Northwest Portland Area Indian Health Board

*Indian Leadership for Indian Health*

**Memorandum**

June 7, 2018

TO: Member Tribes

FROM: Northwest Portland Area Indian Health Board
American Indian Health Commission for Washington State

Re: ***Overview of Washington Medicaid SPA Rehearing Process and Tribal Response Strategy***

On August 22, 2017, the State of Washington Health Care Authority (State) submitted State Plan Amendment (SPA) 17-0027 for the Centers for Medicare and Medicaid Services' (CMS) review. The SPA would allow the State to cover and reimburse services provided by Dental Health Aide Therapists (DHATs) as part of the State's Medicaid Program. On May 14, 2018, CMS notified the State of its decision to deny the SPA based on its determination that the SPA does not comply with two provisions of the Social Security Act. The State has stated that it will challenge CMS's decision pursuant to the administrative rehearing process set forth in federal regulations at 42 C.F.R. §§ 430.60-104.

The Swinomish Indian Tribal Community, who has been at the forefront of DHAT expansion in Washington State, is to date the only tribe that has decided to intervene as a party to the administrative rehearing process. The Northwest Portland Area Indian Health Board (NPAIHB) and the American Indian Health Commission for Washington State (AIHC-WS) have also decided to file jointly an amicus brief in the process. Other Tribes in Washington, Oregon, and Idaho have expressed an interest in supporting the State challenge of the SPA denial. This memorandum provides an overview of the situation to date, discusses the appeal process, and discusses considerations for tribes interested in supporting the State in the appeals process.

## I. Background on the DHAT Program

In Alaska, for many years DHATs have been primary oral health care professionals who provide basic restorative dental treatment and preventive services, and have long been part of the existing community health aide program. DHATs in Alaska are federally certified providers, and the community health aide program in Alaska is authorized under Section 119 of the Indian Health Care Improvement Act (IHCIA), 25 U.S.C. § 1616*l*. The Alaska DHAT program has been extremely successful in addressing the shortage of dental health providers in rural tribal communities throughout Alaska. DHATs complete a two-calendar year (three-academic year) education program and are certified to perform a range of cost-effective dental procedures that would not otherwise

be available in rural and remote communities. In Alaska, many of the DHATs are recruited from and return to their Native community, promoting culturally appropriate care and a strengthened local economy.

The IHCIA provides authority to the Secretary of Health and Human Services to develop a national community health aide program, except that DHAT services are excluded from being covered by such a program. 25 U.S.C. § 1616*l*(d)(2)(B). That exclusion does not apply, however, when a Tribe or tribal organization is " located in a State (other than Alaska) in which the use of dental health aide therapist services or midlevel dental health provider services is authorized under State law," in which case the tribal DHATs can " supply such services in accordance with State law." *Id.* § 1616*l*(d)(3)(A). Currently, DHATs are authorized in one form or another in Alaska, Arizona, Maine, Minnesota, Oregon,[1] and Washington State.

In Washington, on February 22, 2017, Governor Jay Inslee signed into law Washington Substitute Senate Bill 5079, which authorizes DHAT services as part of on-reservation tribal health programs within Washington State. Under this Washington law, DHAT services must be provided by a person who is "certified" as a DHAT by a federal community health aide certification board (*i.e.*, the Alaska Community Health Aide Program Certification Board) or by "[a] federally recognized Indian tribe that has adopted certification standards that meet or exceed the requirements of a federal community health aide program certification board." *Id.* §§ 2(1)(a)(i), (ii). The law also requires that all of the DHAT services be performed as part of an Indian health program within the boundaries of an Indian reservation, and be provided in accordance with the certification standards and pursuant to any applicable written standing orders by a supervising dentist. *Id.* § 2(1)(b). Under the Washington law, the DHAT services may be provided only to members of federally recognized tribes or anyone else who is "eligible for services under Indian health service criteria" pursuant to the IHCIA. *Id.*

