National Indian Health Board

Tuesday, January 23, 2024

Denis McDonough
Secretary
Department of Veterans Affairs
810 Vermont Ave. NW
Washington, D.C. 20420

Submitted via consultation@ihs.gov and tribalgovernmentconsultation@va.gov

Re: REVISED IHS-VA REIMBURSEMENT AGREEMENT

Secretary McDonough,

On behalf of the National Indian Health Board (NIHB) and the 574+ federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, thank you for the opportunity to engage with the department and provide comment on the revised reimbursement agreement (Agreement) between the Department of Veterans Affairs (VA) and the Indian Health Service (IHS).

In recent years, the VA, in coordination and collaboration with IHS, has made progress toward closing health disparities, addressing barriers to care, and honoring AI/AN veterans by upholding the federal government's Trust responsibility. This Agreement represents a significant step towards upholding the federal government's Trust responsibility and marks a considerable accomplishment between both agencies. AI/AN veterans face numerous challenges in accessing health care, and their unique needs require a steadfast commitment from the VA and IHS. NIHB thanks you for your continued support in providing AI/AN veterans exceptional health care.

However, there is much to do to ensure that the implementation of this reimbursement agreement benefits AI/AN veterans and upholds the federal Trust responsibility. NIHB makes the following comments, requests, and recommendations in response to the December 6, 2023, request for comments on the reimbursement Agreement with further explanation below:

1. The VA and IHS must host joint Tribal consultations during implementation;
2. The processing guide must define "contracted travel" to include all outsourced medical transport; and
3. The VA and IHS must expedite backpay for purchased/referred care (PRC) and contracted travel costs.

AI/AN Veterans and the Trust Responsibility

AI/AN people have a deep history of serving in the United States (US) military[1] and have traditionally served at a higher rate than any other ethnic group in the US.[2] Today, more than 145,000 AI/AN veterans live in the US[3] In return for their military service, the United States promises all veterans, including Native veterans, "exceptional health care that improves their health and well-being." [4] However, the federal government's responsibility to provide exceptional health care to AI/AN veterans extends beyond that owed to them in return for their military service. The US also has a well-established trust responsibility to "maintain and improve the health of the Indians."[5] Rooted in treaties and authorized by the US Constitution, the Trust's responsibility to Tribal nations is repeatedly reaffirmed by the Supreme Court, legislation, executive orders, and regulations.[6] This Trust responsibility animates and shapes every aspect of the federal government's duty to Tribes and AI/AN veterans, including implementing the revised Agreement.

Consultation is Required on all Implementation Materials

The VA and IHS must host a joint Tribal consultation on the claims processing guide before the guide is published or finalized.[7] The NIHB commends the VA and IHS for hosting listening sessions and consultations during the drafting process. Robust and meaningful consultation is critical to respecting the nation-to-nation relationship and honoring the Trust responsibility. Consultation is also vital in ensuring that all materials and policies related to the Agreement's implementation are tailored to fit the needs of AI/AN veterans, given the direct impact those materials and policies have on AI/AN veterans. Further, consultation on the claims processing guide is required per Executive Order 13175, and all consultations on the matter should follow the guidance issued in President Biden's November 30, 2022, Memorandum on Uniform Standards for Tribal Consultation.[8]

Reimbursable Travel Must Include non-Contracted Travel

The claims processing guide must stipulate that "contracted travel" includes all outsourced medical transport regardless of a contract between a contractor or vendor and a Tribal health program (THP). The Agreement states that the "VA shall reimburse the IHS for Contracted Travel at the actual cost paid by the IHS to the travel contractor," which is concerning since THPs do not always contract third-party medical transport services when securing medical travel for eligible beneficiaries. Often, third-party vendors refuse

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[1] This includes at least 9,000 Native American men who served the United States in World War One, before this country granted universal citizenship to American Indians and who suffered a casualty rate five times higher than the total force; 42,000 AI/ANs who served in the Vietnam War, representing twenty-five percent of the entire AI/AN population at the time; and over 33,000 AI/ANs who have served following September 11, 2001. *See* U.S. Department of Veterans Affairs, American Indian and Alaska Native Veterans, 2017 27-28 (May 2020), https://www.va.gov/vetdata/docs/SpecialReports/AIAN.pdf ; Tanya Thatcher, James Ring Adams & Anne Bolen, Patriot Nations: Native Americans in Our Nation's Armed Forces, 17 American Indian Magazine 3 (2016), https://www.americanindianmagazine.org/story/patriotnations-native-americans-our-nations-armed-forces.

