

National Indian Health Board



February 23, 2024

Ms. Alison Barkoff
Principal Deputy Administrator
Acting Administrator and Assistant Secretary for Aging
Administration for Community Living
330 C St SW
Washington, DC 20201

RE: Draft Administration for Community Living Tribal Consultation Policy

Principal Deputy Barkoff,

On behalf of [the National Indian Health Board](https://www.nihb.org) and the 574 federally recognized American Indian and Alaska Native (AI/AN) Tribes we serve, thank you for the opportunity to provide feedback and recommendations on the draft Administration for Community Living (ACL) Tribal Consultation Policy. We commend ACL for taking an important step in affirming and strengthening the nation-to-nation relationship between Tribes and the federal government. ACL plays a vital role in fulfilling the federal trust responsibility to ensure the health and well-being of AI/AN people living with disabilities and, especially our Elders.

The ACL's role in upholding the trust responsibility requires continued partnership to address the health disparities our people face. Across all age groups, AI/AN people face disproportionately high rates of disability. In 2019, the U.S. Census Bureau estimated that 5.9 percent of AI/AN homes had a child with a disability, which is the highest disability rate of any ethnic or racial group.¹ Centers for Disease Control and Prevention (CDC) data from 2020 show that roughly 1 in 3 (30 percent) of AI/AN adults have a disability and are 50.3 percent more likely to have a disability when compared to the national average.² Other estimates place the rate of AI/AN adults 55+ living with a disability higher than their counterparts. U.S. Census Bureau data from 2019 finds that 34 percent of AI/AN

¹ Young, Natalie A. E. "Childhood Disability in the United States: 2019." American Community Survey Briefs, U.S. Department of Commerce, Mar. 2021, <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-006.pdf>. Accessed 1 July 2021.

² U.S. Department of Health and Human Services, Centers for Disease Control and Prevention. "Adults with Disabilities: Ethnicity and Race." 16 Sept. 2020, <https://www.cdc.gov/ncbddd/disabilityandhealth/materials/infographic-disabilities-ethnicity-race.html>. Accessed 2 July 2021.



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people ages 65+ live with a disability, compared to 23 percent for the same overall population.³

The disproportionately high rate of disability among our Elders is of particular concern when we consider that our Elders age 65+ have experienced the largest decline in life expectancy between 2019 and 2021. During this period, the life expectancy for AI/AN Elders decreased by 6.6 years compared to 2.7 years for the general population.⁴ Across our cultures, our Elders are our protectors, teachers, keepers of cultural knowledge, and sharers of our traditional healing practices. In all Tribal communities, traditional medicine is essential for providing care and support to our Elders living with disabilities. Keeping our Elders in our communities and providing adequate services is imperative to ensure that our cultures thrive, and we have healthy communities for the next Seven Generations. If we prematurely lose our Elders, we consequently suffer loss of culture. If we lose our culture, we lose our health.

ACL's Tribal Consultation Policy represents an important opportunity to foster strong connections to strengthen the government-to-government relationship between Tribal Nations and ACL. The final policy must ensure that Tribal consultation is meaningful, robust, and consistent with the U.S. Department of Health and Human Services (HHS) Consultation Policy. Additionally, ACL's Tribal Consultation Policy must align with President Biden's November 30, 2022 Presidential Memorandum on Uniform Standards for Tribal Consultation and Executive Order 13175.

Inclusion of the Federal Trust Responsibility as a Policy Objective

The ACL Tribal Consultation Policy must mention its role in upholding the federal trust responsibility as an objective of this policy. Since first contact, the United States and sovereign Tribal nations signed over 350 Treaties requiring the federal government to assume specific, enduring, and legally enforceable fiduciary obligations to Tribes. The terms codified in those Treaties – including provisions for quality and comprehensive health resources and services – have been reaffirmed by the U.S. Constitution, Supreme Court decisions, federal laws, rules, and regulations. These federal promises exist in perpetuity and collectively form the basis for what we now refer to as the federal trust responsibility. During permanent reauthorization of the Indian Health Care Improvement Act, Congress declared that *“it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians . . . to ensure the highest possible health status for Indian and urban Indians and to provide all resources necessary to effect that policy.”*⁵

³ Young, Natalie A. E. “Childhood Disability in the United States: 2019.” American Community Survey Briefs, U.S. Department of Commerce, Mar. 2021, <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-006.pdf>. Accessed 1 July 2021.

⁴ Arias, Elizabeth et. Al. “Provisional Life expectancy Estimates for 2021.” Vital Statistics Rapid Release, U.S. Centers for Disease Control and Prevention No. 23, Aug. 2022. <https://www.cdc.gov/nchs/data/vsrr/vsrr023.pdf> Accessed 22 February 2024.

⁵ 25 U.S.C. § 1602.

The federal trust responsibility establishes a clear relationship between Tribes and the federal government; at the core of that is ensuring the health and welfare of AI/AN people. As the nation’s primary agency responding to the needs of our AI/AN Elders and AI/ANs with disabilities, the ACL is one of the federal entities responsible for upholding the trust responsibility. **Tribal consultation is one of the primary means of respecting and actively demonstrating the special relationship. Tribal consultation is also an important mechanism that allows the federal government to engage with Tribal nations as true sovereigns** Further, mention of the trust responsibility as an objective of this policy would align the ACL Tribal Consultation Policy with the HHS Tribal Consultation Policy.⁶

Appropriate Consultation Mechanisms

The section “Consultation Mechanisms” includes items such as mailings and teleconferences; however, these are **inappropriately categorized as “consultation,” and they do not align with the Uniform Standards for Tribal Consultation.** As written, the current phrasing suggests that the ACL considers sending a mailing as consultation when this should never be considered consultation. Tribal consultation is a formal, two-way, government-to-government dialogue between official representatives of Tribes and federal agencies. A mailing does not – and cannot – fit under that description and is incongruent with the HHS Consultation policy and President Biden’s Memorandum on Uniform Standards for Tribal Consultation. Further, a teleconference may or may not be a consultation—it depends greatly on how the ACL conducts the teleconference. Consultations occurring over teleconference must be accessible to the relevant Tribal audience and allow for a free flowing, mutually beneficial exchange of information. The ACL must clarify this section to promote access and participation and the use of appropriate Consultation mechanisms to maximize participation and meaningful, robust discussion.

