

Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

c/o National Indian Health Board 926 Pennsylvania Avenue, SE Washington, DC 20003 (202) 507-4070 (202) 507-4071 fax

Submitted via electronically

December 7, 2012

Stacey Ecoffey, Principal Advisor for Tribal Affairs
Office of Intergovernmental and External Affairs
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
200 Independence Ave SW, Room 620-E
Washington, DC 20201

Re: Comments on DHHS Tribal Consultation

Dear Ms. Ecoffey:

On behalf of the Tribal Technical Advisory Group (TTAG) of the Center of Medicare and Medicaid Services (CMS), we appreciate this opportunity to submit comments to you in response to Secretary Sebelius's letter requesting our thoughts and views about the Department's tribal consultation policy (TCP). We are pleased to provide these comments to you for the Department's consideration.

The TTAG advises Center of Medicare and Medicaid Services (CMS) on Indian health policy issues involving Medicare, Medicaid, the Children's Health Insurance Program, and any other health care program funded (in whole or part) by CMS. In particular, the TTAG focuses on providing policy advice to CMS regarding improving the availability of health care services to American Indians and Alaska Natives (AI/AN) under these Federal health care programs, including through providers operating under the health programs of the Indian Health Service, Indian Tribes, tribal organizations and urban Indian organizations (I/T/U).

We first wish to convey that TTAG is pleased the Department is updating its TCP. By frequently reviewing what is working and what can be improved, the Department is helping to ensure that the TCP remains relevant and meaningful well into the future.

Numbering. As a preliminary matter, we urge that the TCP be renumbered so that it is easier to reference. There are a number of places in the policy in which there is duplicative numbering or numbering that does not follow standard conventions. For instance, in the version of the TCP at www.hhs.gov/intergovernmental/tribal/tcp.html (last visited November 6, 2012), there appears to be two subsections (A) in Section 8. The second (A) should be renumbered to (B) and the remaining subsections appropriately renumbered to (C) and (D). In addition, there is a sequence of numbers even more the lettered sections started. The TCP is very important for tribes and the Department and should be as easy to use as possible.

Tribal Consultation Process; Communication Methods. There are two changes in the consultation process that could be improved.

First, we believe that the Receipt of Tribal Comments (Section 8(A)(4)) can be improved by providing that all Tribal comments submitted in writing will be posted on an HHS webpage unless the commenter expressly requests in writing that the comment not be posted, in which case the identity of the commenter and the date of the comment would be posted with a notation that there was a request that the comment not be posted. The process would be similar to the way all Federal agencies must deal with comments to proposed regulations, notices and many other matters. It assures much greater transparency and creates opportunities for better dialogue among tribal leaders where differences of views may exist. It also makes the reporting on outcomes under Section 8(A)(5) much clearer. We specifically recommend adding at the end of Section 8(A)(4), the following:

All comments submitted in writing in response to a request for consultation or a Dear Tribal Leader Letter by HHS or any of its Divisions or programs will be posted on an HHS webpage with the request or DTLL unless the written submission contains an express request that the comment not be posted, in which case the identity and date of the comment will be posted with an appropriate notation about why the comment is not available for public review. All requests and comments received in response to them will remain available on an HHS webpage for no less than two years after the request.

The second improvement involves the outcome and continuing dialog between the Department and tribes following a consultation session. Section 8(A)(5) of the TCP provides that the Department will report to tribes on the outcomes of consultation within 90 calendar days of the final consultation meeting, and make status reports throughout the year for those ongoing issues identified in consultation. Section 13 of the policy recognizes that consultation should result in a meaningful outcome, but is focused on measuring the level of satisfaction that tribes have with the process. We think it would be helpful not only to report back to tribes within a certain timeframe and measure satisfaction with the procedural aspects of consultation, but also to be specific about the response to the comments received and the timelines for accomplishing tasks or achieving objectives that are identified through consultation and listening sessions and agreed upon by the Department. We also believe that the Department should then periodically report on the extent to which it has completed the tasks and achieved the objectives to ensure there is follow-through on the promises made or issues identified.

Consultation Follow-Up. Additionally, while Section 13(2)(e) of the TCP also requires that final, adopted policy decisions be communicated to tribes in the annual consultation report, there is no mechanism in place for following up on recommendations and creating a process to work through recommendations until a final policy change can be made. We thus suggest that the Department consider holding “doing sessions” after a consultation or listening session, so that the Department and tribes do not return to consultations year after year without knowing the status of the issues raised in the previous year and so that forward progress can be made on resolving concerns and addressing challenges. There should also be a continued cycle of consultation, where the Department provides feedback to tribes and keeps the dialog going. Many times we have participated in excellent consultation meetings, but return the following

year to learn there was little to no progress on certain issues that resurface as concerns that have to again be raised by tribal leaders for resolution. Consultation can be a very effective tool for learning where there needs to be improvement or coordination, but there must be a process in place to thereafter ensure that the improvement or coordination can and will be addressed.

Definitions and Use of Terms.

Section 7(2) of the TCP refers to “Indian Organizations” (note that below we recommend this term be replaced throughout with “Tribal Organizations” to be consistent with the Indian Self-Determination and Education Assistance Act). We suggest that the description of the role to be played by Tribal Organizations in this section be updated to reflect the same recognition found in the Indian Health Service’s consultation policy that there are federal statutes and policies in place that allow for consultation with Tribal Organizations. Section 7(2) could be redrafted to state as follows:

It is frequently necessary that the HHS communicate with Tribal Organizations to solicit consensual Indian Tribe(s)’ advice and recommendations. Although the special “Tribal-Federal” relationship is based on a Government-to-Government relationship, other statutes and policies exist that allow for consultation with Tribal Organizations. These organizations by the nature of their business serve and represent Indian Tribes’ issues and concerns that might be negatively affected if these organizations were excluded from the consultation process.

