

United States Senate

WASHINGTON, DC 20510

April 27, 2018

The Honorable Alex Azar
Secretary, U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, D.C. 20201

Dear Secretary Azar,

We write to express our growing concerns at the views expressed by the Department of Health and Human Services (HHS) and the Centers for Medicare and Medicaid Services (CMS) in a “Dear Tribal Leader” letter issued on January 17, 2018, and subsequent related statements made by HHS personnel on the issue of American Indian and Alaska Native (AI/AN) exemption from Medicaid work requirements. The views expressed fail to recognize the unique legal status of Indian tribes and their members under federal law, the U.S. Constitution, treaties, and the federal trust relationship. We call on the Department to respond expeditiously to the information requests on this matter outlined below.

In the January 17 letter entitled “Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries State Medicaid Director Letter,” Center for Medicaid and CHIP Services Director Brian Neale stated that the Agency is unable to require states to exempt AI/ANs from work and community engagement requirements because it is “constrained by statute.” Notably, Mr. Neale also attributed the Centers’ inability to require the exemption to “civil rights issues.” The letter provided no additional information outlining the basis for the Agency’s statutory constraints or civil rights concerns.

On the same day CMS sent the “Dear Tribal Leader” letter, members of the Secretary’s Tribal Advisory Committee (STAC) met with CMS Administrator Seema Verma, who indicated that the Agency based its views on the HHS’s Office of Civil Rights (OCR) interpretation that a work requirement exemption for AI/ANs would be “race based.” Tribal Leaders and organizations confirmed to our Offices that other Department officials have continued to cite OCR’s interpretation in meetings with Tribal Leaders on several subsequent occasions.

The U.S. Constitution empowers Congress to regulate commerce with Indian tribes. The “Indian Commerce Clause” is generally cited as the source of authority for the federal government to establish treaties, statutes, executive orders, and regulations that support a distinctive legal status under federal law for federally-recognized Indian Tribes. The Supreme Court has repeatedly upheld this unique political status and the government-to-government relationship between Tribes and the United States – most notably, in *Morton v. Mancari*, which affirmed that federal classifications fulfilling federal obligations to Indians are not based on race but instead on a political relationship between the Tribes and the federal government. This ruling -- combined with a number of statutes, regulations, and additional court decisions -- confirms that Tribes are not a racial group but rather political communities.

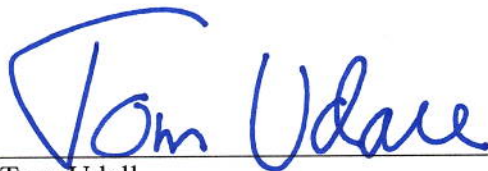
Shortly after the *Mancari* decision, Congress made clear its intent to leverage the Medicaid and Medicare programs for fulfillment of its trust and treaty obligations to Tribes through changes to sections 1905(b) and 1911 of the *Social Security Act*. Congress's extension of Medicaid and Medicare rests on the solid principles set forth by *Mancari* and its progeny: That Congress can extend federal benefits to Indian tribes and their members as a means of fulfilling Congress's unique obligation toward tribes—all while abiding by the Equal Protection clause. Medicaid participation now ensures that more than 50 percent of patients at some tribally operated health systems, 40 percent of patients at federally operated Indian Health Service facilities, and 25 percent of all AI/ANs nationwide have access to vital medical care.

Concerned that CMS appears close to approval of Section 1115 waivers from states where Indian tribes are located that would impose work requirements on AI/ANs, Tribal Leaders and organizations have met with HHS and CMS officials to discuss a work requirement exemption. They report that the Agency has provided little insight into the legal and policy foundation for the views expressed in the "Dear Tribal Leader" letter. Accordingly, the potentially devastating impacts that CMS's views on AI/AN Medicaid enrollment protections could have on AI/AN health care access combined with HHS' reported mischaracterization of the status of AI/ANs as "race based" by its officials raises significant concerns.

Given our own concerns regarding HHS' views and as part of our work in the Senate to ensure fulfillment of the federal government's trust responsibilities, we request the Department furnish following information:

- CMS's views of Tribal Leader and state requests to exempt AI/ANs from Medicaid work requirements;
- The statutory constraints that prevent CMS from exempting AI/ANs from Medicaid work requirement referenced in the January 17, 2018, "Dear Tribal Leader" letter; and
- Clarification of OCR's interpretation that such an exemption for AI/ANs "could raise civil rights concerns."

Sincerely,



Tom Udall
Vice Chairman
U.S. Senate Committee on Indian Affairs



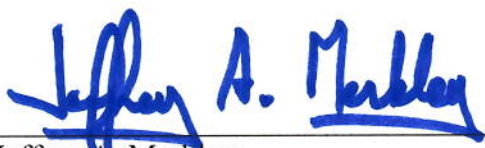
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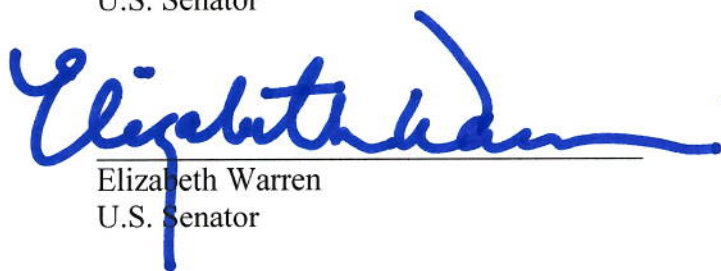
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