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MAY 14 2018

Ms. MaryAnne Lindeblad  
Director  
State of Washington, Health Care Authority  
626 8th Avenue PO Box 45502  
Olympia, WA 98504-5050

Dear Ms. Lindeblad:

We have reviewed the Washington State Plan Amendment (SPA) 17-0027, received by the Centers for Medicare & Medicaid Services (CMS) on August 22, 2017. The purpose of this amendment is to propose the coverage and reimbursement of services provided by Dental Health Aide Therapists (DHATs) under the Other Licensed Practitioner (OLP) benefit at 42 C.F.R. § 440.60. CMS issued a Request for Additional Information (RAI) to Washington on November 16, 2017. The state submitted a response to the RAI to CMS on February 14, 2018.

The proposed effective date for Washington SPA 17-0027 is July 23, 2017. While CMS strongly supports DHATs and improving dental services for tribes, for the reasons set forth below, CMS is unable to approve Washington SPA 17-0027 because it does not comply with the requirements of sections 1902(a)(23) and 1902(a)(10)(A) of the Social Security Act (the Act). CMS is willing to work with the state in the future to overcome the issues that resulted in disapproval of this SPA, in an effort to reach a solution that meets Medicaid program requirements.

#### Free Choice of Provider

Washington relies on Senate Bill 5079 (codified in state law at RCW 70.350.020) for the coverage of DHATs. CMS requested additional information from Washington through a series of calls ultimately culminating in a formal RAI. As a result of CMS' questions, the state confirmed in the RAI response that under state law, DHAT services are available only in a practice setting within the boundaries of a tribal reservation and only when operated by an Indian health program, and are only available to members of a federally recognized tribe or those otherwise eligible for services under Indian Health Service criteria. Washington would therefore not permit Medicaid beneficiaries to receive Medicaid coverage for DHAT services if they are not members of a federally recognized tribe or otherwise eligible for services under Indian Health Service criteria.

Under section 1902(a)(23) of the Act, a Medicaid state plan must provide that Medicaid beneficiaries may obtain covered services "from any institution, agency, community pharmacy, or person, qualified to perform the service or services required . . . who undertakes to provide . . . such services[.]" This provision is often referred to as the "any willing provider" or "free choice of provider" provision. Implementing regulations at 42 C.F.R. § 431.51(b)(1) require the state plan to provide that Medicaid beneficiaries may obtain covered services from any willing and qualified provider. As a result, under the state plan, states are not authorized to limit beneficiaries' free choice of willing and qualified providers, which means that states must ensure

that all willing and qualified providers are able to furnish state plan services to beneficiaries who opt to receive those services from them.

On its face, proposed Washington SPA 17-0027 is inconsistent with section 1902(a)(23) because it would restrict DHAT access to a limited group of beneficiaries, and it would also prevent beneficiaries from receiving DHAT services from similarly qualified dental services providers that provide services outside the boundaries of a tribal reservation or that are not Indian health programs. We find Washington's arguments in its response to the RAI that SPA 17-0027 is nonetheless consistent with section 1902(a)(23) to be unpersuasive, and to be inconsistent with binding, federal legal precedent from the U.S. Court of Appeals for the Ninth Circuit interpreting the plain language of section 1902(a)(23).

#### Other Licensed Practitioner Benefit

Section 1902(a)(10)(A) of the Act requires state plans to make "medical assistance" available to eligible beneficiaries. "Medical assistance" is defined in section 1905(a) of the Act to mean payment of part or all of the cost of certain listed types of care and services, including services pursuant to the other licensed practitioners (OLP) benefit. The OLP benefit, authorized at section 1905(a)(6) of the Act and defined at 42 C.F.R. § 440.60, requires that OLP services include medical care or any other type of remedial care, other than physicians' services, provided by licensed practitioners within the scope of practice as defined under state law. Under CMS's interpretation of section 1905(a)(6) and 42 C.F.R. § 440.60, care and services provided by unlicensed providers may be covered under the OLP benefit if they are provided under the supervision of a licensed practitioner within the licensed practitioner's scope of practice as defined under state law. That is, if state law defines a licensed practitioner's scope of practice to include the supervision of unlicensed practitioners, and if a licensed practitioner is following state law requirements related to supervision of unlicensed practitioners, then services provided by the unlicensed practitioners under supervision of the licensed practitioner can be covered under the OLP benefit.

