2nd Annual Trends in Tribal Self-Determination in Healthcare Conference

Association of Indians for Self-Determination in Health Care

National Update - June 28, 2019

ELLIOTT MILHOLLIN

HOBBS, STRAUS, DEAN & WALKER LLP

National Update | Overview

- Trump Administration Health Care Priorities
- Congressional Health Care Priorities
- Tribal Health Care Priorities
- National Trends in Maximizing Resources for 638s

Trump Administration Priority| Overturn the ACA

- Support for Legislative efforts to repeal the ACA. Effort has failed (so far)
- *Texas v. United States* (5th Circuit) case on the constitutionality of the ACA
  - In December 2018, Northern District of Texas found the entire ACA was unconstitutional.
  - Trump administration originally took the position that only part of the ACA was unconstitutional. It now supports repeal of entire ACA
  - If entire ACA falls, IHCIA falls
  - HSDW filed Tribal amicus brief on behalf of 483 Tribes – either individually or through an organization, arguing that IHCIA is severable from the ACA and should be preserved

Trump Administration Priority | Weaken the ACA

- Trump Administration working to weaken and dismantle the Affordable Care Act.
- Weaken Insurance marketplace – raise deductible and out of pocket expenses and reduce premium tax credits.
- Reduce employer coverage requirements – Allow employers to offer short-term insurance that does not comply with the ACA’s consumer protections
- Reduce poverty levels by reducing index
- Oppose Medicaid Expansion

Trump Administration Priority| Medicaid Work Requirements

- HHS and CMS greenlighted the use of "community engagement" requirements as a condition of eligibility as part of a State's Medicaid plan under a Section 1115 waiver
  - Deep concern that work requirements will lead to the disqualification of many AI/ANs from Medicaid
  - Many States, like Arizona, asked for AI/ANs to be exempt.
- CMS Office of Civil Rights determined exempting Indians from work requirements would raise "civil rights" issues as a racial classification that violates the equal protection clause
  - Office of Civil Rights is incorrect
  - Tribal representatives pushing back on this with CMS and states
- Arizona waiver - CMS determined that an exemption for members of federally recognized tribes would be permissible
  - Tribal advocates want an exemption that is consistent with IHS eligibility requirements, which covers children and descendants without depending on enrollment status

Trump Administration Priority| Medicaid Block Grants/Per Capita Caps

- Administration has signaled support for States to impose per capita caps on Medicaid spending through Medicaid 1115 waivers
- Utah is the first state to propose such caps
- Caps are inconsistent with federal law, which requires United States to pay 100 percent of Medicaid claims for services provided through the IHS and tribal health programs
- Per capita Medicaid caps would mean fewer Medicaid dollars going to IHS and tribal health facilities

Congressional Priority | Medical Surprise Billing

- Multiple bills seek to ban surprise billing for medical emergencies and follow-up care, and for out-of-network lab/diagnostic testing ordered by an in-network provider
- The bills do not appear to impact PRC; notice is still required within 72 hours
- Two general approaches to pay out-of-network providers for their services:
  - With a set rate assessed by the average cost for similar services in the geographic area
  - By the median in-network area rate with an option for arbitration to adjust the payment

Congressional Priority| Prescription Drug Pricing

- Many pending healthcare bills include provisions that address prescription drug pricing by encouraging competitive, low-cost prescription drug options
- Provisions under consideration in the House and Senate include:
  - Ban the use of drug manufacturer agreements that delay or prevent the entrance of generic equivalents on the market
  - Enable generic drug manufacturers to obtain necessary samples of brand-names for testing
  - Amend the 180-day exclusivity rule on processing patents for generic drugs
- Tribal programs can access Rx from the Federal Supply Schedule or the 340B program and are generally more interested in being fairly reimbursed for the cost of the drugs they do acquire

Tribal Priority| Opioids Litigation

- Multi-district litigation in the U.S. District Court for the Northern District of Ohio
  - Thousands of cases involving federal claims have been consolidated
  - “Bellwether” or “test” cases being used to test the strength of the parties’ arguments in different fact patterns are underway
- Two tribal bellwethers: Muscogee (Creek) Nation and the Blackfeet Tribe
  - Indian Country amicus brief representing 448 federally recognized tribes filed on Oct. 5, 2018
  - Goal was to provide clear understanding of unique tribal standing in the litigation *and* ensure direct tribal shares of any settlement reached in the multi-district litigation
  - Magistrate Judge recommended the majority of tribal claims should move forward – RICO, negligence, nuisance, misleading statements. No trial date has yet been set.
- Next steps: Trial date for a different bellwether set for October 2019. Important to monitor as parties are motivated to settle before having to present evidence at trial.

Tribal Priority| Litigation on 3rd Party CSC

- Tribes bringing cases to determine whether the IHS owes CSC on the portion of a tribal healthcare program funded with third-party revenues like Medicaid or private insurance.

