



Pokégnek Bodéwadmik • Pokagon Band of Potawatomi
Tribal Council

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September 19, 2014

Marilyn Tavenner, Administrator, CMS
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Pokagon Band of Potawatomi Indians of Michigan and Indiana Comments on Indiana HIP 2.0 1115 Demonstration Waiver and HIP Extension Waiver

Dear Administrator Tavenner:

The Pokagon Band of Potawatomi Indians of Michigan and Indiana (the "Band") is pleased to provide the following comments on the State of Indiana's HIP 2.0 and HIP Extension Section 1115 Demonstration Waiver request. The Band shares the State's goal of expanding Medicaid in the State of Indiana as soon as possible, and is committed to working with the State to ensure that goal is accomplished in a manner that works for all of our citizens.

The State's proposal asks the Center for Medicare and Medicaid Services ("CMS") to waive a statutory provision in existing federal law that protects American Indians and Alaska Natives ("AI/AN") from being forced to participate in managed care systems as a condition of participating in the Medicaid program. To our knowledge, CMS has never waived this requirement, and doing so would impose a significant barrier for our people to access the Medicaid program. The Band has proposed a simple, expedited solution to the State that would address the Band's concerns at no cost to the State, but the State rejected the Band's proposal without adequately consulting with the Band.

The State Failed to Engage in Ongoing Consultation on its Waiver Request with the Band

The State initially consulted with the Band in a very positive meeting on August 5, 2014. In that meeting, the Band raised with the State its concerns with the waiver and offered a simple proposal that would maintain tribal federal rights. We were informed by the State that it was committed to consulting with the Band on the waiver, that it would carefully consider the Band's proposal, and that it would provide a response to the Band. Regrettably, the State never followed up with the Band.

Instead, the State simply re-submitted its application to CMS on August 21, 2014 unchanged. In its application, the State appended a six page point-by-point rejection of the Band's proposal. The Band was surprised to learn of the State's resubmission given the State's representation that it was committed to engaging in meaningful consultation with the Band. Ultimately, the Band learned of the State's resubmission from CMS' website. The Band was

disappointed to see that CMS sent the State a letter the very next day deeming the State's application complete.

The Band has several concerns with the process to date. First, the State did not adequately consult with the Band on its waiver proposal. Pursuant to CMS's transparency regulations, 42 C.F.R. § 431.408(b), States are required to comply with the July 17, 2011 letter governing tribal consultation (SMDL#01-024). That letter requires states to consult with "[a]ll federally recognized tribal governments maintaining a primary office and/or a major population within a state." Because the Pokagon Band has an area office in South Bend and a major population in the State, the State was required to consult with the Band on the waiver.

A single meeting with the Band followed by a summary rejection of the Band's comments and resubmission of its waiver proposal does not constitute adequate consultation. SMDL #01-024 states that consultation should be an ongoing process:

Access to the decision-making process regarding the Medicaid and SCHIP programs is especially critical for Tribes for cultural, treaty, and statutory reasons. Participation in the decision-making process can best be achieved through an ongoing and effective consultation process that ensures the inclusion of Federally-recognized Tribal governments while preserving the right of State Medicaid agencies to make appropriate decisions based upon the needs of all Medicaid and SCHIP beneficiaries.

SMDL #01-024 at 2. It encourages States "to be as responsive as possible to the issues and concerns expressed by the Tribes during the consultation process." *Id.* at 3. The consultation process outlined in SMDL #01-024 contemplates "time for discussion between the State and Tribes responding to the notification." That did not occur here. The Band submitted its comments to the State, but at the meeting the State was not yet prepared to respond to the Band's comments and committed to discussing it with the Band further. However, the State did not communicate further with the Band in response to the Band's proposal and, instead, simply submitted its application to CMS unchanged.

The State should not be allowed to go through the motions and "check the box" for tribal consultation by simply informing the Band of what it intends to do and then moving forward with its proposal. If that is what consultation means, then consultation is meaningless.

The Band is seeking to re-engage with the State to discuss the impact its proposal would have on AI/AN, including Band citizens. CMS cannot, of course, force the State to accept and submit the Band's alternate proposal, but it can and should refuse the State's request that the federal government waive critically important tribal protections in the Medicaid statute.

