July 27, 2020

The Honorable Charles Grassley
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

On behalf of the undersigned organizations, I am writing to **urge you to oppose any proposal to amend the Social Security Act to extend 100% Federal Medical Assistance Percentage (FMAP) to States for Medicaid services furnished by non-Indian Health Care Providers (IHCPs) to American Indian and Alaska Native (AI/AN) beneficiaries.** Current law provides for 100 percent FMAP reimbursement to States for services to AI/ANs received through IHCPs as part of a package of laws designed to bring additional federal Medicaid resources into the Indian health system. Extending 100 percent FMAP for services to Indians by non-IHCPs with no referral from IHCPs would be a dramatic departure from current law, historic practice, and sound federal Indian policy. It would severely undercut Tribes and the Indian health system, allow States to balance their Medicaid budgets on the back of Indian people and the Indian health system, and ultimately diminish access for Indian people to culturally competent health care services.

Specifically, we are very concerned about a legislative proposal that would amend the Social Security Act to eliminate the requirement that Medicaid services provided to AI/AN people be "received through" an IHS or Tribal facility in order for a State to claim 100 percent FMAP. The proposal is <u>a major shift in federal Indian policy</u>, which for decades has sought to fulfill the federal trust responsibility, empower Tribes, and support Tribal sovereignty and Tribal self-determination and self-governance by transferring federal Indian programs and resources to Tribal governments and Tribal organizations.

Current law makes the States whole for their Medicaid payments to IHS and Tribal health programs by reimbursing them at 100 percent FMAP. Congress should not entertain any proposal that would provide a windfall for States by providing them significant additional federal Medicaid dollars that have absolutely no connection to the Indian health system. The proposal under consideration by members of the Senate Finance Committee would allow qualifying States to receive a large infusion of federal Medicaid dollars with no obligation whatsoever to use the additional funds to assist IHCPs or AI/AN beneficiaries. The proposal does nothing to advance the federal trust responsibility, nothing to advance the cause of the Indian health system, and nothing for individual AI/AN patients. It just benefits the qualifying States and

dramatically increases federal Medicaid payments to them, simply because they happen to have citizens who are Indian.

While we appreciate the need for Congress to stabilize State health care delivery systems, we firmly hold that it should not come at the expense of the Indian health system, and should not undo decades of precedent in federal Medicaid policy towards the Tribes. Congress must find alternative solutions to alleviate strains on state budgets.

Importantly, this legislative proposal is both unnecessary and very expensive. This is because on February 2016, the Centers for Medicare & Medicaid Services (CMS) issued State Health Official (SHO) Letter, #2016-002, that expands CMS' interpretation of its 100% FMAP policy. The SHO Letter allows States to claim 100% FMAP for services provided by non-IHCPs if the services are "received through" an IHCP by a referral from an IHCP and under an agreement that the non-IHCP will coordinate the patient's care and share patient records with the IHCP. This ensures that services remain "received through" an IHS or Tribal facility to qualify for 100% FMAP, as required by statute, while also allowing IHS and Tribal programs to partner with non-Indian programs to meet the healthcare needs of Indian people. We believe this process should be left as is – and Congress should not step in and enact federal legislation that would infringe on a process that Tribes, IHS, States, and external providers have been collaboratively addressing.

Background on 100% FMAP

In 1976, Congress amended the Social Security Act to authorize the IHS and Tribal systems to bill the Medicaid program for services provided to AI/AN Medicaid enrollees. The Act made IHS and Tribal facilities eligible to collect reimbursements from Medicaid and applied a 100% FMAP for States to Medicaid services provided to an AI/AN served by an IHS or Tribally-operated facility. This policy was intended to bring additional revenue into the Indian health system in order to address the deplorable condition of Indian health facilities, many of which were in such a poor state they were unable to achieve accreditation. The application of a 100% FMAP to States for the Medicaid-covered services provided by these facilities was intended to offset the additional costs to the States of authorizing IHCPs to bill the Medicaid program. It was intended to make the States whole – but no more – in exchange for fulfilling the federal trust responsibility by providing additional federal health care resources to the then failing Indian health system.

When this authority was granted, it added a new class of Medicaid providers—Indian health care providers. Prior to the enactment of 100 percent FMAP for services received through IHS or Tribal facilities, States paid their full share of Medicaid services furnished to AI/ANs outside the Indian health system. The 1976 amendments to the Social Security Act did not alter that, and instead provided 100% FMAP to offset the cost to States of authorizing a new class of providers to bill Medicaid and help provide additional resources to the chronically underfunded IHS. Congress recognized that the States still had a responsibility to cover the costs of Medicaid services provided to AI/AN beneficiaries provided outside of IHS and Tribal facilities, otherwise it would have authorized 100% FMAP to States for all service providers at that time.

