

National Indian Health Board



Submitted via regulations.gov

January 22, 2013

Office of Management and Budget
Office of Information and Regulatory Affairs
Attention: CMS Desk Officer

RE: Comments regarding CMS-10434: MACPro: New CMS Online System for State Plan Amendments, Waivers, and Demonstrations.

To whom it may concern,

I write on behalf of National Indian Health Board (NIHB)¹ regarding the request for comments on CMS-10434: Medicaid and CHIP Program System (MACPro): New Centers for Medicare & Medicaid Services (CMS) Online System for State Plan Amendments, Waivers, and Demonstrations.² We appreciate the opportunity to comment on the MACPro.

Background on the MACPro System.

CMS notes that both State and CMS officials will use MACPro to improve the State submission and Federal review processes, improve Federal program management of Medicaid programs and CHIP, and standardize Medicaid program data. Specifically, State officials will use MACPro to (1) submit and amend Medicaid State Plans, CHIP State Plans, and Information System Advanced Planning documents and (2) submit applications and amendments for State waivers, demonstration, and benchmark and grant programs. CMS will use MACPro to (1) review and dispose of applications and (2) monitor and track application activity. MACPro will essentially provide States with a standardized application form for these types of changes and amendments as well as an opportunity to upload necessary documentation

¹ Established 40 years ago, 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. 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 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, NIHB is their advocate.

² 77 Fed. Reg. 75,634 (Dec. 21, 2012).



associated with the application, and will function as centralized, electronic depository for this information for the purposes of CMS review.³

MACPro requires the State to submit information on both general and Tribal consultation processes in the “initial application,” which the State completes at the outset of any submission. With regard to Tribal consultation, the application first asks whether “one or more Indian Health Programs or Urban Indian Organizations furnish health care services in this State.” If the State answers “yes,” the application then asks whether “this state plan amendment is likely to have a direct effect on Indians, Indian health care programs, or urban Indian organizations.” If the State answers in the affirmative, the application then asks whether “the State has solicited advice from Tribal governments prior to submission of this single place application (SPA),” and, if the State indicates that it has, the application asks for the name of any Indian Tribe, Tribal organization, or urban Indian organization (I/T/U) that was consulted, the consultation date, and the method/location of the consultation. The State must also upload any copies of the consultation notices sent to the I/T/Us. The State is not required provide any summary of the Tribal comments received and/or the State’s response (if any): while the application form allows States to submit this kind of information, a State’s decision to do so is entirely voluntary.⁴

Once this initial application is completed, MACPro provides the State with a specific submission form that, unlike the ubiquitous general application, is specifically tailored to the exact action or amendments that the State is proposing. MACPro will also send the State a notification reminding it to complete this next form.⁵ After the State submits its final package to CMS, MACPro will assign a CMS Point of Contact and review team to the SPA. The package is then “dispositioned” for approval, disapproval and post-approval. Alternatively, if CMS reviews the State’s application and determines that additional information is needed, the review team will notify the State, which must then resubmit the package to CMS.⁶

Tribal consultation.

We appreciate the fact that the MACPro system includes multiple steps for documenting Tribal consultation. Section 5006(e) of the American Recovery and Reinvestment Act (ARRA)⁷ added a new

³ In lieu of drafting PDF or other hard copy materials as part of its public outreach campaign, CMS devised a series of webinars outlining the structure and use of the MACPro system. The webinars, their slides, and their PDF transcripts may be accessed at <http://www.medicaid.gov/State-Resource-Center/Medicaid-and-CHIP-Program-Portal/Medicaid-and-CHIP-Program-Portal.html>. Our understanding of the MACPro system is derived from these webinar presentations; citations to the various webinars in this comment (all available on the general website, above) will be noted specifically in footnotes.

