

National Indian Health Board



May 28, 2021

Denis McDonough
Secretary
Department of Veterans Affairs
810 Vermont Ave N.W.
Washington, DC 20420

Re: Waiver of co-payments for American Indian/Alaska Native Veterans

Dear Secretary McDonough:

On behalf of the National Indian Health Board (NIHB),¹ I write to you regarding your agency's implementation of *Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020*, which prohibits Veterans Affairs (VA) from collecting copayments from covered Veterans for the receipt of hospital care or medical services under laws administered by VA. This letter is in response to your Dear Tribal Leader Letter (DTLL) from March 29, 2021, which solicited opinions from Indian Country on how this Act should be enforced.

We ask that VA allow AI/AN veterans to self-identify their status, with the caveat that the veteran could be asked to submit proof of eligibility at a later date. We encourage the agency to work with the VA Tribal Advisory Committee (VA TAC) to formulate an equitable method of verification for veterans who may be asked to provide additional documentation. As we will outline in this letter, the provisions of the Act make verification a difficult task and we want to ensure that AI/AN veterans are not burdened with paperwork requirements that impede their ability to receive timely care with no out of pocket expense.

Trust Responsibility

The United States owes a special duty of care to Tribal Nations, which animates and shapes every aspect of the federal government's trust responsibility to Tribes. Rooted in treaties and authorized by the United States Constitution, the federal government's unique responsibilities to Tribal Nations have been repeatedly re-affirmed by the Supreme Court, legislation, executive orders and regulations.² In 1977, the Senate report of the American Indian Policy Review Commission stated

¹ Established in 1972, the National Indian Health Board (NIHB) is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

² The Court has consistently held that the federal government has a trust responsibility to Tribes, which has formed the foundation for federal/Tribal relations. *See Seminole Nation v. United States*, 316 U.S. 286 (1942), *United States v. Mitchell*, 463 U.S. 206, 225 (1983), and *United States v. Navajo Nation*, 537 U.S. 488 (2003).

that, “[t]he purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian tribes and people.” This trust responsibility is highlighted recently in the Department of Health and Human Services (HHS) Strategic Plan FY 2018–2022:

Importantly, the Federal Government has a unique legal and political government to-government relationship with Tribal governments and a special obligation to provide services for American Indians and Alaska Natives based on these individuals’ relationship to Tribal governments.³

The trust responsibility establishes a clear relationship between Tribes and the federal government.⁴ The Constitution's Indian Commerce Clause, Treaty Clause and Supremacy clause, among others, provide the legal authority and foundation for distinct health policy and regulatory decision making by the United States when carrying out its unique trust responsibility to provide for the health and welfare of AI/ANs and support for the Indian health system that provides their care. We appreciate Congress’s decision to ensure that AI/AN veterans are protected from having to pay co-payments for the care that they receive as a receipt for their service to the United States. We believe that this represents an additional step towards ensuring that the trust responsibility is fulfilled.

Definition of Indian

We are concerned by the agency’s framing of this provision in the DTLL and how it interacts with the text of the statute. The DTLL asks for ways to verify that a veteran is a “member of the Indian Tribe.” However, this is an incorrect framing of the text that authorizes this exception. The Act defines an Indian pursuant to Section 4 of the Indian Health Care Improvement Act⁵, which has a substantially broader definition of Indian than the scope of the DTLL. The relevant portion of Section 4 of IHCA is provided below:

(13) Indians or Indian

The term “Indians” or “Indian”, unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (d) hereof, except that, for the purpose of sections 1612 and 1613 of this title, such terms shall mean any individual who

(A) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member, or

(B) is an Eskimo or Aleut or other Alaska Native, or

(C) is considered by the Secretary of the Interior to be an Indian for any purpose, or

(D) is determined to be an Indian under regulations promulgated by the Secretary.

The definition of Indian in the IHICA encompasses more than just enrolled members of Indian Tribes, it also includes descendants and anyone else deemed by the Secretary of the Interior to be an “Indian” for any purpose. Requiring VA medical facilities to implement a narrow interpretation of the definition requiring that a person must be a member of a Tribe is inconsistent with the Act and

³ Introduction, “Cross-Agency Collaborations”, <https://www.hhs.gov/about/strategic-plan/introduction/index.html>

⁴ In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Supreme Court explicitly outlined that the relationship between the federal government and the Tribes is a relationship between sovereign nations and that the states are essentially third party actors.

