



USET

SOVEREIGNTY PROTECTION FUND

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Transmitted electronically

December 15, 2017

Seema Verma
Administrator
Department of Health & Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244

Dear Administrator Verma,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) we write regarding the issuance of two informational bulletins by the Centers for Medicare & Medicaid Services (CMS) seeking to revise the current process for the review and management of 1.) Section 1115 Demonstration Process and 2.) State Plan Amendment and 1915 Waiver Process.

USET SPF is a non-profit, inter-tribal organization representing 27 federally recognized Tribal Nations from Texas across to Florida and up to Maine¹. 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.

On Monday, November 6, 2017, CMS issued two informational bulletins that include improvements to the review, approval, monitoring and evaluation of Medicaid processes. According to CMS, the guidance provided under these bulletins seeks to improve collaboration between CMS and states in pursuit of more effective program management and ensure state accountability in the implementation of Medicaid. Referenced in both bulletins was the March 14, 2017 letter from the Department of Health and Human Services (HHS) and CMS issued to state governors on the intent to modify the Medicaid collaborative process with states under the new Administration.

Federal Trust Responsibility and Tribal Consultation

USET SPF is concerned that this recent guidance to states is not reflective of the trust responsibility the U.S. has to provide health care to Tribal Nations. USET SPF reminds CMS that the U.S., and all of its

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).

federal agencies, 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 sustained in law and policy, and has become the cornerstone of federal Indian policy. The fulfillment of this trust obligation is a federal responsibility and should not be delegated to the states. We remind CMS that it has a responsibility to exercise its oversight over Medicaid programs to ensure the implementation of these programs by the states is conducive to meeting federal trust obligations, as well as statutory and regulatory requirements. Therefore, any guidance provided by CMS in the implementation of programs administered under the agency must be reflective of the agency's own Tribal Consultation Policy which underscores the unique trust relationship to address issues that are vital to the health of Tribal Nations. And this guidance must give clear direction to the states on Tribal consultation and other requirements associated with the waiver process and the Medicaid program

USET SPF recommends that CMS utilize the advisory resources available under its Tribal Technical Advisory Group (TTAG) to vet guidance provided by CMS, such as the aforementioned bulletins, to ensure the impacts to Tribal Nations are addressed and the trust responsibility upheld. TTAG advises CMS on Indian health policy issues involving health care programs under CMS, particularly providing policy guidance designed to improve the availability of health care services to American Indians and Alaska Natives (AI/ANs). While collaborating with TTAG does not replace the CMS requirement for full and comprehensive Tribal consultation, working with TTAG will ensure CMS is taking the necessary steps to fulfill its federal trust responsibility.

Further, any proposed changes to the administration of Medicaid must be preceded by comprehensive consultation with Tribal Nations. Medicaid has been a critical source of funding and reimbursement for the chronically underfunded Indian Health System since Congress amended the Social Security Act 40 years ago to authorize Medicare and Medicaid reimbursement for services provided in Indian Health Service (IHS) and Tribally-operated health care facilities. Changes to the Medicaid program must be executed in a manner that fulfills Tribal consultation requirements and upholds federal treaty and trust responsibilities.

Work Requirements for 1115 Waivers

On November 7, 2017, two days after the issuance of the above bulletins, you delivered remarks to the National Association of Medicaid Directors 2017 Fall Conference. These remarks included a detailed explanation of how the Administration plans to approach Medicaid, particularly ushering in new practices within CMS that would provide states with more flexibility in the design and administration of Medicaid programs. Specifically, the Administrator voiced the willingness to approve state proposals to impose work requirements as a condition of Medicaid eligibility through the 1115 waiver process.

While USET SPF understands that work requirements may be appropriate for the U.S. general population, we remind CMS of the federal trust responsibility and the unique nature of the relationship between Tribal Nations and the federal government. The federal government does not have this relationship, or trust responsibility to provide health care, with any other population in the U.S. Work requirements and other barriers to healthcare access, are counter to the execution of this trust responsibility. Therefore AI/AN Medicaid recipients must be made exempt from these barriers to accessing the health care to which they are entitled, and CMS has a duty to ensure that this occurs as a part of the waiver process.

Medicaid currently represents 67% of 3rd party revenue at IHS, and 13% of overall IHS spending. Disincentivizing Medicaid enrollment by imposing work requirements is a de facto cut to the underfunded Indian Health System. In addition, instead of incentivizing healthy behaviors as intended, work requirements will hinder access to Medicaid for Tribal citizens. While USET SPF strongly supports full employment for Tribal citizens, making work requirements a condition of Medicaid eligibility will not

encourage them to find work. It will instead discourage them from enrolling in Medicaid at all. CMS must exercise its oversight and trust responsibilities to ensure state plans do not interfere with access to health care for Tribal citizens. Currently, the 1115 waiver process requires that states engaged in Tribal Consultation prior to submission of 1115 Demonstrations to CMS. CMS must ensure Tribal consultation with Tribal Nations occurs at both the state and federal levels before state waiver applications can proceed.

Conclusion

As an agency of the U.S. government, CMS has a trust responsibility to provide health care to the citizens of Tribal Nations, and Medicaid is a critical mechanism through which CMS meets that obligation. Therefore, CMS has a responsibility to address the impacts agency guidance may have on Tribal Nations, and do so in manner that fulfills Tribal consultation requirements. 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