



STATE OF MICHIGAN

DEPARTMENT OF HEALTH AND HUMAN SERVICES
LANSING

GRETCHEN WHITMER
GOVERNOR

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TRIBAL CONSULTATION POLICY

PURPOSE

The Michigan Department of Health and Human Services (Department) and the federally recognized sovereign Indian tribes of Michigan (Tribes) share the goal of establishing clear policies to further the government-to-government relationship between the State of Michigan (State), the Department, and the Tribes. True and effective consultation shall include and result in the timely and effective exchange of information, mutual understanding, and informed decision making between the Tribes and Department.

To the extent practicable and permitted by law, it is essential that the Tribes and Department engage in open, continuous, and meaningful consultation. This consultation policy applies to all divisions of the Department (Divisions) and shall serve as guidance for the Tribes and Divisions to effectuate consultation through communication, collaboration, and resolution of issues.

BACKGROUND

On October 31, 2019 Governor Whitmer issued Executive Directive No. 2019-17 (Directive). As noted in the Directive, on October 28, 2002, the State entered into a Government-to-Government Accord (Accord) with several Tribes. Through the Accord, the State and the Tribes acknowledged each government's sovereignty and committed to consultation.

The Directive seeks to reaffirm, implement, formalize, and extend the Accord in at least three ways. First, the Directive seeks to ensure that State departments, the including the Department, is aware of and follows certain fundamental principles of government-to-government relations. Second, the Directive provides the process for consultation to ensure "meaningful and mutually beneficial communication and collaboration" on "all matters of shared concern." Third, the Directive builds into the State's operations the infrastructure necessary to ensure compliance with the Directive and Accord.

The Directive requires that the Department's policies and practices reflect all of the following principles:

1. The Tribes are sovereign governments.
2. The Tribes have jurisdiction over their lands and citizens.

3. The Tribes possess the right to self-governance and self-determination.
4. The United States government has a unique trust relationship with the Tribes.
5. The State and the Department have a unique government-to-government relationship with the Tribes.

This special relationship is affirmed in statutes including, but not limited to:

- Older Americans Act
- Indian Health Care Improvement Act
- Children's Health Insurance Program Reauthorization Act of 2009
- American Recovery and Reinvestment Act of 2009
- Patient Protection and Affordable Care Act of 2010
- Indian Child Welfare Act
- Michigan Indian Family Protection Act
- Indian Child Protection and Family Violence Prevention Act

OBJECTIVES:

1. Formalize the Department's policy to seek consultation and the participation of the Tribes in the development of policies and program activities that impact Tribes.
2. Establish requirements regarding the Department's engagement of and consultation with the Tribes for policy development and program activities that impact the Tribes.
3. Establish a minimum set of requirements and expectations of Department staff with respect to consultation and participation in consultation.
4. Create and formalize a process for the Department to communicate and consult with Tribes when new issues arise.
5. Establish communication channels with the Tribes and Indian organizations to increase knowledge and understanding of Department programs.
6. Enhance tribal-State partnerships that will include technical assistance and tribal access to Department program benefits for tribal citizens.
7. Coordinate efforts with other State of Michigan departments on issues of mutual concern.

CONSULTATION POLICY

The Department's Tribal Liaison (Tribal Liaison) will coordinate the Department's interactions with the governments of the federally recognized Indian Tribes within Michigan. All incoming requests for consultation must be forwarded to the Tribal Liaison. The Tribal Liaison will consult with his or her superiors to determine the need to proceed with a formal consultation process, erring on the side of consultation. The Tribal Liaison will promptly disseminate all communications related to tribal consultation to appropriate Department staff or Tribes.

Before the Department takes an action or implements a decision that may affect one or more of the Tribes, the Department, to the extent practicable and permitted by law, will consult with the Tribes. Activities that may require consultation include, but are not limited to, the following:

1. Rules or regulations.
2. Policy and guidance documents or directives.
3. Compliance monitoring.
4. Emergency preparedness and response.
5. Infectious disease response.
6. Federal authorizations or delegations.
7. Efforts to carry out obligations under a State compact or agreement.

