U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 13, 2007

The Honorable Byron L. Dorgan
Chairman
Committee on Indian Affairs
United States Senate
Washington, D.C. 20510-6450

Dear Mr. Chairman:

Thank you for the opportunity to comment upon S. 1200, the Indian Health Care Improvement Act Amendments of 2007. The Department of Justice fully supports the purposes of this legislation – improving access to health care for American Indians and Alaska natives. The Department has worked with the Committee on Indian Affairs on previous versions of this legislation and believes that most of its prior concerns have been addressed by S. 1200. The Department does, however, continue to have a few concerns with the legislation that we have noted in the past. As explained below, the Department believes that these concerns can be addressed with relatively modest changes to bill language that would not detract from the overall goal of improving health care for Native Americans but would, in the Department's view, benefit both the Native American community specifically and taxpayers generally.

1. The legislation authorizes funding and encourages the use of traditional health care practices. The Department does not oppose the provision of traditional health care practices as an adjunct to "Western" medical practices. We note that on March 8, 2007, Ms. Rachel Joseph, Co-Chairperson of the National Steering Committee for the Reauthorization of the Indian Health Care Improvement Act, testified that "[t]raditional health care practices are usually provided as complementary services to Western medical practices at the request of family members." Ms. Joseph also testified that "[i]n most cases, the traditional health care practitioners are not employees of the IHS or tribes so FTCA coverage would not apply in the event that a malpractice claim was ever filed."

A prior version of this legislation contained language clarifying that traditional health care practitioners are not covered by the Federal Tort Claims Act ("FTCA"), and we recommend that this language be added back to S. 1200. Specifically, we recommend the following provision as an addition to section 805:

> (b) No Liability.— Although the Secretary may promote traditional health care practices, consistent with the Service standards for the provision of health care, health promotion, and disease prevention under this Act, the United States is not liable for the acts or omissions of any person in providing traditional health care practices under this Act that result in damage, injury, death, or any outcome to any patient.

This language is intended to confirm existing law that there is no valid cause of action under the FTCA for injuries resulting from traditional tribal healing practices provided pursuant to self-determination contracts because state law generally does not make private parties liable for "malpractice" involving traditional tribal healing practices. *See* 28 U.S.C. § 2674. Thus, this provision would ensure that the United States would not face potential tort liability for the provision of treatment through traditional health care practices for which no state standard of care exists and would prevent costly litigation about whether the United States could be held liable under the FTCA for such practices. Moreover, it would preclude intrusive discovery regarding the nature and purpose of traditional health care practices. Such litigation would almost certainly raise questions as to the advisability of Tribal health practices and potentially create unnecessary conflict between these practices and Western medical standards. Additionally, we believe the proposed language would ameliorate any Tribal sovereignty concerns that would arise in FTCA litigation regarding inquiry into traditional health care practices. At the same time, this language would not scale back in any way the current liability protections that the Tribes enjoy in carrying out self-determination contracts.

We also have concerns regarding changes made to section 213 of the legislation. The current version of section 213(b)(1) was modified to provide:

> (b) Terms and Conditions ---
>
> (1) In General.—Any service provided under this section shall be in accordance with such terms and conditions as are consistent with accepted and appropriate standards relating to the service, including any licensing term or condition required under this Act.

The previous version of the legislation, unlike S. 1200, made explicit that the Secretary "shall require" that any service provided be in accordance with terms and conditions that the Secretary determined to be consistent with accepted and appropriate standards relating to the service. We think S. 1200 is unclear in this regard, as it fails to explicitly specify who is responsible for requiring that any services provided are in accordance "with such terms and conditions as are consistent with the accepted and appropriate standards relating to the service." We suggest revising subsection 213(b)(1) to provide:

(1) In General.— The Secretary shall require that any service provided pursuant to this Act is in compliance with the accepted and appropriate standards relating to the service, including any licensing term or condition under this Act.

Relatedly, S. 1200 made changes to the prior language of subsection 213(b)(2). That subsection now reads:

(b)(2)(A) Standards.---

In General.—The Secretary may establish, by regulation, the standards for a service provided under this section, provided that such standards shall not be more stringent than the standards required by the State in which the service is provided.

