USET
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Submitted via Medicaid.gov

September 15, 2017

Ms. Seema Verma, Administrator
Centers for Medicare and Medicaid Services
7500 Security Blvd. Mailstop S1-05-06
Baltimore, MD 21244

RE: Request for Consultation Regarding Maine 1115 Research and Demonstration Waiver

Dear Administrator Verma,

The United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) hereby requests formal Tribal consultation with federally recognized Maine Tribal Nations and the Centers for Medicare and Medicaid Services (CMS) pursuant to section 8.1.2 and 8.2.1 of the CMS Tribal Consultation Policy regarding the State of Maine's proposed MaineCare 1115 Demonstration Waiver published for public comment on August 1, 2017. Tribal consultation with the federally recognized Tribal Nations located in Maine must occur before the MaineCare Waiver is allowed to proceed.

USET SPF is a non-profit, inter-tribal organization representing 26 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.

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. Changes or improvements to the Medicaid program, therefore, should move forward in a manner that respects Tribal sovereignty and upholds Federal treaty and trust responsibilities.

Since Medicaid was designed to be jointly managed by the federal government and the states, state Medicaid programs play a critical role in assisting the federal government in meeting its trust responsibilities

[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), 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).

to Tribal Nations. Among the responsibilities of states within the context of this relationship is Tribal consultation regarding any proposed changes to Medicaid programs. Accordingly, states must consult with Tribal Nations prior to the submission of any waiver requests, such as the MaineCare 1115 Demonstration Waiver[2] . In the case of the MaineCare Waiver, however, Tribal consultation has not occurred. USET SPF urges CMS to exercise its oversight and trust responsibilities, and ensure Tribal consultation with Maine Tribal Nations occurs at both the state and federal levels before the MaineCare Waiver application can proceed.

In addition to the lack of Tribal consultation, we are deeply concerned about the changes proposed in the MaineCare Waiver. Many of these changes would violate the federal trust responsibility to provide health care to American Indians/Alaska Natives (AI/ANs). AI/AN Medicaid recipients residing in the state of Maine must be made exempt from these barriers to accessing the health care to which they are entitled. These objectionable proposals include:

- Community Engagement and Work Requirements- 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, as they have access to the Indian Health System. However, as you are already aware, the Indian Health System is 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. Disincentivizing Medicaid enrollment is a de facto cut to the Indian Health System.

  Furthermore, according to the Bureau of Indian Affairs' (BIA) most recent American Indian Population and Labor Force Report, which uses 2010 data, Maine is one of ten states in which fewer than 50% of AI/ANs living in or near Tribal areas are employed. This is not because AI/AN citizens are not seeking work, but simply because few employment opportunities exist. Significant infrastructure and other investment in Indian Country is needed to utilize the Tribal labor force and make private-sector employment attainable for Tribal citizens. Tribal citizens, who have paid for their health care through the cession of land and have a special treaty relationship with the United States, must be included in the individual exemption classifications of the proposed waiver.

- Cost Sharing Initiatives- As noted above, AI/ANs often reside in high unemployment areas within the state of Maine. Imposing a cost sharing requirement to individuals who already struggle to access jobs, reliable transportation, and access healthy foods does not incentivize personal responsibility, it simply serves to deny AI/ANs access to health care. The federal government realizes its trust responsibility to Tribal Nations and has exempted AI/ANs from cost sharing requirements in the past.

  In addition, AI/AN Medicaid recipients receiving services through the Indian Health System pose no cost to state Medicaid programs. To ensure that Indian health care remained a federal responsibility that was not shifted to states, in 1976 Congress also provided for a 100% federal medical assistance percentage (FMAP) for Medicaid services received through an IHS or Tribal facility and in 2009, it prohibited states from imposing premiums or cost-sharing on AI/ANs receiving covered services through the Indian health system. The state, which has been provided funding to insure AI/ANs, must also exempt AI/ANs from cost-sharing requirements.

[2] 42 CFR 431.408(b)

- Asset Limitations- The Modified Adjustment Gross Income (MAGI) based methodology has been working since inception in many states. MaineCare's proposal to dismiss MAGI and apply an asset test to MaineCare beneficiaries is unrealistic and draconian. The initial intent of eliminating the asset test from Medicaid eligibility determinations was to streamline the already cumbersome eligibility process, improve productivity of state workers and to achieve Medicaid administrative cost savings. MaineCare's proposal to bring the asset test back undermines former welfare reform efforts and Maine's own premise of their proposed 1115 Waiver, to improve Maine's overall financial standing. In bringing back the asset test, MaineCare will see in influx in administrative costs to research and conduct the asset tests, thereby reducing the amount of funding available to benefit the existing MaineCare population. USET SPF proposes that the state strike the provisions reestablishing an asset test. Eliminating an existing eligible population based on having a small savings account or vehicle does not assist MaineCare in providing a basic medical safety net to those needy populations to which the 1115 Waiver is based on.

- Retroactive Eligibility and Presumptive Eligibility Determinations by Qualified Hospitals- MaineCare's proposal to eliminate retroactive eligibility puts a patient's care in jeopardy. Although the state is trying to encourage individuals to seek coverage when they are healthy instead of waiting for medical expenses to incur, that does not happen. The eligibility process is challenging, which discourages advance enrollment. Removing retroactive and presumptive eligibility would force health care providers and hospitals to make the decision to take on costs of care or not service a patient. Providers should focus on patient health and wellness, not weighing financial risks.

These reforms may be appropriate for Maine to consider in modernizing and reforming Medicaid for other state citizens, but they will not work for AI/ANs in Maine. Instead of incentivizing healthy behaviors, they will hinder access to Medicaid for Indian people. This is because unlike other vulnerable populations, AI/ANs have access to the IHS system at no cost to them. Rather than meeting these requirements in order to obtain coverage, AI/ANs will simply elect not to enroll in Medicaid at all. Further, creating additional barriers to health care access for AI/ANs is a violation of the federal trust responsibility to provide care. CMS must ensure that access to Medicaid is maintained for AI/ANs by ensuring they are made exempt from the changes proposed in the MaineCare Waiver.

We look forward to consultation between the state, CMS, and federally recognized Tribal Nations located in Maine to ensure any changes to MaineCare account for the unique circumstances of the Indian health system and the federal trust responsibility. Thank you for your assistance with this issue, 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