Activities require consultation when they have:

1. Implications concerning one or more of the Tribes.
2. An effect on the relationship between the Department and one or more of the Tribes.
3. An effect on the distribution of power or responsibilities between the Department and one or more of the Tribes.

As used above, activities have “implications concerning one of more the Tribes” when they contain an express reference to Indians, Indian tribes, bands or groups, or Indian organizations, or an effect on their collective or individual treaty or other rights or benefits secured under Michigan or federal law by virtue of their status as a member or citizen of a federally recognized tribe or federally recognized tribal government.

Each of the Department’s Divisions must implement this consultation policy and engage in meaningful communication and collaboration with the Tribes on matters of shared concern. Each of the Divisions will engage in regular meetings and/or conference calls with the Tribes to discuss matters that may require consultation. Consultation with the Tribes on Medicaid policy changes will continue through the current Medicaid promulgation process.

This policy establishes the following minimum consultation requirements each of the Divisions must implement:

1. Step One – Identification. When an activity or decision has been identified as potentially needing consultation, the Department will determine whether consultation is appropriate. Identification includes a determination of the complexity of the activity, the identity of the tribe(s) potentially affected by the activity, the activity’s potential implications for the tribe(s), and any time or resource constraints relevant to the application of the consultation process to the activity. The Department should err on the

side of consultation. Determination of matters to be addressed through consultation shall be identified through the following:

- a. Department-Initiated identification – The Department may determine that an action or decision may affect a tribe’s interests such that consultation is appropriate.
 - b. Tribe-Initiated Identification – A tribe may request consultation on an activity that may impact one or more of the Tribes. If anyone in the department is contacted by a Tribe for consultation, the person shall notify the Tribal Liaison to review and determine if it is appropriate to initiate the consultation process. The Department will evaluate the need for consultation, affording substantial weight to the tribe’s request.
 - c. Other Resources – An activity that may be appropriate for consultation may be identified through interaction with outside organizations, including, but not limited to, the Midwest Alliance of Sovereign Tribes, The United Tribes of Michigan, the Michigan Tribal Health Directors Association, or Tribal/State Partnership meetings.
2. Step Two – Notification. If a Tribal request for consultation has been received that the Department determines does not warrant formal consultation, then a notice shall be promptly sent to the affected tribes providing an explanation. As soon as the Department identifies an activity that may be appropriate for consultation, it shall promptly notify all Tribes potentially affected. The notice must be sufficiently detailed to describe the proposed action. The notice may be conveyed by U.S. mail, email, telephone, and/or other agreed-upon means.
3. Step Three – Input. The Department must receive and consider input from the affected Tribes and must coordinate with the Tribe(s) to ensure that those participating in consultation:
- a. Receive all necessary information;
 - b. Have an opportunity to provide and discuss with the Department any additional input regarding the proposed new activity or changed circumstances.

The Tribal Liaison or their designee will work with interested Tribes in planning the time(s), location(s) and method of consultation. Tribes may contact the Tribal Liaison to request that an official with decision-making authority participate in a consultation.

4. Step Four – Follow-up. The Department must follow up with the Tribes involved in the consultation. The Department must explain how the Tribes’ input was considered and/or implemented in a final decision or action. This feedback must be in writing from

a senior Department official involved in the consultation to the most senior tribal official, as determined by the Tribe, involved in the consultation. Where practicable, the Department shall provide preliminary written feedback to the Tribes prior to issuing its final decision.

The Department will disseminate the final consultation policy widely within the Department and provide training to management and other staff that have contact with or perform actions that may have an effect on the Tribes or tribal citizens in their daily work.

PROTOCOL

1. Identification of Need. Upon identification that an activity has potential implications for one or more of the Tribes, the Department will initiate consultation. If other State departments may be impacted, the Department Tribal Liaison will contact the Tribal Liaison for the other department(s) to determine if they should coordinate consultation efforts.