We have concerns about this language. For the purposes of tort liability under the FTCA, state law provides the standards governing the conduct at issue. If the Secretary, by regulation, establishes standards that fall below the standards required by the State, there is a risk the United States could be held liable under the FTCA, even if the care complied with the standards promulgated by the Secretary. Moreover, and more likely troublesome, if the Secretary approves services for which there are no applicable state standards, subsection (b)(2), by its plain language, would appear to prevent the Secretary from establishing any appropriate standards because those standards would, by their very existence, be more stringent than what is required by the State. Where no state standards are applicable, it is in the interests of both the United States and the Tribes to whom such services might be provided to have some applicable and appropriate standards of care set by the Secretary. Thus, along with the Department of Health and Human Services, we propose working with the Committee to revise subsection (b)(2)(A) to address this concern.

Finally, S. 1200 also includes this new provision to section 213:

(b)(2)(B) Use of State Standards.—

If the Secretary does not, by regulation, establish standards for a service provided under this section, the standards required by the State in which the service is or will be provided shall apply to such service.

We agree that state standards should be applicable, since liability under the FTCA would be measured by those standards. Again, however, if there is no applicable state standard, the Secretary should be permitted to set some meaningful and appropriate standard of care, which is arguably not possible given the limitation of subsection (b)(2)(A).

2. The Department believes that the legislation continues to raise a constitutional concern to the extent that it provides government benefits to individuals who are not members of, or closely affiliated with, a federally recognized Indian tribe. As the Department has noted in the past, the Supreme Court has held that classifications based on affiliation with a federally recognized tribe are "political rather than racial," and therefore will be upheld as long as there is a rational basis for them. To the extent, however, that programs benefiting "Urban Indians" under this legislation could be viewed as authorizing the award of grants and other Government benefits on the basis of racial or ethnic criteria, rather than tribal affiliation, these programs would be subject to strict scrutiny under the equal protection component of the Due Process Clause. Both this bill and the current statute broadly define "Urban Indian" to include individuals who are not necessarily affiliated with a federally recognized Indian tribe. Under the Supreme Court's decisions, there is a substantial likelihood that legislation providing special benefits to individuals of Indian or Alaska Native descent who do not have a clear and close affiliation with a federally recognized tribe would be regarded by the courts as creating a racial preference subject to strict constitutional scrutiny, rather than a political preference subject to rational basis review. In the event the legislation is regarded as awarding Government benefits based on a racial classification, it would be constitutional only if the bill is supported by a factual record demonstrating that its use of race-based criteria to award the benefits at issue is "narrowly tailored" to serve a "compelling" Government interest.

The bill's extension of benefits to members of state-recognized tribes raise the same concern. As a threshold matter, it is not clear whether the courts would agree that Congress can constitutionally delegate its tribal recognition authority to the States and, even if Congress can do so as a general matter, the delegation in this bill would allow states to designate as "tribal members" eligible for federal benefits individuals who: (i) do not belong to a "distinctly Indian community" or other group that conforms to the Supreme Court's definitions of "the Indian tribes" referenced in the Commerce Clause, but instead are considered a member of a state "tribe" solely on the basis of race or affiliation with a group that lacks the sovereign attributes the Supreme Court has identified as important to classification as an "Indian tribe" for purposes of Commerce Clause legislation; and/or (ii) are otherwise outside the class of beneficiaries that Congress intended to reach with this bill. In this regard, as you may know, the American Indian Heritage Support Center ("AIHSC"), in a March 29, 2007, letter to the Department, with copies to Members of Congress, voiced concerns about the extension of benefits under this legislation to "state recognized tribes" because, according to the AIHSC, some of these "tribes" "have no historical background past the last 10 to 20 years" and simply seek "tribal" recognition to take advantage of certain recent Government benefits such as gaming privileges.

The Department recommends that, consistent with the settled practice of avoiding unnecessary constitutional issues, Congress revise the bill to extend benefits only to individuals who, in addition to satisfying whatever other criteria Congress may wish to impose, qualify as "members of, or individuals having a clear and close affiliation with, a federally-recognized tribe." Such a revision would avoid the constitutional concerns outlined above in a way that the

Department believes would not detract from the overall goal of improving heath care for Native Americans, and might actually better ensure that benefits under the bill would extend only to the class of beneficiaries contemplated by Congress and the Constitution.

