



COMMONWEALTH of VIRGINIA

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Mark R. Herring
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MEMORANDUM

TO: EMILY MCCLELLAN
Regulatory Supervisor
Virginia Department of Medical Assistance Services

FROM: USHA KODURU *UK*
Assistant Attorney General

DATE: September 20, 2021

SUBJECT: Exempt final regulation regarding tribal consultations (5758/9306)

I have reviewed the attached exempt final regulation to establish a process for the Department of Medical Assistance Services ("DMAS") to regularly consult with designees of Indian health programs on Medicaid matters with a direct impact on those programs. You have asked the Office of the Attorney General to review and determine if DMAS has the legal authority to amend the regulation and if the regulation comport with state and federal law.

Federal law at Section 1902(a)(73) of the Social Security Act requires DMAS to consult with Indian Health Programs when one or more furnish health care services. Based on my review, the Director of DMAS, acting on behalf of the Board of Medical Assistance Services, in accordance with Virginia Code §§ 32.1-324 and 325, has the authority to amend this regulation, subject to compliance with the provisions of Article 2 of the Administrative Process Act ("APA") and has not exceeded that authority. It is my view that the amendment of this regulation is exempt from the procedures of Article 2 of the APA pursuant to Va. Code § 2.2-4006(A)(4)(c).

If you have any questions about this matter, please contact me at 786-4072.

cc: Kim F. Piner, Esquire

Attachment

12VAC30-10-40 State Medical Care Advisory Committee

There is an advisory committee to the Medicaid agency director on health and medical care services established in accordance with and meeting all the requirements of 42 CFR 431.12.

The State enrolls recipients in MCO, PIHP, PAHP, and/or PCCM programs. The State assures that it complies with 42 CFR 438.104(c) to consult with the Medical Care Advisory Committee in the review of marketing materials.

Tribal Consultation:

Section 1902(a)(73) of the Social Security Act requires a State in which one or more Indian Health Programs or Urban Indian Organizations furnish 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, whether operated by the Indian Health Service (IHS), Tribes or Tribal organizations under the Indian Self-Determination and Education Assistance Act (ISDEAA), or Urban Indian Organizations under the Indian Health Care Improvement Act (IHCIA) Consultation is required concerning Medicaid matters having a direct impact on these Indian health programs.

DMAS seeks advice on an ongoing basis from federally recognized tribes, Indian health programs, and Urban Indian organizations on matters related to Medicaid and CHIP programs. DMAS has identified a program designee as an advisory contact, through which, the dissemination of information will occur. Designees from each tribe, Indian health program, and Urban Indian organization receive written communication from DMAS about State Plan Amendments, waiver proposals, waiver extensions, waiver amendments, and waiver renewals before any of these documents are submitted to CMS. Tribes, Indian health programs, and Urban Indian organizations may request additional information, and may request meetings to discuss the proposed changes. DMAS invites these groups to request additional information, and/or offer comments on proposed changes, within 30 days of the notification of State Plan Amendments, waiver proposals, waiver extensions, waiver amendments, and waiver renewals. For emergency-related submissions such as a natural disaster, legislative mandate, etc., DMAS seeks information requests, comments, and/or proposed changes within 15 days of notification. The coordination of this consultation process was established through an email communication with designees from each tribe and Indian Health program on January 29, 2021. To maintain a cooperative channel of communication and informative dialogue between DMAS and the tribal organizations, the Agency sought out, and will continue to seek, advice on a regular, ongoing basis, via email, teleconference, and/or meetings.