

National Indian Health Board



Submitted via: www.regulations.gov

May 9, 2016

Betty Gould
Regulations Officer
Indian Health Service
Office of Management Services
Division of Regulatory Affairs
5600 Fishers Lane
Mail Stop: 09E70
Rockville, MD 20857

Re: Catastrophic Health Emergency Fund (CHEF): 42 CFR Part 136

Dear Ms. Betty Gould:

On behalf of the National Indian Health Board (NIHB), I write to provide comments in response to the Indian Health Service's (IHS) proposed regulation for the Catastrophic Health Emergency Fund (CHEF), which was published in the Federal Register on January 26, 2016. NIHB is grateful for the CHEF proposed regulation comment period extension from March 11, to May 10.

Established in 1972, the NIHB is an inter-Tribal organization that advocates on behalf of Tribal governments for the provision of quality health care to all American Indians and Alaska Natives (AI/ANs). The NIHB is governed by a Board of Directors consisting of a representative from each of the twelve Indian Health Service (IHS) Areas. Each Area Health Board elects a representative to sit on the NIHB Board of Directors. In areas where there is no Area Health Board, Tribal governments choose a representative who communicates policy information and concerns of the Tribes in that area with the NIHB. Whether Tribes operate their entire health care program through contracts or compacts with IHS under Public Law 93-638, the Indian Self-Determination and Education Assistance Act (ISDEAA), or continue to also rely on IHS for delivery of some, or even most, of their health care, the NIHB is their advocate.

We appreciate that this is the first time that IHS has promulgated proposed regulations with regards to the CHEF program and while NIHB supports the lowering of threshold to \$19,000 in FY 2016, we are very concerned with some of the other elements in the proposed rule.

Tribal Consultation

Although the proposed rule insists that Tribal consultation took place prior to its creation, NIHB respectfully requests that *Meaningful* Tribal consultation, as mandated by Executive Order 13175 and reconfirmed in the President's memorandum of November 5, 2009 take place. The preamble of the proposed rule states that IHS complies with Tribal consultation because of the meetings of the IHS Director's Workgroup on Improving Contract Health Services programs held on October 12-13, 2010, June 1-2, 2011, and January 11-12. The preamble also states that IHS issued two Dear Tribal Leader letters on February 9, 2011 and May 6, 2013. However the recommendations of the Workgroup described in these letters makes it clear that the Workgroup was never consulted on the proposed rule as it was published on January 26, 2016.

The Workgroup recommendations made at these meetings were not about the development of regulations for CHEF and most concerning, the Workgroup was never given an opportunity to discuss or make recommendations on changes to IHS policy regarding the definition of alternate resources (addressed below). The preamble to this proposed rule also relies on the rulemaking process to serve as Tribal consultation. NIHB disagrees as the rulemaking process is open to public discourse, not just Tribes. The rulemaking process does not satisfy Tribal consultation as defined in Executive Order 13174 which states that federal agencies, prior to the rulemaking process that has Tribal implications, to consult with Tribal officials "early in the process of developing the proposed regulation." Now that a proposed rule has been developed, Tribes are responding to IHS's proposal rather than being engaged. NIHB respectfully requests that IHS not moved forward with a final rule until true *Meaningful* Tribal consultation can take place on the definition of alternate resources.

Definition of Alternate Resources

NIHB is strongly opposed to the inclusion of "Tribal" as part of the list of primary payers in the "alternate resource" definition located in Section 136.506 the Catastrophic Health Emergency Fund (CHEF) proposed rule. The provision states "any Federal, State, Tribal, local, or private source of reimbursement for which the patient is eligible. Such resources include health care providers, institutions, and health care programs for the payment of health services including but not limited to programs under titles XVIII or XIX of the Social Security Act (i.e. Medicare and Medicaid), other Federal health care programs, State, Tribal or local health care programs, Veterans Health Administration, and private insurance." The preamble also states that IHS considers Tribal self-insured plans to be "private insurance." The inclusion of Tribal self-insurance as an alternate resource prior to CHEF reimbursement is intolerable. Tribal governments and Tribal programs will be burdened with a substantial negative impact on Tribal health service programs. NIHB insists that the Indian Health Service (IHS) remove "Tribal" from the definition of "alternate resource" in Section 136.501 and from Section 136.06.

