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F I S C A L I M P A C T R E P O R T

SPONSOR Shendo **ORIGINAL DATE** 02/22/21 **LAST UPDATED** **HB**

SHORT TITLE Tribal Sovereignty For Managed Care **SB** 391

ANALYST Bachechi/Esquibel

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
Indeterminate			Recurring	Medicaid Federal Funds

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Indeterminate				Recurring	Medicaid General Fund, Federal Funds

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates House Bill 251
Relates to Appropriation in the General Appropriation Act of 2021

SOURCES OF INFORMATION
LFC Files

Responses Received From
Human Service Department (HSD)
Indian Affairs Department (IAD)
Office of the Attorney General (NMAG)
Children, Youth and Families Department (CYFD)

SUMMARY

Synopsis of Bill

Senate Bill 391 (SB391) prohibits the Human Services Department (HSD) from requiring a sovereign Indian nation, tribe or pueblo to be a party to any Indian managed care entity (IMCE) contract with the state and directs HSD to respect the sovereign will Indian nations, tribes and pueblos to self-determination and to control their respective healthcare decisions.

FISCAL IMPLICATIONS

Although there are no certain fiscal implications from this bill, there could be costs associated with implementing a Medicaid Indian managed care entity. Currently, about 139 thousand Native Americans are enrolled in the state's Medicaid program. Of those enrolled, almost 73 thousand or 53 percent are covered under the fee-for-service program. The remaining 66 thousand, or 47 percent have elected coverage under a managed care organization (MCO). The Medicaid MCOs capitated rates under an Indian managed care entity would likely be somewhat higher than the current fee-for-service costs, and would require state matching funds to leverage federal funds.

Additionally, the Indian Health Care Improvement Act provides for 100 percent federal medical assistance percentage (FMAP) for Medicaid services provided through an IHS or tribal facility.[1] However, to date it has proven difficult to meet all the administrative requirements needed for the state's Medicaid program to collect these revenues. If more Native Americans choose to obtain their care through the IMCE, the state could potentially capture more federal Medicaid funds. The fiscal implications related to the creation of an IMCE are not unique to the provisions of this bill.

SIGNIFICANT ISSUES

Background on Indian Managed Care Entities (IMCEs)

In 2009, Congress passed the American Reinvestment and Recovery Act (ARRA) that amended Medicaid laws to allow for Indian managed care entities (IMCEs) that are controlled by tribes and tribal entities.

In 2012, pursuant to the Affordable Care Act's reauthorization and amendment of the Indian Health Care Improvement Reauthorization and Extension Act, Congress tasked the Centers for Medicare and Medicaid Services (CMS) with assessing the feasibility of establishing a Navajo Medicaid agency within the borders of the Navajo Nation for the express purpose of improving the provision of Medicaid benefits to eligible Navajos and their families. The agency's findings determined that such an approach would indeed be feasible and provide benefit to underserved Navajos. In October 2017, HSD held a formal tribal consultation on the Centennial Care 2.0 waiver program. Based on the feedback from that tribal consultation, HSD requested permission from CMS to operate an IMCE. CMS approved the state's request to operationalize an IMCE with the approval of the Centennial Care 2.0 waiver in December 2018, which authorized the state "to collaborate with Indian managed care entities (IMCE) … including a pilot program with the Navajo Nation."

Building on the CMS' approval, since 2019, HSD, the Navajo Nation, Naat'aanii Development Corporation (NDC)[2] and Molina Healthcare of New Mexico (MHNM) have been working

[1] https://www.medicaid.gov/medicaid/indian-health-medicaid/indian-health-care-improvement-act/index.html

[2] In 2017, the then Navajo nation president, Russell Begaye, signed legislation establishing the Naat'áanii Development Corporation (NDC) to advance economic development programs and initiatives for the Navajo people. It is organized under the Navajo Nation Corporation Act and further incorporated under Section 17 of the Indian Reorganization Act, with a Charter approved by the Secretary of the Interior and Ratified by the Navajo Nation Council under Resolution No. CO-69-17.

together to develop the first ever Indian Medicaid managed care entity (IMCE) for Native Americans in New Mexico focused on ensuring that the Navajo people are offered a Medicaid managed care program that: (1) is dedicated to American Indians and Alaska Natives (AI/AN) and their families, particularly the Navajo; (2) provides access to quality care; and (3) is tailored to AI/AN health, cultural, and geographical needs.

On March 20, 2020, the Navajo Nation Council passed Resolution No. CMA-14-20 authorizing the development and implementation of an Indian managed care entity (IMCE) designed to meet the healthcare needs of Navajos currently enrolled in the State of New Mexico's Medicaid program. On March 26, the Navajo Nation President Jonathan Nez exercised the presidential veto authority to veto CMA-14-20. On April 17, during a special council session, the Navajo Nation Council passed resolution CAP-23-30, overruling and superseding the veto action taken by the President.

