



Best Practices in State-Tribal Consultations

FINDINGS FROM OREGON



Best Practices in State-Tribal Consultations: Findings from Oregon

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Submitted to:

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Introduction

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. Specifically, these case studies examined tribal consultation State Plan Amendments (SPAs) established by each state as required by Section 5006 of the American Recovery and Reinvestment Act of 2009 (ARRA). The project seeks to highlight best practices and lessons learned as perceived by both state and tribal participants, stemming from both successful and unsuccessful consultation efforts on Medicaid and Children's Health Insurance Program (CHIP) policies and mandates. Such strategies may provide the foundation for similar, successful consultation plans in other states.

Guided discussions were held with seven state and tribal representatives from the state of Oregon, including representatives from the Oregon Health Authority (OHA), the state Legislative Commission on Indian Services, Northwest Portland Area Indian Health Board (NPAIHB), administration and directorship from the health departments of two tribes located within the state, and a large nonprofit organization in the area that provides education, health, and treatment services to American Indians and Alaska Natives. These discussions centered on the consultation as required by ARRA and did not focus on issues or consultation policies regarding 1115 Medicaid waiver regulations or state-based insurance marketplaces. Analysis of data from these discussions revealed a consultation process generally well regarded by both state and tribal respondents.

In Oregon, a mutually respectful relationship rooted in open, honest communication contributed to a general feeling of trust among stakeholders. Still, like other states, Oregon struggles with consultation overload that puts particular strain on tribes' ability to effectively participate in the process. When consultation does take place, it can be difficult for the state to follow through on agreed-upon outcomes. That said, continued maintenance of a formal consultation policy and more efficient communication provide a stable foundation upon which Oregon has established a successful state-tribe consultation process.

Consultation in the State of Oregon

Like Minnesota and Washington, consultation policy in Oregon predates the requirements set out by Section 5006 of ARRA and Section 1115 of the Social Security Act (SSA). In fact, state legislation passed in 1975 created the Legislative Commission on Indian Services in order to improve services to tribal communities throughout Oregon. All nine federally recognized tribes in Oregon have a representative on the Commission and engage with the state in consultations on various issues affecting tribal communities.

To meet federal consultation requirements outlined in ARRA, the state established Senate Bill 770 (SB 770). SB 770 stipulates that OHA meet quarterly with state tribes and representatives

from Indian Health Service (IHS), tribally operated, and urban Indian programs (I/T/Us). Tribal stakeholders largely set the agenda for discussion for these meetings. Consequently, tribal stakeholders designate and send representatives who best represent their interests given the topics under discussion for the particular consultation event. In expedited circumstances, OHA may communicate with tribal representatives and stakeholders outside of the regular quarterly meeting.

The state requires consultation on any proposed SPA, rule-making change, or proposal or amendment to a waiver or demonstration project that may have a direct impact on tribal communities or I/T/Us. Thirty days prior to any submissions to CMS, the state distributes information regarding any Medicaid SPAs. Discussions surrounding the proposed SPA are normally scheduled during the SB 770 meetings. Ten days prior to the meeting, the state staff tribal liaison sends out the meeting agenda and documents describing proposed action to I/T/Us. Email and conference calls 10 days in advance of submission to CMS are used in expedited circumstances to provide written notification and offer tribes the opportunity to request feedback meetings. Tribal stakeholders are also invited to attend all Rule Advisory Committee meetings to provide input on rule concepts and language.

Findings from Guided Discussions

Perceptions of the Oregon Consultation Process

State and tribal participants agreed that consultations as they are currently carried out seem effective. Consultations provide tribes with a platform from which they can work with the state to discuss and develop solutions to health issues affecting the community:

So it kind of brings into reality and real life what's happening within tribes, out in the field, within our service areas, and it brings it to a level that they're saying, "Oh, okay we're making the policies here. We're pushing stuff through legislature; how is that in direct conflict or how is that not working for the tribes?" So really it bridges that. – Tribal health participant

Participants also noted that consultation in Oregon went beyond formal gatherings or consultations. Consultation also includes regular communication and meetings throughout the year. Similar to respondents in Washington, Oregon participants referred to these more informal exchanges as "Little C," while formal consultation events were dubbed "Big C." Both Big C and Little C-caliber exchanges contribute to the continued success of the state-tribe consultation process:

[A] lot of times we're not doing a waiver...We're not doing a new State Plan Amendment or anything, so there's actually no official reason that we would have to get together, but we do. And you can call them tribal consultations if you want to, but they're there to also help maintain and continue that good working relationship that we have. – OHA participant

Other informal exchanges can include everything from email messages and sharing publications of interest to phone calls and unscheduled discussions. They encourage more regular, open

communication between state and tribal stakeholders, and help maintain a positive government-to-government relationship.

Strengths of the Oregon Consultation Process

Honest, open, and meaningful conversation

Both state and tribal participants made repeated references to the need for meaningful conversation during the consultation process. This includes providing tribes with necessary information and the time needed to review it. Discussions consist not only of speaking, but also active listening. Disagreements or limitations do not derail consultation efforts; as a result, both good and bad news can be shared and discussed openly. As one participant summarized:

[T]o my way of thinking, the most critical thing for effective consultation is you make sure that you create enough opportunities where the appropriate people have a chance to talk to each other, have a chance to learn from each other, and it is two way. – *State Commission participant*

Involvement and support of tribal and state leadership

Several respondents commented on the significance of tribal and state leader presence and the importance of bringing tribal and state leadership representing sovereign nations to engage in the consultation process:

Call it a largely ceremonial day, because that's really what it is. The governor gives a speech and all the tribal chairs give a pitch and then we have kind of workshops. It's not a productive one to where we're going and meet[ing] on various needs for health care in that meeting, but it's a bigger picture. [It's] a huge message. [I]t's a real good sense of symbolism of drawing those two separate sovereigns together and outlining the importance of working together and partnering. – *OHA participant*

The active presence of tribal and state leaders contributes to meaningful, informed discussion during consultations and further strengthens the government-to-government relationship by demonstrating the involvement of members with policy-making authority from both the state and tribes.

