

# Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

c/o National Indian Health Board 910 Pennsylvania Avenue, SE Washington, DC 20003 (202) 507-4070 (202) 507-4071 fax

October 5, 2020

Lisa Wright-Solomon  
HRSA Information Collection Clearance Officer  
Room 14N136B  
5600 Fishers Lane  
Rockville, MD 20857

*Submitted electronically to paperwork@hrsa.gov and aianhealth@hrsa.gov*

**Re: Federal Tort Claims Act Program Deeming Sponsorship Application for Free Clinics,  
OMB No. 0915-0293– Revised**

Dear Ms. Wright-Solomon:

On behalf of the Centers for Medicare and Medicaid Services (CMS) Tribal Technical Advisory Group (TTAG), I submit this comment in response to the Health Resources and Services Administration (HRSA) notice published August 6, 2020 in the Federal Register, requesting public comment on the agency’s plan to submit an Information Collection Request (ICR) regarding the Federal Tort Claims Act Program Deeming Sponsorship Application for Free Clinics, OMB No. 0915-0293– Revised. I write to emphasize TTAG’s support for deeming Urban Indian Organizations with Public Health Service status on behalf of their sponsored individuals for purposes of liability protections, including Federal Torts Claims Act coverage.

### **Liability Protections Under the Federal Tort Claims Act**

The Public Health Service (PHS) Act<sup>1</sup> authorizes the “deeming” of certain individuals as PHS employees for the purposes of receiving liability protections, including Federal Torts Claims Act (FTCA)<sup>2</sup> coverage, for the performance of medical, surgical, dental or related functions within the scope of deemed employment. Current law also provides FTCA coverage for malpractice liability to HRSA Health Centers<sup>3</sup> as well as IHS-operated facilities and Tribal Health Programs.<sup>4</sup> Urban Indian Organizations, which are not covered, must spend hundreds of thousands of their limited federal dollars to obtain liability coverage. For covered entities, the FTCA substitutes the United States as the defendant in a suit so the United States—not the individual employee—bears any resulting liability. The federal government pays for court judgments and compromise settlements of lawsuits out of the Judgment Fund. The Judgment Fund is a permanent, indefinite

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<sup>1</sup> Section 224(o) of the Public Health Service (PHS) Act (42 U.S.C. 233(o)), as amended, authorizes this coverage for Free Clinics.

<sup>2</sup> Congress enacted FTCA medical malpractice protection for federally-supported health centers through the Federally Supported Health Centers Assistance Act (FSHCAA) of 1992 (P.L. 102-501) and FHSCAA of 1995 (P.L. 104-73), later codified as 42 U.S.C. §§ 233 (g) – (n).

<sup>3</sup> 42 CFR 6.2, 6.3.

<sup>4</sup> Congress first extended the FTCA to negligent acts of Tribal contractors carrying out contracts, grants, or cooperative agreements pursuant to the Indian Self-Determination and Education Assistance Act in 1988.

appropriation that is available to pay monetary awards against the United States that are judicially or administratively ordered.

### **UIOs are Critical to Indian Health Care Delivery System**

Urban Indian Organizations (UIOs) were established in 1976 because Tribes advocated for the protection of trust and treaty health rights for American Indians and Alaska Natives (AI/ANs) living off of Tribal land. Such individuals are considered to be “Urban Indians” under the Indian Health Care Improvement Act (IHCIA).<sup>5</sup> UIOs are authorized under IHCIA to serve members from all 574 federally recognized Tribes as a part of the Indian Health Service (IHS) system, which consists of IHS, Tribal Health Programs, and UIOs. Collectively, this health care delivery system is often referred to as the “I/T/U” system.

As a critical component of the I/T/U system, UIOs provide care to some of the 70%<sup>6</sup> of AI/ANs living in urban areas, **ensuring that the federal government’s trust responsibility to provide health care to AI/ANs is fulfilled regardless of where they reside.** There are currently 41 IHS UIOs, which operate 74 facilities in 22 states. UIOs provide a wide range of culturally competent health care and social services to urban AI/AN communities including primary care, oral care, HIV treatment, substance use disorder treatment, behavioral health, and other preventive services. UIOs offer quality, accessible health care centers governed by leaders in the Indian community.<sup>7</sup>

HRSA is the primary federal agency for improving health care to those who are economically or medically vulnerable, two classifications applicable to the Urban Indian population. HRSA, like all federal agencies, has a trust responsibility to AI/ANs. Many UIOs are beneficiaries of HRSA programs, including the Health Center Program<sup>8</sup> and 340B Drug Pricing Program. In fact, in a list of priorities<sup>9</sup> “to help Tribal organizations maximize the impact of key government programs” identified by HRSA and IHS, “Increase Urban Indian Health participation in the Health Center Program” appears at the top of the list.

### **Tribal Support for FTCA Coverage of UIOs**

#### ***Tribal Budget Formulation Workgroup***

Malpractice insurance through the FTCA is among the cost-saving measures that UIOs have been deemed ineligible, although they are available to the other components of the I/T/U system. In its recommendations for fiscal year (FY) 2022, the National Tribal Budget Formulation Workgroup (TBFWG) recognized that because UIOs receive direct funding from primarily one historically underfunded line item in the IHS budget (Urban Indian Health) and do not receive direct funds

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<sup>5</sup> 25 U.S.C. §1603 (28).