Issues Related to State Tribal Collaboration Act ("STCA") and State Contracts

SB391 prohibits HSD from requiring the Navajo Nation be a direct party to the contract and requires HSD to "follow the Indian tribe, nation or pueblo's sovereign 'will' according to the laws and processes of the Indian nation, tribe or pueblo." HSD asserts it is unclear what is meant by "will" and what would be legally sufficient to serve as evidence as a sovereign's "will" for the state to be sure they are entering into a valid contractual relationship. HSD believes that the term "will" needs to be better defined and is problematic when combined with "law and processes of the Indian nation." For example, the current IMCE progress has been put on hold by HSD due to the lack of clarity regarding the "will" of the nation and a perceived difference in interpretation of the term "will" and difference in the interpretation of legislative actions. HSD asserts it needs a clearer definition of a tribes "will" and it would be problematic if the bill attempts to require the state to enter into a contract for Medicaid funding that does not include the Navajo Nation as a direct contracting party.

In 2009, the State Tribal Collaboration Act ("STCA), was signed into law and provides the framework for the state and Indian nations, tribes and pueblos to work together to develop successful programs and services to benefit New Mexico's Native American citizens. Pursuant to STCA, HSD adopted a state-tribal consultation, collaboration and communication policy ("policy") that became effective on December 18, 2009. Section III of the policy provides a set of principles to guide state-tribal relationships. Section III (A) recognizes and respects sovereignty—the state and tribes are sovereign governments. The recognition and respect of sovereignty is the basis for government-to-government relations and this policy. Sovereignty must be respected and recognized in government-to-government consultation, communication and collaboration between the agency and tribes." The policy also provides, with respect to health care delivery and access, that the "agency's objective is to work collaboratively with tribes to ensure adequate and quality health service delivery in all tribal communities, as well as with individual American Indians/Alaska Natives in urban areas or otherwise outside tribal communities." Section III (G). Under the policy, tribes "means any federally recognized Indian nation, tribe or pueblo located wholly or partially within the boundaries of the State of New Mexico." The policy also provides in Section V. (B)(6)(c), that the "agency retain the final decision-making authority with respect to actions undertaken by the agency and within agency jurisdiction. In no way should this policy impede the agency's ability to manage its operations."

IAD and HSD report the state of New Mexico would require certainty and clarity when entering

into contractual relationships and in practice has contracted directly with pueblos, tribes and nations for major joint undertakings in the past. HSD asserts that requiring that the Navajo Nation be a party to the IMCE contract, ensures HSD the new IMCE has their full support and predicts a more successful outcome of the IMCE. HSD also notes, if direct contracting with pueblos, tribes or nations is not required, it could result in multiple scenarios of non-Native American or semi-private contractors trying to start up new IMCEs where the primary interest could be profit and not the improvement in the health of the pueblo, tribe or nation. HSD indicates active tribal participation is beneficial to ensure the success of the first IMCE in the state.

In addition, HSD also points to a number of legal issues associated with the State of New Mexico, through HSD, contracting with the Navajo Nation to form an IMCE. If there were to be a legal dispute under the IMCE contract, the state would have to be able to raise any contractual claims in state or federal court without the Navajo Nation having immunity from such claims. The state cannot treat the Navajo Nation any differently than the other Medicaid MCO's in the state with respect to contractual relationships.

HSD asserts it should retain its ability to choose with whom it contracts for an IMCE and the restrictions contained in this bill could reduce the likelihood of success of an IMCE. HSD further emphasizes a failed startup of an IMCE, related to lack of full support of a pueblo, tribe, or nation, would be costly in terms of general fund support and all the administrative and relationship building work completed to datecould be lost. HSD has temporarily paused work on the Indian managed care entity (IMCE) due to concerns that are outside of the department's control. HSD writes, "HSD has great respect and support for the Navajo Nation and the work put forth in developing the IMCE. Currently, HSD is giving the Navajo Nation the time necessary to review and discuss the contract internally. HSD will continue to support all parties and looks forward to the development of a Medicaid IMCE to serve Native Americans and their families."

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Duplicates House Bill 251
State-Tribal Collaboration Act (2009).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The failure to enact this bill will not affect HSD's ability to start up an IMCE once the will of a pueblo or nation is clearly defined through agreement of its leaders. Absent an IMCE, Native American Medicaid beneficiaries will continue enrollment and coverage with the current three managed care entities (Blue Cross Blue Shield, Presbyterian Healthcare and Western Skies Community Care), or choose to have services covered through the traditional fee-for-service Medicaid program.

CLB/RAE/al/rl