



USET

SOVEREIGNTY PROTECTION FUND

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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).

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

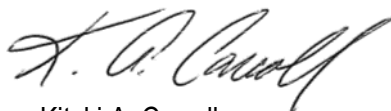
Changes or improvements to the Medicaid program must move forward in a manner that respects Tribal sovereignty and upholds federal treaty and trust responsibilities. Conditioning access to Medicaid on state imposed work requirements is a violation of the federal trust obligation. We continue to oppose, 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