

**JUN 10 2004**

TO: Area Directors

FROM: Director

SUBJECT: Clarification of Indian Health Service Authorities Under the Indian Self-Determination and Education Assistance Act

This memorandum is to clarify some recent issues regarding the authorities of the Indian Health Service (IHS) pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA) to contract or compact with Tribes for the operation of Indian health programs. As Tribes assume operation of their programs, decisions are made about how to design their health programs. It should be noted that the Tribal redesign authority is not limited only to those programs currently administered by the IHS. Although, a Tribe has many redesign options, the authority extended to the redesign programs can be no greater than the authority given to the MS under the Snyder Act, the Indian Health Care Improvement Act (IHCIA), and other authorities listed in 25 United States Code (U.S.C.) 450f(a)(1) and 458aaa-4. In other words, any redesigned program identified in a compact, contract, or annual funding agreement must be a program that the IHS has the authority to administer. The IHS does not have the authority to contract or compact with Tribes to administer programs authorized by other statutes. For example, the IHS does not have the authority either to administer the program known as Women, Infants, and Children (WIC), administered by the Department of Agriculture, or to contract or compact with a Tribe to operate the WIC program.

A Tribe may supplement the funding it receives from the IHS with funds from other sources. It should be noted that the calculation of contract support costs only considers the Secretarial amount, not any supplemental funds added to the IHS program from other sources.

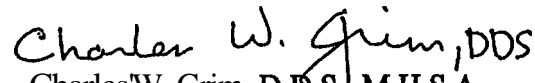
In other words, to the extent permitted by WIC, a Tribe may supplement its IHS nutrition program with WIC funds. However, my understanding is that WIC and other programs may preclude the Tribe from limiting services to Indian people. Section 813 of the IHCIA allows the IHS and Tribal facilities to extend services to non-Indians only in narrow circumstances. Inclusion of section 813 language in an ISDEAA agreement permits the Tribes to access Federal sources of supply, e.g., the Federal Supply Schedule (FSS), which is administered by the Department of Veterans Affairs. The determination of who is eligible to access the FSS is an inherent Federal function which may not be delegated to a Tribe. Therefore, a Tribe may not unilaterally determine the scope of FSS by requiring the IHS to put language in its ISDEAA contract. For example, if WIC required the Tribe to provide services to non-IHS eligibles, absent

contract language whereby the IHS and the Tribes agree that the requirements of section 813 were met, such services would not be considered services under the IHS contract for the purposes of accessing FSS or Federal Tort Claims Act (FTCA) coverage.

Tribes have expressed concern about whether their health care providers will be covered by the FTCA. In redesigning their programs beyond the programs currently administered by the IHS under 25 U.S.C. 450f(a)(1) and 458aaa-4, Tribes should exercise caution. The final decision regarding access to FTCA coverage is made by the Department of Justice and the Federal courts. As Tribes push the boundaries of IHS authority, they also may push the boundaries of FTCA coverage.

Rather than try to define in every detail the boundaries of the IHS's authority, these situations are better addressed on a case-by-case basis. However, to sign an agreement with a Tribe concerning a redesigned program, the IHS must make a determination that it has the authority to operate the program under the authorities listed in 25 U.S.C. 450f(a)(1) and 458aaa-4. Before agreeing to language which would extend access to FSS and FTCA, the IHS must find that the criteria of section 813 have been met.

I trust this information is helpful in clarifying the authorities of the IHS pursuant to ISDEAA contracting and compacting with Tribes and the operation of the Indian health programs.


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cc: Agency Lead Negotiators
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