

National Indian Health Board



June 28, 2021

Secretary Denis McDonough
Department of Veterans Affairs
810 Vermont Ave N.W.
Washington, DC 20420

Re: Pharmacy reimbursement rates for the lower 48 state facilities participating in Veterans Affairs Indian Health Service/Tribal Health Program Reimbursement Agreement Program.

Dear Secretary McDonough:

On behalf of the National Indian Health Board (NIHB),¹ I write to you regarding the Department of Veterans Affairs (VA) request for written Tribal consultation regarding pharmacy reimbursement rates for the lower 48 state facilities participating in VA's Indian Health Service/Tribal Health Program (IHS/THP) Reimbursement Agreement Program (RAP). This letter is in response to your Dear Tribal Leader Letter (DTLL) dated May 29, 2021, which solicited opinions from Indian Country on their preferred method of determining pharmacy reimbursement rates.

While Tribes appreciate the agency's DTLL letter soliciting Tribal opinion on their preferred reimbursement method, it is unclear why Tribes were not provided with a listening session or consultation before determining the limited options for reimbursement contained in the DTLL. **We ask that VA allow for further discussion and meaningful consultation on determining which pharmacy reimbursement rates methodology should apply to IHS/THP.** Tribes question why only two options were offered; Wholesale Acquisition Cost (WAC) or Average Wholesale Price (AWP), plus dispensing fee, for Tribes to consider, and why for example, the OMB reimbursement rate for Medicaid was not offered for consideration.

Further, Tribes question the \$1 per drug dispensing fee. It is unclear whether this is an industry standard for government programs. For example, in California, the dispensing fee at least matches what is the similar dispensing fee for other Medicaid programs, a \$10 reimbursement per dispensed drug.² Dispensing costs in the Tribal system are uniquely different from the non-Tribal system.

¹ Established in 1972, the National Indian Health Board (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.

² https://files.medi-cal.ca.gov/pubsdoco/ncpdp/Pharmacy_Provider_Self-Attestation_faq.aspx

Tribal pharmacies spend more time on average and have higher infrastructure costs when dispensing drugs. A dispensing fee in the amount of \$1 does not adequately consider the costs for dispensing by Tribal emergency departments or Tribal clinics. These costs are uniquely different than the costs of dispensing by non-Tribal or other federal health programs. Tribes are also concerned with how the dispensing fee would be calculated when fulfilled through a mail order.

Trust Responsibility

The United States owes a special duty of care to Tribal Nations, which animates and shapes every aspect of the federal government's trust responsibility to Tribes. Rooted in treaties and authorized by the United States Constitution, the federal government's unique responsibilities to Tribal Nations have been repeatedly re-affirmed by the Supreme Court, legislation, executive orders and regulations.³ In 1977, the Senate report of the American Indian Policy Review Commission stated that, "[t]he purpose behind the trust doctrine is and always has been to ensure the survival and welfare of Indian Tribes and people." This trust responsibility is highlighted recently in the Department of Health and Human Services (HHS) Strategic Plan FY 2018–2022:

Importantly, the Federal Government has a unique legal and political government to-government relationship with Tribal governments and a special obligation to provide services for American Indians and Alaska Natives based on these individuals' relationship to Tribal governments.⁴

The trust responsibility establishes a clear relationship between Tribes and the federal government.⁵ The Constitution's Indian Commerce Clause, Treaty Clause and Supremacy clause, among others, provide the legal authority and foundation for distinct health policy and regulatory decision making by the United States when carrying out its unique trust responsibility to provide for the health and welfare of AI/ANs and support for the Indian health system that provides their care. The VA's Tribal consultation policy recognizes the unique status of Tribal governments and the VA's unique obligations to engage in meaningful consultation with Tribes.

Meaningful Consultation

Tribes are sovereign nations and the agency should be mindful of that status as they develop policies that impact AI/AN people. **Tribal consultation is an important means through which this relationship is respected.** Tribal governments are the oldest governments in North America and their existence predates the United States. This was recognized in Article I, Section 8, Clause 3 of the U.S. Constitution, which states that the United States Congress shall have power "*[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*" Respect for the sovereignty of Tribal nations should frame every interaction between Tribes and the federal government. Respect for sovereignty is demonstrated by meaningful consultation, which is required by the VA's own Tribal consultation policy. According to that

³ The Court has consistently held that the federal government has a trust responsibility to Tribes, which has formed the foundation for federal/Tribal relations. See *Seminole Nation v. United States*, 316 U.S. 286 (1942), *United States v. Mitchell*, 463 U.S. 206, 225 (1983), and *United States v. Navajo Nation*, 537 U.S. 488 (2003).

⁴ Introduction, "Cross-Agency Collaborations", <https://www.hhs.gov/about/strategic-plan/introduction/index.html>

⁵ In *Worcester v. Georgia*, 31 U.S. 515 (1832), the Supreme Court explicitly outlined that the relationship between the federal government and the Tribes is a relationship between sovereign nations and that the states are essentially third party actors.

policy, the primary objective of government-to-government consultation is to reach consensus on the issues in a manner that respects Tribal sovereignty. **Tribes are requesting the opportunity for a consultation that explains to Tribal Leaders how the methodologies were formulated and selected.** A consultation also provides the opportunity for Q&A, which is a vital component of meaningful consultation. Not all Tribes have the resources to employ technical staff with subject matter knowledge of the complexities of calculating pharmaceutical reimbursement. Meaningful consultation includes both detailed explanation and the opportunity to provide feedback and ask questions.

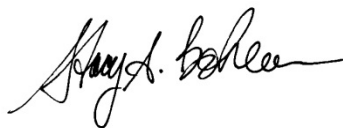
Further Consultation

Tribes are requesting further consultation on the most appropriate rate to use for the lower 48 state facilities participating in the VA's Indian Health Service/Tribal Health Program (IHS/THP) Reimbursement Agreement Program, including both of the proposed rates and the OMB encounter rate. More data is needed to determine which methodology is most fair and beneficial to the Tribes. We also believe that more consultation is needed in order for VA to hear from Tribes on their concerns about reimbursement and how these issues can be effectively resolved. We reject the idea that simply issuing a Dear Tribal Leader Letter and asking for comments is meaningful consultation on this matter. Indian Country needs to hear from VA technical experts so they can make an informed decision.

Conclusion

We are concerned about the limited choice of reimbursement options offered to Tribes for consideration. We question what data was used to determine the best methodology and whether it is in keeping with other standard government reimbursement rates. We respectfully request further consultation on this matter. Thank you in advance for your consideration of our letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Stacy A. Bohlen". The signature is fluid and cursive, written over a white background.

Stacy A. Bohlen

CEO, National Indian Health Board