

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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Submitted via Regulations.gov

Office for Civil Rights
Department of Health and Human Services
Hubert H. Humphrey Building, Room
509F, 200 Independence Avenue SW.,
Washington, DC 20201.

Re: Comments on Request for Information Regarding Nondiscrimination in Certain Health Programs and Activities, 1557 RFI (RIN 0945-AA02)

The Tribal Technical Advisory Group (TTAG) to the Centers for Medicare and Medicaid Services (CMS) is pleased to submit the following comments in response to Request for Information (RFI) Regarding Nondiscrimination in Certain Health Programs and Activities, RIN 0945-ZA01, published by the Office of Civil Rights, HHS, in the Federal Register on Thursday, August 1, 2013. Reference No. 1557 RFI (RIN 0945-AA02). The RFI seeks information to inform the Secretary, Department of Health and Human Services, regarding the promulgation of regulations to implement Section 1557 of the Affordable Care Act (ACA), 42 U.S.C. 18116, which prohibits discrimination in certain health programs and activities.

The TTAG advises Center of Medicare and Medicaid Services (CMS) on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care program funded (in whole or part) by CMS . In particular, the TTAG focuses on providing policy advice to CMS regarding improving the availability of health care services to American Indians and Alaska Natives (AI/AN) under these Federal health care programs, including through providers operating under the health programs of the Indian Health Service, Indian Tribes, tribal organizations and urban Indian organizations (I/T/U).

The RFI asks "Are there any other issues important to the implementation of Section 1557 that we should consider?" Although we do not believe that Section 1557 applies in a manner inconsistent with Indian health programs administered by the Indian Health Service and by Indian tribes and tribal organizations through compacts and contracts under the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. 450, *et seq.*,¹ we provide the following comments to confirm that is the case. We also request that any regulations implementing Section 1557 reaffirm the exemption for Indian health programs in the Department's regulations governing application of Title VI of the Civil Rights Act of 1964, and we request that the Office of Civil

¹ For the purposes of this Comment, we will refer to health programs operated for the benefit of American Indians and Alaska Natives by the Indian Health Service and by Indian tribes and tribal organizations under the ISDEAA as "Indian health programs."

rights consult with Tribes on this issue prior to developing any such regulations pursuant to the Department's Tribal Consultation policy.

Section 1557(a) provides that "an individual shall not, on the ground prohibited under Title VI of the Civil Rights Act of 1964 . . . be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance." The language "on the ground prohibited by Title VI of the Civil Rights Act of 1964 . . ." indicates that the prohibited discrimination under Section 1557 is discrimination under Title VI. The background section of the RFI in the third paragraph emphasizes this point by noting that:

In developing a regulation to implement Section 1557, the Department recognizes that Section 1557 builds on a landscape of existing civil rights laws. For example, the prohibitions against discrimination on the grounds of race, color, national origin, age, and disability in Title VI, the Age Act, and Section 504, respectively, apply to all programs and activities covered by those statutes, including those related to health.

Indian health programs are not programs or activities covered by Title VI because they are specifically exempted from Title VI coverage under the Department's regulations implementing Title VI at 45 C.F.R. § 80.3(d). This regulation provides:

(d) *Indian Health and Cuban Refugee Services*. An individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his.

Indian health programs are limited by Federal law to Indians. The underlying statutory authority for Indian health programs is the Snyder Act, 25 U.S.C. 13, which authorizes the expenditure of appropriated funds "for the benefit, care, and assistance of the Indians throughout the United States" for various listed purposes including the "conservation of health." Congress transferred the administration of Indian health programs from the Department of the Interior to the Department of Health and Human Services by the Transfer Act of August 5, 1954, 42 U.S.C. 2001, et seq. That law provides that "all functions, responsibilities, authorities, and duties of the Department of the Interior . . . relating to the maintenance and operation of hospital and health facilities for Indians, and the conservation of the health of Indians, are transferred to, and shall be administered by, the Surgeon General of the United States Public Health Service, under the supervision and direction of the Secretary of Health and Human Services."² Section 2 of the Indian

² Section 601 of the Indian Health Care Improvement Act, 25 U.S.C. 1661, establishes the Indian Health Service (IHS) as an agency within the U.S. Public Health Service in order to more effectively and efficiently carry out the responsibilities, authorities, and functions of the United States to provide health care services to Indians and Indian tribes, provided by statutes and treaties. The Director of the IHS shall administer all health programs under which health care is provided to Indians based on their status as Indians which are administered by the Secretary.

Health Care Improvement Act, 25 U.S.C. 1601, clarifies that the provision of health care services to Indians is based on a government-to-government relationship. It provides that “Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people.”

Thus, Indian health programs have their roots in the historical Federal trust relationship with American Indians and Alaska Natives. The Snyder Act, the Transfer Act, and the Indian Health Care Improvement Act (IHCIA) are all laws that Congress has enacted under its plenary power in the United States Constitution “to deal with the special problems of Indians.” *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974). The Transfer Act authorized the Secretary to promulgate regulations governing eligibility for the Indian health services program, 25 U.S.C. § 2003. The eligibility regulations now codified at 42 C.F.R. § 136.12, provide that “Services will be made available, as medically indicated, to a person of Indian descent belonging to the Indian community served by the local facilities and program.” Subsection 80.3(d) of the Title VI regulation by its terms applies to “Indian health services.” The regulation is clear that an individual shall not be deemed subjected to discrimination by reason of his exclusion from benefits limited by Federal law to individuals of a particular race, color, or national origin different from his. Under this regulation, the grounds for discrimination under Title VI, race, color, or national origin, do not apply to services and benefits provided under Federal law to Indians.

Rather, these provisions reflect Congressional recognition that providing limited health services for non-Indians in certain circumstances is a necessary part of the Federal government’s trust responsibility towards Indians and Indian health. They do not in any way indicate that Title VI applies to Indian health programs.

The exemption for Indian health services in the Title VI regulation recognizes the special Federal trust relationship with the Indians and the special nature of the Indian health services program rooted in that relationship. We request that the exemption for the Indian health program and services presently in the Title VI regulations be reaffirmed in any Section 1557 regulations.

Sincerely,



Valerie Davidson

Chair, TTAG