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Submitted via email to:
Linda.Brown2@cms.hhs.gov

October 1, 2014

Linda Brown, Deputy Director, Tribal Affairs Division
Centers for Medicare & Medicaid Services
Intergovernmental and External Affairs Group
Center for Medicaid and CHIP Services
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Baltimore, MD 21244-08010

Re: Comments of the United South and Eastern Tribes, Inc. on the Centers for Medicare and Medicaid Services Tribal Consultation Policy and State-Tribal Consultation

Dear Ms. Brown,

The United South and Eastern Tribes, Inc. (USET) is pleased to provide the Centers for Medicare and Medicaid Services (CMS or the Agency) with the following comments in response to the agency's August 20, 2014 "Dear Tribal Leader" letter requesting feedback on the CMS Tribal Consultation Policy (TCP), as well as recommendations on how CMS can work with state Medicaid agencies to make the state-Tribal consultation process more consistent and effective.

USET is a non-profit, inter-tribal organization representing 26 federally recognized Indian Tribes from Texas across to Florida and up to Maine.[1] Both individually, as well as collectively through USET, our member Tribes work to improve health care services for American Indians. Our member Tribes operate in the Nashville Area of the Indian Health Service (IHS), which contains 36 IHS and Tribal health care facilities. Tribal members may receive health care services at IHS facilities, as well as in Tribally-operated facilities operated under contracts with IHS pursuant to the Indian Self-Determination and Education Assistance Act (ISDEAA), P.L. 93-638.

[1] USET member Tribes include: Alabama-Coushatta Tribe of Texas, Aroostook Band of Micmac Indians of Maine, Catawba Indian Nation of South Carolina, Cayuga Nation of New York, Chitimacha Tribe of Louisiana, Coushatta Tribe of Louisiana, Eastern Band of Cherokee Indians of North Carolina, Houlton Band of Maliseet Indians of Maine, Jena Band of Choctaw Indians of Louisiana, Mashantucket Pequot Indian Tribe of Connecticut, Mashpee Wampanoag Tribe of Massachusetts, Miccosukee Tribe of Florida, Mississippi Band of Choctaw Indians, Mohegan Tribe of Connecticut, Narragansett Indian Tribe of Rhode Island, Oneida Nation of New York, Passamaquoddy Tribe at Indian Township of Maine, Passamaquoddy Tribe at Pleasant Point of Maine, Penobscot Indian Nation of Maine, Poarch Band of Creek Indians of Alabama, Saint Regis Mohawk Tribe of New York, Seminole Tribe of Florida, Seneca Nation of New York, Shinnecock Indian Nation of New York, Tunica-Biloxi Tribe of Louisiana, and the Wampanoag Tribe of Gay Head (Aquinnah) of Massachusetts.

Introduction

USET applauds CMS' commitment to continued dialogue on its Tribal Consultation Policy (TCP), as well as the Agency's intention to work with the Tribal Technical Advisory Group's (TTAG) Tribal Consultation Policy Subcommittee during the comment review process. We appreciate the opportunity to revisit the TCP, as it must be updated to reflect recent changes in federal Indian law and policy, and because much of what the TTAG Tribal Consultation Policy Subcommittee recommended in 2011 for inclusion in the CMS TCP remains absent. Engaging the TTAG in the review process shows a clear commitment to a TCP that reflects Tribal input and will provide CMS with vital guidance in its revision and implementation.

Along with the TTAG, USET is committed to the addition of key missing elements from the Department of Health and Human Services' (HHS) Tribal Consultation Policy, as well as other improvements. We maintain that HHS' TCP should be treated as a floor rather than a ceiling, and that CMS should take steps to personalize its TCP in order to make it more relevant to the Agency and to Tribes.

