National Indian Health Board

Submitted electronically though www.medicaid.gov

January 6, 2019
Administrator Seema Verma
Centers for Medicare and Medicaid Services
200 Independence Ave SW
Washington, DC, 20101

RE: Comments on the State of Virginia's Medicaid Section 1115 Demonstration Application

Dear Administrator Verma:

On behalf of the National Indian Health Board (NIHB)[1] and the 573 federally recognized Tribal Nations that we serve, I am submitting comments to the Centers for Medicare and Medicaid Services (CMS) on Virginia's demonstration extension "entitled the "Virginia GAP ARTS Delivery System Transformation, renamed, Virginia COMPASS: Creating Opportunities for Medicaid Participants to Achieve Self-Sufficiency" (Project Number 11-W-00297/3) (the "Extension Application"). The Extension Application would, among other things, (1) seek to impose work and community engagement requirements on certain Medicaid enrollees, and (2) create a Health and Wellness program that includes premiums and cost-sharing for certain individuals with incomes between 100 percent and 138 percent of the federal poverty level.

NIHB supports the comments submitted by the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) (See Attachment 1). We stand with USET in opposition to mandatory Medicaid work and community engagement requirements that do not provide an exemption for American Indians and Alaska Natives (AI/AN), and we are also concerned that the Demonstration Application does not clearly exempt AI/ANs from new premiums and cost-sharing as required by the Social Security Act.

[1] Established in 1972, 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/AN). 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 93-68, 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.

As you know, the NIHB and Tribes oppose mandatory Medicaid work and community engagement requirements for IHS eligible Medicaid enrollees because of the challenges American Indians and Alaska Natives (AI/AN) already face in achieving adequate medical coverage (See Attachment 2). If approved, this demonstration project would have a significant and detrimental impact on AI/AN who reside in the state of Virginia.

The United States has a trust and treaty based responsibility to provide access to health care for American Indians and Alaska Natives, and that responsibility includes ensuring access to federal health programs like Medicaid. Congress has declared 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."[2]

This trust responsibility is highlighted most recently in the Department of Health and Human Services (HHS) Strategic Plan FY 2018 - 2022,

> Importantly, the Federal Government has a unique legal and political government to-government relationship with Tribal governments and a special obligation to provide services for American Indians and Alaska Natives based on these individuals' relationship to Tribal governments.[3]

HHS and CMS have a duty to advance these objectives when administering the federal healthcare programs they oversee, for all Tribal members. This trust responsibility and the federal laws enacted to carry it out not only permit CMS to treat those served by the Indian health system as unique Medicaid enrollees entitled to special accommodation and treatment, they require it.

In making these comments, we remind you that AI/AN are among the nation's most vulnerable populations and that Medicaid plays a critically important role in extending valuable resources to the chronically underfunded Indian health system which serves IHS beneficiaries.[4] As a result, it is critically important that CMS and HHS provide accommodations for IHS beneficiaries from any mandatory Medicaid work and community engagement requirements, including Virginia's programs, consistent with the United States' trust and treaty responsibility to Tribal nations.

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 IHS beneficiaries when exercising administrative discretion in reviewing Virginia's demonstration extension. CMS has

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[2] 25 U.S.C. § 1602(a)(1)

[3] Introduction, "Cross-Agency Collaborations", https://www.hhs.gov/about/strategic-plan/introduction/index.html

[4] 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.

made such accommodations in the past when exercising administrative discretion in the absence of a statute, and must do so once again.

In conclusion, changes must be made to Virginia's demonstration extension before it is approved by CMS. NIHB supports the comments made by USET SPF and stands ready to provide CMS with any technical assistance that may be required.

Sincerely,

Vinton Hawley
Chairman, National Indian Health Board

Attachment 1: USET SPF Comments to CMS VA 1114 Demonstration Waiver (January 4, 2019)

Attachment 2: NIHB Resolution 18-19, Support for Exempting IHS Eligible Beneficiaries from Medicaid Work and Community Engagement Requirements

Attachment 1

USET
SOVEREIGNTY PROTECTION FUND

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Transmitted via Medicaid.gov

January 4, 2019

Administrator Seema Verma
Centers for Medicare and Medicaid Services
200 Independence Ave SW
Washington, DC, 20101

Dear Administrator Verma,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comment to the Centers for Medicare and Medicaid Services (CMS) regarding the Section 1115 Demonstration Waiver Extension application submitted by the Commonwealth of Virginia on November 20, 2018 entitled the "Virginia GAP ARTS Delivery System Transformation, renamed, Virginia COMPASS: Creating Opportunities for Medicaid Participants to Achieve Self-Sufficiency" (Project Number 11-W-00297/3) (the "Extension Application"). The Extension Application would, among other things, (1) seek to impose work and community engagement requirements on certain Medicaid enrollees, and (2) create a Health and Wellness program that includes premiums and cost-sharing for certain individuals with incomes between 100 percent and 138 percent of the federal poverty level.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine.[1] Both individually, as well as collectively through USET SPF, our member Tribal Nations work to improve health care services for American Indians. Our member Tribal Nations operate in the Nashville Area of the Indian Health Service, which contains 36 IHS and Tribal health care facilities. Our citizens receive health care services both directly at IHS facilities, as well as in Tribally-operated facilities under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