The section “Consultation Occurs” misclassifies appropriate consultation mechanisms. Our concerns over this section mirror those detailed in the above paragraph and – as currently written – trigger deep concerns about the ACL’s understanding of Tribal consultation. While verbal and written communications exchanged during site visits or through daily correspondence may lead to mutual understanding and consensus building, the informality of these exchanges does not meet the threshold of consultation. We reject the notion that consultation requirements are achieved by merely scheduling a time to talk or informally exchanging ideas. Formal consultation must allow for the heads of government to come together, generate ideas and solutions, and negotiate policy, as well as their roles and responsibilities.

As we have stated, consultation is a ***formal*** exchange of information, requiring a public discussion and record between Tribes and federal decision-makers. One of the defining features of Tribal consultation is a detailed record of proceedings through meeting notes, transcriptions, etc. Informal exchanges, like informal field conversations, provide little ability for the ACL or the Tribes to accurately record the proceeding, which relegates exchanges like these to non-consultative exchanges.

⁶ See HHS Tribal Consultation Policy, Sec. 3 “Background.”

During the January 24, 2024, ACL Consultation on this policy, NIHB staff asked for clarification from the ACL on the section. ACL staff assured NIHB that the ACL doesn't intend for email exchanges and informal conversations between Tribal and federal partners to replace a formal Tribal consultation. However, if this is the case, the ACL must edit this section to reflect the official response given during the consultation.

We thank ACL for explicitly outlining a process for Tribes to request Tribal Consultation in this draft policy. Inclusion of this principle shows that the ACL is committed to fostering the government-to-government relationship and fostering collaborative policy making with Tribes and Tribal leaders. The ACL should include this provision in the final consultation policy as it is an important tool for Tribal leaders and aligns the ACL's Tribal Consultation Policy with HHS's Consultation policy.

Clarification of Terms and General Language

This policy includes various references to "reasonable time" when determining the time frame for action from the ACL. For example, the "Consultation Action" section states that a summary of Tribal input will be shared publicly within a reasonable time period after a consultation or meeting. We ask that the final policy state a specific time period to account for agency action, as "reasonable appropriately" is a very loose term that can be argued away in either direction by either side of the matter. We suggest the agency provide this summary within 60 days (or 90 days, at most) following a meeting or consultation.

Further, where the ACL Consultation Policy states notification/notice requirements, we request that ACL change the language to "shall" or "must" to ensure that the requirement cannot be interpreted as optional, under any circumstance, and is instead a requirement.

Incongruencies between Consultation Participants

There are discrepancies within the draft as to who is included as parties during consultation. In the section "Consultation Participants" the draft policy details parties that can participate in the formal consultation process. However, in a later section "Consultation Occurs", Indian Organizations are included as applicable parties to formal Tribal consultation. Indeed, Indian Organizations are a critical part of the consultative process as they provided technical assistance and policy analysis to Tribal leaders to facilitate meaningful participations. Additionally, Indian Organizations are established and governed by elected Tribal leaders, and inclusion of Indian Organizations in the consultative process respects Tribal sovereignty and gives Tribal leaders the power to determine who represents their interests. While we have expressed separate concerns over the section "Consultation Occurs", these concerns expressed here should be addressed separately and changes should align what bodies can participate in Tribal consultation.

These edits should also consider Tribal sovereignty and how that principle influences Tribal consultation. Tribes have the inherent authority to govern themselves, which is affirmed in the U.S. Constitution, and further clarified in *Cherokee Nation v. Georgia*.⁷

⁷ 30 U.S. 1 (1831).


Tribes have a sovereign right to determine who and how they will be represented during consultation, and it is an important mechanism that allows the government to engage with Tribal nations as true sovereigns. Respect for the sovereignty of Tribal nations should frame all interactions between Tribes and the ACL.

Further, protecting and supporting Tribal sovereignty is a priority of the Biden/Harris Administration, and this was most recently affirmed in the Administrations December 6, 2023, Executive Order on Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination.⁸

Conclusion

Thank you for the opportunity to engage with the ACL and provide comments and feedback on the ACL's Draft Tribal Consultation Policy. This draft policy is an important step towards honoring the Treaties and ensuring that Tribes and Tribal nations are included in the policy making process. For your convenience, we have included a redlined version of the ACL Draft Consultation Policy that includes friendly grammatical edits to the draft policy. Additionally, many of NIHB's suggested comments are reflected in the redlined document. If you or your staff have questions or need assistance during the revision process, please reach out to our staff at NIHB. We look forward to continued collaboration between Tribes, Tribal organizations, and the ACL during the revision process. Tribal consultation is of the utmost importance to ensure there is a strong government-to-government relationship.

Sincerely,



Chief William Smith
Valdez Native Tribe
Chairman
National Indian Health Board

CC: Cynthia LaCounte, Director, Office for American Indian, Alaska Natives, and Native Hawaiian Programs

⁸ See Presidential Executive Order 14112 on Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination (Dec. 6, 2023): <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/06/executive-order-on-reforming-federal-funding-and-support-for-tribal-nations-to-better-embrace-our-trust-responsibilities-and-promote-the-next-era-of-tribal-self-determination/>.