

# State-Tribal Consultations

## A SUMMARY OF BEST PRACTICES

DEPARTMENT OF HEALTH & HUMAN SERVICES · USA

CMS
CENTERS FOR MEDICARE & MEDICAID SERVICES

# State-Tribal Consultations: A Summary of Best Practices from Washington, Oregon & Minnesota

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# Executive Summary

## Purpose of the Project

The Centers for Medicare & Medicaid Services (CMS) conducted a series of descriptive case studies examining how certain states engage in consultation with tribes and obtain the advice and input from programs operated by the Indian Health Service, tribes, or tribal organizations under the Indian Self-Determination and Education Assistance Act (Pub.L. 93-638), or urban Indian health organizations under Title V of the Indian Health Care Improvement Act. Pursuant to federal law, states are required to consult with tribes and obtain advice from IHS, tribally operated, and urban programs (I/T/Us) regarding implementation of changes to its Medicaid and Children's Health Insurance Program (CHIP). This consultation is required by Section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA) and 1115 Medicaid waiver transparency regulations.

These case studies examined tribal consultation State Plan Amendments (SPAs) established by each state as required by ARRA. They did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces. The studies highlight the perceptions of both the state and tribal participants interviewed for this project on successful and unsuccessful consultation efforts in implementing policy changes to the Medicaid and CHIP programs. Through these case studies, the best practices and lessons learned and other strategies may provide the foundation for implementing successful state-tribal consultation plans in other regions.

## Methodology

The case studies focused on Washington, Oregon, and Minnesota as three states with a perceived history of successful state-tribal consultation. CMS conducted guided discussions with state and tribal representatives in these three locations. Discussion participants were asked to describe their state's tribal consultation process, its strengths and weaknesses, and the lessons that other states could take from their consultation experience. Results are presented in one case study for each state (three in total) and in this executive summary, which identifies best tribal consultation practices across all three states.

To conduct the case studies, CMS first completed all federally required protocols (e.g., written supervisory/administrative permission or agency IRB approval). It then reviewed the Medicaid Tribal Consultation State Plan Amendment (SPA) and other tribal consultation policies effective in each state.

Working with the Governor's Office of Indian Affairs located in each state, 21 representatives from the following entities were identified and contacted:

- the Oregon Health Authority,
- the Washington Health Care Authority,
- the Washington Department of Social and Health Services,

- the Native American Rehabilitation Association,
- the Northwest Portland Indian Health Board,
- the Minnesota Department of Human Services,
- the Oregon Legislative Commission on Indian Services, and
- multiple tribes located throughout the Washington, Oregon, and Minnesota regions.

CMS conducted guided discussions with identified points of contact to discuss tribal consultation policies and processes. These exchanges consisted of a series of probes to guide discussion regarding:

- Stakeholders' understanding and perception of the tribal consultation policy or process, including:
    - Perceived successes or strengths,
    - Perceived failures or weakness, and
    - Aspects of the process that may be missing or in need of further development;
- Stakeholders' perceptions of the outcomes and effectiveness of the consultations; and
- Stakeholders' recommendations to others regarding the creation of successful state-tribal consultation policy and practices.

## Federal Consultation Requirements

In 2009, Congress enacted section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA), codified at Section 1902(a)(73)of the Social Security Act, *Protections for Indians under Medicaid.* Section 5006 requires a state in which one or more Indian health programs or urban Indian organizations furnishes health care services to establish a process for the state Medicaid agency to seek advice on a regular, ongoing basis from designees of Indian health programs. This includes programs operated by the Indian Health Service (IHS), tribes, or tribal organizations under the Indian Self-Determination and Education Assistance Act, or Urban Indian Organizations under the Indian Health Care Improvement Act. Section 2107(e)(I) of the Social Security Act was also amended to apply these requirements to CHIP.

State Medicaid and CHIP programs are required to develop a process for obtaining the advice and input from I/T/Us and to submit the process as a SPA for review and approval by CMS. A synopsis of the tribal consultation SPA for each of the three states included in the case studies can be found in the appendix of this report. Of the 50 states, 37 states have an I/T/U located within their borders and are required to submit a Medicaid Tribal Consultation SPA. All 37 SPAs can be found at https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/StateTribal-RelationsonHealthcare.html.