USET SPF is opposed to mandatory Medicaid work and community engagement requirements that do not provide an exemption for American Indians and Alaska Natives (AI/ANs), and is concerned that the Demonstration Application does not clearly exempt AI/ANs from new premiums and cost-sharing as required by the Social Security Act. We discuss each in turn.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Attachment 1

USET SPF is Opposed to Work and Community Engagement Requirements for IHS Beneficiaries
Restricting access to Medicaid to IHS beneficiaries through the approval of work requirements such as those proposed by the Commonwealth of Virginia is a violation of the federal trust obligation. CMS has a trust responsibility to ensure continued Medicaid access for AI/ANs, including through the Medicaid program operating in the Commonwealth of Virginia. Approval of the Extension Application, or any similar 1115 waiver that does not contain an exemption for AI/AN from work requirements by CMS is a failure to recognize this sacred duty. As we have expressed in numerous communications with CMS, work requirements, and other barriers to healthcare access, are counter to the execution of this trust responsibility and will have a unique and adverse effect in Indian Country.

The United States has a unique trust responsibility to provide Tribal health care, founded in treaties and other historical relations with Tribal Nations, and reflected in numerous statutes. This trust relationship has been solidified in law and policy, and has become the cornerstone of federal Indian policy and which CMS currently reflects in its own Tribal Consultation Policy adopted in December of 2015. In recognition of the federal obligation, Congress amended the Social Security Act over 40 years ago in 1976 to authorize Medicare and Medicaid reimbursement for services provided in IHS and Tribally-operated health care facilities.

Constitutionality of AI/ANs Exemptions to Medicaid Work Requirements
USET SPF continues to be deeply concerned by and opposed to CMS' legally incorrect position that the approval of an 1115 waiver containing an exemption for AI/ANs from work requirements would raise civil rights concerns. As USET SPF and Tribal Nations, organizations, and legal scholars have noted previously, 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. Further, imposing work requirements on AI/ANs is inconsistent with the objectives of the Medicaid statute generally, as well as the objectives of the Medicaid statute that are specific to the Indian health system. As a result, CMS may not lawfully approve any State Demonstration Project under Section 1115 of the Social Security Act unless it exempts AI/ANs from mandatory work requirements.

Yet, CMS continues to indicate an unwillingness to consider opportunities for an AI/AN accommodation, as it considers proposals to impose work requirements on Medicaid beneficiaries. While Tribal Nations were initially informed that CMS was open to considering options outside of a "blanket" exemption, the CMS' Tribal Technical Advisory Group (TTAG) was told by a CMS official that these alternatives were merely a clever way to get a full exemption. USET SPF joins TTAG and others in expressing our deep disappointment at this development. In accordance with its trust and treaty obligations, CMS must reverse course and work with Tribal Nations to ensure AI/ANs retain access to the Medicaid program as Congress intended.

Concerns with the Extension Application
AI/AN Medicaid recipients accessing services in the Commonwealth of Virginia must be made exempt from barriers to accessing the Medicaid program. Those AI/ANs enrolled in Medicaid already face significant challenges in attaining adequate medical coverage. USET SPF is deeply concerned about the changes proposed in the Extension Application, as the work requirements included in the proposal would violate the federal trust responsibility to provide health care to AI/ANs.

While USET SPF strongly supports full employment for AI/ANs, work requirements as a condition of Medicaid eligibility will not encourage them to find work. It will instead discourage them from enrolling in Medicaid at all, as they have access to the Indian Health System. Disincentivizing Medicaid enrollment is a de facto cut to the Indian Health System. The Indian Health System remains chronically under-funded. Congress recognized this

over 40 years ago when it determined that Medicaid resources should be available to Tribal health programs to help fulfill the federal trust responsibility. Today, Medicaid represents 67% of 3rd party revenue at the Indian Health Service (IHS), and 13% of overall IHS spending.

Further, AI/ANs have prepaid for their health care through the cession of land and have a special treaty relationship with the United States, and therefore, must be included in the individual exemption classifications of the proposed waiver.

The Extension Application includes a number of exemptions to the proposed work and community engagement requirements, including "[a]ny additional exemptions as the Commonwealth deems necessary to support the health of enrollees and achieve the objectives of the program." For all of the reasons summarized above, we believe that an exemption for AI/ANs is just such an additional exemption that is needed to support the health of AI/AN enrollees and is necessary to achieve the objectives of the Medicaid program for the Indian health system.

Clarification that AI/ANs are Exempt from Health and Wellness Program Requirements
AI/ANs are exempt from premiums, deductibles, co-payments or cost-sharing of any kind. Section 1916(j)(1)(A) of the Social Security Act (42 U.S.C. § 1396o(j)(1)(A)) provides:

> No enrollment fee, premium, or similar charge, and no deduction, copayment, cost sharing, or similar charge shall be imposed against an Indian who is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services for which payment may be made under this title.