Tribal Objections to the State's Waiver Proposal

In its comments to the State and in its request for Tribal consultation with CMS, the Band suggested that the State take the approach that was recently approved by CMS in the Arkansas waiver that allowed AI/AN in the State to opt-in to the demonstration if they wished, but also

provided that they would be eligible for the ABP generally available to the new adult group through a FFS system. We also provided the State and CMS with proposed “Standard Terms and Conditions” to its proposed Waivers that are based on the Arkansas waiver and which would accomplish this goal (Attached). The State is already proposing to exempt the medically-frail from mandatory participation in the Demonstration, and as a result will maintain a FFS system that could be used for AI/AN as well.

The Band is concerned about the waiver because it would:

- Mandate AI/AN into managed care as a condition of participation in Medicaid by asking CMS to waive 42 U.S.C. § 1396u-2(a)(2)(C), which is designed to protect AI/AN from having to participate in managed care delivery systems as a condition of participating in Medicaid.
- Require AI/AN to maintain “personal responsibility” health saving accounts under either HIP Basic or HIP Plus to participate in the Medicaid program, a federal health benefits program used to help meet the federal trust responsibility to provide health care to AI/AN.
- Require AI/AN to make payments to these “personal responsibility” accounts in order to access the enhanced benefits package under HIP Plus in manner inconsistent with Medicaid premium and cost-sharing exemptions for AI/AN, 42 U.S.C. §§ 1396o(j), 1396o-1(b)(3)(A)(vii) and (b)(3)(B)(x).
- Provide no guarantee that other critical tribal Medicaid protections would be met. These include the right of tribal Medicaid enrollees to choose an Indian health care provider as their primary health care provider, 42 U.S.C. § 1396u-2(h)(1), and the right of such Indian health care providers to be paid by managed care entities for the provision of covered services, 42 U.S.C. § 1396u-2(h)(2), including the right to receive wrap around payments by the State, 42 U.S.C. § 1396u-2(h)(2)(C)(ii).
- Seek a waiver that would allow the State to no longer provide reimbursement under the Medicaid program for non-emergency transportation. Non-emergency transportation is a significant cost that must be borne by the Band’s Health Department to effectively meet the health care needs of Band citizens, and Medicaid reimbursement for those services is critically important to the Band.

The State takes the position that the Band’s concerns are unfounded, but as explained below, the State’s response is unpersuasive and flawed.

1. Mandatory Managed Care

The State states that it is continuing to seek permission from CMS to waive federal law and require AI/AN to participate in managed care “so that all individuals are able to experience the benefits of coordinated care that such placement creates.” The Band’s citizens already participate in a managed care delivery system through the IHS system, whereby they receive

primary care at the Band's health care facility, and their care is coordinated and referred out to specialists when necessary through the contract health (now referred to as purchased/referred care) system. The Band is extremely concerned about this waiver request, because experience has shown that managed care delivery systems have proven to be an insurmountable barrier to AI/AN accessing the Medicaid program while accessing culturally competent care at IHS facilities as is their right. None of the managed care entities in the State has entered into a provider agreement with the Band's health clinic to date, and there is no reason to believe they will under HIP 2.0.

Section 1932(a)(C)(2) of the Social Security Act was included in order to protect AI/AN and tribal health clinics from the difficulties of integrating into managed care systems with no experience with the tribal healthcare system. Tribes have found it extraordinarily difficult to enter into provider agreements with managed care entities, as many of those entities insist on using standard form contracts that do not respect tribal rights reflected in federal law. In addition, managed care delivery systems are often designed to limit access to providers, and impose requirements on participants that are inconsistent with the rights of AI/AN to participate in the Medicaid program at no cost to them and in a manner that ensures they may continue to receive care through the IHS system. Section 1932(a)(C)(2) is designed to protect AI/AN from these barriers to accessing the Medicaid program.

The State says it will structure the managed care program in a way to alleviate the Band's concerns, and will continue to provide protections for IHS providers. These protections, which are required by Section 5006 of the American Recovery and Reinvestment Act, are not a panacea for mandating managed care in the first place. They were included in order to ensure that those AI/AN *who elect to participate* in managed care can still choose to use their IHS provider as their primary care provider and can participate in the Medicaid program at no cost to them, and to ensure that their tribal health care provider is properly reimbursed by managed care entities and made whole by the State. They were not designed to be, nor should they be interpreted to be, a solution for the problems posed by managed care systems for AI/AN in the first instance. If CMS were to waive Section 1932(a)(2)(C), it would be unprecedented. Instead, CMS should work with the State so that they might make minor alterations to their proposal to exempt AI/AN from mandatory managed care and use a FFS system in a similar manner to how the State proposes to treat the medically-frail.

