National Indian Health Board

Submitted via: *www.regulations.gov*

May 18, 2016

Betty Gould
Regulations Officer
Indian Health Service
Office of Management Services
Division of Regulatory Affairs
5600 Fishers Lane
Mail Stop: 09E70
Rockville, MD 20857

Re: Payment for Physician and Other Health Care Professional Services Purchased by Indian Health Programs and Medical Charges Associated with Non-Hospital-Based Care, RIN 0917-AA12

Dear Ms. Betty Gould:

On behalf of the National Indian Health Board (NIHB), I write to provide comments in response to the Indian Health Service's (IHS) final rule on Payment for Physician and Other Health Care Professional Services Purchased by Indian Health Programs and Medical Charges Associated with Non-Hospital Based Care. We appreciate that the Indian Health Service has provided Tribes with an additional opportunity to comment on this important rule.

Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

NIHB appreciates the considerable time and careful consideration that IHS put into creating this final rule. We are appreciative that IHS took the comments of all 54 timely commenters to heart, especially the thirty-eight commenters who supported the proposed rule with changes, including the ability to opt-in to the rule. Although NIHB requested the ability to opt-out of the proposed

rule, NIHB believes the ability to opt-in is better and provides Tribes with the most flexibility in terms of application of the rule. Although NIHB supports the final rule, NIHB requests clarification on the issues below.

The Opt-In Provision

In several meetings and an All-Tribes call that IHS hosted to explain the new rule, IHS explained that the manner in which a Tribe would opt-in to the final rule would be through a modification to a Tribe's existing annual funding agreement. This method is concerning because it undermines the flexibility that Tribes should have for choosing to opt-in to the rule since the annual funding agreement needs to be approved by IHS before a Tribe can truly opt-in. In the final rule, IHS states the reasoning for providing Tribe's an opt-in ability was a demonstration of deference to Tribal sovereignty and the ability of a Tribe to know how best to meet the health care needs of their community.

NIHB requests that IHS revise the method for opting-in to the rule. The process should be done through a letter from the Tribe to IHS, notifying them of their decision to opt-in to the rule. The same process should be done for opting out of the rule as well.

Definition of Referral

In the final rule, IHS provides a definition of referral, stating that a "*Referral* means an authorization for medical care by the appropriate ordering official in accordance with 42 CFR part 136 subpart C."

42 CFR part 136 subpart C makes reference to payment for medical care and services obtained from non-Service providers or in non-Service facilities.

This subpart does not make reference to a referral, but rather a purchase order, which is an authorization or payment for services, the above definition of referral needs to be further clarified as a referral for service and not an authorization for payment by a Contract Health Service/Purchased Referred Care (CHS/PRC) program for service. The definition also needs to be clarified so the applicability of a referral is consistent with other regulations. For example, the Affordable Care Act uses the concept of a CHS/PRC referral for people who are enrolled in limited cost sharing plans. The referral does not authorize payment for services, but rather indicates that the patient has a relationship with an I/T/U. The CHS/PRC program may issue either an authorization for payment or a referral for service. A CHS/PRC authorization tells the non-I/T/U provider that CHS/PRC program will pay for the service that is being authorized.

Sub-regulatory guidance should be developed that provides a clear and distinct difference between a "referral for service" and a "referral for payment or authorization."

Payor of Last Resort

NIHB is strongly opposed to the inclusion of "Tribal" as part of the list of primary payers in IHS' new interpretation of the payor of last resort provisions. Although the "alternate resource" is not specifically defined in the rule, Section 136.203 references alternate resources and that they must be exhausted before PRC funds can be used. In IHS' recent proposed rule regarding the Catastrophic Health Emergency Fund (CHEF), alternate resources are defined in section 136.506. The provision states "any Federal, State, Tribal, local, or private source of reimbursement for which the patient is eligible. Such resources include health care providers, institutions, and health care programs for the payment of health services including but not limited to programs under titles XVIII or XIX of the Social Security Act (i.e. Medicare and Medicaid), other Federal health care programs, State, Tribal or local health care programs, Veterans Health Administration, and private insurance." The preamble to the CHEF proposed rule also states that IHS considers Tribal self-insured plans to be "private insurance." The inclusion of Tribal self-insurance as an alternate resource is intolerable. Tribal governments and Tribal programs will be burdened with a substantial negative impact on Tribal health service programs. NIHB insists that the Indian Health Service (IHS) remove "Tribal" from the definition of "alternate resource" in Section 136.501 and from Section 136.06.

NIHB understands the need to conserve limited PRC funds by using other payment resources prior to utilization of PRC funds. However, the inclusion of Tribes as one of the sources of payment to alternate resources is a gross overreach of the Secretary's rulemaking authority.

The Indian Health Service (IHS) has recognized the importance of preserving Tribal resources for decades. In previous IHS payor of last resort regulations, as well as policy guidance in the IHS Manual, IHS specifically provided that certain Tribally-funded health insurance plans "would not be considered "alternate resources" under IHS' payor of last resort regulations in an effort to be consistent with Congressional intent not to burden Tribal resources. This drastic change in IHS policy is a clear violation of the government's Trust responsibility to provide health care to Tribes. Tribes should never pay primary to the federal government and IHS must not move forward with its proposed definition of alternate resources.

Reporting

IHS has not provided information on how it intends to monitor and report on the success of the final rule once it is implemented. As part of the final rule, IHS should commit to developing a report within 12 months of the effective date of the rule, and annually thereafter, that would include an assessment of:

- The number of programs by region that have implemented the rule;
- The actual number of PRC visits each year by region to demonstrate the increase in referrals seen by providers;
- The savings achieved by PRC programs by region;
- The number of providers by region who refuse to accept the rate, type of provider and location of that provider;
- Identify barriers to implementation of the rule.

Conclusion

Thank you for the opportunity to comment on the Indian Health Service's final rule on Payment for Physician and Other Health Care Professional Services Purchased by Indian Health Programs and Medical Charges Associated with Non-Hospital Based Care. NIHB strives to partner with IHS to ensure that the health care needs throughout Indian Country are met. Please contact Devin Delrow, NIHB Federal Relations Director at ddelrow@nihb.org or (202) 507-4072 if there are any additional questions or comments.

Respectfully,

Lester Secatero
Chairman, National Indian Health Board