USET SPF is concerned that the new requirements in the Extension Application Health and Wellness program do not clearly exempt AI/ANs from such requirements.

For example, the Extension Application would impose premiums on a sliding scale to all individuals with incomes between 100 percent and 138 percent of the federal poverty level "who are not otherwise exempt." The Extension Application should clarify that AI/ANs are exempt from such premiums as required by Section 1916(j)(1)(A) of the Social Security Act.

Similarly, the Extension Application would impose a $5 co-pay for non-emergent use of the Emergency Department, and states that because the amount of the co-pay is within federal requirements, the Commonwealth does not require demonstration authority to impose this requirement. The Extension Application should clarify that AI/ANs are exempt from this requirement as well.

The Extension Application would also require certain individuals to pay premiums into a Health Wellness Account (HWA). Because AI/ANs are exempt from paying premiums in Medicaid, the Extension Application should clarify that they are exempt from such premiums. Because they are not required to pay such premiums, AI/ANs should also be exempt from having to maintain an HWA as well.

Conclusion
Changes or improvements to the Medicaid program must move forward in a manner that respects Tribal sovereignty and upholds federal treaty and trust responsibilities. Conditioning access to Medicaid on state imposed work requirements is a violation of the federal trust obligation. We continue to oppose, in the strongest possible terms, any action taken by the federal government that fails to recognize this sacred duty,

including the approval of the Extension Application, or any 1115 waiver, that does not contain an exemption for AI/AN from work requirements. We urge CMS to retract its deeply flawed legal interpretation and work with Tribal Nations to preserve AI/AN access to Medicaid. We also urge CMS to ensure that existing statutory AI/AN protections from premiums and cost-sharing are reflected in the waiver. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 202-624-3550.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director

Attachment 2

National Indian Health Board

National Indian Health Board
Resolution 18-19

SUPPORT FOR EXEMPTING IHS ELIGIBLE BENEFICIARIES FROM MEDICAID WORK AND COMMUNITY ENGAGEMENT REQUIREMENTS

WHEREAS, the National Indian Health Board (NIHB), established in 1972, serves all Federally recognized American Indian/Alaska Native (AI/AN) Tribal governments by advocating for the improvement of health, behavioral health and public health services to AI/ANs and for the fulfillment of the Federal government's trust responsibility to AI/AN Tribal governments; and

WHEREAS, the NIHB is duly elected to serve the sovereign rights of all Federally recognized Tribal governments, to promote the highest levels of health for AI/AN people, and to advise the Federal government in the development of responsible health care policy; and

WHEREAS, the unmet health needs of American Indians and Alaska Natives are severe and the health status of American Indians and Alaska Natives is far below that of the general population of the United States, resulting in an average life expectancy for American Indians and Alaska Natives 5.5 years less than that for the U.S. all races population; and

WHEREAS, the United States assumed the trust responsibility through a series of treaties with Tribes, exchanging compensation and benefits for Tribal land and peace. The Snyder Act of 1921 (25 USC 13) legislatively affirmed this trust responsibility. To facilitate upholding its responsibility, the federal government created the Indian Health Service (IHS) and tasked the agency with providing health services to AI/ANs; and,

WHEREAS, the trust relationship requires the Federal government to provide for the health and welfare of Tribal nations, the Indian Health Service (IHS) remains chronically underfunded at only 46.6 percent of need, and American Indians and Alaska Natives suffer from among the lowest health status nationally; and

WHEREAS, over 40 years ago, Congress permanently authorized the IHS and Tribal facilities to bill Medicaid for services provided to Medicaid-eligible American Indians and Alaska Natives to supplement inadequate IHS funding; and

WHEREAS, IHS and Tribal Health Programs rely upon third party billing from the Centers for Medicare and Medicaid (CMS) to help support the Indian health system which is severely underfunded; and

WHEREAS, CMS has stated they will approve States to include work requirements as a condition of eligibility for Medicaid; and

WHEREAS, Many Tribal Nations experience disproportionately high rates of joblessness and imposing work requirements on Tribal Nations and Citizens will result in IHS eligible beneficiaries not enrolling in Medicaid; and

WHEREAS, Indian Health system will lose access to the critical Medicaid resources resulting in further rationed care and worse health outcomes for American Indians and Alaska Natives, and

WHEREAS, The Federal Government has authority to provide special protections for IHS eligible beneficiaries as part of the Federal Government's trust responsibility and the government-to government relationship, and

NOW THEREFORE BE IT RESOLVED, that NIHB requests CMS to adhere to long standing law and policy and put in place special protections for IHS eligible beneficiaries to avoid the severe and negative impacts the imposition of work requirements will have on the Indian health system; and

BE IT FINALLY RESOLVED, that the National Indian health Board calls on CMS to exempt IHS eligible beneficiaries from state imposed work and community requirements as a condition of eligibility for Medicaid.

CERTIFICATION

The foregoing resolution was adopted by the Board, with quorum present, on the 9th day of November, 2018.

Victoria Kitcheyan
_____
Victoria Kitcheyan
NIHB Vice-Chair

ATTEST:

Lisa Elgin
_____
Lisa Elgin
NIHB Secretary