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The Honorable Mehmet Oz, MD
Administrator
Centers for Medicare and Medicaid Services
7500 Security Blvd.
Baltimore, MD 21244

Dear Administrator Oz,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we write to provide comments to the Centers for Medicare and Medicaid Services (CMS) regarding the Interim Final Rule (IFR) titled "Medicaid Program; Community Engagement Requirement for Certain Individuals" and implementation of the statutory exclusion of American Indians and Alaska Natives (AI/ANs) from these requirements. USET SPF appreciates the initial guidance the IFR provides regarding the AI/AN exclusion, but we request CMS clarify certain issues in the Final Rule and, more immediately, issue the supplemental guidance that has been developed in consultation with the CMS Tribal Technical Advisory Group (TTAG). To aid CMS in strengthening the Rule to ensure smooth implementation and honor obligations to Tribal Nations, USET SPF provides the following comments and recommendations for consideration.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico[1]. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

Introduction

One of the more critical priorities for protecting and advancing the health of Tribal citizens and communities is preservation of our access to Medicare and Medicaid. Medicaid in particular serves a third or more of the AI/AN population in the United States, and reimbursements from the Medicaid program constitute a significant portion of IHS and Tribal health care program budgets.

[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), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), 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), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Most importantly, Medicare and Medicaid are major avenues through which the federal government fulfills its trust and treaty obligation to provide for AI/AN healthcare. The federal government has a perpetual obligation enshrined in federal law, policy, and Supreme Court decisions to provide all resources that may be necessary to raise AI/AN health status to the "highest possible level." This necessarily includes an obligation to ensure that existing resources are not diminished or limited, as all citizens of federally recognized Tribal Nations are entitled to healthcare services solely by virtue of their AI/AN status.

Congress acknowledged its responsibility to protect AI/AN access to Medicaid by statutorily excluding AI/ANs from the new community engagement requirement and other changes that had the potential to impact our ability to access Medicaid coverage. It is now CMS's responsibility to issue guidance to and provide oversight over state implementation of these exclusions to ensure that Tribal access to the Medicaid program is preserved as Congress intended.

Ensure Maximum Flexibility and Minimal Administrative Burden for AI/AN Beneficiaries

The whole of the federal government is responsible for upholding federal trust and treaty obligations owed to Tribal Nations and our people, including the provision of health care. Out of these obligations is born a responsibility to ensure that AI/AN access to healthcare services is free from barriers, including overly burdensome administrative requirements. In recognition of these responsibilities, Congress explicitly excluded AI/ANs from the community engagement, cost-sharing, and 6-month eligibility redetermination requirements. Further, Congress indicated at various points in the legislative text its intention that the burden of verifying applicable and excluded individuals lies largely with the state and not with the applicable individual. For example, Congress stipulated states use existing data and processes (from within their Medicaid system or from other federal, state, or local datasets the state can access) to determine an individual's status as it relates to the work requirements "without requiring, where possible, the applicable individual to submit additional information."

Now, CMS is responsible for issuing guidance to states through rulemaking and other administrative pathways to guide state implementation of the law, including the requirement to ensure AI/AN Medicaid beneficiaries are properly identified and not wrongfully penalized or disenrolled due to misidentification in state systems. As part of this, USET SPF asserts CMS must also honor Congress's intentions, as well as this Administration's focus on government efficiency, and ensure that the process is not burdensome for excluded individuals. The initial guidance CMS provided on the AI/AN exclusion from community engagement requirements in the IFR provides a foundation for implementation, but CMS should provide additional clarifications regarding state standards for identifying and verifying excluded individuals. We also request CMS eliminate certain requirements for states in the Final Rule that would create additional administrative burdens for AI/AN beneficiaries.

First, we request CMS clarify that self-attestation of AI/AN status is a current and standard practice within Medicaid for determining eligibility for existing exemptions and flexibilities for AI/ANs such as cost-sharing, special treatment of certain income, and eligibility for special enrollment periods. CMS should expressly instruct states in the Rule to apply self-attestation as the standard method for establishing AI/AN status. While the IFR does instruct states to use existing data and its existing verification policies to determine AI/AN status, we believe the guidance would be strengthened by an explicit statement that self-attestation is foundational to these existing processes and should be used as the standard for all new and renewing AI/AN Medicaid beneficiaries.

Further, CMS should explicitly instruct states in the Final Rule to refrain from requiring additional documentation to support AI/AN status verification in situations where existing systems may not contain the necessary information. In the IFR, CMS is proposing to allow states to accept self-attestation in these situations through the end of 2027, However, starting in 2028, states would be required to request documentation from applicants/beneficiaries to support status verification when no existing information is available. This was not a requirement Congress included in the statute, and we do not believe Congress intended for CMS to create such a burden for AI/AN beneficiaries, particularly considering the precedent of existing verification methods within Medicaid. In recognition of trust and treaty obligations, AI/ANs' special political status and Congress's intent in the legislation, USET SPF requests CMS instruct states that this standard does not apply to the AI/AN exclusion verification process.