<sup>6</sup> The American Indian and Alaska Native Population. U.S. Census Bureau. Accessed January 12, 2012, at: <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>.

<sup>7</sup> See 25 U.S.C. §1603 (28). UIOs are “governed by an urban Indian controlled board of directors, and provid[e] for the maximum participation of all interested Indian groups and individuals”.

<sup>8</sup> Eligible UIOs that participate in HRSA’s Health Center Program may be granted medical malpractice liability protection under the FTCA. Notably, many UIOs do not qualify for tIHS benefit.

<sup>9</sup> U.S. Dept. of Health & Human Services Guidance Portal, HHS-0906--F-5851, published June 25, 2020, available at: <https://www.hhs.gov/guidance/document/hrsa-tribal-consultation-policy-1>.

from other distinct IHS line items,<sup>10</sup> **any savings or funding increases would therefore make a huge difference to UIOs in providing care to Urban Indians.** As stated in the TBFWG’s Recommendations on the IHS FY 2022 Budget:<sup>11</sup>

The Federal Tort Claims Act (FTCA) allows federally-supported health care centers to secure medical malpractice liability protection with the federal government acting as their primary insurer at no cost. IHS and Tribal providers are covered under the FTCA, as well as Community Health Centers, but UIOs are not. Consequently, UIOs must divert precious dollars from health care to pay for expensive malpractice insurance, which can cost hundreds of thousands of dollars per annum.

FTCA coverage for UIOs would mean scarce funding could be better utilized by UIOs in providing programs and services for Urban Indians. UIOs would no longer need to utilize limited federal funds to purchase costly malpractice insurance. Including UIOs in FTCA coverage would in effect save federal dollars – as those monies could be used to provide care, helping to offset the significant funds needed to combat the COVID-19 crisis.

### ***Current Legislation***

Tribes and Tribal Organizations support H.R. 6535 and S.3650, legislation that would allow UIOs and their employees to be included in the pool of individuals and entities that receive liability protection under the FTCA. This legislation represents a technical fix that has long enjoyed broad bipartisan support, including from both sides of the aisle and both Chambers of Congress, as well as from the Administration and the TBFWG.

On July 1, 2020, the Senate Committee on Indian Affairs held an oversight hearing on “Evaluating the Response and Mitigation to the COVID-19 Pandemic in Native Communities” and a legislative hearing on S. 3650, the Coverage for Urban Indian Health Providers Act. National Council of Urban Indian Health Vice President Robyn Sunday-Allen, who is also the Chief Executive Officer of the Oklahoma City Indian Clinic, submitted written testimony<sup>12</sup> emphasizing the importance of S. 3650, which has been exacerbated by the COVID-19 pandemic. During the hearing, many Senators emphasized the critical nature of this fix to help expand resources for Urban Indian health services and IHS Director Rear Admiral Michael Weahkee endorsed the bill.

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<sup>10</sup> IHS budget items that UIOs are ineligible for include the Hospital and Health Clinics, Mental Health, Alcohol & Substance Abuse, Indian Health Care Improvement Fund, Health Education, Indian Health Professions, or any of the line items under the IHS Facilities account.

<sup>11</sup> *Reclaiming Tribal Health: A National Budget Plan to Rise Above Failed Policies and Fulfill Trust Obligations to Tribal Nations* The National Tribal Budget Formulation Workgroup’s Recommendations on the Indian Health Service Fiscal Year 2022 Budget, April 2020, page 32, available at: [https://www.nihb.org/docs/05042020/FINAL\\_FY22%20IHS%20Budget%20Book.pdf](https://www.nihb.org/docs/05042020/FINAL_FY22%20IHS%20Budget%20Book.pdf).

<sup>12</sup> Available at [https://www.ncuih.org/action/document/download?document\\_id=346](https://www.ncuih.org/action/document/download?document_id=346).

**Conclusion**

In conclusion, although this feedback may fall outside the scope of comments expected in response to this particular ICR, I wish to reiterate TTAG’s support for deeming UIOs with Public Health Service status on behalf of their sponsored individuals for purposes of liability protections, including FTCA coverage. UIOs are distinct from Tribal Health Programs and IHS facilities, but their services are similarly critical to AI/AN health. Although UIOs are an essential component to ensuring the federal government’s trust responsibility to provide health care to AI/ANs is fulfilled, UIOs do not currently have the same liability protections as their counterparts in the Indian health care delivery system, nor those of Community Health Centers nor Free Clinics. We request the agency’s support to correct this injustice.

Sincerely,

A handwritten signature in black ink that reads "W. Ron Allen". The signature is written in a cursive, flowing style.

W. Ron Allen, Chairman, CMS Tribal Technical Advisory Group  
Chair/CEO, Jamestown S’Klallam Tribe

CC: Carolyn Hornbuckle, Chief Operations Officer, National Indian Health Board  
Kitty Marx, Director, Division of Tribal Affairs, Centers for Medicare & Medicaid Services  
CAPT Elijah Martin, Tribal Health Affairs Manager, Office of Health Equity, HRSA  
Sunny Stevenson, Director, Federal Relations, National Council of Urban Indian Health