CMS Tribal Consultation Policy

In both May and December of 2011, TTAG Tribal Consultation Subcommittee provided extensive recommendations to the agency on the design and contents of its TCP. Unfortunately, many of these recommendations were not included in the final TCP signed by CMS Administrator Don Berwick in 2011. As a result, the USET concurs in the TTAG's recommendations on improvements to the CMS TCP, including the following selected edits by section:

- **Background**

  This section of the TCP should include references to the Snyder Act, as well as Titles XVIII, XIX, and XX of the Social Security Act (SSA). These laws relate specifically to the binding obligations the United States and in the case of the SSA, CMS has to Tribes, and help to form the basis for consultation.

- **Purpose and TTAG Philosophy**

  CMS did not take the opportunity to personalize the Policy to make it more relevant to CMS's unique relationship with Tribes and Indian health providers. We recommend that this section be amended according to TTAG recommendations including adding language taken directly from the HHS TCP. The TTAG language is more relevant to and descriptive of the relationship between CMS and Tribes.

- **Objectives**

  This section must include requests from Tribes for consultation or technical assistance in accessing CMS resources as an impetus for initiating consultation. The current language implies that only CMS may initiate consultation, which is inconsistent with Executive Order 13175 as reaffirmed by President Obama's November 5, 2009 Executive Memorandum on Tribal Consultation. Executive Order 13175 provides that:

  (c) When undertaking to formulate and
  implement policies that have tribal implications,
  agencies shall:
  (1) encourage Indian tribes to develop
  their own policies to achieve program

objectives;
(2) where possible, defer to Indian tribes
to establish standards; and
(3) in determining whether to establish
Federal standards, consult with tribal
officials as to the need for Federal
standards and any alternatives that
would limit the scope of Federal
standards or otherwise preserve the
prerogatives and authority of Indian
tribes.
The CMS TCP does not reflect the role of Tribes in initiating consultation to set their own standards or CMS' requirement to defer to Tribes to set their own standards when possible. Additionally, this section should reference CMS' responsibility to provide direction to states regarding consultation, state obligations to consult with Tribal health providers, and CMS' obligation to ensure that States are in fact consulting with Tribes when required.

- **Tribal Consultation Principles**
  With regard to the promulgation of regulations, CMS's TCP applies only if the regulation has both Tribal implications AND preempts Tribal law. The TTAG draft applied if either condition were present. In addition, the TCP only sets out the special rule for regulations that have both Tribal implications and preempt Tribal law. The overarching rule that CMS should defer to Tribes to set their own standards when formulating policies that have tribal implications should be integrated into this section as well, as "policies that have tribal implications" is defined to include regulations. The TCP also leaves out examples of "government's deliberative process" that were put in TTAG draft in order to help CMS staff realize that deliberative process should not be applied too broadly.

- **Roles**
  This section should include the concept that the Tribal Affairs Group is "accountable" to assure that consultation occurs. In addition, it makes consultation with Tribal organizations permissive, instead of mandatory, even though the Tribal organization has been delegated authority to carry out programs for the Tribe under the ISDEAA.

- **CMS Tribal Consultation Process**
  In the spirit of a fully transparent consultation process, USET supports the TTAG recommendation that this section include the following:
  a. Time frames for initiating consultation processes
  b. A description of the TTAG's role in identification of issues and how consultation should occur
  c. References to "critical events" and Indian Health Providers.

- **Tribal Sovereignty**
  Instead of merely referring to the HHS TCP, CMS should restate the language to allow readers without access to the HHS TCP the ability to appreciate the concept and significance of Tribal sovereignty.

- **Definitions**
  - Consultation – TTAG not included among the parties in the consultation.