States must consult on Medicaid and CHIP issues that directly impact I/T/Us. Such impacts can include Medicaid or CHIP changes that further restrict eligibility determinations; reductions in payment rates or service coverage; changes in I/T/U provider payment methodologies,

payment methodologies for services reimbursed to I/T/U providers, or consultation policies; and proposals for demonstrations or waivers that may impact Indians or I/T/U providers. Thus, depending on the issue, states must consult with tribes and I/T/Us regarding SPAs, waiver proposals, waiver extensions, waiver amendments, waiver renewals, and proposals for demonstration projects. SPAs must include information about the frequency, inclusiveness (i.e., individuals, groups or organizations included from whom advice will be sought), and process for seeking such advice from tribes and I/T/Us.

The tribal consultation requirements of ARRA are intended to acknowledge the sovereignty of American Indian and Alaska Native governments and the importance that decisions regarding implementation of Medicaid and CHIP policies might have on the Indian health programs operated by these tribal governments. Tribal consultation, although not perfect, provides a venue through which tribes and states can discuss and address policies and issues affecting tribal communities within the state. Procedures for consultation vary between states, with subsequently differing levels of success and efficacy. These case studies demonstrate an effort to understand the strategies used by certain states that could possibly be used to improve state-tribal consultation policies nationwide.

## Strengths, Barriers, and Recommended Strategies for Effective Consultation

Overall, participants interviewed in each state described the state-tribal consultation process positively. Respondents noted various attributes that contribute to the success of these interactions, including:

- Involvement and support of tribal and state leadership,
- An established state-tribe relationship, and
- Genuine, meaningful, and open communication.

In contrast, barriers to effective consultation reflected issues such as:

- Obstacles created by consultation requirements, including overdemand for consultation,
- State or tribal staff turnover, and
- Resource limitations preventing participation in consultations.

The experiences in these areas, however, have helped identify several best practices that can serve as building blocks for states attempting to establish similar successful state-tribal consultation processes. These lessons include:

- Establish a formal consultation policy that holds specific agencies or actors responsible for designated activities. This policy should be developed with tribal stakeholders and should be available for public comment and review.
- Regularly monitor and evaluate the consultation process, amending it as necessary to maintain effectiveness.

- Working with state and tribal stakeholders, review consultation protocol to ensure that requirements foster efficiency and effectiveness. Attempt to limit formal consultation requests to relevant, significant matters, rather than requiring consultation for every issue.
- Acknowledge the sovereignty of tribal nations by engaging collaboratively in consultation as equal partners. Identify and work toward shared goals and outcomes.
- Ensure ongoing training in tribal history, state-tribal relations, and consultation protocol for state and tribal staff, particularly those involved in the consultation process.
- Provide consultation participants with the necessary information to prepare for the consultation event. Allow an appropriate amount of time before the event to review the material.
- Tailor communication so that the appropriate method is used for the intended audience. While reaching out via telephone or email may be suitable for some contacts, such avenues may be inappropriate when contacting tribal chairpersons.
- Encourage and engage in regular, informal communication with consultation participants (such as email, phone discussions, etc.).
- Invite and include state and tribal leadership to participate in the consultation process. This acknowledges the sovereignty of participating governments by ensuring that figures of equal authority from both governments are involved during consultations.

# Appendix

## Synopsis of Tribal Consultation Policy State Plan Amendments

# Minnesota

Date of Submission: December 28, 2010

Approval Date: March 28, 2011

Effective Date of Amendment: October 1, 2010

Inclusiveness: The SPA describes consultation with tribal chairs, tribal health directors of federally recognized tribes, IHS representatives, and urban Indian providers.

Process for Seeking Advice: The state agency meets quarterly with tribal health directors of federally recognized tribes, IHS representatives, and urban Indian health care providers. Additional separate meetings, conference calls, or other mechanisms are also possible. Representatives of the tribes are appointed to the Medicaid Citizens' Advisory Committee. The state agency liaison sends electronic written notification to tribal chairs, tribal health directors, tribal social services directors, the IHS Area office director, and the director of the Minneapolis Indian Board Clinic of anticipated actions. When an Indian health care provider requests changes, the state agency liaison reports back on whether or not the change was included in the submission.

