legal authority to approve the exemption and highlighting the critical role the Medicaid program plays in keeping the Indian health system afloat.

Sincerely,

Vinton Hawley
Chairman
National Indian Health Board

Jefferson Keel
President
National Congress of American Indians

cc: Jack Kalavritinos, Acting Director, Office of Intergovernmental Affairs, HHS
Stacey L. Ecoffey, Acting Deputy Assistant Secretary for Native American Affairs and Commissioner, Administration for Native Americans, HHS
Calder Lynch, Senior Counselor to the Administrator, (CMS), HHS
Kitty Marx, Director, CMCS Division of Tribal Affairs, CMS, HHS

Attachment

Briefing Paper

Exemption for AI/ANs from State-Created Mandatory Medicaid Work and Community Engagement Requirements

AI/AN Exemption from Medicaid Requirements

The Department of Health and Human Services (HHS) has taken the position that it cannot approve an exemption for American Indians and Alaska Natives (AI/AN) from state-created Medicaid work requirements. HHS says approving the exemption would raise civil rights concerns, but it is not willing to provide any legal analysis or rationale for its position.

Section 1115 of the Social Security Act authorizes the Centers for Medicare and Medicaid Services (CMS) to waive the requirement that a state comply with certain enumerated provisions of the Social Security Act, but only so that the state may carry out a demonstration project that CMS finds is "likely to assist in promoting the objectives" of the Social Security Act. 42 U.S.C. § 1315(a). One of the objectives of the Social Security Act is that Medicaid funding be made available to the Indian health system. Section 1911 of the Social Security Act was enacted to ensure that Medicaid funds flow into Indian Health Service (IHS) institutions "as a much needed supplement to a health care program which for too long has been insufficient to provide quality health care to the American Indian." H.R. REP. NO. 94-1026, pt. III at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2782, 2796; *see also* 42 U.S.C. § 1396j.

On January 11, 2018, CMS issued a Dear State Medicaid Director Letter (SMD: 18-002) entitled *Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries.* The letter paved the way for states to mandate work requirements through Section 1115 waivers.

Ten states have submitted Section 1115 waivers to CMS asking for permission to impose work requirements as a condition of Medicaid eligibility. CMS has approved three of these waivers (Kentucky, Indiana, and Arkansas), and seven more are pending a decision by CMS (Utah, Arizona, Kansas, Wisconsin, Maine, Mississippi, and New Hampshire).

These work requirements would require AI/AN Medicaid enrollees to show they are working or complying with state-defined work programs in order to retain Medicaid eligibility. Tribes universally oppose these work requirements as a condition of Medicaid eligibility for AI/ANs.

Several states have consulted with tribes and included an exemption from work requirements for AI/ANs (Arizona, Utah, and Mississippi). In fact, the State of Arizona recently enacted a law requiring its waiver to contain an exemption for AI/ANs from work requirements. Yet, HHS has taken an across-the-board position that approval of an exemption from work requirements for AI/ANs would raise "civil rights concerns." HHS has not provided any legal justification for its position.

AI/ANs' Legal Status

As explained in a memorandum submitted to CMS by the CMS Tribal Technical Advisory Group in February of 2018, CMS has ample legal authority to provide accommodations to AI/ANs in the receipt of health care without violating the Constitution's equal protection clause or, by extension, statutes prohibiting discrimination based on race. Under well-established principles of Indian law, the United States may make accommodations for AI/ANs under its constitutional Indian affairs powers when doing so is rationally related to the United States' unique obligation to AI/ANs. Such classifications are not racial in nature, and thus they do not create a suspect classification under the Constitution.

Tribes are sovereign political entities that existed before the founding of the United States. As political entities, they entered into treaties and other agreements with the United States through which they bargained for what they could in exchange for portions of their land and other concessions—all with the goal of providing for their people under the circumstances they faced.