Prior to the law's passage, the Swinomish Indian Tribal Community became the first tribal community outside of Alaska to employ a DHAT to work as part of the dental team and provide basic oral health services to community members under a *tribal* licensing and regulatory scheme. The Port Gamble S'Klallam Tribe welcomed their first DHAT in early 2018. Swinomish, Port Gamble S'Klallam, and other tribes in Washington State are now implementing DHAT programs, and several DHATs are in enrolled in the Alaska Dental Therapy Education Program with plans to provide DHAT services on tribal reservations in Washington, Oregon, and Idaho upon graduation,

[1] In Oregon, the state approved the "Oregon Tribes Dental Health Aide Therapist Pilot Project" submitted by the Board as a pilot project authorized through 2021. There are currently three pilot sites: Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians; the Coquille Indian Tribe; and the Native American Rehabilitation Association.

including at the Lummi Nation, the Tulalip Tribes, the Confederated Tribes of the Colville Reservation, and the Coeur d'Alene Tribe of Indian[2]

Washington Substitute Senate Bill 5079 also specifically exempts DHATs from state licensure requirements applicable to other dental professionals, and notes that the Washington State legislature intends for services provided by DHATs to be subject to reimbursement from Washington's Medicaid program. The law directs the State to coordinate with CMS to ensure that the Medicaid payments made by the State Medicaid program for DHAT services are eligible for reimbursement to the State by the federal government at 100% FMAP.

The Washington SPA accordingly seeks to carry out this requirement of Washington law, whereby the State would cover and reimburse services provided by DHATs under the other licensed practitioner (OLP) benefit at 42 C.F.R. § 440.60. Under the SPA, to be reimbursable through Medicaid, DHAT services would have to be provided consistent with Washington Substitute Senate Bill 5079, so must be performed as part of an Indian health program within the boundaries of an Indian reservation.

## II. CMS's Decision to Deny the SPA

In its denial letter to the State, CMS explains that it denied the SPA based on its determination that the program violates Sections 1902(a)(23) and 1902(a)(10)(A) of the Social Security Act (Act). A brief summary of CMS's reasoning in relation to both provisions follows.

Under Section 1902(a)(23), 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." CMS explains that pursuant to this provision, "states are not authorized to limit beneficiaries' free choice of willing and qualified providers." CMS found that the plain language of the proposed SPA was inconsistent with Section 1902(a)(23) because it limits access to DHAT services to a limited group of beneficiaries, i.e., to members of a federally recognized tribe or those otherwise eligible for care from the Indian Health Service (IHS). CMS also found that the limitation of DHAT services to a practice setting within the boundaries of a tribal reservation were similarly restrictive. It held that the proposed SPA unlawfully restricted DHAT Medicaid coverage to a narrow group of beneficiaries and, therefore, could not be approved.

[2] DHATs have also recently graduated and are about to begin providing DHAT services in Oregon, including, for example, at the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians and the Coquille Indian Tribe's program. There are also DHATs working at the urban Indian health program in Portland, OR.

Under the Act, states are required to cover medical and remedial care, other than physicians' services, provided by licensed practitioners within the scope of practice as defined under state law. This requirement is known as the OLP benefit, and it must be made available to all eligible beneficiaries as part of Medicaid "medical assistance" under Sections 1902(a)(10)(A) and 1905(a). CMS interprets the OLP benefit as covering unlicensed provider services if such services are provided under the supervision of a licensed practitioner in accordance with state law.

CMS explains that based on a series of communications with the State, it was unclear to the agency whether DHATs must be supervised by a licensed professional as part of their scope of practice. CMS states that dental services must be "provided by or under the supervision of a dentist in the practice of his profession" pursuant to Section 1905(a)(10) of the Act and 42 C.F.R. § 440.100 of the governing regulations. As a result, CMS states that it could not confirm whether the SPA would cover DHAT services "in a manner that is consistent with the requirements of the OLP benefit" and, thus, it was "unable to determine that DHAT services are 'medical assistance,'" consistent with the Act.

Based on the reasons above, CMS found that while it "strongly supports DHATs and improving dental services for tribes," the SPA ultimately violates federal law and is, therefore, not approvable in its current form. CMS states that it is "willing to work with the state in the future to overcome the issues that resulted in the disapproval of this SPA, in an effort to reach a solution that meets Medicaid program requirements."

