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Antigone Dempsey
Associate Administrator
Health Resources and Services Administration
5600 Fishers Lane
Rockville, MD 20857

Dear Associate Administrator Dempsey,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF) we submit these comments in response to the request for input from the Health Resources and Services Administration (HRSA) on the agency's Tribal consultation policy and the scoring system for HRSA Health Provider Shortage Area (HPSA) designations. Tribal Nations continue to struggle with access to resources, including those under HRSA, and workforce shortages that hinder our ability to provide healthcare services to our communities. Changes to the HPSA scoring system could mitigate some of these challenges. Equally as important is the role of the HRSA Tribal consultation policy. The Tribal consultation policy plays a critical role in all interactions between HRSA and Tribal Nations and its language has equal potential to help or harm Tribal Nations in our efforts to engage meaningfully and advocate for our priorities with HRSA. USET SPF appreciates this opportunity to provide HRSA with comments, and we hope that our recommendations will both strengthen the HRSA Tribal consultation policy and address concerns and challenges with the current system for HPSA scoring.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico[1]. USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

[1] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Aroostook Band of Micmac Indians (ME), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

Introduction

While the topics HRSA has requested Tribal consultation on during this comment period are quite different, they both concern the trust and treaty obligations and responsibilities that the United States owes Tribal Nations. Tribal Nations ceded vast land holdings and natural resources, oftentimes by force, to the United States out of which grew an obligation to provide benefits and services to Tribal Nations – promises that exist in perpetuity. An essential part of the trust responsibility is providing for the health and well-being of Tribal Nations. However, at no point during our centuries-long relationship has the United States honored these promises, resulting in some of the greatest health disparities among all populations in this country.

Tribal consultation is a vital part of the federal trust and treaty obligations, but consultation policies and processes often do not hold agencies accountable for obtaining consent from and implementing the guidance of Tribal Nations, leading to failures in the delivery of trust and treaty obligations. The scoring methodology for HPSAs is a potential example of this problem. HPSA scoring has the potential to greatly impact Tribal Nations' ability to secure providers and resources – access to which we should be automatically provided in fulfillment of the federal trust and treaty obligations. Tribal Nations continue to express our concerns with respect to HPSA scoring through Tribal consultation, and HRSA has the obligation – both as a component of the federal trust obligation and in accordance with Executive Order 14112 – to take that guidance and revise its policies to avoid negative impacts to the Indian Health System and ensure our access to critical resources.

Recommendations for HRSA's Tribal Consultation Policy

Last updated in 2014, the HRSA Tribal consultation policy contains several encouraging provisions that USET SPF supports. However, it seems as though many of the provisions are not being practiced or enforced by HRSA, which severely limits the utility of this policy. Further, there are issues with some of the language HRSA has employed to define Tribal consultation and its goals that USET SPF believes should be strengthened. In the letter requesting Tribal consultation on these topics, HRSA indicated that it is updating its Tribal consultation policy to ensure alignment with the Department of Health and Human Services' (HHS) revised Tribal consultation policy and the Executive Order on Uniform Standards for Tribal Consultation. It is with this in mind that USET SPF offers our recommendations for strengthening the policy, and we encourage HRSA to review the comments we submitted to HHS on its draft Tribal consultation policy.

First, HRSA must meaningfully acknowledge its role in fulfilling the U.S.'s trust and treaty responsibilities and obligations. As an arm of the federal government, HRSA has a responsibility to uphold federal trust obligations to ensure the provision of healthcare to Tribal Nations and Native people. As stated in the President's Memorandum on Uniform Standards for Tribal Consultation, "consultation recognizes Tribal sovereignty and the Nation-to-Nation relationship between the United States and Tribal Nations and acknowledges that the United States maintains certain treaty and trust responsibilities to Tribal Nations." As the President's memorandum is intended as a "baseline standard" for agency consultation policies, HRSA must acknowledge its trust and treaty obligations in the same manner.

Relatedly, HRSA must also better acknowledge the inherent sovereignty of Tribal Nations and should imbue respect for Tribal sovereignty throughout the consultation policy by evolving consultation to consent. To that end, HRSA should revise the definition of consultation in the policy to clarify that Tribal consultation is a formal government-to-government exercise with the goal of reaching mutually-agreed upon results, not

just “meaningful communication.” HRSA should additionally draw inspiration from the HHS policy, which states that “on issues relating to Tribal self-governance, Tribal self-determination, Tribal trust resources, or Tribal treaty and other rights, HHS shall make all practicable attempts, where appropriate to, use consensual mechanisms for developing regulations, including negotiated rulemaking.”

