NORTHWEST
PORTLAND
AREA
INDIAN
HEALTH
BOARD

Burns-Paiute Tribe
Chehalis Tribe
Coeur d' Alene Tribe
Colville Tribe
Coos, Suislaw &
Lower Umpqua Tribe
Coquille Tribe
Cow Creek Tribe
Cowlitz Tribe
Grand Ronde Tribe
Hoh Tribe
Jamestown S'Klallam Tribe
Kalispel Tribe
Klamath Tribe
Kootenai Tribe
Lower Elwha Tribe
Lummi Tribe
Makah Tribe
Muckleshoot Tribe
Nez Perce Tribe
Nisqually Tribe
Nooksack Tribe
NW Band of Shoshoni Tribe
Port Gamble S'Klaliam Tribe
Puyallup Tribe
Quileute Tribe
Quinault Tribe
Samish Indian Nation
Sauk-Suiattle Tribe
Shoalwater Bay Tribe
Shoshone-Bannock Tribe
Siletz Tribe
Skokomish Tribe
Snoqualmie Tribe
Spokane Tribe
Squaxin Island Tribe
Stillaguamish Tribe
Suquamish Tribe
Swinomish Tribe
Tulalip Tribe
Umatilla Tribe
Upper Skagit Tribe
Warm Springs Tribe
Yakama Nation

527 SW Hall
Suite 300
Portland, OR 97201
☎ (503) 228-4185
FAX (503) 228-8182
www.npaihb.org

September 23, 2009

Judy Mohr-Peterson, Medicaid Director
State of Oregon
Department of Human Services
Division of Medical Assistance Programs
500 Summer Street N.E., E-35
Salem, OR 97301-1079

Dear Ms. Mohr-Peterson:

The Northwest Portland Area Indian Health Board is a P.L. 93-638 Tribal organization that represents the nine federally recognized Tribes in the State of Oregon. On behalf of our nine Tribes, we are providing you with our recommendations in response to Mr. Jim Edge's letter (dated July 28, 2009) seeking comments from Oregon Tribes on the proposed change in the manner that DHS will manage a list of potential applicants for the Oregon Health Plan (OHP) Standard benefit package.

We acknowledge the State for its efforts to provide as many Oregonians as possible with quality health care and appreciate the challenge of that task. As you are aware, American Indian and Alaska Native (AI/AN) people suffer from disproportionately poorer health status than the general U.S. population. Yet, AI/ANs are under enrolled and do not utilize Medicaid and CHIP programs to the same extent as other Oregonians. There are many barriers to AI/AN enrollment and participation in Medicaid that include access issues, cultural barriers, fluctuating income, mistrust, and many who feel that their health care has already been paid for with millions of acres of land ceded to the United States, therefore do not feel that they should have to participate in a means tested program. Despite these barriers, there are solutions.

In light of these significant health disparities and under-enrollment and utilization in state Medicaid programs we propose that the State of Oregon include the following in its request to CMS:

1. **Maintain an open-enrollment status in OHP for AI/AN people served by Indian Health Service (IHS) and Tribally-operated health facilities.**

   Since services provided to AI/AN people served by an IHS or Tribally operated facility are reimbursed to the State of Oregon at 100% FMAP, this request is budget neutral to the state. In 1976, Congress acknowledged the deplorable health conditions of AI/AN people and their under enrollment and utilization in the Medicaid program by amending the Social Security Act to grant IHS and Tribal health programs authority to collect Medicare and Medicaid reimbursements. Section 1880 made IHS hospitals (including those operated by Indian tribes) eligible to collect Medicare reimbursement, while Sec. 1911 made IHS and Tribal facilities eligible to collect reimbursements from Medicaid. An amendment to Sec. 1905(b) applied a 100 percent Federal Medical Assistance Percentage (FMAP) to Medicaid services provided to an Indian by an IHS or tribally-operated facility.

Sections 1880 and 1911 were intended to bring additional revenue into the Indian health system in order to address the deplorable condition of Indian health facilities, many of which were in such a poor state they were unable to achieve accreditation. The application of a 100% FMAP to the Medicaid covered services provided by these facilities was made in express recognition of the federal government's treaty obligations for Indian health. The Committee of jurisdiction observed that since the United States already had an obligation to pay for health services to Indians as IHS beneficiaries, it was appropriate for the U.S. to pay the full cost of their care as Medicaid beneficiaries This action is consistent with the status of AI/ANs as a political designation.

In addition, the recently passed Indian provisions contained in the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) and the American Recovery and Reinvestment Act of 2009 (ARRA) demonstrate Congress' intent to increase enrollment of AI/AN people into the Medicaid and CHIP programs. The legislation also directed CMS, acting through the state Medicaid program, to take necessary steps to "facilitate cooperation with and agreements between States and the Indian Health Service, Indian Tribes, Tribal Organizations or Urban Indian Organizations" regarding services." The CHIPRA legislation also included a $10 million Tribal set-aside to increase outreach and enrollment in order to improve "access to, and delivery of, health care for Indians under Titles XIX and XXI." This request is consistent with the Congressional intent.

2. Reactivate the request to implement SB-878

SB-878 was passed in the 2003 Biennium legislative session and provides authority for an AI/AN people who are eligible for or receiving medical assistance described in ORS 414.025 (OHP Standard) to receive the same benefit package of health services described in ORS 414.835 (OHP Plus) if DMAP receives 100% FMAP for payments made to IHS or Tribal programs. A request to implement SB-878 was submitted to CMS in 2005, however communications with CMS staff indicated that the request would likely be denied on the basis that the request would be inconsistent with the strict scrutiny test applicable to race, color, or national origin classifications under Title VI of the Civil Rights Act of 1964 (Title VI).

It is Oregon Tribe's position, that this request does not violate Title VI of the Civil Rights Act. In fact under the Supreme Court's seminal decision in Morton v. Mancari, federal legislation which provides preferences to Indians is not subject to strict scrutiny, and will be upheld when rationally related to the Federal government's unique trust obligations to Indians. Because this request furthers the Federal government's unique trust responsibility to provide health care to Indians, it is not subject to strict scrutiny under Mancari and does not violate Title VI. In this regard, it is no different than the hundreds of other Federal Indian preference programs currently on the books. The current request would enhance access to health care for many needy AI/AN people in the State of Oregon, and is critical to ensure that these people receive health care. For these reasons, we respectfully request that the State re-initiate this request to CMS in the upcoming submission to implement changes in the OHP Standard plan.

In closing, I want to underscore a very important provision that Congress included in the American Recovery and Reinvestment Act of 2009. Congress included a provision that requires states to consult

with Tribes in the development of any Medicaid program changes that will have a direct effect on Indian people. The provision requires states *"shall include solicitation of advice prior to submission of any plan amendments, waiver requests, and proposals for demonstration projects likely to have a direct effect on Indians, Indian Health Programs, or Urban Indian Organizations."*[1] In light of this very important provision, we urge Oregon to include our recommendations in its submission to CMS.

On behalf of our Oregon Tribes, we thank you for the opportunity to provide comments on the State's proposed changes for the OHP Standard Program.

Thank you for your attention to this very important matter!

Sincerely,

Joe Finkbonner, RPH, MHA
Executive Director

cc: Janna Starr, DMAP
Richard Acevedo, DHS Tribal Relations Liaison
Doni Wilder, IHS Portland Area Office

[1] Sec. 5006(e)(2)(A). Solicitation of Advice Under Medicaid and CHIP.