USET
SOVEREIGNTY PROTECTION FUND

Nashville TN Office
711 Stewarts Ferry Pike, Ste. 100
Nashville TN 37214
P: (615) 872-7900
F: (615) 872-7417

Washington DC Office
400 North Capitol St., Ste. 585
Washington DC 20001
P: (202) 624-3550
F: (202) 393-5218

Transmitted via Medicaid.gov

December 20, 2019

Seema Verma
Administrator
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 state of Tennessee's proposal to convert its current Medicaid demonstration program, TennCare, into a hybrid block grant program. The proposal seeks to amend the state's current 1115 demonstration waiver to authorize the conversion of the federal share of its Medicaid to a lump sum block grant. According to the state's proposal, the block grant amount will be calculated based on CMS' projected cost of providing care to the TennCare member population, with per capita adjustments in future years to reflect TennCare enrollment growth. If the block grant proposal is approved, many other states are likely to seek approval under this model. The TennCare proposal, therefore, has large implications for the provision of Medicaid throughout the nation, particularly for American Indians and Alaska Natives (AI/ANs) who access Medicaid as a part of the federal trust obligation to provide health care. USET SPF writes to CMS to urge Tribal consultation on this issue and to register our opposition to Medicaid block grant models that do not provide an exemption for IHS beneficiaries.

USET SPF is a non-profit, inter-tribal organization representing 30 federally recognized Tribal Nations from the Canadian Border to the Everglades and across the Gulf of Mexico[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 patients 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.

In the strongest possible terms, USET SPF is opposed to any and all changes to Medicaid that fail to acknowledge or would otherwise undermine the federal trust obligation to provide quality healthcare to AI/ANs. With this in mind, we are deeply concerned that in its current form, the TennCare proposal (and

[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), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), 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), Rappahannock Tribe (VA), 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).

any others that may follow) stands to violate this sacred obligation. We remind CMS that the agency has a unique trust responsibility to provide Tribal healthcare, founded in treaties and other historical relations with Tribal Nations, reflected in numerous statutes and caselaw, and articulated in CMS' Tribal consultation policy.

Congress recognized this obligation over forty years ago by amending the Social Security Act to authorize Medicaid reimbursement for services provided within the Indian Health Service (IHS) and Tribally-operated healthcare facilities – further obligating CMS to ensure continued Medicaid access for individuals eligible to receive IHS services (IHS beneficiaries). Barriers to healthcare access are counter to the execution of this trust responsibility and will have a unique and adverse effect in Indian Country. However, CMS continues to move forward by substantially revising the delivery of Medicaid in a manner that is not just counter to the intention of the law but is in violation of the federal trust obligation.

There are approximately 25,000 AI/ANs residing in the state, many of whom seek access to Medicaid. Tennessee's proposal makes no mention of Tribal Nations or IHS beneficiaries, yet will allow the state to have virtually no federal oversight in ensuring critical Medicaid dollars are accessible to IHS beneficiaries.

Further, if approved, Tennessee's block grant proposal will have large implications for IHS beneficiaries who access Medicaid across the country. Should additional states follow suit, IHS beneficiaries could see cuts in eligibility levels and services due to state income and eligibility determinations for Medicaid, even though the federal funding for those services for AI/ANs should not count against the caps. As a result, we are deeply concerned that the block grant model may result in reduced eligibility and/or services at the state level due to changes in the block grant calculation. We provide additional comments below to CMS, and demand the agency cease all efforts that would authorize the delivery of Medicaid through block grants without Tribal consultation and an across-the-board exemption for IHS beneficiaries.

Absence of Tribal Consultation

Thus far, Tribal Nations have recommended and requested Tribal consultation from CMS on the agency's proposed Medicaid block grant guidance due to the impacts it will have on Medicaid within the Indian Healthcare System. However, these recommendations and requests have gone unanswered by the agency. CMS recently developed guidance that was pending at the Office of Management and Budget (OMB) which would allow states to develop state Medicaid block grant programs and payment caps proposals. Regrettably, Tribal Nations were not included in the development of this guidance, despite repeated outreach from Tribal Nations to CMS, both formal and informal. Tribal Nations' requests for more information about the proposed guidance, including the implications on the Indian Healthcare System, were further ignored by CMS even though the agency reportedly worked directly with states on their concerns. Though CMS has since withdrawn the guidance from the OMB's final review process without explanation, Tennessee's proposed block grant program is an indication the agency fully intends to move forward with similar block grant proposals for other interested states.