Legislative Proposal is a Major Shift in Federal Indian Policy

The most concerning issue with any proposal to extend 100% FMAP to States for Medicaid services furnished by non-IHCPs is that it would transfer a significant amount of additional resources to the States, with no additional benefits being provided to the Indian health system or AI/AN patients. It would uncouple 100% FMAP from the requirement that the services be "received through" the Indian health system. This is a significant policy change that will significantly increase Federal Medicaid costs in the affected States, as they claim 100% FMAP for more services provided to AI/AN beneficiaries by non-IHCPs. Most

importantly, by severing the link to IHS and Tribal governmental programs, the proposal undermines the Federal trust responsibility by shifting it away from Tribal governments.

If enacted, the policy will reverse course on the hallmark of United States Indian policy—*self-determination and self-governance*. The proposal to expand 100% FMAP to non-IHCPs will provide significant additional resources to the states without any guarantee that those funds be used to advance the Indian health system. It would allow States to use the new funding to offset State general revenue losses, or to share savings with non-IHCPs, without any guarantee that the funds be used in the Indian health system. The policy creates incentives for States to direct care away from the Indian health system, fragmenting health services to AI/ANs and diminishing their access to culturally competent care. It also makes it much more unlikely that Tribal Governments in areas that have not yet fully embraced self-governance will do so.

Current FMAP Policy Supports Self-Governance and Economic Opportunities

The current 100% FMAP policy supports innovation by encouraging States to work with IHS and Tribes to design Medicaid programs that accommodate and support the unique needs of the AI/AN patients and the Indian health system. States are given broad authority to tailor their Medicaid programs to their populations. Yet, for AI/AN beneficiaries, Medicaid is an extension of the federal trust obligation and what works for a state's non-Indian population may not be suitable for AI/AN beneficiaries. The 100% FMAP provision ensures that exceptions to Medicaid programs are crafted to account for the trust obligation and the unique circumstances of AI/AN beneficiaries and the Indian health system, without States incurring additional costs.

Many self-governance Tribes have worked with States to maximize the 100% FMAP policy to create new programs and services that increase access to services through the Indian health system at no cost to States. Self-governance Tribes have constructed Medicaid patient housing, manage non-essential Medicaid travel (NEMT), created new Tribal Medicaid provider types and reimbursement rates, entered into shared savings arrangements under the CMS SHO Letter #2016-002, created special Medicaid 1115 waivers for uncompensated care programs (AZ, CA, OR), and created special arrangements to certify public expenditure authority for conduct Medicaid administrative activities. These successful outcomes could not have been achieved without the current 100% FMAP policy and changing it would compromise the ability of Tribal health programs to collaborate with the States on mutually beneficial policy and financing outcomes.

Changing this policy to include non-IHCPs would also have adverse economic consequences for self-governance programs and the Indian health system, which invest millions in Medicaid reimbursements to build out the capacity for new services and programs, increase access to health care, create and pay for jobs, purchase goods and services, construct new facilities, and make other economic contributions to state economies. Given the chronic underfunding of the Indian health system, these resources have become critical to our operational continuity and these programs contribute billions back to state economies. Changing the 100% FMAP policy would undermine the achievements that tribes have made through the policies of self-determination and self-governance.

Conclusion

In closing, we have grave concerns about any proposal to extend 100% Federal Medical Assistance Percentage (FMAP) to States for Medicaid services furnished by non-IHCPs because it would shift resources intended for the Indian health system to the states, would dramatically change long-standing federal Indian policy, and is not needed since there is an administrative process for the states to receive 100% FMAP for services of non-IHCPs that are coordinated with the Indian health system. We urge you to oppose any such sweeping and damaging change to current law and policy.

Sincerely,

National Indian Health Board
Alaska Native Health Board
Confederated Tribes of the Colville Reservation
Confederated Tribes of Grand Ronde
Confederated Tribes of Warm Springs
Cow Creek Band of Umpqua Tribe of Indians
Great Plains Tribal Chairman's Board
Little Shell Tribe of Chippewa Indians
Inter-Tribal Association of Arizona
Native American Rehabilitation Association of the Northwest, Inc.
National Congress of American Indians
National Council of Urban Indian Health
Northwest Portland Area Indian Health Board
Project Native in Spokane
Self-Governance Communication and Education Tribal Consortium
Southern Plains Tribal Health Board
United South and Eastern Tribes Sovereignty Protection Fund