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TRANSMITTED VIA EMAIL
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May 17, 2018

RADM Michael Weahkee
Acting Director
Indian Health Service
5600 Fishers Lane
Rockville, MD 20857

RE: CSC "97/3 Method" Tribal Consultation

Dear Acting Director Weahkee,

On behalf of the Mississippi Band of Choctaw Indians, we write to provide comment to the Indian Health Service (IHS) in response to the April 13, 2018 Dear Tribal Leader Letter on proposed changes to the contract support cost (CSC) policy regarding the "97/3 method", the method for determining indirect costs included in service unit shares. In December 2017, IHS moved to unilaterally rescind the 97/3 method. According to IHS, the 97/3 method, which was agreed to by IHS and Tribal Nations in October 2016 after extensive negotiations, "may not conform in all cases with statutory authority of the Indian Self-Determination and Education Assistance Act (ISDEAA)" and may result in overpayments due to the potential duplication of Service Unit shares. These concerns are unfounded and this conclusion undermines IHS' Tribal consultation and trust obligations. Below, Mississippi Band of Choctaw Indians provides comments and recommendations to IHS regarding the initiation of Tribal consultation and the actions taken thus far by the Agency regarding the important CSC policy.

Lack of Tribal Consultation on Rescission of Indian Health Manual, Chapter 3, Section E(b)

The Mississippi Band of Choctaw Indians was deeply disappointed in IHS's unilateral decision to suspend the 97/3 method provision of the CSC policy without consultation in December 2017. The 97/3 method had been the result of extensive Tribal consultation and negotiation between Tribal Nations and IHS. The CSC policy agreement in 2016 was developed after years of CSC workgroup meetings, which were followed by a period of Tribal consultation where comments from Tribal leaders and representatives were incorporated into the policy. This process is representative of the government-to-government relationship and consultation process where federal agencies work directly with Tribal Nations to develop a compromise in policy, despite competing views. Though neither federal nor Tribal representatives were completely satisfied with the result in 2016, both sides respected the differing perspectives and agreed to the compromise. However, the lack of transparency from IHS in the decision to rescind the 97/3 method has been a far cry from the collaborative consultation process exercised by IHS in previous years. By unilaterally rescinding this part of the 2016 agreement as well as seeking Tribal consultation on

recommendations that were not accepted by the full CSC workgroup, IHS has failed to honor its consultation and trust obligations.

Further, despite requests from Tribal Nations to restore the current 97/3 method pending changes and Tribal consultation to the CSC policy, IHS has refused. As a result, no Tribal Nation has had the 97/3 method available, or any alternative tools, to successfully conduct CSC funding negotiations. Any action or proposal from IHS that would impede this process must be preceded with robust outreach and meaningful consultation with Tribal Nations prior to the implementation or rescission of any policy. It is a failure on the part of IHS that many Tribal Nations are left without the necessary CSC negotiation tools that would create or expand new critical Indian healthcare programs.

97/3 Method and Alternatives

The 97/3 method was modeled after the previous, longstanding 80/20 method by providing a simple calculation for Tribal shares that sought to save Tribal Nations and IHS from potentially contentious negotiations. Like the 97/3 method, the 80/20 method was respectful of Tribal sovereignty in that Tribal Nations had the ability to choose an option that would better suit their negotiation needs during CSC funding negotiations. However, IHS' abrupt and unilateral decision to rescind the 97/3 method has damaged trust in the agency. The suspension of the 97/3 method halted many CSC negotiations, thus preventing Tribal Nations from developing or expanding new programs for Fiscal Year (FY) 2018. Despite this damage, Tribal representatives to the CSC workgroup subsequently met in good faith with IHS to develop recommendations and compromise language with the agency while addressing IHS' concerns regarding overpayments and non-conformity to ISDEAA. The CSC workgroup drafted language, included in the April DTLL, that would remove the ability for a Tribal Nation to unilaterally elect the 97/3 method instead of a previously negotiated and agreed upon duplication offset number identified in a prior funding agreement.

In the March 2018 CSC workgroup meeting, IHS provided data that was said to support the Agency's assertion that the 97/3 method violated ISDEAA by resulting in overpayment. However, it has been reported that the data presented by IHS showed that the agency had only encountered one situation where the Agency believed that violations of ISDEAA from overpayment may occur, even stating that the overpayment had actually not occurred. Mississippi Band of Choctaw Indians believes that the remote possibility of overpayment does not justify rescinding the entire 97/3 method, particularly since the policy was reached after years of extensive, meaningful, and sometimes difficult consultation with Tribal Nations. IHS could simply deal with these unlikely scenarios on a case-by-case basis. Further, it was reported that the data presented by IHS also showed that, in most cases, the 97/3 approach generally works as the purpose is to provide a simplified and fair approximation to save negotiation time and effort for both federal and Tribal parties.

For these reasons, Mississippi Band of Choctaw Indians urges the immediate reinstatement of the original 2016 language developed between Tribal Nations and IHS, as that language struck a compromise between both parties that facilitated continued contracting and compacting. However, if IHS determines the 97/3 method to remain unsuitable, Mississippi Band of Choctaw Indians recommends adopting the CSC workgroup's compromise language, as this language preserves the 97/3 method in all other circumstances while retaining as much of the original policy, and Tribal autonomy, as possible. We also believe the CSC workgroup's recommendations directly address IHS' concern about previously negotiated amounts.

Further, Mississippi Band of Choctaw Indians opposes IHS' two recommendations with the Dear Tribal Leader Letter. The first proposal appears to cut off the right of Tribal Nations from renegotiating a duplication amount if it was contracting before FY 2017. This includes negotiations on funding due in earlier

years that have yet to be closed out, even though IHS has not completed the reconciliation process for many Tribal Nations from as early as FY 2014. The second proposal would deprive a Tribal Nation of the right to choose which negotiation method to use, and instead requires a choice both Tribal Nations and IHS agree on. Mississippi Band of Choctaw Indians fears this may result in instances where IHS will be in a position to force a Tribal Nation into a contentious negotiation leading to litigation if an agreement is not made. This runs counter to the goals of the 97/3 method within CSC policy, as well as the goals of the ISDEAA.

Conclusion

IHS must discontinue practices where agreed-to terms are unilaterally suspended by the Agency with little to no notice or Tribal consultation. This behavior violates IHS' own Tribal consultation policy, as well as the sacred government-to-government relationship with Tribal Nations. Moving forward, IHS must respect and uphold its consultative obligations, including on the development and implementation of CSC policy. Because IHS has sufficient safeguards to address situations where it believes applying the policy would cause a violation of the law, Mississippi Band of Choctaw Indians insists the IHS reinstate the 97/3 method. Reinstating the 97/3 method would help to undo the damage that has been done after IHS' abrupt and unilateral rescission. Mississippi Band of Choctaw Indians looks forward to this critical course correction from the Agency. Should you have any questions or require further information, please contact Tina Scott, Health Director @ (601) 389-4254.

Sincerely,

Phyliss J. Anderson, Tribal Chief
Mississippi Band of Choctaw Indians