- Critical Events – limits where such events may originate to those arising within CMS, excluding other components of HHS.
- Indian – does not reference the definitions in 42 C.F.R. § 447.50 for the purposes of CMS programs or Affordable Care Act.
- Indian Tribe – following the HHS Tribal Consultation Policy definition, does not include reference to other entities included in definition of “Indian tribe” under the IHCIA.
- Indian Health Provider – having not included the phrase “Indian health provider,” CMS also does not define the term.
- Joint Tribal/Federal Workgroups and/or Task Forces; Native American– not included.
- Policies with Tribal Implications – does not include any of the examples offered by the TTAG.
- To the Extent Practicable and Permitted by Law – does not include the clarification recommended by the TTAG that “permitted by law” should be interpreted to include anything that is not expressly prohibited by law.

State-Tribal Consultation

Along with the ability to revisit the CMS TCP, USET greatly appreciates the opportunity to discuss the status of consultation between states and Tribes. Although USET member Tribes assert that our consultative relationship is with the federal government, there are times when Tribes and/or Tribal organizations must be consulted with to allow us the opportunity to provide advice and guidance to states in order to protect our Indian health care delivery programs. In accordance with this position, and through the2010 “Dear State Medicaid Director” letter, CMS states that Section 5006(e) of the American Recovery and Reinvestment Act (ARRA) requires states, “to utilize a process for the State to seek advice on a regular, ongoing basis from designees of the Indian health programs and Urban Indian Organizations concerning Medicaid and CHIP matters having a direct effect on Indians, Indian health programs or Urban Indian Organizations.” The 2010 letter also references a 2001 “Dear State Medicaid Director” letter that provides the guidelines of a process for States to use in consultation.

Both letters provide States with the flexibility to determine what exactly their consultations with Tribes will entail, within certain guidelines. The basis for deciding whether Tribal consultation occurred and was adequate depends on state-provided documentation. That is, the State merely attests that it has completed the appropriate consultation.

However, USET continues to hear reports that Tribes have not been properly consulted with as States make changes to their Medicaid and CHIP programs through state plan amendments and the waiver process. In addition, it seems that some States have not yet recognized their obligation under ARRA to consult not just with Tribes residing within their bounds, but also with Tribes on actions that affect individual American Indians and Alaska Native residents. It is possible that States without a federally-recognized Tribe may assume that they are not subject to consultation requirements. In addition, while CMS has been enforcing the requirement that States comply with the July 17, 2001 SMDL as a condition of complying with its transparency regulations for Section 1115 Demonstration Waivers and renewals, it has become clear that many States are not aware of what is required to meet that obligation. Many States continue to simply provide Tribes a summary notice of their intent to submit a waiver, rather than the proposed waiver language itself, and then do not engage in a consultative process with Tribes as they negotiate the waiver with CMS. In some cases, Tribes are not even informed of the waiver until it is submitted and approved, even though the States have attested to consulting with Tribes when

they submit their waiver application. This process leaves Tribes in the dark as to what is ultimately submitted and approved, and does not constitute consultation.

As a solution, USET proposes that CMS work with the TTAG to draft and release another "Dear State Medicaid Director" letter that clearly outlines a process for including Tribes, and Indian Health Service, Tribal, and Urban Indian Health Programs as CMS works to verify whether the appropriate consultation took place. This process could include creating a feedback loop from Tribes to CMS, and from CMS to Tribes, through the utilization of CMS' Native American Contacts (NACs). When CMS receives a State submission, the NAC would communicate directly with affected Tribes to ensure that consultation has occurred. Simply relying on State-attestation is not sufficient.

USET appreciates the opportunity to provide comments. We are encouraged by CMS' willingness to work with the TTAG and look forward to the results of a successful collaboration on a revised Tribal Consultation Policy, as well as an improved State-Tribal consultation process. Should you have questions or require additional information please do not hesitate to contact Ms. Dee Sabattus, USET Tribal Health Program Support (THPS) Director, at (615) 467-1550 or by e-mail at dsabattus@usetinc.org.

Sincerely,

Brian Patterson
President

Kitcki A. Carroll
Executive Director

CC: USET member Tribes
Wanda Janes, USET Deputy Director
Dee Sabattus, USET THPS Director
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