October 26, 2018

Administrator Seema Verma
Centers for Medicare & Medicaid Services
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Joint Comments on Michigan's Healthy Michigan Plan § 1115 Demonstration Extension Application Amendment Healthy Michigan Plan Amendment

On behalf of the National Council of Urban Indian Health,[1] National Indian Health Board,[2] and the Tribal Self-Governance Advisory Committee[3] (collectively, National Organizations) appreciate the opportunity to submit comments on the State of Michigan's Section 1115 waiver application, the Healthy Michigan Plan (HMP) § 1115 Demonstration Extension Application Amendment (HMP Amendment). As elected leaders of National Organizations, we serve as the collective voice for the health care interests of American Indians and Alaska Natives (AI/ANs) and we oppose the HMP Amendment that proposes to subject AI/ANs to work and community engagement requirements.[4] The imposition of such a barrier for AI/ANs to access quality health care is inconsistent with the objectives of the Medicaid statute that are specific to the Indian health system, and the Federal government's trust responsibility for the

[1] The National Council of Urban Indian Health is the premier national representative of Urban Indian Health Programs receiving grants under Title V of the Indian Health Care Improvement Act and the AI/ANs they serve. NCUIH is a 501(c)(3) organization created to support the development of quality, accessible, and culturally sensitive health care programs for AI/ANs living in urban communities.

[2] The National Indian Health Board 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. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-68, the Indian Self-Determination and Education Assistance Act, or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

[3] The Tribal Self-Governance Advisory Committee (TSGAC) provides advice to the Indian Health Service (IHS) Director and assistance on issues and concerns pertaining to Tribal Self-Governance and the implementation of the Self-Governance within the IHS. The TSGAC represents Self-Governance Tribes by acting on their behalf to clarify issues that affect all compacting tribes specific to issues affecting the delivery of health care of American Indian and Alaska Natives.

[4] National Organizations' comments are limited to this topic, which should not be construed as any of the organizations taking or failing to take any position on any other aspect of the waiver in question.

provision of health care to AI/ANs. We further caution that merely including Tribal employment programs in the list of qualifying activities for the workforce engagement requirement does not protect AI/ANs or ensure they will not lose this important health care coverage, nor does it satisfy the Federal government's obligation to AI/AN people. Not allowing a Medicaid exemption for AI/ANs is against the fiduciary duty that CMS has to tribes.

It is longstanding and settled law that the United States has a trust responsibility to provide access to health care for AI/ANs. This obligation is rooted in treaties that have been negotiated since before the foundation of the United States and applies to all federal agencies and extends to all AI/ANs regardless of their current place of residence. As Congress has declared, "it is the policy of [the U.S.], 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."[5] The Department of Health & Human Services has repeatedly recognized this obligation, including in its Strategic Plan FY 2018-2022.

Medicaid is one of the major programs the government provides access to pursuant to its obligation to AI/ANs. Subjecting AI/AN eligibility for Medicaid to the imposition of mandatory work engagement requirements would only exacerbate the challenges AI/ANs already face in achieving adequate medical coverage. Medicaid is a critical resource to the communities that we represent; 27% of nonelderly AI/AN adults and half of AI/AN children are enrolled in Medicaid.[6] It is thus of utmost importance that barriers to access to health care that would impose undue burdens or requirements on the AI/AN population, effectively limiting their participation in the Medicaid program are not imposed, including workforce engagement requirements.

Additionally, restricting participation in Medicaid for AI/ANs will impose significant financial burden on the Indian health system, which already suffers from chronic underfunding. For example, the Indian Health Service is presently funded at approximately 50% of its level of need. This additional burden, in turn, will do little to address the health disparities AI/ANs face, in direct conflict with U.S. policy to "ensure the highest possible health status" for AI/ANs.[7]

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[5] 25 U.S.C. § 1602(a)(1).

[6] Henry J. Kaiser Family Foundation, Medicaid and American Indians and Alaska Natives (Sept. 2017).