2. Requirement to Maintain a "Personal Responsibility" Health Savings Account

The State proposes to require AI/AN to maintain "personal responsibility" health savings accounts as a condition of receiving benefits under the Medicaid program. The State recognizes it cannot require AI/AN to make any co-payments to access its proposed HIP basic program, but would still require them to manage the accounts. Doing so imposes yet another barrier to access to the Medicaid program for AI/AN, who may already be reluctant to participate in Medicaid because they have a right to free care through the IHS system. The United States has a federal trust responsibility to provide health care to AI/AN, and should not approve State designed programs seeking to shift that responsibility to AI/AN.

3. Requirement to make co-payments for HIP Plus

The State takes the position that it is permissible for the State to require AI/AN to make co-payments as a condition of accessing the extended benefits the State intends to provide through HIP Plus. This is so, according to the State, because it is not requiring co-payments for HIP basic, which it anticipates will be designated as Minimum Essential Coverage by CMS, and because the HIP Plus adds additional benefits such as vision and dental services that are not covered by the APB. But the tribal protections against making any payment for services received at an IHS facility or through contract health services are not tied to any particular benefits package. Under Section 5006(a) of ARRA, 42 U.S.C. 1396o(j), "No enrollment fee, premium, or similar charge, and no deduction, copayment, cost sharing, or similar charge shall be imposed against an Indian who is furnished an item or service directly by the Indian Health Service, an Indian Tribe, Tribal Organization, or Urban Indian Organization or through referral under contract health services for which payment may be made under this title." As a result, to the extent that a AI/AN wished to participate in HIP 2.0, and receive services either at the tribal health clinic or through referral to another provider, they could not be charged any cost sharing. The State's waiver proposal is inconsistent with this requirement.

4. Inclusion of ARRA managed care protections

As discussed above, ARRA's managed care protections do not cure the problems associated with mandating managed care for AI/AN as a condition of accessing the Medicaid program. While it is encouraging that the State has attempted to comply with those requirements in its MCE contracts, including those provisions in a contract is of no assistance if the MCEs do not offer to enter into contracts with tribal healthcare providers in the first place. Moreover, the contract provisions provided by the State do not provide any enforcement mechanism.

5. No Additional Cost or Burden on the State

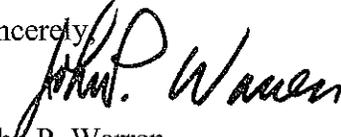
In its comments to the State, the Band pointed out that exempting Indians from HIP 2.0 and allowing them to participate through a FFS system as the State does with the medically-frail would be a much simpler solution than what the State proposes. The State is already proposing to exempt the medically-frail from its Demonstration Waiver, and as a result it should be no great burden to do the same for AI/AN. The Band's proposal should not result in any additional costs to the State either, as services provided to AI/ANs enrolled in Medicaid at the Band's facility or through referral to contract health services are reimbursed by the federal government at 100 percent Federal Medical Assistance Percentage (FMAP).

On the other hand, if the State were to include AI/AN in the demonstration, the State would have to police the contracts with MCEs to ensure that the tribal health facilities are paid regardless of whether they are in-network, ensure a sufficient number of tribal providers are available, and the State would have to make wrap around payments to tribal health facilities. Implementing such a system would be much more burdensome on the State, in our view, than simply exempting AI/AN from the waiver.

Conclusion

The Band shares CMS' goal of expanding Medicaid to every eligible individual in the State of Indiana as soon as possible, and hopes CMS can work with the State to accomplish that goal in a manner that respects tribal rights. The Band's proposal is consistent with waivers recently approved by CMS in States like New Mexico, Arkansas, and Michigan, and should work in the State of Indiana as well.

Sincerely,

A handwritten signature in black ink that reads "John P. Warren". The signature is written in a cursive style with a large initial "J" and "W".

John P. Warren
Tribal Council Chairman
Pokagon Band of Potawatomi Indians