As we commented to HHS, USET SPF supports consensual mechanisms within Tribal consultation, but it is beyond time for a Tribal Nation-defined model of consultation, with dual consent as the basis for strong and respectful diplomatic relations between equal sovereign nations. USET SPF contends that Tribal consultation is simply a first preparatory step towards formal negotiations between Tribal Nations and U.S. government entities that result in mutually-agreed upon results. This is supported by the US-endorsed United Nations Declaration on the Rights of Indigenous Peoples, which states that nations “shall consult and operate in good faith” with Tribal Nations “in order to obtain [our] free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect [us].” We urge HRSA to incorporate stronger language that recognizes Tribal consultation as a diplomatic activity and defines a transparent model for achieving consensus that includes accountability measures. Further Tribal consultation is necessary on the development of consensus and consent-seeking mechanisms in this policy.

USET SPF also urges HRSA to incorporate language from Executive Order 13175 and Executive Order 14112, which direct federal agencies to design, revise and implement programs and services that provide maximum administrative discretion to Tribal Nations. This means encouraging Tribal Nations to develop our own policies and standards for achieving objectives, as well as consultation on the necessity of any federal standards. Specifically, Section 3 of Executive Order 13175 directs agencies to extend “maximum administrative discretion” to Tribal Nations, and HRSA should consider how this section, with the addition of relevant language from Executive Order 14112, can be better operationalized and consistently applied throughout the federal government. In addition, the Indian Canons of Construction should always be applied during Tribal consultation, the policymaking process, and beyond. That is, any ambiguities in law or policy should be interpreted in favor of Tribal Nations. The Department of Veterans Affairs (VA) recently incorporated the Indian Canons of Construction into its Tribal consultation policy, and USET SPF submitted comments applauding this language as a model for other federal Tribal consultation policies.

Further, HRSA must operationalize deference to Tribal Nations and respect for Tribal sovereignty by not delegating its trust and treaty obligations. For example, the current policy states that HRSA will explore options to directly fund Tribal Nations when there is no statutory or regulatory requirement that the resources flow through a state, and “explore the permissibility” of encouraging or requiring Tribal consultation as a condition of the state’s receipt of funds. USET SPF reminds HHS that the trust obligation rests only with the federal government, and this responsibility may not be delegated to the states. This section of the policy must be strengthened to include workable methods of state oversight to ensure that Tribal Nations are fairly and adequately incorporated into HRSA-funded state programs. It is not enough to notify the states of funding the agency believes “should be allocated to Indian Tribes” – there must be language incorporated into the policy to compel states to disburse funding for which Tribal Nations are intended or eligible recipients and to hold them accountable when they do not. Beyond this, HRSA must act upon its own commitment to finding ways to directly fund Tribal Nations by expanding the programs and authorities that can be administered through ISDEAA self-governance contracting and compacting. In addition, for programs jointly or statutorily-mandated to be run by states, HRSA must exercise its oversight authority to hold states accountable for engaging in meaningful Tribal consultation. HRSA, as an arm of the

federal government, must do more to educate states on expectations related to Tribal consultation and work with Tribal Nations to ensure those expectations honor our guidance.

Lastly, HRSA must enforce certain provisions that already exist in the policy regarding transparency and accountability. All too often following Tribal consultation, the federal government renders a decision without further explanation as to how that decision was reached. This is particularly true in the case of "check-the-box" consultation, where Tribal Nations provide input and that guidance is ignored completely. Not only does this run counter to the federal government's consultation obligations, it undermines our Nation-to-Nation relationship. USET SPF has consistently advocated for requirements that compel federal agencies to publish summaries of comments received, how they influenced the agency's decision, and why the decision was reached. Included within the current policy are several requirements that HRSA report on consultation outcomes within 45 to 90 days, and the policy goes so far as to explicitly outline minimum reporting requirements such as a list of follow-up items and a discussion of "HRSA and Tribal satisfaction with the consultation process." While USET SPF strongly supports the inclusion of these provisions, we remind HRSA that such requirements are rendered useless when unenforced. We urge HRSA to properly implement and enforce this and other provisions within the policy that require oversight and federal/state accountability to Tribal Nations.

Tribal Nations Require Maximum HPSA Scores

Under the HPSA scoring methodology, Tribal HPSAs should always automatically receive the highest possible score. This is due to both the unique characteristics and challenges of IHS and Tribally-operated health programs, and the inapplicability of the HPSA scoring methodology to Tribal Nations and our communities. The National Health Service Corps (NHSC) created the HPSA designation to help "distribute [NHSC] participants to where they're needed most" and other federal programs use the designation to direct resource distribution. However, Tribal Nations are not benefiting from the designation – largely due to the scoring system – at the level we should be, as IHS and Tribal facilities continue to face substantial workforce shortages and persistent lack of resources.