If implemented, Medicaid block grants (or other per-capita capped systems) would significantly shift authority over program eligibility and administration to states in a manner that undermines the sacred government-to-government relationship between CMS and Tribal Nations. It is deeply concerning that, despite the likely impacts to the Indian Healthcare System, CMS has continued to move forward on guidance for Medicaid block grant proposals without engaging in any Tribal consultation. The United States has a unique trust responsibility to consult with Tribal Nations on matters that affect us. This obligation is recognized in the agency's own Tribal Consultation Policy adopted in December of 2015, which states:

> "To establish and maintain a positive government-to-government relationship, communication and consultation must occur on an ongoing basis so that Indian tribes have an opportunity to provide meaningful and timely input on issues that may have a substantial direct effect on Indian tribes. Consultation with tribal governments is especially important in the context of CMS programs because Indian tribes serve many roles in their tribal communities."

Until the agency consults with Indian Country in a meaningful and transparent manner, CMS must terminate any efforts that would drastically alter the delivery of Medicaid to IHS beneficiaries, including block grant proposals and guidance.

Implications for 100% FMAP

Under Section 1905(b) of the Social Security Act, 100% Federal Medical Assistance Percentages (FMAP) provides reimbursements to states for services to IHS beneficiaries received through the IHS and Tribal health programs. Under this statute, Congress recognized that since the federal government already had an obligation to pay for health services to AI/ANs, that it was necessary to pay the full cost of their care as Medicaid beneficiaries. While there are no IHS, Tribal healthcare programs, or Urban Indian Organizations (I/T/Us) in Tennessee, USET SPF highlights for CMS that the state's proposal does not take into account payments for IHS beneficiaries who receive medical assistance through an IHS or Tribal healthcare facility out of state and how they are paid for under TennCare. As such, USET SPF underscores that it is essential CMS uphold the federal trust responsibility for Indian healthcare by ensuring that 100% FMAP for services received through the Indian Healthcare System are preserved.

Additionally, Tennessee proposes to use state funding to cover gaps arising from block grant funds that may prematurely exhaust. However, USET SPF highlights that the proposal fails to address how usage of these funds may conflict with the federal government's 100% FMAP obligations and how those obligations will be paid for if Tennessee's Medicaid funds are prematurely exhausted. The 100% FMAP rule is one of the ways that Congress has ensured that the United States upholds the trust responsibility to provide health care services to AI/ANs. Block grant proposals like Tennessee's would shift that federal trust responsibility to the State. The State would have the risk, not the United States. And the United States would no longer no longer be fulfilling the trust responsibility as Congress intended through the 100% FMAP rule. USET SPF strongly opposes any block grant that does not exempt AI/ANs for that reason.

Proposal to Vary Benefit Packages

USET SPF further highlights Tennessee's proposal to vary benefits packages for different TennCare members based on medical factors or other considerations. We are deeply concerned that this proposal could alter the eligibility of an IHS beneficiary for "alternative sources," and may conflict with, or violate, current law that authorizes IHS as the payor of last resort. This would place further strain on an already underfunded IHS and would thus have a grave impact on existing services. We strongly encourage CMS to work closely with Indian Country to ensure these proposals do not conflict with existing law, and to ensure IHS' status as payor of last resort.

IHS Beneficiary Exemption from Block Grant Caps

If CMS intends to move forward with finalizing state guidance and implementing Medicaid block grants, the agency must work with Indian Country to ensure IHS beneficiaries are exempted from block grant caps. Any state proposal, or subsequent approval from CMS, that does not contain an exemption for IHS beneficiaries from block grant caps is a failure to recognize the sacred duty to provide healthcare to AI/ANs. USET SPF reminds CMS that the agency has clear legal authority, as well as precedent, to provide an AI/AN accommodation, as those action are fully related to the United States' unique obligation to AI/ANs.

Conclusion

In the absence of an exemption for IHS beneficiaries, funding Medicaid through state block grants would undermine the federal trust obligation by inappropriately shifting responsibility to fund AI/AN access to Medicaid from the United States to the states and placing AI/AN access to Medicaid solely in their hands. USET SPF reminds CMS that any changes to the Medicaid program must move forward in a manner that respects Tribal sovereignty and upholds federal treaty and trust responsibilities. Limiting or hindering access to Medicaid through a block grant system is a violation of the federal trust obligation. We continue to oppose any action taken by the federal government that fails to recognize this sacred duty. In accordance with its trust and treaty obligations, CMS must immediately reverse course and work with Tribal Nations to ensure IHS beneficiaries retain access to the Medicaid program as Congress fully intended. 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