United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 1, 2020 Decided April 13, 2021

No. 19-5299

SWINOMISH INDIAN TRIBAL COMMUNITY,
APPELLANT

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY,
U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-01156)

Paul E. Frye argued the cause for appellant. With him on the briefs were *Rachel A. Sage*, *Stephen T. LeCuyer*, *Steven D. Gordon*, and *Philip Baker-Shenk*.

Lloyd B. Miller, *Donald J. Simon*, *Rebecca A. Patterson*, and *Whitney A. Leonard* were on the brief for *amici curiae* 19 Native American Tribes and Tribal Organizations and the National Congress of American Indians in support of appellant.

John S. Koppel, Attorney, U.S. Department of Justice, argued the cause for appellees. With him on the brief was *Daniel Tenny*, Attorney.

Before: KATSAS, RAO and WALKER, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALKER.

WALKER, *Circuit Judge*: Indian Health Service agreed to pay the Swinomish Indian Tribal Community to run a health program on the Swinomish Reservation. In this case, Swinomish says Indian Health Service shortchanged it.

The district court disagreed. So do we.

I.

A.

For much of the history of American Indian reservations, the Bureau of Indian Affairs ran most aspects of tribal government. The federal government controlled tribes' health care, education, and policing. The result was that decisions crucial to the lives of American Indians were made by politicians and bureaucrats far removed from tribal communities. This was not, to put it mildly, ideal. *See* H.R. Rep. No. 93-1600, at 19 (1974) ("The growth of the administrative power of the Bureau of Indian Affairs . . . on Indian reservations had effectively destroyed existing tribal forms of government.").

So Congress passed the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. § 5301 *et seq.*), to provide federal funds directly to tribes that "assume responsibility for aid programs that benefit their members." *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 753 (2016). With regard to health care, tribes in effect

become federal contractors running health programs previously administered by Indian Health Service. They then negotiate contracts with Indian Health Service.

There are, however, limits to the negotiation. No matter what, the government must pay the tribe at least what Indian Health Service would otherwise have spent to run the same program. 25 U.S.C. § 5325(a)(1). This payment is called the secretarial amount. *See, e.g., Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 186 (2012).

Since federal contracts come with expensive compliance costs, Congress amended the Act in 1988 to cover those costs. Pub. L. No. 100-472, § 205, 102 Stat. 2285, 2292-94 (1988) (codified at 25 U.S.C. § 5325). Indian Health Service must now also pay "contract support costs" not included in the secretarial amount:

> There shall be added to the amount required by paragraph (1) contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which —
>
> > (A) normally are not carried on by the respective Secretary in his direct operation of the program; or
> >
> > (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

Id. § 5325(a)(2).

Contract support costs cover indirect administrative expenses like audits and computer systems, as well as direct expenses like workers' compensation and unemployment taxes. Often, the indirect expenses billed to Indian Health Service are a percentage of the total direct costs.

Indian Health Service pays the secretarial amount and contract support costs so that tribes will not have to use their own money to run and support the program. As a result, tribes typically don't bill patients for their medical services. But that doesn't mean tribes can't earn money elsewhere. Like private hospitals and doctors' offices, they can bill patients' insurance companies, including Medicare and Medicaid. 25 U.S.C. § 1641(d)(1).[1]

The Indian Self-Determination and Education Assistance Act is not silent as to this insurance money. It requires tribes to use the insurance money on their health programs. But the Act also requires Indian Health Service to fully fund the tribe's program without regard to any insurance money it receives. *Id.* §§ 5325(m), 5388(j).

In other words, if Indian Health Service would have spent $3 million on a tribe's health care back when it provided the health care directly, it must now pay that contracting tribe at least $3 million — period. This is true even if the tribe earns $1 million in insurance revenue. Indian Health Service can't pay the tribe $2 million on the theory that its revenue will make

[1] Tribes can earn income from a variety of sources. In this case, Swinomish says it earned $636,421 from "third-party billings" and received $27,730 as "additional revenue." Appellant's Br. at 17. Because insurance money makes up the vast majority of Swinomish's income, we refer to all third-party revenue as "insurance money."

up the difference. Instead, the tribe gets to use its $1 million earnings however it wants — as long as it is spent on the program.

But recall that Indian Health Service must also pay contract support costs. Taking the above example, all parties would agree that Indian Health Service owes contract support costs on the $3 million secretarial amount. But what about the additional $1 million the hypothetical tribe receives from insurers and spends on health services? The question in this case is whether Indian Health Service must pay contract support costs on that additional money.

B.

For the past twenty-four years, the Swinomish Indian Tribal Community has directly delivered health care to its members using funds negotiated through a contract with Indian Health Service. As required by statute, *supra* pp. 2-5, these negotiated funds include the secretarial amount and contract support costs. Swinomish uses the funds to run a medical clinic and provide dental services, substance abuse counseling, and other health services.

Those are not the only funds Swinomish spends on its medical services. It bills its patients' health insurance providers and spends this revenue on its health services. And the Tribe can tap into its general treasury.[2]

[2] *Cf.* Appellant's Br. at 17 ("Thus, even if [Indian Health Service] had paid the Tribe's 2010 [contract support costs] claim in its entirety (*i.e.*, for $245,867), the Tribe would still be short $242,885 in operating the Federal program.") (emphasis omitted).

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