



## Issues Related to Medicare Like Rates & Tribal Self-Insurance

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### A. Medicare Like Rates (MLR)

1. ***Hospital MLR*** (Section 506 of the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. 108-173; adds new subpart D to 42 C.F.R. Part 136).
  - Requires any Medicare-participating inpatient hospital to agree to be a PRC provider; to be bound by the same admission requirements that apply to Medicare generally; and to accept no more than the Medicare-established pay rates for the services provided to PRC-referred patients.
  - Applies only to Medicare-participating hospitals that provide inpatient hospital services, including all departments and provider-based facilities of such hospitals, and to critical access hospitals.
  - Covers all levels of care provided by such hospitals – inpatient, outpatient and skilled nursing.
  - Includes long-term care hospitals, independent inpatient rehabilitation facilities and inpatient psychiatric facilities, as they all furnish inpatient hospital services.
  - All such providers are subject to the MLR payment rates when providing a service *authorized under 42 C.F.R. Part 136* (IHS regulations) by a PRC program of the IHS or by a tribe/tribal organization carrying out such a program under ISDEAA.
2. ***Non-Hospital MLR*** (IHS issued final regulations at 42 C.F.R. Part 136, Subpart I).
  - Became effective May 20, 2016.
  - Applies to payments to providers and suppliers not already covered by the existing “Hospital MLR” regulations.
  - Unlike Hospital MLR, it is not a condition of Medicare participation, which means non-hospital providers do not have to accept payment at MLR in order to participate in Medicare.
  - Health programs operated by tribes or tribal organizations pursuant to a contract or compact under the ISDEAA have the choice of whether or not to participate in the new Non-Hospital MLR regulations. 42 C.F.R. § 136.201(c). Must opt in by adding language to ISDEAA agreement.
  - Rate to be paid depends on whether the PRC program has negotiated a specific rate with the provider.
  - Rates apply only when the tribal PRC program has validly authorized PRC for the services under the PRC regulations set forth at 42 C.F.R. Part 136, Subpart C.

### B. Tribal Self-Insurance & PRC

- MLR only applies when the PRC program validly authorizes PRC.
- Consider the Structure and Administration of the Plan.

- Plan Language.
- Consider a Coordination Agreement.
- Section 402 of the IHCA authorizing tribes to purchase care (a tribal health program).
- *Grand Traverse Band of Ottawa & Chippewa v. Blue Cross & Blue Shield of Mich.*

### **C. Developing Issues: Alternate Resources and Access To CHEF**

#### **1. Payor of Last Resort Rules**

- IHS CHS rule – 42 C.F.R. § 136.61.
- PPACA Extension - § 2901(b) of Pub. L. 111-148:
  - “Health programs operated by . . . Indian tribes, tribal organizations . . . shall be the payer of last resort for services provided by such . . . tribes, or organizations to individuals eligible for services through such programs, notwithstanding any Federal, State, or local law to the contrary.”

#### **2. Tribal Self-Insurance As An Alternate Resource**

Recent significant change in IHS longstanding policy (*see* Section 2-3.8I of the IHS Indian Health Manual) of *not* treating tribal self-insurance plans as alternate resources:

- *Redding Rancheria v. Burwell*, Civ. No. 14-2035 (D.D.C.): IHS takes the position that tribal self-insurance plans are to be considered alternate resources to PRC.
- IHS Frequently Asked Questions on PRC Rates: “Since Tribal self-insurance plans are not PRC programs, the PRC rates rule does not address the amount these plans will pay for services, but the rule incorporates that plan’s responsibility for payment relative to the PRC program under the payor of last resort statute.”
- IHS Proposed Regulations On CHEF: IHS proposes not to pay CHEF when patient is eligible for an “alternate resource,” which IHS specifically defines to include tribal self-insurance.
- IHS proposed Circular On Purchase of Insurance Under Section 402 of the IHCA:
  - Would treat tribal self-insurance as a payer before IHS.
  - Could exclude some individuals being eligible to receive PRC if they have insurance purchased under Section 402 (including tribal self-insurance).
  - But, some flexibility on tribal self-insurance and CHEF: If a tribe has a self-insurance plan funded wholly or partially by ISDEAA funding, there is no reinsurance or indemnity, and the plan is “designed to follow PRC eligibility,” then the IHS would consider the plan to be eligible for CHEF reimbursements on the same basis that any PRC program is eligible for CHEF.

#### **3. Thoughts on Potential Implications**

- IHS’s new position is inconsistent with applicable law, and contrary to Congress’ goals of implementing its federal trust responsibility and expanding access to federal health care resources for American Indians and Alaska Natives.
- However, if IHS is successful in its arguments, it could undercut some of the legal parameters under which tribes have carefully coordinated their PRC and tribal self-insurance plans to date, and it may become necessary to reconsider those relationships.