

# Tribal Technical Advisory Group

To the Centers for Medicare & Medicaid Services

c/o National Indian Health Board 910 Pennsylvania Avenue, SE Washington, DC 20003 (202) 507-4070 (202) 507-4071 fax

February 2, 2021

Acting Administrator Elizabeth Richter  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
P.O. Box 8013  
Baltimore, MD 21244-1850

**Re: CMS-1736-FC**

Dear Administrator Richter:

On behalf of the Centers for Medicare and Medicaid Services (CMS) Tribal Technical Advisory Group (TTAG), I submit this comment in response to CMS-1736-FC, in particular the portions that discuss the revisions to the Hospital Quality Star Rating Methodology. We want to reiterate our belief that this methodology is incompatible with the Indian health system and results in an artificially low rating for our hospitals, which serves only to undermine confidence in our hospitals among the communities that we serve. **We urge CMS to grant an exemption to hospitals that are run by the Indian Health Service and Tribal health systems.**

## **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 has been repeatedly re-affirmed by the Supreme Court, legislation, executive orders and regulations.<sup>1</sup> 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.<sup>2</sup>

The trust responsibility establishes a clear relationship between the Tribes and the federal government.<sup>3</sup> 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

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<sup>1</sup> 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).

<sup>2</sup> Introduction, "Cross-Agency Collaborations", <https://www.hhs.gov/about/strategic-plan/introduction/index.html>

<sup>3</sup> 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.

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.

### **Incompatibility with the Indian Health System**

The Hospital Quality Star Rating summarizes a variety of measures across seven areas of quality into a single star rating for each hospital. A hospital can get a rating between 1 and 5 stars, with a 5-star rating considered excellent. These ratings are meant to help consumers compare hospitals based on quality and performance measures. We note that this rule proposes adding the Veterans Hospital Administration (VHA) hospital system to the Rating system, starting in Calendar Year (CY) 2023. The agency justifies this decision by saying that it will allow veterans to compare VHA hospitals to private hospitals and make their decision based on the quality of the VHA hospitals. For the reasons outlined below, we do not believe that this same logic applies to IHS and Tribal hospitals.

A review of the Hospital Quality Star Rating system reports that several IHS and Tribal hospitals have a low star rating, with many IHS and Tribal hospitals having no rating at all. The TTAG is concerned that the rating system does not adequately or fairly consider other federal reporting requirements that IHS facilities may have to comply with or the population served. For example, our patient population includes higher proportions of patients with multiple complex chronic health conditions and lower socio-economic status, which both contribute to lower health status. If patients in the Indian Health System are in worse health than the average non-Indian, then the Hospital Star Ratings will likely be negatively impacted simply for serving AI/ANs. The star rating also has the potential to misinform consumers, and more importantly Congress, because the measures do not fairly consider the uniqueness of the Indian health system and the patients it serves.

The TTAG is concerned that the rating system unfairly measures IHS reported Medicare data in way that masks quality and over-emphasizes patient experiences, while failing to consider inadequate funding and the health and economic characteristics of the population being served. **For these reasons, the TTAG requests that Indian Health Service and Tribally-operated health facilities be exempt from the Hospital Quality Star Rating.**

### **Conclusion**

We respectfully ask that the agency exempt IHS and Tribally operated health facilities from the Hospital Quality Star Rating system. We believe that its limitations, when combined with the uniqueness of our patient population, render it impossible to get a fair and accurate rating for our facilities, resulting in a distortion of quality. We believe that this distortion misleads our populations, Congress, and any external stakeholders with an interest in the quality of our system. In order to ensure that IHS and Tribal facilities are unfairly penalized, **these facilities must be exempt from this system.**

The TTAG thanks CMS for the opportunity to comment on this final rule with comment period and stands ready to answer any questions CMS may have for us.

Sincerely,

A handwritten signature in black ink that reads "W. Ron Allen". The signature is written in a cursive style with a large, sweeping "W" and a long, horizontal tail on the "n".

W. Ron Allen, Chair/CEO – Jamestown S’Klallam Tribe  
Chair, CMS Tribal Technical Advisory Group

CC: Kitty Marx, Director, CMS Division of Tribal Affairs  
Devin Delrow, Associate Director, HHS Office of Intergovernmental and External Affairs