



NATIONAL INDIAN HEALTH BOARD

101 Constitution Ave. N.W., Suite 8-B02 • Washington, DC 20001

Phone: (202) 742-4262 • Fax: (202) 742-4285 website: www.nihb.org

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**Response to the Department of Justice Memorandum
On S. 1057, The Indian Health Care Improvement Act Amendments:
INDIAN HEALTH CARE IMPROVEMENT ACT REAUTHORIZATION NOW!**

Thirty years ago, on September 30, 1976, the Indian Health Care Improvement Act of 1976 was enacted. Thirty years later, Indian Country, once again, sees another Congressional session ending without passage of the Indian Health Care Improvement Act Amendments of 2006 (S. 1057 and H.R. 5312). This time, the bill was derailed largely due to an unofficial memorandum provided to key Senators during the late hours on the last day of the pre-election Session of Congress. This memo, highly critical of many foundation elements of the Indian health care system and issues that go to the heart of sovereignty and containing several inaccurate and erroneous claims, was written by an unnamed person within the Department of Justice. Once again, at the 11th hour of consideration of the reauthorization bill, it appears that Indian Country faces a nameless opponent whose actions threaten the foundation of American Indian and Alaska Native health care.

How did we get here?

During the 109th Congress, four major committees of jurisdiction favorably reported the bill out of committee: Senate Committees on Indian Affairs, Finance, and Health, Education, Labor and Pensions (HELP) and the House Committee on Resources, each with amendments. On September 15, 2006, S. 1057 was “hotlined” as an Amendment in the Nature of a Complete Substitute, incorporating amendments from the Finance and HELP committees. “Hotlining” is a legislative procedure whereby a Senate bill is circulated to all of the members of the Senate with a 72 hour window for objections. If no member objects, the bill passes by unanimous consent.

In the case of S. 1057, initially, there were four objections to the bill. Two were dropped and as of the week of September 25, 2006 (the last week before it recessed) two objections to the bill remained. The Republican Steering Committee, chaired by Senator Sessions (R-AL), held one of the objections. The Budget Committee, chaired by Senator Gregg (R-NH) held the other objection. On September 22, the NIHB forwarded documents to the Senate staff on the Republican Steering Committee that had been

prepared in response to previous Senate Committees concerns regarding the increase in direct spending and the Medicaid cost sharing exemptions.

During the week of September 25th, the Senate Budget Committee hold was released; however, a subsequent hold was placed on the bill by Senator Ensign (R-NV). NIHB reached out to Indian Country targeting tribal chairmen in Nevada, and also all tribal chairmen with requests to contact their Senators and to call Senators Ensign and Sessions to release their holds on the bill. This effort was not successful.

The Department of Justice Enters

By Friday, September 29th, two holds remained on the bill, now one was held by Senator Coburn (R-OK), and the other objection was still held by the Republican Steering Committee. At 2:30 pm, on September 29th, Buford Rolin, Vice-Chair of the NIHB, was able to secure a Department of Justice (DOJ) White Paper opposing the “hotlined” version of S. 1057, *see attached document*. For two weeks, the Republican Steering Committee placed a hold on the bill to afford the Department of Justice sufficient time to issue its White Paper opposing the bill. Because the Tribes received a copy of the DOJ document late Friday afternoon (September 29, 2006), there was no opportunity for Tribes to respond before the Senate recessed. Even if there had been time, to whom would the Tribes have responded to: the document is not printed on DOJ letterhead, is not dated, is not signed, and does not include any information as to what office or person issued it. Tribes were placed in the untenable position of having to respond to the Administration’s objections with no notice, no warning and no person to be held accountable.

DOJ Objections

Many of the DOJ’s objections are based on an underlying philosophy that calls into question the fundamental government to government relationship between the United States and Indian Tribes and further questions the Federal government’s responsibility to provide health care to Indian people based on that unique relationship. The following is a summary of the DOJ objections and the tribal response where appropriate.

The DOJ objects to S. 1057 because it would increase the potential liability of the United States through coverage of tribal and urban Indian program employees under the Federal Tort Claims Act (FTCA). However, as noted by the DOJ, tribes and tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA) are covered by the FTCA for activities carried out within the scope of an ISDEAA contract, compact or funding agreement. While the DOJ writes that it opposes legislation that would make the American taxpayers liable for torts of persons who are not Federal employees, S. 1057 does not amend existing law that currently provides for FTCA coverage to tribal employees acting under the authority of the ISDEAA.

In July 2000, the General Accounting Office (GAO) issued a Report to the Chairman, Committee on Indian Affairs, U.S. Senate. The report is entitled: *Federal Tort Claims Act: Issues Affecting Coverage for Tribal Self-Determination Contracts*. The report describes the process for implementing FTCA coverage for tribal self-determination

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contracts, describes the FTCA claims history for tribal self-determination contracts, and discusses other FTCA issues that are unique to tribal contractors. The report shows that for the years 1997 to 1999, a total of 342 FTCA claims were filed involving tribal contractors from the Bureau of Indian Affairs and IHS. The claims involved a small number of tribes and the damages totaled about \$700 million. Of the 342 claims, 114 were Indian health FTCA claims and involved 40 tribal contractors (25 tribes and 15 tribal organizations out of 556 federally-recognized tribes) and the median claim amount was \$1 million. The GAO report demonstrates that the number of tribal FTCA claims and the damages paid is minimal.

