

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

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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 Tribal Technical Advisory Group to the Centers for Medicare and Medicaid (TTAG) and in response to the CMS Dear Tribal Leader Letter dated August 20, 2014, we are writing to provide you with the TTAG comments and recommendations on the CMS Tribal Consultation Policy. In addition, we have included a side-by-side analysis, which compares the current CMS policy to the current HHS Tribal Consultation Policy. We have included this analysis to complement the TTAG recommendations to improve the current CMS policy.

In addition to the recommendations included here, we note for the record that the TTAG submitted a memorandum to Mr. Roger Goodacre on November 17, 2008 and a letter to Marilyn Tavenner on April 11, 2012, and respectfully request that the issues presented in this communicate be included as a part of our formal comments and recommendations. We have attached copies of the memorandum and letter for this purpose.

The TTAG notes 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 the Section 1115 Waiver Transparency regulations—since the CMS Tribal Consultation Policy was developed. The TTAG 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.

The TTAG further recommends that CMS re-engage the TTAG Tribal Consultation Subcommittee to assist CMS to review the comments received from this tribal and state consultative process. 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 some of the more salient issues and recommendations included in our side-by-side analysis below (referenced by section number of the CMS Policy):

2. Background

- Does not include reference to the Snyder Act or Titles XVIII, XIX, and XX of the Social Security Act. Since these relate specifically to obligations of the United States and, in the case of the SSA, CMS, they are important. However, unlike the other laws cited, they do not specifically address the obligation for tribal consultation, which is the lead in to the list of laws.
- Does include the Indian Self-Determination and Education Assistance Act, as amended (ISDEAA), Native American Programs Act of 1974, and Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which seems positive.

3. Purpose and TTAG Philosophy

- CMS did not take the opportunity to personalize the Policy to make it more relevant to CMS's unique relationship with Tribes and Indian health providers.
- CMS chose not to even include HHS language recommended by the TTAG. Some of this language is very important to CMS staff understanding the role every component of HHS, including CMS, should play in reducing health disparities and ensuring access to critical health services.
- CMS has no equivalent to the TTAG Philosophy section.

4. Objectives

- The CMS policy did not include requests for consultation or technical assistance at the request of a Tribe.
- CMS did not include any reference to CMS's obligations regarding providing direction to States and States responsibility to conduct consultation with Tribal health providers

5. Tribal Consultation Principles

- With regard to the promulgation of regulations, CMS's draft applies only if the regulation has both Tribal implications AND preempts Tribal law. The TTAG draft applied if either condition were present.
- Leaves out examples of "government's deliberative process" that were put in TTAG draft in order to help CMS staff realize that deliberative process should not be applied too broadly.

6. Roles

- Does not contain the concept that the Tribal Affairs Group is "accountable" to assure that consultation occurs.
- Makes consultation with Tribal organizations permissive, instead of mandatory, even though the Tribal organization has been delegated authority to carry out programs for the Tribe under the ISDEAA.
- Does not include the more complete description of the TTAG's history and authority under ARRA and its statutorily referenced Charter.

- Does not include definitions of Indian tribes, IHS, and Indian Health Providers.
7. CMS Tribal Consultation Process
 - Does not include time frames for initiating consultation processes as recommended by TTAG.
 - Does not include a description of the TTAG's role in identification of issues and how consultation should occur.
 - Does not include most references to "critical events," although the term is found in the definitions and is used in the HHS Tribal Consultation Policy.
 - Does not include references to Indian health providers (i.e. I/T/U)
 8. Budget Formulation
 - Does not include requesting information from TTAG; instead CMS is committed under the Policy to rely only on the TTAG's annual plan.
 9. Tribal Consultation Performance Evaluation
 - Does not include an opportunity for the TTAG to review CMS's draft performance evaluation or the commitment to include the TTAG views in CMS's final evaluation report.
 10. Meeting Records and Additional Reporting
 - Does not require CMS to post all TTAG meeting records and recommendations; merely to make them readily available.
 11. Conflict Resolution
 - Uses different wording, but achieves the same outcome regarding referral of issues outside the consultation policy.
 12. Tribal Sovereignty
 - Relies on a reference to the HHS Tribal Consultation Policy rather than restating the language, which means that all readers will have to have both in hand to fully appreciate the significance of tribal sovereignty.
 15. 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 include the phrase "Indian health provider," CMS also does not define the term.
 - Joint Tribal/Federal Workgroups and/or Task Forces; Native American– not included.

- Policies with Tribal Implications – does not include any of the examples offered by the TTAG.
- 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.

While we recognize that CMS is seeking to improve its policy by soliciting specific recommendations, it would also be constructive for CMS to work with the TTAG to review the comments submitted by the state Medicaid programs and develop a policy that would be mutually beneficial for CMS, states and Tribes. Some of these issues are addressed in the memorandum to Roger Goodacre, dated November 17, 2008, however the correspondence predates the Transparency Regulations. We are hopeful that as CMS reviews the comments received through this consultative process, they will work with the TTAG to develop a meaningful solution to this process.

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 TTAG 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,



W. Ron Allen, TTAG Chair



Tihtiyas (Dee) Sabattus, TTAG Vice-Chair

Enclosures: 1. Feedback on CMS Revisions to TTAG Proposed Tribal Consultation Policy
2. Letter to Marilyn Tavenner
3. Side-by-Side of Tribal Consultation Policies approved by HHS