

HHS Secretary's Tribal Advisory Committee (STAC)

Priority Issues prepared for Sec. Sylvia Mathews Burwell

Prepared: July 21, 2014

The following information has been prepared to brief HHS Secretary Burwell on the STAC's highest priority issues. Providing these issues will help to orient Sec. Burwell to the STAC's most immediate concerns.

1. Government-to-government relationship

Tribal governments have a unique legal and political relationship with the United States. This relationship has been recognized and reinforced by the Constitution, nation-to-nation treaties and executive orders, federal statutes, case law, and other administrative policies. This government-to-government relationship between tribal nations and the United States government has existed since the formation of the United States. In Alaska, the government-to-government relationship is between Alaska Native tribes and the federal government, and also includes significant roles for tribal organizations. See History and Requirements of Tribal Consultation.

This historical and legal foundation has created a fundamental contract between tribal nations and the United States: Tribes ceded millions of acres of land that made the United States what it is today. In return, tribes have the right of continued self-government and the right to exist as distinct peoples on their own lands. And for its part, the United States has assumed a federal trust responsibility, exchanging compensation and benefits for tribal land and peace. The Snyder Act of 1921 (25 U.S.C. § 13) legislatively affirmed this responsibility. More recently, the passage of the Indian Health Care Improvement Act in 2010 (IHCIA) addressed this responsibility when it stated: "it is the policy of this Nation, in fulfillment of its special trust responsibilities and legal obligations to Indians -- to ensure the highest possible health status for Indians and urban Indians and to provide all resources necessary to effect that policy." The existence of this truly unique obligation supplies the legal justification and moral foundation for policy making specific to American Indians/Alaska Natives (AI/AN) – with the objectives of enhancing their access to health care and overcoming the chronic health status disparities of this segment of the American population.

2. Implementation of the Affordable Care Act

The federal government's duty to provide health care to AI/ANs has historically been carried out through the Indian Health Service (IHS), tribes and tribal organizations, and urban Indian organizations. Collectively, these entities are referred to as "I/T/U". Under provisions of the IHCIA, Medicare and Medicaid have become important additional means through which the resources to fulfill the federal trust responsibility have been made available. Now, with the passage of the Affordable Care Act (ACA) and the assistance to be provided to certain AI/ANs enrolled through an Exchange, an additional mechanism—although not a replacement mechanism—has been put in place to fulfill the federal trust responsibility and achieve the policies set out by Congress. Thus, tribal governments have a special interest to assist the Administration to implement the ACA so that its full benefits of providing health care to Americans can be achieved. In order to assist the Administration and HHS to implement the law we respectfully request the following issues to be addressed:

- Pursue uncompensated care or premium assistance 1115 demonstration waivers in those states not expanding Medicaid.
- HHS should revisit a regulatory solution the Definition of Indian in the ACA.
- CCIIO and IHS should implement electronic verification of IHS beneficiaries in Exchanges.
- HHS to designate authority for IRS to verify and process all ACA exemptions.
- Need ACA data metrics to evaluate AI/AN outreach and enrollment.
- Require QHPs to make available Summary of Benefits and Coverage documents on how Indian-specific cost-sharing reductions apply under zero cost-sharing and limited cost-sharing plan variations.