[7] *See* U.S.C. § 1602(a)(1). In addition, this action would be contrary to the Congressional intent of § 1911 of the Social Security Act, which authorizes the Indian health system to bill the Medicaid program and receive reimbursement for services provided. The legislative history clearly evinces this intent. *See* H.R. Rep. No. 94-1026

The National Organizations therefore request that CMS honor its trust obligation as it pertains to AI/ANs because the workforce engagement requirements would, in fact, limit AI/AN participation in Medicaid, in violation of the Trust obligation.

National Organizations strongly oppose CMS' determination that AI/ANs cannot be legally exempt from work and community engagement requirements. This misunderstanding is founded on an incorrect understanding of both law and facts. CMS has ample legal authority to make accommodations to ensure that work and community engagement requirements do not pose a barrier to access to Medicaid for AI/ANs. Based upon the unique legal status of Tribes under federal law and the trust obligation as authorized by Congress, CMS must affirmatively address barriers to healthcare for the AI/AN population. The unique government-to-government relationship between Indian Tribes and the federal government is grounded in the U.S. Constitution, numerous treaties, statutes, federal case law, regulations, and executive orders that establish and recognize the trust relationship with Indian Tribes and AI/AN people – a relationship that is unique and does not present Equal Protection concerns. This relationship and the trust obligation it embodies derive from this political and legal relationship and *is not based upon race*.[8]

Although the National Organizations take no position on Michigan's stated goals of its work engagement requirements in general, it is incumbent on CMS to take extreme caution in its consideration of a waiver that applies those requirements to AI/ANs under the guise of reducing government interference. Michigan provides that the purpose of the workforce engagement requirements is "to assist, encourage, and prepare able-bodied adults for a life of self-sufficiency and independence from government interference."[9] However, the trust obligation necessarily includes interaction between the federal government and AI/ANs because it obligates the federal government to provide health care to AI/ANs, a responsibility that stems from negotiations conducted after government interference. If these work requirements are

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Part III at 21 (May 21, 1976) ("These Medicaid payments are viewed as a much-needed supplement to a health care program which has for too long been insufficient to provide quality health care to the American Indian."].

[8] For instance, Congress's extension of Medicaid to IHS beneficiaries rests on the "solid principles . . . [t]hat Congress can extend federal benefits to Indian tribes and their members as a means of fulfilling Congress's unique obligation toward tribes – all while abiding by the Equal Protection Clause." *See* Letter of Bipartisan Senators to Department of Health and Human Services Secretary concerning AI/AN exemptions to Medicaid work requirements (April 27, 2018). *See also Morton v. Mancari*, 417 U.S. 535 (1974) ("as long as the special treatment [for Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such judgments will not be disturbed.").

[9] Attachment M, State of Michigan Department of Health & Human Services Dear Tribal Chair and Health Director Letter (July 9, 2018)

imposed, its failure to adequately provide health care to these citizens represents a violation of this federal obligation, and a failure to meet this commitment, under the pretext of concern for government interference.

Finally, Michigan's waiver application makes mention of requests from Tribal nations for an exemption to the workforce engagement requirements but notes that CMS has indicated that they cannot exempt AI/ANs from the workforce requirements. This is inconsistent with CMS' stated position at the Secretary's Tribal Advisory Committee on May 9, 2018 where the agency committed to providing States with flexibility and discretion to implement work and community engagement requirements with respect to Tribal members. We request for CMS clarify to Michigan and others that states do have flexibility and discretion to include AI/AN accommodations in their waiver applications as well as honoring such accommodations when they are proposed, consistent with the United States' treaty and trust responsibilities.

In conclusion, National Organizations caution CMS that the imposition of barriers to AI/AN access to health care, like mandatory work requirements as a prerequisite for Medicaid eligibility, would result in a violation of longstanding U.S. policy and a failure to meet the Federal trust obligation to AI/ANs. For the aforementioned reasons, we oppose Michigan's Section 1115 waiver as it pertains to workforce engagement requirements for AI/ANs and respectfully request CMS to take action in accordance with the recommendation contained herein.

Sincerely,

Maureen Rosette
President
National Council of Urban Indian Health

Vinton Hawley
Chairman
National Indian Health Board

Chief Lynn Malerba
Mohegan Tribe of Connecticut
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