In turn, the United States has always dealt with tribes as political entities and, by extension, it has dealt with AI/ANs generally and individually as persons with a special political status. Through this course of dealings, the United States has taken on a unique obligation to AI/ANs and tribes. The Constitution itself recognizes the unique political status of AI/ANs and tribes, and it specifically permits the United States to deal with them through broad Indian affairs powers.

When the United States takes actions with regard to AI/ANs pursuant to its constitutional Indian affairs powers, such actions do not create a suspect racial classification. When such actions are rationally related to the United States' unique obligation to AI/ANs, they meet the rational basis test and pose no civil rights concerns.

In 1974, the Supreme Court in *Morton v. Mancari*, 417 U.S. 535 (1974), held that the federal government may lawfully treat AI/ANs and tribes differently from other groups in carrying out the United States' unique obligation to them without running afoul of the Constitution's equal protection clause. The Court, in determining that it was not dealing with a suspect racial classification, explained that the analysis "turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress [drawn from the Constitution], based on a history of treaties and the assumption of a 'guardian-ward' status." *Id.* at 551. It went on to apply the rational basis review applicable to non-suspect classifications, holding that, "[a]s long as the special treatment [for Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," such treatment is constitutionally permissible. *Id.* at 555.

The Supreme Court and every Circuit Court of Appeals that has considered it has recognized and repeatedly reaffirmed AI/ANs' special political status under the Constitution. This principle has been extended in many contexts as well as to federal agencies' actions, and the Department of Justice has routinely and successfully defended it.

Provision of Health Care is Within Constitution's Indian Affairs Powers and in Furtherance of United States' Unique Obligation to AI/ANs

Provision of health care to AI/ANs is an action taken pursuant to the Constitution's Indian affairs powers and thus does not create a suspect racial classification. Congress has taken many actions to provide health care to AI/ANs. In 1921, Congress enacted the Snyder Act, authorizing the Bureau of Indian Affairs to provide AI/ANs with health care. In 1954, Congress transferred that responsibility to the Public Health Service. More than 40 years ago, Congress through enactment of Section 1911 of the Social Security Act required HHS to support provision of health care to AI/ANs through funding from the Medicaid program. Thus, HHS has received significant delegated power from Congress to carry out health care programs for AI/ANs, including through the Medicaid program, separate and apart from any of its own independent power to deal with AI/ANs.

Provision of health care to AI/ANs is also undertaken in furtherance of the United States' unique obligation to AI/ANs. Dating back to the earliest treaties, the United States promised tribes basic health care. Further, Congress has declared through many statutes that "it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians . . . to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." 25 U.S.C. § 1602(a)(1). HHS and CMS have recognized this trust responsibility in their tribal consultation policies.

Utilizing this authority, HHS has taken many actions to facilitate AI/ANs' receipt of health care, including through the Medicaid program. Thus, an assertion by CMS that granting an exemption for AI/ANs from requirements that would otherwise impinge on their receipt of health care somehow raises civil rights concerns is legally incorrect.

Medicaid is Uniquely Important to AI/ANs

AI/ANs are among the United States' most vulnerable populations, and yet the Indian health system remains woefully underfunded. The Indian health system provides services to 2.2 million AI/ANs and has facilities in 36 states across the country. IHS is currently funded at around 60% of need,[1] and average per capita spending for IHS patients is only $3,688 compared with $9,523 nationally.[2] Many AI/ANs live in areas of chronic unemployment, which leaves them without any form of coverage other than Medicare and Medicaid.

Unlike other Medicaid enrollees, AI/ANs have access to IHS services to fall back on at no cost to them. As a result, unlike other Medicaid enrollees, they can and will simply elect not to participate in Medicaid if eligibility is tied to state-imposed work requirements. In this way, work requirements will have a unique effect on AI/AN Medicaid enrollees alone that will, in turn, deny the Indian health system Medicaid funding Congress intended it to receive through Section 1911 of the Social Security Act.

[1] See Indian Health Service, Frequently Asked Questions, https://www.ihs.gov/forpatients/faq/.
[2] Indian Health Service, IHS 2016 Profile, https://www.ihs.gov/newsroom/factsheets/ihsprofile/.