[2] Proclamation on National Native American Heritage Month, 86 C.F.R. § 60545 (2021), available at https://www.whitehouse.gov/briefingroom/presidential-actions/2021/10/29/a-proclamation-on-national-native-american-heritage-month-2021/.

[3] VA Veteran Population Projection Model, 2018: https://www.va.gov/vetdata/veteran_population.asp.

[4] Veterans Health Administration, About VHA, https://www.va.gov/health/aboutVHA.asp.

[5] 25 U.S.C. § 1601(1).

[6] The Court has consistently held that the federal government has a trust responsibility to Tribes, which has formed the foundation for federal/Tribal relations. *See* Seminole Nation v. United States, 316 U.S. 286 (1942), United States v. Mitchell, 463 U.S. 206, 225 (1983), and United States v. Navajo Nation, 537 U.S. 488 (2003).

[7] At the January 16, 2023 Medicare, Medicaid and Health Reform Policy Committee (MMPC) – IHS Workgroup meeting, Raho Ortiz, Director of IHS Division of Business Office Enhancement, state that the VA and IHS were negotiating the claims processing guide and several rounds of edits on the document had occurred.

[8] *See* Presidential Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022): https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/.

to contract with Tribes but instead prefer to offer medical transportation services in one-off instances without a formal contract for travel.

Additionally, the Agreement language is based on language pulled from 25 U.S.C. § 1645C and § 1621L. However, Tribes are concerned that future interpretations may not be as inclusive as your office has indicated.[9] Including more precise language in the claims processing guide will help avoid potential conflicts deriving from differences in interpretation.

Reimbursement for PRC Costs Must be Expedited

Reimbursement from the VA to IHS for PRC care provided to eligible AI/AN veterans on or after January 5, 2021, must be expedited to ensure that IHS and Tribal health providers are fully compensated for care according to the law and that they can use their scares federally appropriated dollars to provide more life-saving care to patients. To be clear, the inclusion of PRC in this Agreement represents significant progress in collaboration between the VA and IHS in delivering healthcare to AI/AN veterans. Further, retroactively providing reimbursement for PRC delivered on or after January 5, 2021 is a significant step in the VA honoring the Trust responsibility.

However, the purchased/referred care appropriation provided by Congress has been flat-funded for many years despite the soaring costs of medical inflation and increased transportation costs especially in remote and rural areas. Flat funding means that the dollars received by IHS are severely limited, causing care to be deferred or delayed. This limit only exacerbates the health disparities of Native veterans, leading to loss of life and increased long-term costs. VA must prioritize reimbursing the IHS and Tribal providers according to the law. PRC is a critical funding source upon which AI/AN veterans rely to get the care they deserve, and delay in payment only forces IHS and Tribal providers to further ration care.

Conclusion

Thank you for the opportunity to provide feedback and recommendations on the final Agreement. NIHB is encouraged by the finalization of the Agreement, and we look forward to continued collaboration between Tribes, Tribal organizations, the VA, and IHS during the implementation process for this Agreement. NIHB recommends that the VA and IHS host joint Tribal consultations during program implementation and rules making, define "contracted travel: to include all outsourced medical transportation and that the VA and IHS expedite reimbursement for PRC provided to AI/AN veterans on or after January 5, 2021. We look forward to continued partnership to improve access to care for Native veterans and to advance health equity.

Sincerely,

Chief William Smith, *Valdez Native Tribe*
Chairman
National Indian Health Board

[9] At the June 26, 2023 Listening Session, Hillary Peabody, Deputy Assistant Under Secretary for Health for Integrated Veterans Care, stated that the VA pulled current S5(C) language from 25 U.S.C. § 1645(c) and the VA "legal team feels strongly that the term contract should be included, but 'contract' would be up to the THP to define."