When consultation is determined to be appropriate, the following steps shall be taken:

- Identify the applicable program, policy, rule, regulation, and/or statute.
 - Identify how the activity impacts one or more of the Tribes, if known.
 - Identify affected/potentially affected Tribes.
 - The Department will respond to requests for consultation in a timely manner consistent with Department policy or as set forth by the Michigan Medicaid State Plan approved by the Center for Medicare and Medicaid Services (CMS); Title XX Social Security Act; ICWA (25 U.S.C. 1901 et seq.); and MIFPA (MCL 712B. 1 – 41).
2. Determine Consultation Mechanism: When the Department determines that consultation is required, the Department will evaluate the nature of the activity in collaboration with the Tribe(s) to determine the appropriate mechanism for consultation. Such evaluation should include, but is not limited to, a review of the complexity, implications and time constraints at issue that may impact policy, funding and/or budget development; programs; services; functions; or activities. Consultation mechanisms include, but are not limited to, one or more of the following:
 - Mailings
 - Teleconferences
 - Face-to-Face meetings between the Department and the Tribes
 - Round Tables
 - Webinars
 - Michigan Tribal Health Directors Association Meetings

- Michigan Tribal/State Partnership meetings
 - Other regular or special program-level consultation sessions.
3. Official Notification: The Department must provide written notice to the potentially affected Tribes of the activity in need of consultation and proposed consultation-mechanism using all appropriate methods and provide clear details of the manner and timeframe in which Tribes may voice concerns or potential impacts, propose actions or activities, or provide other comments. Notice will be sent to the Tribal Leader and their identified designee(s) which may vary depending on subject matter.
 4. Notification timelines: The Department must provide as much advance notice as practicable or required by Department policy. The Tribal Liaison or their designee will respond to consultation requests in a timely manner.
 5. Receipt of Tribal Comment(s): The Department shall use all appropriate methods, including in person, teleconference, or in writing, to communicate clear and explicit instructions on the methods and timeframes for the Tribes to submit comments on the activity in need of consultation.
 6. Meetings: When necessary, the Department shall convene a meeting in a State-wide, regional, local, or otherwise appropriate forum, to the extent practicable and permitted by law, by teleconference, webinar, or face-to-face contact with all potentially affected Tribes to discuss all activities identified as needing consultation.
 7. Feedback: To the extent practicable and allowed by law, the Department will respond to concerns raised by the tribes before taking an action or implementing a decision that was a subject of consultation.
 8. Reporting of Outcome: The Department shall report to the Tribes the outcome of the consultation within 90 calendar days of final consultation. If the Department is awaiting guidance from a federal regulatory agency in order to proceed and has not received the guidance before the 90 day deadline, the Department will notify the Tribes of the delay and request an amended date for reporting of final consultation outcome. Once the consultation process is complete and a proposed policy is approved and issued, the final policy must be disseminated to the Tribes and any necessary tribal organization.

APPLICABLE LAW

1. July 17, 2001 State Medicaid Director Letter #01-024: The July 2001 state Medicaid director letter describes the tribal consultation process that states must employ prior to submitting any Section 1915 and 1115 Waiver request. States are required to consult

with all federally recognized tribal governments maintaining a primary office and/or major population in the state at least 60 days before the state intends to submit a Medicaid waiver request or waiver renewal to CMS, or to follow the consultation state plan if the state plan addresses government-to-government consultation with tribes.

The notification required by the July 2001 State Medicaid Director letter must describe the purpose of the waiver or renewal and its anticipated impact on tribal citizens. In order for tribal governments to understand the impact on its tribal citizens, the notification should include actual language from the demonstration waiver or renewal that has tribal implications and should not be in summary or outline form.

2. The 2002 Michigan State/Tribal Accord may be viewed at:
https://www.michigan.gov/documents/som/2002_Tribal-State_Accord_195712_7.pdf
3. Executive Directive 2019-17 may be viewed at:
https://www.michigan.gov/whitmer/0,9309,7-387-90499_90704-520036--,00.html
4. Section 5006(3) of the American Recovery and Reinvestment Act: (ARRA) requires any state with one or more Indian health providers to obtain advice and input on a regular and ongoing basis prior to submission of any Medicaid or CHIP Medicaid State Plan Amendments (SPAs), waiver requests or proposal for a demonstration project that is likely to have a direct effect on Indians and Indian health providers. States are required to submit a Medicaid SPA in order to document its process for such consultation.

