

Memorandum

To: Tribal Clients and Friends

Re: Indian Health Service Funding Stoppages for Tribal Co-pay Policies

Date: July 2, 2008

Boozhoo...Indian Health Service (IHS) officials are strongly considering a shift in policy that would result in the stoppage of IHS funding for health care at IHS-funded facilities. Any IHS-funded facility that charges eligible beneficiaries (i.e., a co-payment) for portions of health service or pharmaceuticals may be subject to a complete halt in funding.

IHS derives the authority to provide health care services and funding from the Snyder Act and the Indian Health Care Improvement Act (IHCIA), and in some cases, Indian Self-Determination and Educational Assistance Act (ISDEAA). IHS is attempting, however, to impose prohibitions placed upon IHS in these statutes upon tribes to further erode tribal sovereignty. IHS has been conducting “consultations” at IHS Regional Offices and at other events to determine how many tribes have instituted a co-payment policy or are otherwise charging eligible beneficiaries for health care services.

There is some speculation that IHS is concerned that Congress could view co-payment policies as a reason to further reduce the IHS budget and therefore, reduce the IHS funding available for tribes. To support the agency’s position, however, IHS contends the agency does not have the authority to enter into or honor Annual Funding Agreements (AFA) with a tribe if the tribe requires a co-payment. IHS views the statutory prohibition that prevents IHS from directly billing “Indians” pursuant to 25 U.S.C. § 458aaa-14(c) as also prohibiting the tribes from billing patients. A plain reading of the statute, however, supports the tribal position that tribes may institute a co-pay policy as a “redesign” if the tribe deems the policy to be “best interest of the health and welfare” of the community. 25 U.S.C. § 458aaa-5(e). In addition, the stance of IHS is overall contrary to the federal policy of self-determination as provided for in Title I of the ISDEAA and contrary to the process of negotiating and executing Self-Governance Compacts and an AFA between the tribes and IHS pursuant to Title V of the ISDEAA.

In *Susanville Indian Rancheria v. Leavitt*, IHS argues the agency does not have the authority to compact with tribes that charge a co-pay policy even though there is no explicit prohibition against tribes charging a co-pay. Although the U.S. District Court in *Susanville* rejected the IHS argument, this case exemplifies the stance of the IHS in litigation opposing co-payment policies for pharmaceuticals and how IHS is attempting to shift the agency’s policy. Depending on your tribe’s policies, it may be appropriate to review the case materials and to pay close attention to this developing case. The decision of the federal district court (Eastern District of California) granting Susanville’s Request for Preliminary Injunction can be found at: <http://turtletalk.files.wordpress.com/2008/01/dct-order-granting-pi.pdf>. The Department of Health and Human Services and IHS have appealed the decision of the District Court to the

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Ninth Circuit and it appears IHS feels strongly about their position and policy shift despite its possible detrimental impact on Indian Country and the strong logic of the U.S. District Court.

With the rising costs associated with health care, some tribal governmental budgets are being swallowed up to pay for health care for tribal citizens and tribal employees. In some cases, a tribe may have adopted a co-pay policy to defray costs of health and dental care, as well as prescription pharmaceuticals offered to tribal citizens. As happens too often, IHS funding or CHS dollars dry up during the spring or summer so tribes may be forced to look elsewhere for funding. As we are all aware, different tribes have different policies and this shift in IHS policy will have varying impacts on tribes. This is a serious matter that should be reviewed by tribal leaders, health care staff, and tribal attorneys. It is prudent to directly contact your IHS Regional Office to ascertain the current policy of IHS regarding co-pay policies and the probability IHS would stop IHS funding for your tribe.

Chi-miigwetch...For more information on the IHS co-payment matter or any other Indian law matters please contact Ezekiel "Zeke" Fletcher (517-377-0730, EFletcher@honigman.com). This Indian Law Alert can also be found at www.honigman.com.

If you have any questions regarding this new development, please reply to this email or to any of the members of our Tribal Sovereignty and Development Practice Group listed below.

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