⁵ 25 U.S. Code § 1603

contrary to Congressional intent. **This interpretation would prevent eligible veterans from claiming the exemption.**

The process of verifying whether someone is an “Indian” for the purposes of IHCIA can be very complex and requires a level of expertise that VA intake staff may not have. For example, staff would have to interpret documentation that verifies descendancy or membership in a state or federally recognized Tribe. While there is a published list of federally recognized Tribes, there is no such list for state recognized Tribes, and proof of descendancy can take many forms. VA front line staff would also have to verify the accuracy of these documents and ensure that a veteran is not trying to falsely claim a benefit to which they are not entitled. There are 574 federally recognized Tribes, requiring a staffer to be able to spot the authenticity of documentation is a monumental task. Given its complexities, we do not think that it is appropriate for the VA to ask their staff to interpret IHCIA, especially when it comes to enforcing such a critical part of the trust responsibility. Mobilizing such an effort would be costly and certainly result in inconsistencies across the system. **VA must allow for self-attestation by AI/AN veterans of their status as AI/AN veterans.** We believe that this is the most equitable way to ensure that AI/AN veterans can properly benefit from this exemption. **The complexity of the documentation required to verify eligibility makes doing so for every AI/AN veteran a difficult and nuanced task that would inevitably result in thousands of AI/AN veterans becoming lost in a maze of paperwork and bureaucracy.**

There are other examples of federal programs adopting self-attestation processes, such as the Medicaid and Affordable Care Act Marketplace programs. While the agencies reserve the ability to later verify or review if there are questions, self-attestation ensures that the AI/AN veteran begins receiving their special protections immediately. Adopting a similar stance would not be without precedent and would be in line with the practices of other federal agencies. In order to ensure that veterans are able to access this exemption quickly and avoid unnecessary expenses, **the VA must move forward with allowing veterans to self-identify their status as AI/AN veterans.**

Awareness of Eligibility

The VA must provide adequate training to VA staff working with eligible veterans. Armed with this information, these VA staff will be able to ensure that eligible veterans receive this benefit. Without this training and active outreach efforts, many AI/AN veterans will miss out on this opportunity entirely. This concern is reinforced by a 2019 GAO study that found that it is not uncommon for VA staff to avoid asking veterans for racial or ethnic classification.⁶ As the report outlines, many of these determinations are made based on the observations of the staff member. This is troubling. We are concerned that this kind of workplace culture will lead to AI/AN veterans, who may not appear “Indian” to a staff person, not being made aware or receiving this exemption. **VA must ensure that AI/AN veterans are aware of this exemption and that staff are able to work with them to ensure they receive it.**

We also urge the VA to share data with Indian Country on the utilization of this exemption. This data should be shared on a yearly basis and broken down by region. This data will be essential for ensuring that Indian Country has the information it needs to certify that AI/AN veterans are

⁶ See <https://www.gao.gov/assets/gao-20-83.pdf>

benefiting from this program and to conduct outreach efforts to increase participation. It also will help Indian Country hold VA accountable for ensuring that AI/AN veterans are receiving this benefit.

Verification of Eligibility

We acknowledge that the VA has an interest in protecting the integrity of its programs. Indian Country also has an interest in ensuring that people are not fraudulently benefiting from the trust responsibility and the legislation passed to enforce it. As a deterrent to fraud, VA should make it known that documentation of eligibility could be requested, either if fraud is suspected or during a randomly selected audit. VA should create a fair and equitable way to handle such cases, which will involve removing the decision-making authority from front line staff and placing these determinations within the purview of staffers with the requisite subject matter expertise to interpret and apply federal statutes to the documents that will be presented to them. Nevertheless, we believe the risk of abuse is small and far outweighed by the benefit of ensuring most, and hopefully all AI/AN Veterans are timely exempted from co-payments.

We urge VA to begin enforcing the Act immediately. **However, we encourage VA to work with its Tribal Advisory Committee (TAC) once it is seated to devise a verification process that allows them to verify that a veteran is “Indian” (as defined by Section 4 of IHCIA) when they are selected for additional verification (or as part of an audit).** When a verification method is created, it must also go through Tribal consultation to ensure that it is acceptable to Indian Country. The verification process must provide the veteran with the opportunity to prove their status as an AI/AN veteran and have a clear set of requirements in order to do so. **Further, a veteran should not lose access to this exemption without having gone through the verification process.** If VA seeks additional documentation from a veteran the exemption must remain in place until the veteran’s appeal has reached completion.

Conclusion

We are concerned about what appears to be VA’s interpretation of the Act. The DTLL frames the question as if the Act requires membership in a Tribe. However, the exemption that prohibits VA from collecting copayments from covered veterans for hospital care or medical services under laws administered by VA uses the definition at 25 U.S.C 1603, which is broader than explained in the VA DTLL. **Given the complexity of documentation that could be required to verify that a person meets that definition, we urge the agency to allow for self-attestation.** We also urge the agency to take steps to ensure that AI/AN veterans are aware of the benefit and that data is made available about its utilization. The agency must also work with its TAC to devise a way to verify eligibility for individuals when it is determined that additional documentation is needed. Thank you in advance for your consideration of our letter.

Sincerely,



Stacy A. Bohlen, CEO
National Indian Health Board