The "alternate resource" definition for purposes of CHEF eligibility is derived from 25 U.S.C. Section 1621e(d)(5), which entails the Secretary "to ensure that no payment be made from CHEF

to any provider of treatment to the extent that such provider is eligible to receive payment for the treatment from any other Federal, State, local or private source of reimbursement for which the patient is eligible.” Under 25 U.S.C. Section 1683, CHEF, “shall not be used to pay for health services provided to eligible Indians to the extent that alternate Federal, State, local, or private insurance resources for payment...are available and accessible to the beneficiary...” “Tribal” is not included as an alternate resource in the law. NIHB understands the need to conserve limited CHEF funds by using other payment resources prior to utilization of the CHEF funds. However, the inclusion of Tribes as one of the sources of payment as alternate resources to CHEF is a gross overreach of the Secretary’s rulemaking authority.

The Contract Health Service (CHS) program, now the Purchased Referred Care (PRC) program applies a similar rule in 42 CFR Section 136.23(f) and 42 CFR Section 136.61. The term “alternate resource” is used to identify programs that must be exhausted before CHS/PRC program funds are paid. In this context, the payer of last resort (PLR) rule defines “alternate resource” to include Federal programs with specific mention of Medicare and Medicaid, and “State, or local health care programs, and private insurance.” There is no reference or intent to include Tribal governments and programs.

The Indian Health Service (IHS) has recognized the importance of preserving Tribal resources for decades. In previous IHS payor of last resort regulations, as well as policy guidance in the IHS Manual, IHS specifically provided that certain Tribally-funded health insurance plans “would not be considered “alternate resources” under IHS’ payor of last resort regulations in an effort to be consistent with Congressional intent not to burden Tribal resources. This drastic change in IHS policy is a clear violation of the government’s Trust responsibility to provide health care to Tribes. Tribes should never pay primary to the federal government and IHS must not move forward with its proposed definition of alternate resources.

Reimbursement Procedure

The Procedure for reimbursement set out in the proposed rule does not provide any criteria or procedure for how PRC directors will review CHEF claims or how IHS headquarters will determine whether alternate resources exist. Such determinations are left entirely to the discretion of AREA PRC programs and IHS headquarters. This lack of transparency is very concerning and NIHB request that the procedures for governing the reimbursement of CHEF funds include procedures guiding the award process as well as the submission process.

Referral Definition

IHS proposes to define Purchased/Referred Care” in section 136.501 to mean “any health service that is –(1) Delivered based on a *referral by, or at the expense of*, an Indian health program” We think that it is appropriate the regulation recognizes that a PRC referral does not equate to requiring payment for services, particularly because Tribes and Tribal Organizations are payers of last resort. We request that IHS provide clarity that the word “referral” as used in the CHEF regulations is not to be interpreted to require payment for services, nor interpreted in other contexts (e.g., Section 1402(d)(2) of the Patient Protection and Affordable Care Act pertaining to qualification for cost-sharing exceptions).

Conclusion

Thank you for the opportunity to comment on the Indian Health Service (IHS) Proposed Rule for the Catastrophic Health Emergency Fund (CHEF). The National Indian Health Board (NIHB) requests that IHS take these comments and recommendations under consideration. NIHB strives to partner with IHS to ensure that the health care needs throughout Indian Country are met. Please contact Devin Delrow, NIHB Federal Relations Director at ddelrow@nihb.org or (202) 507-4072 if there are any additional questions or comments on the issues addressed in these comments.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Lester Secatero', with a stylized flourish extending to the right.

Lester Secatero
Chairman, National Indian Health Board