While IHS and Tribal facilities are automatically designated as HPSAs, the scoring is crucial to ensure access to quality providers and resources. The difference of just a point or two can result in a facility losing out on a critical provider, and provider shortages are one of the greatest barriers to the delivery of healthcare services through the Indian Health System. Challenges like geography, housing, and funding shortfalls all contribute to significant recruitment and retention issues for Tribal and IHS facilities. HRSA must ensure that Tribal Nations have access to all available resources for recruiting providers, and this necessarily includes an automatic score of 25 (or 26 for dental) for all IHS and Tribal facilities. USET SPF reminds HRSA that, as an arm of the federal government, it is responsible for fulfilling the federal trust and treaty obligations to provide for the health and well-being of Tribal Nations and our communities. Ensuring access to providers and resources through the provision of a maximum HPSA score is a necessary component of the trust obligation.

Additionally, the methodology HRSA employs for scoring HPSAs is largely inappropriate for Tribal and IHS facilities. HRSA relies on data from states, the Census, the American Community Survey, and other agencies like the Centers for Disease Control and Prevention (CDC) to score facilities, but there are numerous documented challenges with those data sets in Indian Country. Within the census and healthcare data at agencies like the CDC in particular, there are consistent issues with racial

misclassification and data quality that result in undercounting or misattribution of populations. HRSA itself said in a listening session that "good data" will ensure the most accurate score, but when inaccurate or insufficient data is used to calculate a score that determines access to resources, Tribal Nations are frequently disadvantaged. HPSA scoring also relies on data points like the distance to the nearest source of care outside the HPSA designation area – a factor that is also inappropriate for this purpose. Some Tribal Nations, particularly ones in the USET SPF region, may be "too close" to an urban area to receive an appropriate score for travel time for example, but travel time to a provider outside an IHS or Tribal service area is useless if the provider is outside the Indian Health System.

Further, relying on data from states and requiring Tribal Nations to work with state primary care offices – as they are the point of contact for all Auto-HPSAs in a given state – is inappropriate. Beyond the same issues explained previously existing in state datasets, Tribal Nations are sovereign governments with a Nation-to-Nation relationship with the United States government, not the states. As we stated earlier regarding delegation of the trust responsibility, Tribal Nations should never have to rely on or seek recourse through a state government for an issue with the federal government.

Changing the HPSA scoring methodology is also consistent with the principles laid out in Executive Order 14112. The Executive Order directs federal agencies to revise and design programs and services to increase the accessibility, equity and utility of federal programs for Tribal Nations. It specifically instructs federal entities to take into account the "unique needs" or "significant barriers" faced by Tribal Nations by providing "reasonable and appropriate exceptions or accommodations where necessary." USET SPF believes that automatically granted a maximum HPSA score for Tribal and IHS facilities, given our unique challenges and circumstances, fits squarely into this directive.

HRSA has the ability to mitigate all the challenges associated with HPSA scoring by simply scoring IHS and Tribal facilities at the highest possible level. Tribal Nations and our communities continue to experience the greatest health disparities among all populations in the U.S., including the highest rates of suicide and premature death. Many of these disparities are the result of a lack of primary care and mental health services and they affect Tribal Nations of varying geography, size, and population. Given the well-documented lack of resources and health disparities in our communities that continue to persist despite auto-designation as HPSAs, it is clear that the HPSA scoring system for Tribal and IHS facilities must be revised. USET SPF urges HRSA to automatically score Tribal and IHS facilities to the maximum level in accordance with Executive Order 14112 and in fulfillment of its trust and treaty obligations to Tribal Nations.

Conclusion

USET SPF welcomes this opportunity to consult on HRSA Tribal consultation policy and the HPSA scoring methodology. For far too long, the United States has consistently failed to fully uphold its obligations to consult with Tribal Nations, resulting in irreparable damage to Tribal Nation governance, interests, and public health. It has even resulted in initiatives like HPSA scoring, which were ostensibly created to mitigate some of the challenges associated with being a Health Professional Shortage Area, continuing to perpetuate disparities because the scoring methodology was not created to fit the Indian Health System. Proper consultation that is grounded in respect for our Government-to-Government relationship should never result in the perpetuation of policies that do not benefit Tribal Nations. USET SPF strongly encourages HRSA to accept these comments and work with the Administration and other federal partners to more fully and meaningfully honor Tribal sovereignty and its obligations to Tribal Nations. If properly

implemented, the updated Tribal consultation policy will result in a more diplomatic and just Nation-to-Nation relationship, and an updated HRSA scoring methodology will result in more resources flowing to the Indian Health System. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at Lmalerba@usetinc.org or 615-838-5905.

Sincerely,

Kirk Francis

Kitcki A. Carroll