

# 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

April 11, 2012

Marilyn Tavenner  
Acting Administrator  
Centers for Medicare & Medicaid Services  
Department of Health and Human Services  
P.O. Box 8010  
Baltimore, MD 21244-08010

Dear Ms. Tavenner,

On behalf of the Tribal Technical Advisory Group to the Centers for Medicare and Medicaid (TTAG)<sup>1</sup>, I am writing in regards to the CMS Tribal Consultation Policy that was approved on November 17, 2011. The TTAG is requesting that you reconvene the TTAG Tribal Consultation Policy Subcommittee, which includes CMS Staff, to begin work to refine the CMS policy.

The TTAG applauds CMS for adopting a Tribal Consultation Policy, which had been in the works for a number of years. While adoption of the policy is a positive step in CMS's effort to formalize its Tribal consultation process, we are concerned that there was never an opportunity for consultation with Tribes about the draft policy and there were substantive changes and omissions to the draft the TTAG recommended that makes it inconsistent with the HHS Consultation Policy. None of the differences were explained to TTAG.

During the All Tribes Call convened by CMS in December 2011, it was explained the Policy was made to be consistent with the HHS Tribal Consultation Policy. However, our review indicates that there are key elements in the HHS Policy that were removed from the CMS Policy. There are important items dealing with consultation principles, roles, process/timelines, consultation performance evaluation, meeting records and reporting, definitions, and Tribal sovereignty that have been removed or altered from the draft Policy. These provisions of the TTAG recommended draft were consistent with the language included in the Department's policy and are also included in most other HHS operating division policies. We realize that the CMS policy incorporates the HHS Policy, but we do not believe this justifies leaving key provisions out of the CMS Policy. Doing so makes it much harder to use since it requires reference to a separate policy.

In addition, we do not believe the Policy is sufficient to address the consultation requirements of the American Recovery and Reinvestment Act of 2009 (P.L. 111-5), or the new requirements for health insurance exchanges to consult with Tribes under the Affordable Care Act (P.L. 111-148). The policy is absent any meaningful instructions to the States on their responsibilities to consult with Tribes based on these statutes. These are critically important issues and need additional consideration, and to be subject to tribal consultation. Furthermore, the TTAG's statutory charter and its role were not adequately adopted into the CMS Policy. These, as well as other TTAG concerns, should be considered by CMS as we work together to improve its Tribal Consultation Policy.

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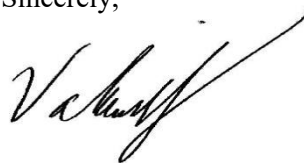
<sup>1</sup> Sec. 5006(e) of the American Recovery and Reinvestment Act codifies in statute, at sections 1902(a)(73) and 2107(e)(1)(C) of the Social Security Act, the requirement for the Secretary of Health and Human Services to maintain a Tribal Technical Advisory Group within CMS and the requirement that States seek advice from Tribes on a regular and ongoing basis where one or more Indian health program or urban Indian organization furnishes health care services.

During the All Tribes Call on December 9, 2011, there was a commitment by CMS to revisit the Policy in one year to evaluate its effectiveness and to determine if changes were needed. Respectfully, we request that you begin this process now so that changes can be made within the one year timeframe, and ideally before the end of this calendar year. Beginning this work now will allow sufficient time for needed changes to be vetted through the TTAG and CMS, and allow an opportunity for Tribal participation in a consultative process.

A precedent for this was set by the Department when the recent revisions to the HHS Tribal Consultation Policy provide for a review/comment period. We respectfully urge you to follow a similar process that allows for Tribal collaboration and a consultative process to finalize a new CMS Tribal Consultation Policy. As discussed on the CMS All Tribes Call, a revised policy could be shared with Tribes at the National Indian Health Board's Annual Consumer Conference scheduled for September 24-28, 2012, in Denver, Colorado.

Thank you for your consideration of our request and we look forward to working with you on this important government-to-government process.

Sincerely,

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

Valerie Davidson  
Chair, Tribal Technical Advisory Group to CMS

Cc: Dr. Yvette Roubideaux, Director, Indian Health Service  
Kitty Marx, Director, CMS Tribal Affairs Group