On September 11, 2017, Washington submitted revised SPA pages to CMS indicating that DHATs work under the supervision of a licensed dentist and included a reference to state law RCW 70.350.020(1)(b)(iii), which provides that DHAT services are performed pursuant to any applicable written standing orders by a supervising dentist. In a subsequent SPA revision on October 5, 2017, after consultation with the tribes, Washington removed the dentist supervision requirement for DHATs. The last state plan page revisions were provided on October 12, 2017, because the state's response to the RAI did not include revised SPA pages. In the October 12, 2017 state plan page revisions, Washington proposes to cover "dental health aide therapists under the supervision required and within the scope of practice authorized under federal, state, or tribal law. The supervisor assumes professional responsibility for the services provided by the therapists and the supervisor bills for services furnished by the therapists." Finally, on October 25, 2017, during a technical assistance call with CMS, Washington asserted that DHATs do not require supervision to furnish services because DHAT certification is equivalent to licensure in the state. In the state's response to the RAI, Washington indicated that, "State law recognizes DHATs as licensed practitioners" but did not provide any documentation to support this assertion. Rather, Washington cited its state law provision that requires DHATs to be certified by a federal Community Health Aide Program (CHAP) Certification Board or by a federally

recognized Indian tribe that has adopted certification standards that meet or exceed the requirements of a federal CHAP Certification Board. RCW 70.350.020(1)(a).

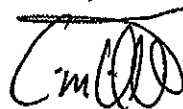
As a result of the differing SPA revisions and the technical assistance call, it is unclear whether DHATs must be supervised by a licensed professional. The SPA does not clearly provide that DHATs work under the supervision of a licensed practitioner, as would be required for coverage under the OLP benefit. Furthermore, because the supervision requirements are unclear, CMS could not assess whether these providers could fall within the dental services benefit as defined in Section 1905(a)(10) of the Act and in regulations at 42 C.F.R. § 440.100. The dental benefit regulation at 42 C.F.R. § 440.100 requires that services be “provided by or under the supervision of a dentist in the practice of his profession.” CMS is not able to confirm that DHAT services would be covered under Washington SPA 17-0027 in a manner that is consistent with the requirements of the OLP benefit, and thus CMS is unable to determine that DHAT services are “medical assistance,” consistent with sections 1902(a)(10)(A) and 1905 of the Act.

### Conclusion

Based on the above, and after consultation with the Secretary, as required by federal regulations at 42 C.F.R. § 430.15(c), I am unable to approve Washington SPA 17-0027. If you are dissatisfied with this determination, you may petition for reconsideration within 60 days after receipt of this letter in accordance with the procedures set forth at 42 C.F.R. § 430.18. Your request for reconsideration should be sent to Ms. Maritza Bodon, Centers for Medicare & Medicaid Services, Center for Medicaid and CHIP Services, 7500 Security Boulevard, Mail Stop S2-26-12, Baltimore, MD 21244-1850.

If you are interested in technical assistance regarding Medicaid coverage for dental mid-level practitioners (including DHATs), or otherwise wish to discuss this determination further, please contact Mr. David Meacham, Associate Regional Administrator, at 206-615-2326.

Sincerely,

A handwritten signature in black ink, appearing to read 'Timothy B. Hill', with a horizontal line above it.

Timothy B. Hill  
Acting Director

cc:

Regional Administrator, Seattle RO  
Associate Regional Administrator, Seattle RO