Relationship marked by mutual respect and trust

Similar to open and honest communication, participants frequently commented on the respect and trust upon which the state-tribe relationship is built:

Yeah, go tribes and go state, because that's the deal. It's a two-way relationship based on mutual respect that's organic and that is changing all the time, so you have to keep at it, and there will be some bumpy times, but again we've got a way that there's enough underlying trust that they can work things out, [along with] learning about each other too, nonstop." – *State Commission participant*

This level of trust and respect, participants noted, is the result of years of efforts to build the relationship between the state and tribes. It is characterized by transparent, accurate, and open communication, as well as a high degree of accountability.

Barriers to Effective Consultation

Overburden brought by consultation efforts

Overburden refers to the strain that consultation requirements place on both tribal and state stakeholders. Tribal participants noted that tribal leaders' busy schedules leave little time open for participation in consultations. Continual requests for consultation by the state, then, can sometimes fail to take limited time and resources into account. Both tribal and state participants expressed similar perspectives:

There's something called consultation overload that a lot of tribes are suffering from right now. – Tribal health participant

[A]s we got more and more engaging, we almost saturated the tribes with wanting to participate in everything we did in this building, and we were inviting them into everything on the planet Earth. "Come and participate and help us hire this person. Help us hire that person. Come to this meeting. Come to that meeting." And the tribes really had to push back and say, "We can't be there 24 hours a day. We've got a tribal program to run and we've got [a] finite amount [of] employees, and we can't spend 60 days a year in Salem." – OHA participant

Uncategorized barriers

The majority of barriers described by state and tribal respondents lacked categorization. Some of the additional issues of note discussed by participants included:

- *Delay in moving forward with consultation outcomes.* Tribal participants noted that at times the state appeared to delay any action from consultations. Respondents attributed this hesitancy to waiting for every tribe to comment on a proposal or other internal barriers:

I think sometimes there are delays because [the state doesn't] have the answer. They're not ready and so we spend a little bit longer than we need to, but we eventually get there. – Tribal health participant
- *New federal health policy.* The implementation of the Affordable Care Act has already changed the health landscape nationally. Within Oregon, the time and resources required for the state to roll out this legislation have detracted from their ability to consult with tribes about the new program and its impact on tribal communities.

Lessons Learned: Strategies for Building the Consultation Process

Strategy 1: Use effective and efficient communication approaches.

- Tailor communication strategies to ensure that the appropriate method is used for the intended audience. (For example, send printed notices via postal mail to tribal leaders to indicate a higher degree of formality.)
- Identify the specific, appropriate recipient for your message. If necessary, create an organizational chart for agencies and tribes to help in this process.

Effective communication must reach the proper audience. Tribal respondents noted that tribal organization varies across the state; the state, then, is responsible for identifying the appropriate point of contact within each tribe when reaching out during consultation:

Not always do you communicate with the appropriate person or office on an issue; that...takes multiple tiers of communication...to recognize the importance of tribal organization in the role of that communication. So, for example, when a state sends something to a tribe—whether it be a tribal leader or tribal health director or administrator of a health and human services program—depending on how the tribe is organized, not always does it make [to] the right person. – NPAIHB participant

Effective communication also refers to the method used to convey information. Respondents acknowledged that effective consultation must use appropriate means of communication, which may vary depending on the intended recipient. Wherein some cases email communication may suffice, a more formal means of delivery—reflecting the official nature of the message—may be more appropriate:

It's not an email to a health director; I guess that's all I can say. – Tribal health participant

Strategy 2: Establish and maintain a formalized consultation policy and process.

- Develop a formalized policy that clearly defines expectations and responsibilities for specific actions. Such a policy should also assign a degree of accountability for failure to follow through on designated responsibilities.
- Ensure that the formalized policy is reviewed, evaluated, and amended as necessary to ensure continued effectiveness.
- Include tribal stakeholders as equal government partners in the development of this policy.

The benefit of a formal consultation policy, as noted by participants, is that it establishes responsibility. Consequently, it also establishes levels of transparency (defining what actions to expect during the consultation process) and accountability (defining the parties responsible for carrying out those actions). By formalizing the consultation policy, the state demonstrates a public commitment to engaging with tribal governments, and tribes have a more significant

process to call on during consultation efforts, thus providing a platform for true government-to-government interaction between the state and sovereign tribal nations. For example:

A governor does not necessarily support tribes, but the process will always support the tribes. A legislature, one person may not support tribes, but the process supports the tribes, and the more it's embedded within government, the more it's embedded within the tribes and the way that it happens [won't depend on one person or one office] because it will become part of the process. – *Nonprofit organization participant*

Additional recommended strategies

- Encourage and engage in regular, informal communication with consultation participants (such as email, phone discussions, etc.).
- Involve state and tribal leadership throughout the consultation process. This acknowledges the sovereignty of participating governments.
- Provide consultation participants with the necessary information to prepare for the consultation event. This information must be provided in advance of the event with an appropriate amount of time to review the material.
- Review consultation protocol to ensure that requirements do not place undue burden on participants (in terms of time or resource commitments). Develop or amend consultation protocol to allow state and tribal participants to effectively address issues of significance or priority.