⁴ Entire paragraph from webinar homepage at “3. MACPro Initial Application.” With regard to general public consultation, the initial application inquires as to whether or not the State solicited public comment, and if so, the manner in which comment was solicited (newspaper, public hearing, targeted emails, etc.). Depending on the manner of solicitation, the State must upload additional information (for example, a copy of the newspaper ad or targeted email, URL of online solicitation) as well as a copy of materials associated with the solicitation. As is the case with Tribal consultation, the State’s decision to upload actual comments and a summary of the State’s response is voluntary. *Id.*

⁵ *Id.*

⁶ *See* webinar homepage at “2. MACPro Home Page.”

⁷ Pub. L. No. 111-5.

provision to § 1902(a) of the Social Security Act,⁸ which governs Medicaid State Plans. Section 5006 requires that in the case of any State in which one or more Indian health programs furnishes health care services, the State must provide for a process under which it seeks advice on a regular, ongoing basis from designees of such Indian health programs “prior to submission of any plan amendment, waiver requests, and proposals for demonstration projects likely to have a direct effect on Indians [and] Indian Health Programs” The disproportionate American Indian and Alaska Native (AI/AN) enrollment in Medicaid and CHIP and the significant role Tribal health providers play in the health care delivery system to AI/ANs means that virtually all changes to these programs have a “direct effect” on Indians and I/T/Us. The fact that MACPro incorporates the § 5006 provisions and requires that States submit information and materials associated with Tribal consultation is an important step in reminding States of their obligations under § 5006 and encouraging compliance.

However, we are concerned about a number of points made in the webinar. The first is that the application asks the State (and the State alone) not only whether a SPA would likely have a direct effect on Indians and Tribal health programs, but whether the State has complied with Tribal consultation requirements. These are determinations that absolutely require Tribal input: many (if not most) State officials will not understand the Indian health system to the point that they can independently determine whether a given SPA or waiver will affect Tribal health programs, and States certainly should not be the final arbiters as to whether they have engaged in meaningful Tribal consultation. Unless the application requires the State to submit far more extensive information regarding consultation (discussed below), Tribes will simply have to hope that the State answers both questions correctly.

Second, the webinars did not provide details about what happens if a State indicates that it has *not* engaged in Tribal consultation.⁹ Given that the Tribal consultation requirement is codified in law, if a State clicks “no” when asked about consultation, a graphic should immediately appear notifying the State that it cannot proceed with its application until such time as it engages in meaningful Tribal consultation. It is not enough to allow the State to finalize and submit its application, even without Tribal consultation, on the assumption that the CMS review team will flag and reject the application: this runs the risk of SPAs and other amendments being erroneously approved even without the requisite Tribal consultation. Rather, States should not be allowed to move forward with amendment applications covered by § 5006 if they have not engaged in *any* Tribal consultation whatsoever.

Third, as noted above, when a State does check the box as having engaged in Tribal consultation, it must submit the name of any I/T/Us that were consulted, the consultation date, the method/location of the consultation, and any copies of the consultation notices sent to the I/T/Us. The State also has the option of providing a summary of the Tribal comments received and the State’s response (if any), although doing so is voluntary. While these are necessary first steps, we do not believe that these requirements are sufficient to alert the CMS review team as to whether a State engaged in meaningful Tribal consultation. This is especially true given that, as discussed above, MACPro allows the State to

⁸ Codified as amended at 42 U.S.C. § 1396a(a)(73).

⁹ While walking through the application during the webinar, the presenter did not click on the “no” button on any of the Tribal consultation questions, and instead repeatedly clicked “yes” when prompted by each question in order to move the presentation along.

unilaterally decide whether a given policy affects Indians and Tribal health programs as well as whether it has adequately consulted with Tribes.¹⁰

Tribes and Tribal health programs are routinely placed situations in which a State claims that it has fulfilled its Tribal consultation requirement by, for example, including Tribal entities in a mass email notifying interested parties about a proposed SPA. For example, CMS recently rejected the Kansas Department of Health and Environment's (KDHE) argument that the presentation of a concept paper to Tribal health programs fulfilled its consultation requirement with regard to a proposed Section 1115 demonstration waiver,¹¹ and similarly rejected a proposed Colorado SPA after the State failed to give specific notice to Tribal health programs until six days before submission of the SPA to CMS.¹² These are examples of not only the type of miscommunication that can arise between States and Tribes concerning the adequacy of Tribal consultation, but emphasizes the comparative efficiency of ensuring that consultation is completed at the outset of a SPA or waiver process so as to avoid the delays and administrative expenses associated with rejections and resubmissions.

