Therese E. Yanan
Attorney at Law
Executive Director

April 13, 2020

Via Electronic Mail at michael.weahkee@ihs.gov

RADM Michael D. Weahkee, Principal Deputy Director
Indian Health Services
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Indian Health Services Response to COVID-19

Dear RADM Michael D. Weahkee:

I am writing today to address a serious situation that threatens members of Native communities that utilize the Indian Health Service (IHS).

Over the past two weeks, the Native American Disability Law Center (Law Center) has made repeated efforts to discover the protocol or procedure that IHS is implementing to allocate medical care during the COVID-19 pandemic. We have contacted regional and national IHS staff and searched the IHS website and other relevant sites. We have also been in touch with our colleagues at the Administration for Community Living and the Office for American Indians, Alaskan Native and Native Hawaiian Programs, also within the Department of Health and Human Services (DHHS). We have not been able to find public information detailing IHS' medical rationing policy, nor have we received any response to our inquiries, which is very disappointing given the pressing nature of the issue. We at the Law Center are offering our expertise to prevent avoidable tragedy in our community. This letter asks that IHS officials take steps to ensure that life-saving care is not illegally withheld from Native Americans with disabilities due to discriminatory resource allocation or altered standards of care during the COVID-19 pandemic.

Specifically, the Law Center requests you take the following immediate action:

- If IHS has protocols in place that outline how medical care and services are being allocated, then publicize those protocols immediately.

- If they do not already exist, issue and disseminate mandatory principles, consistent with federal and relevant DHHS Guidance, reaffirming that persons with disabilities should not be

Funding provided by the Administration on Intellectual & Developmental Disabilities, the Rehabilitation Services Administration, the Center for Mental Health Services, the Social Security Administration, the Arizona Developmental Disabilities Planning Council, the New Mexico Civil Legal Services Commission, the New Mexico Administrative Office of the Courts, the New Mexico Access to Justice Commission

> denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative "worth" based on the presence or absence of disabilities. Medical care decisions should be based on individualized assessments of the patient based on the best available medical evidence; and

- Designate staff from your offices, IHS hospital ethics committees, and representatives from the Native American disability community to develop specific processes for operationalizing non-discriminatory allocation of resources.

Proposed Principles by National Council on Disability and Consortium for Citizens with Disabilities

The National Council on Disability (NCD) and the Consortium for Citizens with Disabilities (CCD) have proposed important principles for the delivery of care. We urge the Indian Health Service to immediately adopt and disseminate mandatory guidelines which clarify the following:

- that Section 504 requires government decisions regarding the allocation of treatment / life-saving resources to be made on individualized determinations, using current objective medical evidence, not generalized assumptions about a person's disability;

- that Section 504 prohibits treatment allocation decisions based on misguided assumptions that people with disabilities experience a lower quality of life, or that their lives are not worth living;

- that Section 504 prohibits treatment allocation based on the perception that a person with a disability has a lower prospect of survival;

- that Section 504 prohibits treatment allocation decisions based on the perception that a person's disability will require the use of greater treatment resources; and

- that a person is "qualified" for purposes of receiving COVID-19 treatment if he or she can benefit from the treatment (that is, can recover) and the treatment is not contraindicated.

Guidance from U.S. Department of Health and Human Services Office for Civil Rights

On Saturday, March 28, 2020, in response to complaints filed by protection and advocacy systems in several states, the DHHS Office for Civil Rights issued guidance regarding this specific topic stating:

> In this time of emergency, the laudable goal of providing care quickly and efficiently must be guided by the fundamental principles of fairness, equality, and compassion that animate our civil rights laws. This is particularly true with respect to the treatment of persons with disabilities during medical emergencies as they possess the same dignity and worth as everyone else.

As you know, COVID-19 is having a significant impact on Native American communities. Native Americans with disabilities are, and will be, at high risk of contracting COVID-19, particularly those who are in congregate residential programs, state or tribal operated institutional settings, prisons and jails, and long-term care facilities. Around the country and in the dominant society, advocacy groups

are confronting outdated and discriminatory policies on emergency resource allocation in which individuals with specific disabilities or functional impairments can be denied access to, or subjected to the removal of, medically necessary ventilators. We want to ensure that these issues are not facing Native Americans with disabilities accessing services through IHS.

The law in this area is clear. All public and private entities overseeing the delivery of life-saving medical interventions must make treatment decisions consistent with the non-discrimination requirements of Section 504 of the Rehabilitation Act, and Section 1557 of the Affordable Care Act. These laws remain in effect and apply to IHS. As such, Native Americans with disabilities should not be denied medical care on the basis of stereotypes, assessments of quality of life, or judgments about a person's relative "worth" based on the presence or absence of disabilities. Decisions by covered entities concerning whether an individual is a candidate for treatment should be based on an individualized assessment of the patient based on the best available objective medical evidence.

This request for guidance is supported by the Disability Law Center of Alaska, the Arizona Center for Disability Law, Disability Law Colorado, Disability Rights New Mexico, the Oklahoma Disability Law Center, and the Disability Law Center in Utah. These organizations also serve a high number of Native American with disabilities who receive services from IHS facilities.

The Law Center is ready to assist in these efforts and can bring a range of local and national resources and expertise, including emerging best practices, to support IHS in this effort. At a minimum, we ask that you confirm receipt of this letter and make clear how IHS tends to address the disability community's concerns regarding discriminatory rationing of care.

You may contact me directly at 505-635-9288 or tyanan@nativeamericandisability.org. Thank you in advance for your consideration of this important matter.

Sincerely,

Therese E. Yanan

Therese E. Yanan