For more information, see Michigan's Medicaid State Plan Section 1.4 b on Tribal Consultation: <http://www.mdch.state.mi.us/dch-medicaid/manuals/MichiganStatePlan/MichiganStatePlan.pdf>

5. The Indian Child Welfare Act, 25 U.S.C. 1901 *et seq.* may be viewed at:
<https://uscode.house.gov/view.xhtml?path=/prelim@title25/chapter21&edition=prelim>
6. Title XX Social Security Act may be viewed at:
https://www.ssa.gov/OP_Home/ssact/title20/2000.htm.
7. The Michigan Indian Family Preservation Act, MCL 712B.1 – 41 may be viewed at:
[http://www.legislature.mi.gov/\(S\(ehbnbe2mwfgyey10cxrfg1\)\)/mileg.aspx?page=getObject&objectName=mcl-288-1939-XIIB](http://www.legislature.mi.gov/(S(ehbnbe2mwfgyey10cxrfg1))/mileg.aspx?page=getObject&objectName=mcl-288-1939-XIIB).

MEETING RECORDS AND ADDITIONAL REPORTING

The Department is responsible for making and keeping records of its tribal consultation activity. All such records shall be made readily available to the Tribes on request.

An annual Consultation Report shall be made by the Tribal Liaison to the Governor's office and will be provided to the Tribes on request.

CONFLICT RESOLUTION

The intent of this policy is to promote a partnership between the Department and the Tribes that enhances the Department's ability to address issues and resolve problems. Nothing in this policy shall be construed to preclude the Tribes from raising issues to responsible officials outside of the consultation process. Nothing in this policy creates a right of action against the State or the Department for failure to comply with this policy.

TRIBAL SOVEREIGNTY

This policy does not waive any tribal governmental rights or authority, including treaty rights, sovereign immunities, or jurisdiction. Additionally, this policy does not diminish any rights or protections afforded to American Indians or Alaska Natives or tribal entities under federal or state law.

Each tribe is a sovereign government with an inherent right to self-governance and self-determination. Each has its own governing structure, culture, traditions, laws, regulations, and policies, which it uses to exercise jurisdiction over land and people. And each has a special trust relationship with the federal government. These principles are rooted in and affirmed by the Constitution, treaties, statutes, and court opinions of the United States, and they fundamentally define the unique legal relationship between these tribes and the State of Michigan.

DEFINITIONS

Activity – Action or decision that may significantly affect tribal interests.

Communication – The exchange of ideas, messages, or information, by speech, signals, writing or other means.

Consultation – An enhanced form of communication which emphasizes trust, respect, and shared responsibility. It is an open and free exchange of information and opinion among parties which leads to mutual understanding and comprehension. Consultation is integral to a deliberative process, which results in effective collaboration and informed decision making with the goal of reaching consensus on issues.

Coordination and Collaboration – Working and communicating together in a meaningful government-to-government effort to create a positive outcome.

Federally Recognized Tribal Government – Indian tribes with whom the federal government maintains an official government-to-government relationship, usually established by a federal

treaty, statute, executive order, court order, or a Federal Administrative Action. The Bureau of Indian Affairs maintains and regularly publishes the list of federally recognized Indian tribes.

Indian Health Provider – Indian Health Services (IHS) tribal health programs, and urban Indian organizations.

Indian Organizations – Those federally recognized tribally constituted entities that have been designated by their governing body to facilitate Department communications and consultation activities. Any statewide or regional organizations whose board is comprised of federally recognized tribes and elected/appointed tribal leaders. The Department does not participate in government-to-government consultation with these entities; rather, these organizations represent the interests of tribes when authorized by those tribes.

Indian Tribe – An Indian Tribe, band nation, village, or community the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the federally recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

Sovereignty – The ultimate source of political power from which all specific political powers are derived.

To the Extent Practicable and Permitted by Law – Refers to situations when the opportunity for consultation is limited because of constraints of time, budget, legal authority, etc.

Treaty – A legally binding and written agreement that affirms the government-to-government relationship between two or more nations.

Tribal Resolution – A formal expression of the opinion or the will of an official tribal governing body which is adopted by vote of the tribal governing body.

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Urban Indian Organization – A program funded under title V of the Indian Health Care Improvement Act.