The DOJ has objections to section 213, a provision that expands categories of treatment to include hospice care, assisted living, long-term health care, and home and community based care. The IHS and Tribes are currently providing many of these services through its Community Health Representative and Long Term Care Programs. The DOJ is concerned that expansion of services under section 213 will increase potential liability under the FTCA. However, to the extent that these services are within the scope of current ISDEAA contracts or compacts, FTCA coverage already applies. The purpose of section 213 is to clarify existing authorities and describe services that can be carried out by IHS and Tribes.

The DOJ objects to the reference to FTCA coverage under section 807(d) which again, is in existing law at 813(d). This is a very limited application of FTCA coverage that applies to non-IHS health practitioners who have hospital privileges in an IHS or tribal hospital and provide services to eligible Indians.

The DOJ has objections to the definition of, and various references to, Traditional Health Care Practices. The revised hotline version of S. 1057 does not contain a definition of Traditional Health Care. The definition was deleted from the bill and references to Traditional Health Care Practices were scaled back to current law in an effort to address previous concerns expressed by the Administration.

The DOJ has objections to the definition of “urban Indians” and “Indians” to the extent that definition encompasses persons other than members of federally recognized tribes. The DOJ is concerned that the definitions might present a litigation risk that if challenged, a court could find the statute subject to strict scrutiny and require a demonstration of a compelling government interest. The definitions of “urban Indians” and “Indians” in S. 1057 are consistent with current law established by regulations dating back to the Transfer Act of 1954 and the IHCIA of 1976. The definitions have not been challenged for over 50 years.!

The DOJ writes that section 512 and 515 of the revised hotlined version of S. 1057 extends FTCA coverage to employees of urban Indian programs. However, in deference to previous concerns expressed by the Administration, any provision extending FTCA coverage to urban Indian programs was deleted from the bill. The DOJ objections are not appropriate because the provisions objected to have been removed from the bill.

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The DOJ expressed concerns regarding section 705 of the bill regarding licensure of mental health care professionals. The HELP Committee, in reporting the bill out of Committee, revised this section to clarify that mental health professionals who are not licensed (i.e., graduate students working in a clinical setting) have to work under the direct supervision of a licensed mental health professional with evaluations and case work reviews conducted as deemed necessary by the Secretary. The amendments by HELP are contained in the revised hotline version of the bill. Again, the DOJ has raised an unnecessary objection by incorrectly referring to a provision of the bill that has already been revised to address the Administration's concerns.

The DOJ objects to section 708 authorizing an Indian Youth Telemental Health Demonstration Project to prevent youth suicides. Indian youth suffer from the highest rates of suicide than any other U.S. population: it is the #3 cause of death for Indian youth. This provision was written in an effort to address the high rates of Indian youth suicide and any potential tort liability risks to the Federal government is minimal compared to the benefits derived from this program.

Tribes Negotiating in Good Faith

Throughout the 109th Congress, the Tribes negotiated in good faith to revise and delete certain provisions of the bill to accommodate the Administration's concerns. For instance, the hotlined version of S. 1057 does not contain any major amendments to the Medicare laws in deference to the Administration's concerns regarding amendments to any Medicare provisions so shortly after enactment of the Medicare Modernization Act of 2003. The Tribes did not object when the Administration insisted on deleting the provision of extending Federal Torts Claims Coverage to urban Indian programs. The Tribes did not object, and praised the efforts of the Senate Finance Committee, in making technically correct conforming amendments to the Medicaid and SCHIP provisions of the Social Security Act. Tribes did not object when the HELP committee recommended revisions to certain provisions of the bill that helped clarify health delivery standards, such as allowing for routine cancer screenings consistent with the U.S. Preventative Task Force, a more appropriate entity for measuring cancer screening effectiveness.

Despite all of this, the Department of Justice, in a six page memorandum that is not printed on DOJ letterhead, is not dated, not signed, and does not even indicate what office or official issued the document, was relied upon by two Senators to hold up passage of a bill that all Indian People need. The bill had favorably cleared the three of the four Senate committees with jurisdiction and an objection from the remaining committee of jurisdiction was released.

It is time for the Department of Justice to withdraw its objections so that S. 1057, and its companion bill on the House, H.R. 5312 can be enacted. We ask the Department of Justice to be a friend of Indian health – to stand with us in the quest for a healthier reality for American Indians and Alaska Natives. We ask Congress to do the right thing - to focus clearly on the lives of Indian children, adults and elders that remain at risk as long as this bill languishes. We call on ALL INDIAN PEOPLE to stand together and petition

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the Government of the United States of America to work in unison to PASS THE INDIAN HEALTH CARE IMPROVEMENT ACT NOW! THIS YEAR. TODAY.