

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

June 3, 2008

Kerry Weems, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2249-P
P.O. Box 8016
Mail Stop C4-26-05
7500 Security Boulevard
Baltimore, MD 21244-1850

Subject: Proposed Rule: CMS-2249-P, Medicaid Program: Home and Community-Based State Plan Services

Dear Mr. Weems:

As Chair and on behalf of the Centers for Medicare & Medicaid Services (CMS) Tribal Technical Advisory Group (TTAG), I appreciate the opportunity to provide comments regarding the proposed rules, CMS-2249-P, implementing section 6086(a) of the Deficit Reduction Act of 2005 (DRA). This section amends the Social Security Act (SSA) by adding a new section 1915(i) that allows States, at their option, to provide home and community based services (HCBS) under their State Medicaid plans.

The CMS TTAG was established in October 2004 to provide advice and input to the CMS on policy and program issues affecting delivery of health services to American Indian and Alaska Natives (AI/ANs) served by CMS-funded programs. The CMS TTAG established a long term care subcommittee to provide advice and input to CMS regarding Medicare and Medicaid programs related to both institutional and home-and-community-based long term care that serve elders, as well as those that serve non-elderly people with disabilities. One of the responsibilities of the subcommittee is to review proposed regulations and make recommendations to CMS regarding ways to reduce barriers and increase access to culturally-appropriate long term care for AI/ANs.

The long term care subcommittee has reviewed the proposed rule, CMS 2249-P, and the TTAG offers the following comments regarding conflict of interest standards and tribal consultation requirements for States when developing and implementing State plan HCBS:

Conflict of Interest Standards:

The proposed rules at 42 CFR 441.568 requires States to define conflict of interest standards for those individuals or agents responsible for independent assessment of need or developing a plan of care. The rules propose that at a minimum the agents:

- not be related by blood or marriage;
- not be financially responsible for the individual;
- not be empowered to make financial or health-related decisions on behalf of the individual; and
- not be providers of HCBS for the individual or be employed by the provider, except when the only and willing agent is also a provider of HCBS.

The States will be required to develop conflict of interest protections, including separation of agent and provider functions within provider entities. Because of the uniqueness of the Indian health delivery system, the TTAG recommends that the proposed rules be modified to require States to consult with Indian Tribes in their States in developing conflict of interest protections.

The TTAG has concerns that the conflict of interest standards, as proposed, and without input from Tribes, could be interpreted to limit the participation by the Indian Health Service (IHS) and Tribally-operated health programs¹ as providers of HCBS under section 1915(i). For instance, in most areas of Indian Country, the IHS or Tribal health programs might be the only entity available to conduct an assessment of need and plan of care and also be a provider of HCBS. Because the IHS and tribal employees are members of the local tribal community, many of the employees could be “related” to the individual through tribal affiliation. The IHS does not bill or charge AI/ANs for health care as fulfillment of its trust responsibility, this should not be interpreted by States as being financially responsible for the individuals. Thus, it is essential that the States engage Tribes in meaningful consultation in development of the conflict of interest protections.

Tribal Consultation:

In addition to requiring tribal consultation in development of conflict of interest protections, the TTAG recommends that the States consult with Tribes in the development of the State plan

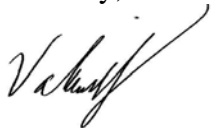
¹ The IHS and Tribes, under Indian Self-Determination and Education Assistance Act contracts or compacts, provide primary and preventive health care to over 1.9 million American Indians and Alaska Natives (AI/ANs), the majority of those residing on or near Indian reservations. In 1976, because of the remoteness and lack of Medicare and Medicaid providers in tribal communities, Congress amended the Social Security Act to authorize the IHS and tribal health programs to participate as providers under Titles XVIII and XIX.

amendment implementing HCBS. The new authorities provided for under section 1915(i) offer opportunities for the IHS and tribal programs to provide HCBS to its tribal elders and disabled. Requiring meaningful consultation between the States and Tribes in implementing State plan HCBS will help ensure that the IHS and tribal programs are able to participate as providers of HCBS to Tribal Medicaid eligible elderly and disabled beneficiaries.

Modifying the proposed regulations implementing section 1915(i) to require tribal consultation is consistent with a November 9, 2006 State Medicaid Director letter encouraging States to consult with Tribes in implementing new provisions of the DRA. As then Director, Dennis Smith, wrote: "Given the States' new flexibility to change their Medicaid programs through State Medicaid plans rather than through Medicaid demonstrations, maintaining ongoing communications between States and Tribes in the redesign of Medicaid programs and services is even more important. "

On behalf of the TTAG, I would ask for your careful consideration of the comments we have provided. The TTAG and especially, members of the long term care subcommittee, are available to provide additional information and input regarding implementation of these regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Valerie Davidson", written in a cursive style.

Valerie Davidson
Chair

Enclosure

Cc: CMS TTAG members
Herb Kuhn, Deputy Administrator
Dorothy Dupree, Director, Tribal Affairs Group