

National Indian Health Board



TRANSMITTED VIA EMAIL: Linda.Brown2@cms.hhs.gov

October 1, 2014

Linda Brown, Deputy Director, Tribal Affairs Division
Centers for Medicare & Medicaid Services
Intergovernmental and External Affairs Group
Center for Medicaid and CHIP Services
P.O. Box 8010
Baltimore, MD 21244-08010

RE: CMS Tribal Consultation Policy, Request for Comments

Dear Ms. Brown:

On behalf of The National Indian Health Board (NIHB) and in response to the CMS Dear Tribal Leader Letter dated August 20, 2014, we are writing to provide you with the NIHB's comments and recommendations on the CMS Tribal Consultation Policy. We would like to note that there have been notable changes in federal Indian policy and regulations—such as the American Recovery and Reinvestment Act (ARRA), Affordable Care Act (ACA), and Section 1115 Waiver Transparency regulations—since the CMS Tribal Consultation Policy was developed. The NIHB recommends that these key policy changes be adopted into the revised CMS Tribal Consultation Policy. In addition, there are two new centers in CMS—the Center for Consumer Insurance Information and Oversight (CCIIO) and the Center for Medicare and Medicaid Innovation (CMMI)—that also need to be integrated into the requirements of the CMS consultation policy.

In addition to the recommendations included here, we recommend that CMS re-engage the Tribal Technical Advisory Group (TTAG) Tribal Consultation Subcommittee to assist CMS in review of the comments received from this tribal and state consultative process. The TTAG advises CMS on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care programs funded (in whole or in part) by CMS. Including the TTAG in the review of Tribal and state comments will help to distinguish critical issues that should be addressed and assist to develop solutions that could be incorporated into the CMS policy. We hope that you will agree that this will be a useful and effective process to improve the CMS policy.

We have summarized our recommendations below:

- The CMS Tribal Consultation Policy does not include requests for consultation or technical assistance at the request of a Tribes.

- CMS did not include any reference to CMS's obligations regarding providing direction to States and their responsibility to conduct consultation with Tribal health providers.
- The policy makes consultation with Tribal organizations permissive, instead of mandatory, even though Tribal organizations have been delegated authority to carry out programs for the Tribe under the ISDEAA.
- The Consultation process does not include time frames for initiating the consultation process nor does it specify how consultation should occur.
- The policy does not require CMS to post all TTAG meeting records and recommendations, merely to make them readily available
- The policy relies on a reference to the HHS Tribal Consultation Policy rather than restating the language, which means that all readers will need to have both in hand to fully appreciate the significance of tribal sovereignty.
- Definitions:
 - Consultation – TTAG not included among the parties in the consultation.
 - Critical Events – limits where such events may originate to those arising within CMS, excluding other components of HHS.
 - Indian – does not reference the definitions in 42 C.F.R. § 447.50 for the purposes of CMS programs or Affordable Care Act.
 - Indian Tribe – Following the HHS Tribal Consultation Policy definition, does not include reference to other entities included in definition of “Indian tribe” under the IHCA.
 - Indian Health Provider – having not included the phrase “Indian health provide,” CMS also does not define the term.
 - Joint Tribal/Federal Workgroups and/or Task Forces; Native American – not included.
 - To the Extent Practicable and Permitted by Law – does not include the clarification recommended by the TTAG that “permitted by law” should be interpreted to include anything that is not expressly prohibited by law.”

We also recommend that CMS develop an enforcement mechanism to ensure states meet their obligations to consult with Tribes on their Medicaid programs. We suggest that CMS consult with the TTAG about what specific state obligations need to be enforced. In addition, CMS should work with the TTAG on waiver applications submitted under the Section 1115 Waiver Transparency regulations, and to develop mechanisms to solicit advice and input from Tribes under ARRA. These issues should be addressed in the policy with specific language with regard to how the states consult with Tribes. It should define the consultative process and create a feedback mechanism for CMS to verify that states have officially followed the process. A single meeting or teleconference where a state informs Tribes on what it intends to do should not be sufficient to meet the standards set by the policy.

We hope that CMS, in the spirit of its partnership and shared interest in improving American Indian and Alaska Native (AI/AN) access to Medicare, Medicaid, CHIP and Exchange programs and services, will work with the NIHB to improve the CMS Tribal Consultation Policy. We thank you for this opportunity to provide our comments and recommendations to improve the CMS Tribal Consultation Policy.

Please feel free to contact me if you should have any questions concerning our recommendations.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lester Secatero', with a stylized flourish at the end.

Lester Secatero, NIHB Chair