Length of Time for Notification: 60 days before submission

Process for Seeking Expedited Advice: Same process for notification set forth above

Length of Time for Expedited Notification: Longest practicable notice

Consultation with Tribe Concerning the SPA: On October 21, 2009, the 11 tribes, IHS, and the Minneapolis Indian Health Board Clinic received electronic notification of the new consultation requirements. On November 17, 2009, the consultation requirements were discussed at the quarterly tribal health directors' meeting. On February 2, 2010, a draft consultation policy went to all Indian health care providers with a request for comments. On February 18, 2010, a discussion occurred at the quarterly tribal health directors' meeting. On May 2, 2010, a revised draft policy was sent to providers. At the May 12, 2010 meeting, the revised draft policy was discussed and since no one requested additional comments, the policy was considered final.

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes

# Oregon

Date of Submission: September 29, 2010

Approval Date: March 21, 2010

Effective Date of Amendment: October 1, 2010

Inclusiveness: The SPA describes consultation with IHS representatives, Urban Indian Programs, and Oregon's nine federally recognized tribes. These entities and individuals include tribal governments (e.g., Tribal Executive Council, Tribal Business Council), tribal chairman or chief or their designated representatives, tribal health clinic executive directors of Oregon's 638/FQHC providers, IHS representatives, tribal organizations established to represent IHS and tribal health programs (such as the Northwest Portland Indian Health Board), and Urban Indian Program(s) Executive Director(s) or designees.

Process for Seeking Advice: Senate Bill 770 establishes a consultation process which the Oregon Health Authority (OHA) implements. On a quarterly basis, 770 meetings occur between OHA and the tribes, urban programs, and IHS representatives. The tribes, urban programs, and IHS representatives suggest the agenda items. The tribes and Indian Organizations select their representatives to attend the meeting. Representatives of all three types of programs are invited to attend all Rule Advisory Committee meetings to provide input on rule concepts and language.

Length of Time for Notification: Documents describing a proposed SPA are distributed 30 days prior to a SPA submission. The meeting agenda is distributed 10 days prior to a quarterly meeting.

Length of Time for Response: Not specified

Process for Seeking Expedited Advice: Correspondence when policy changes are required more quickly than 770 meetings permit. When a SPA requires consultation prior to a regularly scheduled 770 meeting, electronic mail or conference calls may be used.

Length of Time for Expedited Notification: 10 days prior to submission

Length of Time for Expedited Response: Not specified

Consultation with Tribe Concerning the SPA: The consultation policy is written into state law

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes

# Washington

Date of Submission: September 26, 2011

Approval Date: December 21, 2011

Effective Date of Amendment: July 1, 2011

Inclusiveness: The SPA describes consultation with tribal leaders, tribal clinic directors, tribal health administrators as requested by the tribe, the IHS chief executive officer, the urban Indian health organization directors, the American Indian Health Commission (AIHC), the Portland Area IHS office, the Northwest Portland Area Indian Health Board (NPAIHB), and the Senior Director for the Office of Indian Policy (to forward on to Indian Policy Advisory Committee [IPAC] delegates).

Process for Seeking Advice: State Medicaid staff attends the bimonthly meetings of AIHC, ad hoc AIHC groups, quarterly IPAC meetings, and IPAC subcommittee meetings on specific topics. It also disseminates program information to interested parties, including NPAIHB, which each week sends the information to health board delegates. In addition to these processes, the state uses a "Dear Tribal Leader" letter to notify tribes, Indian health programs, and urban Indian health organizations of impending changes. Hard copies are automatically mailed to tribal leaders and to others by email. Others may receive a hard copy if they request it. Both verbal and written responses are documented, and if requested, in-person meetings are scheduled.

Length of Time for Notification: 60 days before submission

Length of Time for Response: 30 days

Process for Seeking Expedited Advice: The SPA implies expedited meetings are possible

Length of Time for Expedited Notification: 10 days before submission

Length of Time for Expedited Response: 7 days

Consultation with Tribe Concerning the SPA: The draft Policies and Procedures were sent electronically to AIHC on June 6, 2011. These documents were then presented at the AIHC meeting on June 10, 2011. The draft was distributed to tribal leaders at a meeting on June 9, 2011. Electronic and written notification and a copy of the SPA were sent on July 28, 2011, to the individuals and entities noted above in the statement about inclusiveness.

Process will be used for CHIP: Yes

Process will be used for Waivers: Yes