  Sage Memorial Hospital (D.N.M.) –court held that tribes can get CSC on third-party revenues. Case appealed to the 10th Circuit, but United States then dropped the appeal.
  - Tribe argued since third-party revenues and appropriations fund services, the amount generating CSC necessarily includes both; IHS argued only appropriated funds generate CSC
  - Impact: the holding is limited to Sage Memorial Hospital in New Mexico
- *Swinomish Indian Tribal Community* (D.D.C.) – Tribe claims IHS has underpaid healthcare costs by not providing CSC for third-party revenues in violation of ISDEAA
  - The case is pending in the U.S. District Court for the District of Columbia
  - Goal: to broadly find the IHS must cover CSC for third-party revenues and appropriated funds

Tribal Priority| Increase Federal Budget

- President's FY 2020 budget proposal funds IHS at $5.9 billion with decreases for facilities, CHRs, and health education. Moderate increases for behavioral health and health IT.
- House Interior Appropriations bill funds IHS at $6.3 billion, which would be a $537 million increase over 2019 enacted level.
- Tribal Budget Formulation Workgroup recommended $7.1 billion for IHS.
- Congress has been successful (so far) at protecting, and in some cases increasing, funding for programs serving Indian Country, which the Administration has consistently tried to decrease or eliminate

Tribal Priority| Budget Line Item Increases

- Special Diabetes Program for Indians (SDPI)
  - Level funding at $150 million since FY 2004; authorization expires on September 1, 2019
  - Push for an increase to $200 million beginning in FY 2020 to address unmet need
  - Healthcare extenders bills would reauthorize SDPI for five years (FY 2019-2024)
  - Hearings on reauthorization are expected to take place this summer
- Section 105(*l*) Leases
  - IHS required to fully fund reasonable, non-duplicative lease costs through the supplemental tribal clinics appropriation
  - IHS seeking a legislative “fix” that nullifies Section 105(*l*)
  - Tribal solution: separate indefinite appropriation like that for CSC
  - RADM Weahkee has repeatedly suggested convening an IHS Technical Workgroup on this issue

Tribal Priority| Advance Appropriations

- Allows appropriations to cover more than one year
- Protects Tribes against government shutdowns, sequestrations and continuing resolutions
- It would provide parity with the Veterans Health Administration, which has demonstrated success in using advance appropriations to improve quality and consistent care
- Bills pending in Congress:
  - H.R. 1135 (Young R-AK) – IHS Services and Facilities accounts; 20 bipartisan cosponsors
  - H.R. 1128 / S. 229 (McCollum D-MN; Udall D-NM) – IHS Services/CSC and some Indian Affairs programs; the House version is bipartisan but the Senate bill is not (yet)

Tribal Legislative Priority | Tribal Medicaid Fix

- Allow tribal facilities to bill Medicaid for any service they can provide under the Indian Health Care Improvement Act
- Allow States to expand Medicaid for IHS Beneficiaries
- Allow States to develop waivers that benefit tribal health programs, and prevent CMS from approving waivers that harm tribal health programs – like work requirements
- Extend full federal funding to the Urban Indian Health program
- Kickoff meeting July 15 at TSGAC meetings in Washington DC.

638 Trends| Update AFAs and FAs and Rates

- Tribes should regularly update their AFAs or Funding Agreements with the IHS
- In any new negotiation, it is important to update calculations of Contract Support Costs, including Indirect Cost Rates submitted to National Business Center
- Properly accounting for spending of IHS dollars is important

638 Trends | 105(l) Leases

- Section 105(l) of the Indian Self-Determination and Education Assistance Act requires the IHS to pay tribes rent for any facility the Tribe provides in carrying out a contract or compact.
- This means that if a tribe built or rents any of the facilities where it provides services under its Compact, the IHS has to pay for the cost of that rent or that facility in the form of a Section 105(l) lease.
- Tribes across the country are taking advantage of this opportunity. In 2019, Congress appropriated $36 million for 105(l) leases.
- In 2020, the House has budgeted an additional $53 million for 105(l) leases

638 Trends| Expanding Scope of Work

- Keeping scope of work in AFA or Funding Agreement up to date is important because it PSFAs must be included in scope of work in order to be eligible for FTCA coverage.
- Tribes are also putting other programs like behavioral health and long term care under the umbrella of their scope of work in order to obtain Medicaid advantages, like cost-sharing exemptions and 100 percent federal funding.

Medicaid | Maximize Encounter Rate Billing

- Tribes have been able to get CMS to approve billing up to 5 encounters per day at the IHS OMB rate for different types of services
- CMS has also authorized tribes to bill for Pharmaceutical services at the IHS OMB rate. This has resulted in significantly increased billing for many tribal providers. A careful analysis is required prior to moving in this direction.

Medicaid | Four Walls Issue

- CMS has taken the position that tribal facilities enrolled in Medicaid as providers of clinic services may no longer bill Medicaid for services provided outside the four walls of the clinic
- As a work around, CMS has said that tribal clinics may re-designate themselves as Medicaid FQHCs, and then bill Medicaid at the IHS OMB Rate if their state plan is amended to allow it.

Insurance | Premium Sponsorship Marketplace Plans

- Tribes have the authority to sponsor (pay for) the cost of Affordable Care Act marketplace plan premiums for their members
- AI/ANs have no cost sharing in the marketplace, which means they do not have to pay co-pays or deductibles.
- As a result, they can enroll in a plan with low premiums and high cost sharing
- Tribes are finding success sponsoring marketplace coverage for their patients

Questions?

Elliott Milhollin
Hobbs, Straus, Dean & Walker LLP
2120 L Street, NW
Washington, D.C. 20037
(202) 822-8282
emilhollin@hobbsstraus.com