We believe that unless CMS receives additional details about a State's consultation process, States may engage in similarly inadequate consultation efforts while managing to categorize the consultation as sufficient based on the vague questions in the application.¹³ We therefore urge CMS to require States to (1) provide a specific list of Tribal participants in each consultation session listed on the application and the topics of discussion (including a copy of the minutes), (2) provide a summary of all comments received during the Tribal consultation, (3) upload any documents submitted by Tribal entities during the consultation process, and (4) describe the specific State response to the Tribal submissions (including relevant documents or correspondences). While MACPro currently allows the State to voluntarily submit some of that information, it should be made mandatory in the Tribal context

¹⁰ Of course, we assume that the MACPro application page will not be the only mechanism through which CMS will evaluate Tribal consultation. However, to date, Tribal advocates have yet to receive more definitive guidance on what, ultimately, CMS will consider adequate consultation for the purposes of ARRA § 5006. In a 2011 hearing evaluating the rejection of a Colorado SPA due to inadequate consultation, CMS sought to review factors including whether the proposal was likely to have a direct effect on Tribal health programs, whether the State had existing mechanisms and processes for I/T/U input, whether the consultation provided Tribes with adequate time to provide meaningful input, and whether the State adequately described the potential impact of the proposed changes during the consultation. CMS Notice of Hearing; Reconsideration of Disapproval of Colorado State Plan Amendments (SPA) 10-034, 76 Fed. Reg. 34,711 (June 14, 2011) (Colorado Hearing). We invite CMS to engage with Tribes and Tribal organizations, including the CMS Tribal Technical Advisory Group (TTAG), to further discuss these and other mechanisms for reviewing Tribal consultation efforts.

¹¹ Due to numerous unanswered questions and a lack of information about the State's application, the Kansas Tribes were unable to submit a formal response to the KDHE. Subsequently, the Kansas Tribes received an email notice that KDHE had submitted the waiver application to CMS on April 26, 2012, and had referred to this initial meeting as Tribal consultation. The Tribes responded with a letter disagreeing with this description. Ultimately, at CMS's direction, KDHE withdrew the application (citing the lack of notice provided to I/T/Us) and hosted three Tribal consultation meetings and worked with the Tribes to ensure that the waiver appropriately addressed I/T/Us.

¹² This eventually resulted in a CMS administrative hearing to further discuss the matter. *See* Colorado Hearing.

¹³ We are not suggesting that States would engage in this behavior in bad faith. Rather, State officials are often unfamiliar with Tribal consultation requirements and may honestly (though mistakenly) believe that the State has complied with Section 5006. Our point is that the Tribal consultation information requirements in the MACPro system are vague enough that it will be difficult for CMS to discern whether or not a State has engaged in adequate consultation.

so as to ensure that the CMS review team will have a complete picture of the actual adequacy of State consultation efforts.

Once a State completes and submits the general application form (which contains the Tribal consultation questions), MACPro will send the State a reminder to begin the next portions of the application (which are tailored to the specific action the State plans on taking). There is no provision that requires CMS to notify Tribes or Tribal organizations that the State has submitted a SPA application in which it described its consultation efforts. We believe that CMS should work to establish one or more point of contacts within each State's Tribal health community and cc them in these post-general application notifications. This will allow Tribes to proactively monitor proposed SPAs that might have a drastic impact on Tribal health programs and intercede with CMS should I/T/Us disagree with the State's characterization of the consultation process.

