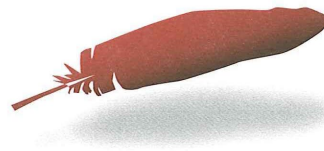


National Indian Health Board



Thursday, July 20, 2023

Denis McDonough
Secretary
Department of Veterans Affairs
810 Vermont Ave. NW
Washington, D.C. 20420

Re: Revised Reimbursement Agreement Template for Tribal Health Programs in the Lower 48 States

Dear Secretary McDonough,

On behalf of the [National Indian Health Board](#) (NIHB)¹ and the 574 federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, thank you for the opportunity to provide feedback and recommendations on the revised Reimbursement Agreement (Agreement) template for Tribal Health Programs (THP) in the lower 48 states.

NIHB thanks the VA for the current draft agreement and the changes reflected from the September 27, 2022 in-person consultation and September 30, 2022 virtual consultation. We would also like to thank you for your continued engagement on this topic, continued willingness to work with Tribal leaders, and your engagement with Tribal Leaders at the 2023 Tribal Self-Governance Annual Conference in Tulsa, OK on Monday, June 26, 2023. In particular, the VA's willingness to extend the reporting period for THPs to 18 months to submit purchased and referred care (PRC) reimbursement requests and changes removing quality improvement measures in this current draft show us that the VA is listening to Tribal leaders and earnestly negotiating this Agreement.

NIHB supports the VA's effort to revise its current Agreement with THPs in the lower 48 states. While this most recent draft of this Agreement brings Tribes, THPs, and the VA closer in agreeance, we believe this Agreement can further be improved upon to ensure that AI/AN veterans receive health care that is seamless and well-coordinated between the VA, Tribes, and THPs. NIHB makes the following comments, requests, and recommendations in response to the May 26, 2023 request for comments on the draft Agreement with further explanation below:

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. 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.



1. NIHB recommends clarifying language in Section 5, Subsection C regarding “Contract Travel” to include all travel that a THP authorizes.
2. NIHB recommends revising language regarding outpatient pharmacy services to:
 - a. Utilize IHS’ formulary when determining outpatient pharmaceuticals eligible for reimbursement,
 - b. Reimburse THPs for outpatient pharmacy services at the Office of Management and Budget (OMB) encounter rate (OMB rate), and
 - c. Clarify preauthorization requirements for medications not on the VA’s formulary.
3. NIHB recommends changing language regarding dispute resolutions and mediation requirements.
4. NIHB requests that the VA host a Tribal consultation on a future draft Agreement before the VA proposes a final Agreement.

AI/AN Veterans and the Trust Responsibility

AI/ANs have served in the United States military in every major armed conflict in the Nation’s history and have traditionally served at a higher rate than any other ethnic group in the United States.² This includes at least 9,000 Native American men who served the United States in World War One, before this country granted universal citizenship to American Indians and who suffered a casualty rate five times higher than the total force; 42,000 AI/ANs who served in the Vietnam War, representing twenty-five percent of the total AI/AN population at the time; and over 33,000 AI/ANs who have served following September 11, 2001.³ Today, there are more than 145,000 AI/AN veterans living in the United States.⁴

In return for their military service, the United States promised all veterans, including Native veterans, “exceptional health care that improves their health and well-being.”⁵ The need for exceptional health care for Native veterans is especially important given that they are more likely to be uninsured and have a service-connected disability than other veterans.⁶

This federal government’s responsibility to provide exceptional health care to Native veterans extends beyond that owed to them in return for their military service. The United States also has a well-established trust responsibility to “maintain and improve the health of the Indians.”⁷ The VA in coordination and collaboration with the Indian Health Service (IHS) and THPs has made significant strides in upholding the federal government’s trust responsibility. Since initiating the current reimbursement agreement in 2012, the VA reimbursed over \$186 million for direct care provided to AI/AN veterans by IHS and THPs. The Agreement expanded to include Urban Indian Organizations (UIO) in 2022. To date, the VA extends Agreements to 74 IHS facilities, 119 THPs, and 1 UIO facility.⁸ However, NIHB believes there is much more the federal government can do to uphold its trust responsibility, including covering travel costs for all

² Proclamation on National Native American Heritage Month, 86 C.F.R. § 60545 (2021), available at <https://www.whitehouse.gov/briefingroom/presidential-actions/2021/10/29/a-proclamation-on-national-native-american-heritage-month-2021/>.

³ See U.S. Department of Veterans Affairs, American Indian and Alaska Native Veterans, 2017 27-28 (May 2020), <https://www.va.gov/vetdata/docs/SpecialReports/AIAN.pdf>; Tanya Thatcher, James Ring Adams & Anne Bolen, Patriot Nations: Native Americans in Our Nation’s Armed Forces, 17 American Indian Magazine 3 (2016), <https://www.americanindianmagazine.org/story/patriotnations-native-americans-our-nations-armed-forces>.

⁴ VA Veteran Population Projection Model, 2018: https://www.va.gov/vetdata/veteran_population.asp.

⁵ Veterans Health Administration, About VHA, <https://www.va.gov/health/aboutVHA.asp>.

⁶ Department of Veterans Affairs, American Indian and Alaska Native Veterans: 2017 14-19 (2020), <https://www.va.gov/vetdata/docs/SpecialReports/AIAN.pdf>.

⁷ 25 U.S.C. § 1601(1).

⁸ See Native American Veterans: Ensuring Access to VA Health Care and Benefits, 2 (2022) (testimony of Roselyn Tso)

AI/AN veterans regardless of their disability rating, and updating the current Agreement is critical to realizing that. While the VA, THPs, and Tribes are making progress in reaching a consensus on the content of this Agreement, further improvements are necessary to ensure AI/AN veterans receive adequate healthcare.

