Federal Register January 13, 2010
CMS-2009-0117-0002
Federal Register Number: E9-31217

"Medicare and Medicaid Programs: Electronic Health Records Incentive Program"

Thank you for the opportunity to comment on the Centers for Medicare & Medicaid Services (CMS) proposed rule on the implementation of the provisions of the American Recovery and Reinvestment Act of 2009 (ARRA) (Pub. L. 111-5) that provides incentive payments to eligible professionals (EPs) and eligible hospital participation in Medicare and Medicaid programs that adopt and meaningfully use certified electronic health records (EHR) technology. The Tribal Technical Advisory Group (TTAG) and the National Indian Health Board (NIHB) would like to comment on the definition of eligible professionals (EPs) and how the Indian Health Service including Tribally-operated outpatient clinics and Urban Indian Health centers may be impacted in our hospital settings.

Advantage/Benefits:

The electronic health record in the hospital setting is different from that in the hospital based clinic setting due to the very unique and distinct care provided. The advantages to the providers and patient care are obvious with the interoperability between the systems. However, the incentive programs and current definitions of EPs allows for the costs of the hospitals while not considering the hospital based clinics. It is not uncommon for one hospital to support 5 individual outpatient clinics – imagine the opportunities for advancement in many areas with an integrated electronic health records.

Disadvantage/Negatives:

ARRA defines hospital-based physicians as those individuals who furnish substantially all of their services in a hospital setting using the facilities and equipment, including the EHR, of the hospital. It is apparent that the broad regulatory interpretation of this hospital-based physician definition may inappropriately exclude our physicians practicing in our outpatient clinics merely because they are part of the hospital network, such as is the case of the Alaska Native health care system and the Phoenix Indian Medical Center's ambulatory health care network that is presently in development with two of the local reservation clinics under construction.

There are hundreds of primary care professionals that practice in hospital-based provider clinics that will be excluded from receiving individual provider incentives under the proposed rules that exclude individual provider incentives for "hospital based providers". Hospital based providers are defined as pathologists, emergency room physicians and anesthesiologist who are employed by the hospital and use hospital inpatient and outpatient location codes for services provided. The hospital rule applies to both Medicare and Medicaid.

Tribal Outpatient Clinic:

The Registration Patient Management System (RPMS) utilized by most all facilities serving American Indian/Alaska Native will be covered by the efforts of the IT departments of the Indian Health Service for Meaningful Use compliance. However there are some Tribal operated clinics who have purchased or installed "off the counter" commercial electronic medical record systems to compliment the current Registration Patient Management Systems (RPMS) of the Indian Health Service.

- These tribal programs purchased the additional IT or EHR systems when the RPMS system could NOT demonstrate that the accounts payable; billing components; accounts receivable and related capacity was as robust as those offered by the outside vendors.
- When Tribes negotiate with the IHS for their annual funding agreement(AFA), these tribes were obligated to select and "pay" from the least expensive RPMS data package to the most expensive RPMS data package out of their annual funding appropriation for IHS services.
- These same Tribes chose to use additional Tribal fiscal resources for the purchase and installation; upgrades for equipment and related hardware; staff trainings and education in order to maximize the reimbursement potential while keeping data linkages with the Indian Health Service. In plain language, these Tribes are paying twice for the infrastructure and development.
- The HITECH/Meaningful Use provider incentive payments should be "reassigned" to the Tribal outpatient clinics as the Tribal clinics developed the infrastructure not the provider themselves.

Tribes as Employers:

Many tribal outpatient clinics have employment contracts with their providers and it is unclear how this EHR Meaningful Use program would have an impact on the relationship between the Tribe as the employer and the medical/dental provider as the Employee.

- Any incentive provider payment would be considered income and additional tax burden upon the clinic providers that could hurt the already delicate provider shortage in many AI/AN communities. One solution would to have any provider incentive EHR payments should be included on employment contracts as new language to help protect the provider as employee and the Tribe as the employer.
- Any provider incentive payment could be reassigned to the Tribal clinic just as current reassignment of benefits for goods and services from Medicare, Medicaid, and other forms of health insurance.

Overall: This is another example that when a new initiative, program or system serving American Indian and Alaska Native people is proposed, Federal entities need to avoid any "one size fits all".

Recommendations for New Models:

Suggestions for consideration to ensure Indian Health providers are not excluded from this incentive program:

- Exclude tribal provider based clinics from the definition of hospital based providers because the providers in the clinics are not hospital specialists as referenced in the law.

- Include an amount per provider based clinic in the calculation of the hospital based incentives.
- Add tribal outpatient clinics to the exclusions provided to FQHC's and RHC's.

Additional Comments on Programmatic or Statutory Changes:

IHS has been working to implement the EHR across the nation and in some IHS Areas advancements in this regard have been made. Tribes, however, that operate their health care inpatient or outpatient services have not yet fully reached their capacity as the cost of purchasing the technology and other factors may be prohibitive.

TTAG and National Indian Health Board requests your consideration and support to ensure that the language needed to maximize the participation of the Indian health care delivery system is in place and that the CMS incentive programs initiate EHR in hospital and non-hospital based settings will be made available to all Indian health programs.

Thank you for the opportunity to share these comments.