

National Indian Health Board



Submitted via: www.regulations.gov

March 27, 2018

Office for Civil Rights
Office of the Secretary
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Department of Health and Human Services, Office for Civil Rights RIN 0945–ZA03

Dear Office for Civil Rights:

I write on behalf of the National Indian Health Board to comment on the notice of proposed rulemaking to revise regulations previously promulgated to ensure that persons or entities are not subject to certain practices or policies that violate conscience, coerce, or discriminate, in violation of such federal laws.

Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self- Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

Through this rulemaking, the Department of Health and Human Services (HHS) proposes to grant overall responsibility to its Office for Civil Rights (OCR) for ensuring that the Department, its components, HHS programs and activities, and those who participate in HHS programs or activities comply with Federal laws protecting the rights of conscience and prohibiting associated discriminatory policies and practices in such programs and activities. In addition to conducting outreach and providing technical assistance, OCR will have the authority to initiate compliance reviews, conduct investigations, supervise and coordinate compliance by the Department and its components, and use enforcement tools otherwise available in civil rights law to address violations and resolve complaints. In order to ensure that recipients of Federal financial assistance and other

Department funds comply with their legal obligations, the Department will require certain recipients to maintain records; cooperate with OCR's investigations, reviews, or other enforcement actions; submit written assurances and certifications of compliance to the Department; and provide notice to individuals and entities about their conscience and associated anti-discrimination rights, as applicable.

The proposed rule proposes to exempt Tribes and Tribal Organizations that contract with IHS under ISDEAA with written certification of compliance but not compliance overall.

The Proposed Rule also requests specific comments on the following: “Comment on whether the proposed rule should apply to Tribes, which are recipients of Federal financial assistance through compact agreements or are awarded Federal contracts. Furthermore, the Department requests comment on exemptions for any Indian Tribes under the notice and certification requirements. Additionally, the Department solicits comment on the rule’s impact on Tribal sovereignty.”

We very much appreciate that the Department has requested Tribal comments on this proposed rule and appreciate the opportunity to provide comments. However, the rulemaking process is no substitute for Tribal Consultation. We respectfully request HHS OCR also comply with Executive Order 13175 and consult directly with Tribes on the proposed rule. It requires any agency “undertaking to formulate and implement policies” affecting Tribes to:

- Where possible, defer to Indian Tribes to establish standards; and
- In determining whether to establish Federal standards, consult with Tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian Tribes.

HHS OCR should accordingly ensure that the Tribal community be given further opportunity to consult, review, and respond in order to more comprehensively flesh out necessary recommendations and changes to the Proposed Rule.

We appreciate OCR’s proposal to exempt Indian Tribes and Tribal organizations contracting under the Indian Self-Determination and Education Assistance Act from the assurance/certification requirements. While we are mindful of the protections for conscience objections, we are unaware of there ever being an issue with such objection with regard to Tribal health providers. We also appreciate ORC’s request for comment on whether the rule should apply to Tribes. The United States has unique legal obligations to Indian Tribes, and the courts recognize that both Congress and the Executive Branch may make special accommodations for American Indians and Alaska Natives without running afoul of civil rights laws or the Equal Protection Clause. Like any other Executive Department Agency, the Department of Health and Human Services has a duty and responsibility to ensure that the laws it administers are implemented in a manner that respects Congress’ authority to enact Indian-specific legislation that fulfills its unique trust responsibility to Indian Tribes and Indian people. As the Supreme Court has recognized, Congress’ authority to authorize Indian-specific programs in furtherance of the trust relationship is subject to rational basis review, and will not be subject to claims of discrimination under strict scrutiny under Title VI of the Civil Rights Act or otherwise.

In implementing this regulation, OCR must maintain the government to government relationship with Tribes. We appreciate the Department's request for comment on this proposed rule and look forward to further Tribal consultation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Vinton Hamby".

Chairman, National Indian Health Board

cc: Stacey L. Ecoffey, Principal Advisor for Tribal Affairs, Office of Intergovernmental Affairs, Immediate Office of the Secretary, Department of Health and Human Services