Additionally, while we appreciate the language in the IFR stating that once AI/AN status is determined it does not need to be reverified by a state, there is only one instance where CMS instructs states that reverification is not permitted. USET SPF recommends CMS strengthen the guidance by including clear statements that AI/AN status "shall not" be reverified in every instance where reverification is mentioned.

Clarify and Protect Data Sharing Responsibilities and Tribal Access to Eligibility Information
During the last major shift in Medicaid operations – the "unwinding" of the continuous coverage standard that required states to resume annual eligibility redeterminations – Tribal access to state Medicaid beneficiary data was critical for preventing wrongful disenrollment of many of our citizens. Access to this information allowed Tribal Nations and organizations to identify affected individuals and facilitate information exchange between CMS and Medicaid beneficiaries to ensure enrollees received and answered notices related to their eligibility redeterminations. At the time, following Tribal advocacy, CMS instructed to states facilitate data exchange with Tribal entities, but did not require them to do so. Without this data, many Tribal citizens fell through the cracks of the system and were procedurally disenrolled despite still being eligible for Medicaid.

Having learned from unwinding, CMS has an obligation to issue clearer, more concrete data-sharing guidance to states to ensure that AI/AN beneficiaries do not wrongfully lose coverage due to misclassification, inappropriate application of community engagement requirements, or procedural disenrollment. USET SPF recommends CMS include language in the Final Rule clarifying that Tribal Nations and organizations are authorized to access this information in accordance with the Health Portability and Accountability Act (HIPAA) and compelling states to share beneficiary information with Tribal health organizations upon request. In the past, CMS has instructed Tribal entities to work directly with state Medicaid offices on these issues, but many Tribal Nations do not enjoy good working relationships with state governments. As an agency that shares in the federal government's trust and treaty obligations, CMS has a responsibility to ensure that states comply with their obligations to facilitate data-sharing with Tribal Nations and organizations and should clearly indicate this requirement in the Final Rule and any supplemental guidance provided on the Tribal exclusions.

Institute Mechanisms to Track State Implementation and Compliance
Proper implementation of the Medicaid community engagement requirement exclusion is critical for maintaining access to and continuity of care for numerous individuals across Indian Country. Further, as previously discussed, CMS has a legal obligation to ensure states are properly implementing the AI/AN exclusion. USET SPF recommends that CMS develop and institute systems to monitor state implementation and exercise its federal oversight authority to take corrective action if it finds states are out of compliance with the statutory exclusion requirement. Robust monitoring would include collecting

information on state processes for exclusion determinations and verification. CMS should also collect data on applicable AI/AN applications and renewals, as well as disenrollments of all types (procedural, eligibility related, or due to alleged noncompliance with inapplicable requirements). This data should also be shared with the TTAG and Tribal Nations so we may assist CMS in detecting and addressing issues.

Thousands of AI/AN beneficiaries were inappropriately procedurally disenrolled from Medicaid during the unwinding process, resulting in loss or gaps in healthcare coverage. Despite knowing this was happening, Tribal Nations and organizations lacked strong and centralized methods for tracking issues at the state level, which impacted our ability to advocate with CMS to intervene with states. To avoid repeating the issues Tribal Nations experienced in unwinding, CMS must institute methods for tracking and overseeing state implementation of P.L. 119-21 requirements to ensure AI/AN beneficiaries are not wrongfully affected by state noncompliance.

Quickly Issue Tribal-Specific Supplemental Guidance to States

In addition to including these changes and clarifications in the Final Rule, USET SPF urges CMS to incorporate them into the supplemental Tribal-specific guidance it has been developing in collaboration with the CMS TTAG. We also urge CMS to work quickly to issue this guidance, since states need this information as they begin to implement these new requirements and systems ahead of the January 1, 2027, deadline. State implementation of the requirements will entail changes and updates to eligibility systems, verification procedures, outreach, and data-sharing practices that directly affect AI/AN beneficiaries and the Indian Health System. It is essential that implementation is done correctly and is informed from the beginning by guidance developed in consultation with TTAG and Indian Country.

Conclusion

USET SPF appreciates this opportunity to provide comments and recommendations on the Interim Final Rule. Our feedback is intended to help CMS strengthen the Rule to ensure consistent standards across states, reduce administrative burden on AI/AN beneficiaries, and align with Congress's intent when it included the exclusions for AI/ANs in the law. USET SPF will continue to support and provide guidance to CMS as it works to amend the Rule, issue supplemental Tribal guidance to states, and put in place monitoring and oversight systems to ensure proper implementation of the exclusion and other flexibilities for AI/AN beneficiaries in Medicaid. 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 615-838-5906.

Sincerely,

Kirk Francis
President

Kitcki A. Carroll
Executive Director