As the Department is considering updates to the TCP, we suggest the definitions in Section 17 be made more concise. Many of the definitions are duplicative and should be consolidated and used consistently throughout the policy to avoid unnecessary confusion. We have the following specific recommendations:

- Federally Recognized Tribal governments. This term is used only in the definition of “Joint Tribal/Federal Workgroups and or/Task Forces.” We think the term should be replaced with “Indian Tribes” as that term is defined in the policy (subject to our proposed amendments found below) and the term “Federally Recognized Tribal governments” be deleted from the definitions section.
- Indian. Because of our recommendation below for revising the term “Indian Tribe,” a change would need to be made for consistency to the definition of “Indian.” Further changes are needed to assure that the TCP does not exclude individuals in its coverage who are “Indians” for other purposes related to HHS activities. Rather than referencing the definition of Indian Tribe at 25 U.S.C. § 479a, we recommend that the reference be to the definition of Indian in the Indian Self-Determination and Education Assistance Act at 25 U.S.C. 450b(d) and to other conditions under which individuals are considered by HHS to be Indian. The definition of “Indian” should be redrafted as follows: *“A person who is a member of an Indian Tribe, as defined at 25 U.S.C. 450b(d) or is otherwise considered by the Secretary to be an Indian for*

purposes of eligibility for Indian health care services, including as a California Indian, Eskimo, Aleut or other Alaska Native or is determined to be an Indian under regulations promulgated by the Secretary. Throughout this policy, "Indian" is synonymous with American Indian/Alaska Native."

- **Indian Organizations.** This term should be replaced throughout the TCP with the term "Tribal Organization," as defined in Section 17(24) of the TCP, consistent with how that term is used in the Indian Self-Determination and Education Assistance Act. The term "Indian Organization" could then be deleted from the definitions.
- **Indian Tribe.** We think the definition of "Indian Tribe" should be consistent with the Indian Self-Determination and Education Assistance Act, as is the case in the Indian Health Service tribal consultation policy. The definition should read, "*Any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village, or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians [25 U.S.C. 450b(e)]."*
- **Tribal Government.** We read the term "Tribal Government" as being synonymous with "Indian Tribe." We suggest the Department replace the term "Tribal Government" throughout the policy with "Indian Tribe" and then delete the definition of "Tribal Government" from the definitions.
- **Tribal Officials.** We recommend the term "Tribal Officials" be revised to be consistent with how that term is defined by the Indian Health Service and Executive Order 13175 to state, "*A duly elected/appointed Tribal Leader or official delegate designated in writing by an Indian Tribe or Tribal Organization.*" We note that the current definition uses the term "inter-Tribal organizations" which is not defined or used in the policy at all. The use of the term "Tribal Organization" is consistent with our advice regarding that term as described above.

Standard for Action. The phrase "whenever practicable and permitted by law" is used many times as a benchmark for whether HHS will take action. (e.g. Sections 4.B, 4.C, 4.D, 7.5, 8.A.3, 9.B.3, 11, and 11.B). [TRIBE] believes strongly that this is the wrong standard. It is one that fails to recognize the important flexibility that should exist in government-to-government interactions. Instead of looking for "permission" under existing law, we believe HHS should take the various actions addressed by the policy unless it is prohibited by law from doing so. This would truly change the frame in which the relationship between HHS staff and legal counsel would undertake analysis of requests. We recommend that everywhere the phrase "whenever practicable and permitted by law is used", it be changed to "*practicable and not prohibited by law*".

Joint Tribal/Federal Workgroups or Task Forces. Finally, we offer several comments to you about Addendum 1, which the Department added to provide details for formation and

operation of joint tribal/federal workgroups or task forces. While we understand the Department is bound to comply with the Federal Advisory Committee Act (FACA) to the extent it is applicable, which is referenced several times in Addendum 1, we recommend the Department clarify that the joint workgroups or task forces formed under the consultation policy are not subject to (or in the alternative are formed to be exempt from) FACA requirements. For many years the Indian Health Service, for example, has used tribal workgroups and task forces as a practical means of consulting with Indian Tribes and Tribal Organizations, and this practice needs to be able to continue unhindered. We understand this is possible because courts have interpreted the definition of an “advisory group” under FACA narrowly, so as not to include every formal and informal consultation between an agency and a group rendering advice. However, the Indian Health Service has recently taken a different view of FACA that is unnecessarily causing problems for the government-to-government relationship.

To the extent this could be clarified by the Department in its tribal consultation policy, we think it would be helpful to ensuring that tribes can continue to unreservedly participate in workgroups and task forces to address critical issues of Departmental policy, and can freely determine who it is they wish to represent them. Additionally, in Section D of Addendum 1, we suggest that “*and Tribal Organizations*” be added to the end of the paragraph.

We appreciate the opportunity to provide input into the review of the Department’s TCP. Should you have any questions about TTAG’s comments at set forth in this letter, please contact Jennifer Cooper, the National Indian Health Board (NIHB) at jcooper@nihb.org. We look forward to reviewing a revised version of the Department’s TCP and request an additional opportunity to provide comments to you on that policy before any changes are finalized and implemented by the Department. We also look forward to continuing to work together closely with the Department and its various divisions into the future.

Sincerely Yours,

A handwritten signature in black ink, appearing to read "Valerie Davidson", with a long, sweeping flourish extending to the right.

Valerie Davidson
Chair, TTAG

Cc: Marilyn Tavenner, Acting Administrator, CMS
Kitty Marx, Director of Tribal Affairs, CMS
Dr. Yvette Roubideaux, Director, IHS
Stacy Bohlen, Executive Director, NIHB
Jennifer Cooper, Legislative Director, NIHB