Reimbursable Services Should Include All THP Authorized Travel

NIHB urges the VA to amend Section 5, Subsection C: Contract Travel of the draft Agreement to include language that grants reimbursement for all necessary uncontracted travel costs, as authorized by a THP. The current agreement language states that any “contracted” transport service will be allowed as reimbursable travel. However, THPs do not always contract with third-party medical transport services when securing travel for eligible beneficiaries. While there are many instances of THPs having medical transportation contracts with external partners, many third-party vendors refuse to contract with Tribes. Often, Tribes work with these third-party medical transportation services in one-off instances without a formal contract for travel.

NIHB understands that the current draft Agreement language is intentional and based on language pulled from 25 USC § 1645C and 25 USC § 1621L. However, the interpretation of this subsection in future interpretations may not be as inclusive as your office has indicated.⁹ NIHB believes that including more precise language will help avoid potential conflicts deriving from differences in interpretation.

Improve and Streamline Reimbursement for Outpatient Pharmacy Services

NIHB recommends that the VA change the language in Section 5, Subsection D: Outpatient Pharmacy Services. Specifically, NIHB asks that the Agreement also use IHS’ formulary when it determines which outpatient pharmaceuticals are eligible for reimbursement. Currently, the Agreement only uses VA’s formulary. However, NIHB believes also using the IHS formulary will provide a better continuum of care for AI/AN veterans seeking outpatient pharmaceutical services at THPs.

NIHB strongly encourages the VA to reimburse THPs for all outpatient pharmacy services at the OMB rate. During the June 26, 2023 Listening Session, Tribal leaders expressed concerns over current Agreement language stating that the VA will reimburse the THP for wholesale acquisition cost (WAC) plus a dispensing fee per outpatient pharmaceutical. However, reimbursing at the OMB rate has the potential to raise substantially more revenues for THPs, which typically lack adequate funding.¹⁰

NIHB asks that the VA clarify prior authorization language throughout the Agreement. Current language in Section 5, Subsection D1 in the Agreement requires prior authorization for pharmacy benefits not listed on the VA formulary. As it stands, this provision provides conflict for THPs and providers who are ethically required to prescribe necessary prescriptions when patients are seen. Additionally, future language must sufficiently outline if the prescription reimbursement will be from the date of approval or if that reimbursement will be backdated to the date of service delivery. NIHB believes that if prior authorization is required, all reimbursement for outpatient pharmacy services should be backdated to the delivery date.

⁹ At the June 26, 2023 Listening Session, Hillary Peabody, Deputy Assistant Under Secretary for Health for Integrated Veterans Care, stated that the VA pulled current S5(C) language from 25 USC 1645(c) and the VA “legal team feels strongly that the term contract should be included, but ‘contract’ would be up to the THP to define.

¹⁰ NIHB acknowledges that other negotiations with separate reimbursement Agreement templates may consider different rates that best support the implementation of specific THPs.

Dispute Resolution Should Uphold Tribal Sovereignty

NIHB thanks the VA for including a dispute resolution process in the current draft Agreement. In previous consultations, Tribes and THPs requested this provision, and we welcome the inclusion of a process. However, NIHB has concerns over the mediation requirement outlined in Section 10, Subsection B, which Tribal leaders expressed during the June 26, 2023 Listening Session in Tulsa, OK. NIHB fears that, as it stands, the current mediation process described in the Agreement threatens Tribal sovereignty by requiring a waiver of sovereignty as part of mediation. Further, many Tribes have legal codes stating they cannot waive certain sovereign rights, which would prevent those Tribes from agreeing to such terms, effectively barring them from participation. Even when no legal code prohibits the waiver of certain sovereign rights, the internal process for a Tribe to consider and act on any waiver is time-intensive and costly.

If a contract dispute arises from an agreement entered pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), then dispute mechanisms for ISDEAA agreements are already best suited for adjudicating this dispute. Requiring THPs to bind themselves to mediation on a claim arising from the scope and terms of their respective ISDEAA agreement is a violation of Tribal sovereignty that creates additional bureaucratic processes that will result in inefficiency and taxpayer waste.

The VA Must Host a Consultation Before Issuing a Proposed Final Agreement

NIHB requests that the VA host a consultation on the next draft Agreement or before issuing a proposed final Agreement. Tribal consultation remains vital to upholding the federal government's trust responsibility. All future consultations on the Agreement must be meaningful and robust per President Biden's November 30, 2022, Memorandum on Uniform Standards for Tribal Consultation.¹¹

Conclusion

Thank you for the opportunity to provide feedback and recommendations on the current draft of the Agreement. NIHB is encouraged by the VA's revisions represented in this Agreement, and we look forward to the VA incorporating further changes recommended by Tribes and Tribal organizations. NIHB recommends clarifying language regarding reimbursable travel and outpatient pharmacy services. NIHB recommends language changes to dispute resolutions, and NIHB further recommends the VA further consults with Tribal leaders before a final Agreement is proposed to continue to engage with Tribes as they assess the impact of the proposed policy. We look forward to your continued partnership in improving access to healthcare for AI/AN veterans.

Sincerely,



William Smith, *Valdez Native Tribe*
Chairman
The National Indian Health Board

CC: Hillary Peabody, Deputy Assistant Under Secretary for Health for Integrated Veteran Care

¹¹ See Presidential Memorandum on Uniform Standards for Tribal Consultation (Nov. 30, 2022): <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/>