Finally, MACPro inquires as to whether a State "has solicited advice from *Tribal governments* prior to submission of this SPA application."¹⁴ The actual language from § 5006 additionally requires consultation with "Indian Health Programs and Urban Indian Organizations," not just Tribal governments. While clicking "yes" on this question does prompt the State to submit information concerning all three types of organizations, State officials may incorrectly interpret the phrase "Tribal governments" as applying only to the specific governing body of an Indian Tribe and incorrectly fill out the application. As a point of clarification, we therefore suggest adding the phrase "Indian health programs and Urban Indian organizations" after the phrase "Tribal governments" in the quoted language above.

Access to proposed SPAs and comments.

According to the CMS webinars, it appears that only State or CMS officials may access the MACPro system.¹⁵ Further, while the information collection notice and the webinars indicate that MACPro will send public information regarding Medicaid and CHIP eligibility coverage to Healthcare.gov and Medicaid.gov, they did not supply details as to what is considered "public information" or how and when such information will be posted online. We strongly recommend that CMS make proposed SPAs, waivers, and similar materials available to I/T/Us in real-time for review in order to maximize Tribal participation and help encourage States to engage in proactive consultation.

Also, as noted above, States are not required to submit information to CMS concerning comments received during either public comment periods or Tribal consultation. We disagree with this approach and believe that it is extremely important that States document to CMS and post on MACPro all comments that they receive (Tribal or otherwise). Absent this type of real-time information release, and despite (oft-ignored) consultation requirements, Tribes and other commentators frequently do not receive notice about a proposed SPA until it is in the final stages of CMS approval, at which point it is

¹⁴ Emphasis added.

¹⁵ State users are limited to the State/Territory Medicaid and CHIP Director, the State Point of Contact/Authorized Submitter, or the State/Territory Editor. A far greater range of CMS officials may access MACPro in various capacities. See webinar homepage at "2. MACPro Home Page." We did not see any information indicating that any other entities can enter the MACPro system.

extremely difficult to either provide meaningful review or persuade State or Federal officials to make necessary changes.

We therefore suggest that CMS ensure that (1) in light of ARRA's Tribal consultation requirements, I/T/Us be able to access the MACPro database to monitor proposed SPAs and associated application materials (even if solely in a "read-only" mode that prohibits the viewer from actually making changes or uploading documents), and/or (2) whatever "public information" that CMS plans on making available via Healthcare.gov include both materials submitted by the State as well as applicable Tribal and general comments. If, as CMS indicated in its webinar, it seeks "greater transparency" in the SPA process, providing these types of materials to the public in real-time is precisely the way to achieve it.

The CMS point of contact and review team.

Once a State submits a final application, the "CMS Point of Contact and review team" will either approve or disapprove the application or, if additional information is required, notify the State and require resubmission. The webinars did not discuss how the review team will determine whether or not the State has complied with § 5006 and engaged in adequate Tribal consultation. We suggest that CMS consult with Tribes and Tribal organizations, including the TTAG, in order to develop guidelines or policies that CMS review teams can use to evaluate the sufficiency of Tribal consultation.

Second, the webinars did not discuss the specific CMS officials that are eligible to serve as a point of contact or on the review team. To the greatest extent possible, when a State that is subject to the consultation requirements in § 5006 submits a SPA or a waiver request, we believe that the CMS point of contact and/or review team should include at least one individual who is either (1) a member of the CMS Tribal Affairs Group or (2) has a demonstrable background in or familiarity with the Indian health system. While we recognize that this may not be logistically feasible in every instance, we believe that this would be a useful mechanism by which to encourage compliance with Tribal consultation requirements.

Thank you once again for providing an opportunity to comment on the MACPro system. Please contact Jennifer Cooper, Legislative Director, National Indian Health Board at jcooper@nihb.org if you would like to discuss the issues addressed in this comment or other issues regarding their application to or effect on AI/ANs.

Sincerely,



Cathy Abramson
Chair, NIHB

Cc: Dr. Yvette Roubideaux, Director, IHS
Stacy A. Bohlen, Executive Director, NIHB
H. Sally Smith, Chair, MMPC
Jennifer Cooper, Legislative Director, NIHB