Thank you for the opportunity to comment upon this very important legislation. We are committed to working with the Committee to have this legislation passed. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Richard A. Hertling
Principal Deputy Assistant Attorney General

cc: Vice Chairman

Senate Report 110-197 - INDIAN HEALTH CARE IMPROVEMENT ACT AMENDMENTS OF 2007

EXECUTIVE COMMUNICATIONS

On May 1, 2007, Chairman Dorgan sent letters to both Secretary Michael Leavitt and Attorney General Gonzales, asking the Department of Health and Human Services and the Department of Justice to provide the Committee with their views on S. 1200.

The Department of Justice submitted a letter of comments on June 13, 2007, which is attached, below.

Department of Justice,

Office of Legislative Affairs,

Washington, DC, June 13, 2007.

Hon. BYRON L. DORGAN,
Chairman, Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Thank you for the opportunity to comment upon S. 1200, the Indian Health Care Improvement Act Amendments of 2007. The Department of Justice fully supports the purposes of this legislation--improving access to health care for American Indians and Alaska natives. The Department has worked with the Committee on Indian Affairs on previous versions of this legislation and believes that most of its prior concerns have been addressed by S. 1200. The Department does, however, continue to have a few concerns with the legislation that we have noted in the past. As explained below, the Department believes that these concerns can be addressed with relatively modest changes to bill language that would not detract from the overall goal of improving health care for Native Americans but would, in the Department's view, benefit both the Native American community specifically and taxpayers generally.

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(b)(2)(A) STANDARDS-

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Finally, S. 1200 also includes this new provision to section 213:

(b)(2)(B) USE OF STATE STANDARDS-

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Thank you for the opportunity to comment upon this very important legislation. We are committed to working with the Committee to have this legislation passed. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Richard A. Hertling,

Principal Deputy Assistant Attorney General.

The Committee has not received any formal communication on S. 1200 from the Department of Health and Human Services other than the testimony presented to the Committee at the hearing on reauthorization of the Indian Health Care Improvement Act on March 8, 2007, which is also attached, below.

STATEMENT OF ADMIRAL JOHN O. AGWUNOBI, MD, MBA, MPH, ASSISTANT SECRETARY FOR HEALTH, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: My name is John Agwunobi and I am the Assistant Secretary for Health for the U.S. Department of Health and Human Services (HHS). As the Assistant Secretary, I serve as the Secretary's primary advisor on matters involving the nation's public health. I also oversee

the U.S. Public Health Service and its Commissioned Corps for the Secretary.

This landmark legislation forms the backbone of the system through which Federal health programs serve American Indians/Alaska Natives and encourages participation of eligible American Indians/Alaska Natives in these and other programs.

The IHS has the responsibility for the delivery of health services to more than 1.8 million Federally-recognized American Indians/Alaska Natives through a system of IHS, tribal, and urban (I/T/U) health programs governed by judicial decisions and statutes. The mission of the agency is to raise the physical, mental, social, and spiritual health of American Indian/Alaska Natives to the highest level, in partnership with the population we serve. The agency goal is to assure that comprehensive, culturally acceptable personal and public health services are available and accessible to the service population. Our duty is to uphold the Federal government's responsibility to promote healthy American Indian and Alaska Native people, communities, and cultures and to honor and protect the inherent sovereign rights of Tribes.

Two major statutes are at the core of the Federal government's responsibility for meeting the health needs of American Indians/Alaska Natives: The Snyder Act of 1921, P.L. 67-85, and the Indian Health Care Improvement Act (IHCIA), P.L. 94-437, as amended. The Snyder Act authorized regular appropriations for `the relief of distress and conservation of health' of American Indians/Alaska Natives. The IHCIA was enacted `to implement the Federal responsibility for the care and education of the Indian people by improving the services and facilities of Federal Indian health programs and encouraging maximum participation of Indians in such programs.' Like the Snyder Act, the IHCIA provides the authority for the Federal government programs that deliver health services to Indian people, but it also provides additional guidance in several areas. The IHCIA contains specific language addressing the recruitment and retention of health professionals serving Indian communities; the provision of health services; the construction, replacement, and repair of health care facilities; access to health services; and the provision of health services for urban Indian people.

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