3. Indian Child Welfare Act Implementation

The Indian Child Welfare Act (ICWA) was enacted by Congress in 1978 in response to alarming numbers of AI/AN children being removed from their families by public and private child welfare agencies, most often being placed in non-Indian homes far from their tribal communities. Today, AI/AN children still face serious obstacles to receiving the full protections provided under the law. AI/AN children are disproportionately represented nationally at 2.0 times their population rate and among individual state foster care systems as much as 10 times their population rate.¹ While no single federal agency is provided full responsibility to monitor and ensure compliance with ICWA, the Administration for Children and Families (ACF) has oversight over much of state child welfare practice, including data collection, ensuring appropriate outcomes, and assisting states to improve their practice and policies to be in compliance with federal law. This includes a state plan requirement under Title IV-B of the Social Security Act requiring states to describe their efforts in consultation with tribes in their state regarding the specific measures taken by the state to comply with ICWA (42 U.S.C. § 622(9)). On May 7, 2013, the former Administration for Children, Youth, and Families Commissioner, Bryan Samuels sent a letter to states reminding them of the need to work with tribes on issues related to services to AI/AN children and the Title IV-B state plan requirement mentioned above. While this was helpful, much more is needed to ensure that states understand the importance of ICWA and have the capacity to respond. A Government Accountability Office Study in 2005 described the opportunities for ACF to better utilize the ICWA data they were already collecting from states to inform technical assistance efforts that could help states comply with ICWA, but the study and recommendation were summarily rejected by ACF.² ICWA provides the protections that AI/AN children and families need and allows tribes to participate with states in the process of helping address the trauma these families and children have experienced. ACF has a critical role in helping collect important data, promoting effective tribal/state collaborations, increasing state capacity to comply with ICWA, and reversing the inequities and disparate treatment that can occur when ICWA is not followed. In order to assist the Administration and HHS in the implementation of ICWA and protection AI/AN children and families we respectfully request the following issues to be addressed:

- Enhance data collection by ACF on issues pertaining to ICWA compliance, including oversight of the Title IV-B requirement for states to consult with tribes on measures to comply with ICWA.
- ACF should work with tribes to improve program instructions and internal administrative procedures regarding state ICWA compliance.

¹ Summers, A., Woods, S., & Donovan, J. (2013). Technical assistance bulletin: Disproportionality rates for children of color in foster care. National Council of Juvenile and Family Court Judges: Reno, NV.

² United States Government Accountability Office. (2005). *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*. (Publication No. GAO-05-290). Retrieved from <http://www.gao.gov/assets/250/245936.pdf>.

- Policy changes should be made that require action and follow-up by ACF in states where there is knowledge of ICWA non-compliance. When ACF becomes aware of ICWA non-compliance, they should provide clear action steps in their performance improvement plans and follow-up should be continuous until compliance has been met.
- Work with tribal governments and national Indian organizations with expertise in this area to develop improved technical assistance and training to help states to effectively implement ICWA on an ongoing basis.

4. P.L. 102-477 Implementation

Since 1992, the 477 program has allowed tribes and tribal organizations to consolidate programmatic employment related funding from the Departments of Interior, Health and Human Services and Labor, while streamlining program approval, accounting and reporting mechanisms, thus offering a model for the Administrative Flexibility reflected in both Executive Order 13635 and last year's President's Memorandum on Administrative Flexibility, Lower Costs, and Better Results for State, Local and Tribal Governments. The law empowers tribes and tribal organizations with the ability to increase efficiency, decrease administrative burden, increase self-determination and ensure superior results than their counterparts at the state and county level, all while maintaining program guidelines. The 477 program is a model program in tribal communities across the nation, especially in the current climate of needing to do more with less. Streamlined funding for 477 Plans through transfers under the provisions of the Indian Self-Determination and Education Assistance Act ("ISDEAA") has been an essential element of the success of the 477 Program. 477 Program funds have been transferred to participating tribes either through agreements authorized under Title I (self-determination contracts) or Title IV (self-governance compacts) of the ISDEAA. In addition, ISDEAA authorizes tribes and tribal organizations to develop programs that re-budget and reallocate the agency program funds to fit tribal priorities and needs. This flexibility facilitates the creation of culturally appropriate programs, adds no costs for the federal government, and frees up program funding for direct client services by eliminating duplicative administration. It provides increased accountability and integration of services, with the maximum employment and training assistance reaching tribal participants, and received the highest OMB PART rating in Indian Country. HHS programs, including TANF, Child Care and Native Employment Works are important components of this successful program. The STAC respectfully urges the Secretary to use your administrative powers to take steps that will fulfill the promise of this important tool for AI/AN success in moving people from welfare to work, such as:

- Remove new guidance requiring one or two years of managing a program and three previous clean audits (already required by the 477 Initiative) before inclusion into a tribe's 477 Plan.
- Assure in writing that funds will continue to be transferred through ISDEAA contracts and compacts.
- Return to reporting mechanisms that worked so well prior to 2009, and permanently rescind the 2009 Compliance Circular.
- Include other eligible programs into 477, such as LIHEAP, Community Services Block Grant, and Head Start.

5. Other Issues

a. IHS Advance Appropriations

Numerous national and local health boards are on record supporting the need for legislation that would place the IHS budget on an advance appropriations basis. The goal is for the IHS and tribal health care providers to have adequate advance notice of the amount of federal appropriations to expect and thus not be subjected to the uncertainties of late funding and short-term continuing resolutions. Congress provides advance appropriations for the Veterans Administration medical accounts, and the request is for parity in the appropriations schedule for the IHS. The STAC respectfully requests:

- An update on the position of the DHHS and the Agency on this issue and their position to support the legislation.
- Support of legislation to authorize IHS advance appropriations in S. 1570 and H.R. 3229.

b. Expand Tribal Self-Governance within the Department of Health and Human Services (HHS)

In 2000, P.L. 106-260, included a provision for designating HHS to conduct a study to determine the feasibility of a demonstration project extending Tribal Self-Governance to HHS agencies other than the IHS. The HHS Study, submitted to Congress in 2003, determined that a demonstration project was feasible. For more than a decade, Tribes identified the expansion a top priority and repeatedly requested to work in collaboration with the Department to identify how to develop language that could be included in a “draft” legislative package. However, up to this point, HHS has not moved forward on this action. Self-Governance represents efficiency, accountability and best practices in managing and operating Tribal programs and administering Federal funds at the local level. Expanding Self-Governance translates to greater flexibility for Tribes to provide critical social services within agencies such as the Administration on Aging, Administration on Children and Families, Substance Abuse and Mental Health Administration, and Health Resources and Services Administration. It is imperative that HHS work closely with Tribes to strengthen current Self-Governance programs and advance initiatives that will streamline and improve HHS program delivery in Indian Country.

- Utilize current administrative authority to expand self-governance within HHS through demonstration projects
- Reconvene the Self-Governance Tribal Federal Workgroup in order to develop legislative language that would expand self-governance within HHS

c. CSC Full Funding and Support Mandatory Spending Authority

The CSC funding problem is not yet solved. Full funding for CSC must not come at the expense a reduction in program funding or effective permanent sequestration of Indian program funds. That result would have the same devastating effect on our service delivery as the failure to fully fund CSC. Yet Congress, in the Joint Explanatory Statement accompanying the FY 2014 Consolidated Appropriations Act, noted that “since [contract support costs] fall under discretionary spending, they have the potential to impact all other programs funded under the Interior and Environment Appropriations bill, including other equally important tribal programs.” Without any permanent measure to ensure full funding, payment of CSC remains subject to agency “discretion” from year to

year, even though tribes are legally entitled to full payment under the ISDEAA. Noting these ongoing conflicts of law, Congress directed the agencies to consult with tribes on a permanent solution. The STAC respectfully requests:

- Continued support for full funding of CSC payments.
- Fast-track settlement of past year's claims and not impose tribes to the rigorous settlement process to provide claims incurred data being implemented by Cotton & Company. Evaluation metric for this should be claims settled and not claim being processed.
- Request supplemental funding to backfill the funds from existing programs used to full-pay CSC, which otherwise would have backfilled the across the board sequester reductions and rescission. Without this supplemental funding, the reductions in funding due to the sequester and rescission remain in base-funding in each succeeding fiscal year.