May 4, 2018

Administrator Seema Verma  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
200 Independence Avenue, S.W.  
Washington, DC 20201

Re: Exemption from Medicaid work requirement rules

Dear Administrator Verma,

I write on behalf of the American Bar Association (ABA), the national representative of the American legal profession with more than 400,000 members nationwide. We are concerned by recent actions of the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) regarding the failure to approve exemptions for American Indians and Alaska Natives (AI/AN) from Section 1115 Demonstration Waivers that impose mandatory Medicaid work and community engagement requirements. Failure to approve exemptions threatens the health of U.S. citizens and ignores the federal trust relationship between the federal government and tribal nations. This is counter to well-established legal doctrine and ABA policy.

Citing statutory constraints and civil rights concerns, CMS indicated it will not include exemptions for AI/ANs in Medicaid work and community engagement requirements. CMS’s position conflicts with tribal requests for exemptions, and is against the statutory intent of Section 1911 of the Social Security Act, the federal government’s trust responsibility to tribal nations, and HHS and CMS’ past approval of Indian-specific provisions and administration of the trust responsibility. There is longstanding legal precedent that tribes are sovereign entities and that the Constitution recognizes this underlying political relationship in creation of the Indian affairs powers. Thus, allowing these exemptions does not constitute a racial preference. Additionally, the treaties entered by various tribes and the United States, and the historical dealings post-treaty-making, serve as the foundation of the trust relationship and hold HHS accountable to fulfilling the United States’ trust obligation.

1 Brian Neale, Director, Centers of Medicare and Medicaid Services, Dear Tribal Leader Letter, January 17, 2018.
3 Hobbs, Straus, Dean & Walker LLP, Re: Constitutionality of Indian Health Care System, February 12, 2018.
Further, Medicaid requirements will have particularly damaging effects for AI/ANs, who are often residents of rural communities and tribal reservations that face staggering unemployment rates.\(^5\)

Our support for removing work requirements as a barrier to access to the Indian health system is consistent with longstanding ABA policy urging the federal government to continue to recognize the special relationship between the United States and American Indian Tribes and the federal responsibility to Indian people based on Indian treaty obligations.

The ABA has an over forty-year history affirming the federal government’s trust responsibility to tribes and supporting access to health care for all. Access to quality healthcare, particularly in the Section 1115 demonstration waiver evaluation process, calls for the elimination of barriers through expansion and improvement. Work requirements for AI/ANs limit rather than expand and improve coverage and are counter to congressional intent. Access to quality care for AI/ANs demands the approval of exemptions from work and community engagement requirements given how much the Indian Health Service and tribal health systems lawfully depend on Medicaid resources to provide healthcare.\(^6\)

Thank you for your consideration of the ABA’s views. We stand ready to assist you however we can.

Sincerely,

Thomas M. Susman

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\(^6\) Hobbs, Straus, Dean & Walker LLP at 13-17.