CMS is incorrect on both counts:

First, the SPA does not restrict free choice of provider. DHATs do not provide any services that are not available from other dental professionals. The services provided by DHATs are available throughout the State to non-tribal Medicaid clients from dentists and other providers. The fact that services are limited to those provided by an Indian health care provider does not restrict free choice of provider. IHS and tribal programs operated under the Indian Self-Determination and Education Assistance Act are specifically authorized to bill and be reimbursed by State Medicaid programs through Section 1911 of the Social Security Act, 42 U.S.C. § 1396j. The fact that not all providers can become IHS or Tribal providers, or that not all Medicaid enrollees can receive services at an IHS or Tribal provider, has never been in conflict with Medicaid's free choice of provider requirements.

Second, CMS takes the position that it is unclear whether the SPA meets the OLP benefit because it is not clear whether DHAT services would be provided under the supervision of a dentist. However, the legislation authorizing tribal DHATs clearly requires that DHAT services be provided "[p]ursuant to any applicable written standing orders by a *supervising dentist*[.]" *See* RCW 70.350.020(1)(b)(iii) (emphasis added).

## III. Administrative Rehearing Process

The State has already made it clear that it plans to challenge CMS' decision and that it will submit a formal request for reconsideration of CMS's decision. The request will trigger a formal administrative rehearing process governed by the federal regulations set forth at 42 C.F.R. § 430.60, *et seq*. The Swinomish Indian Tribal Community has also decided to intervene as a party to the rehearing. Finally, the NPAIHB and AIHC-WS are planning to participate in the process as amici curiae.

### A. Framework for an Administrative Rehearing

Under the governing regulations, only the State may trigger the administrative rehearing process for a denied SPA. The regulation states:

> *Any State* dissatisfied with the Administrator's action on plan material under § 430.15 may, within 60 days after receipt of the notice provided under § 430.16(b) request that the Administrator reconsider the issue of whether the plan or plan amendment conforms to the requirements for approval.

42 C.F.R. § 430.18(a) (emphasis added).

CMS and the State are the only mandatory parties to an administrative SPA appeal. "Other individuals or groups," may, however, "intervene in the process and be treated as parties if the issues to be considered at the hearing have caused them injury and their interest is within the zone of interests to be protected by the governing Federal statute." *Id.* § 430.76(a)-(b). All parties have certain procedural rights during the hearing, including the right to appear in all hearing proceedings, agree to stipulations about facts in the record, present witnesses and oral arguments, and submit post-hearing written materials like briefs and proposed findings of facts and conclusions of law. *Id.* § 430.83.

Interested entities may also participate in the process as amicus curiae (or friends of the court) subject to certain procedural requirements. *Id.* § 430.76(c). Participating in the case in this capacity allows an interested party to submit briefs in the process that help present their viewpoint without participating as a party in the case.

Once issued, the Regional Medicaid Administrator's hearing decision constitutes a "final agency action" that can be challenged under the Administrative Procedure Act. *Id.* § 430.102(c). Judicial review is available in the Circuit Court of Appeals. *Id.* § 430.38.

### B. Timeline for an Administrative Rehearing

The State has been working with the Swinomish Indian Tribal Community, the NPAIHB and the AIHC-WS to ensure that a unified and strong appeal is put forth for CMS's consideration. The State and tribal representatives have agreed that the State will file its formal request for an administrative rehearing on June 8, 2018.

Once the appeal is filed, a series of deadlines will be triggered. The timeline for conducting the administrative rehearing using June 8, 2018, as the anchor date from which all subsequent dates are calculated, is as follows:

- May 14, 2018 – CMS notifies State of SPA decision.
- June 8, 2018 – State files request for reconsideration of CMS decision.
- July 9, 2018 – last date for CMS to publish the time, location, and specific issues to be addressed at the hearing in the Federal Register.
- July 24, 2018 – last date for interested parties to file a Petition to Participate in the hearing, which must be "promptly" approved or denied by the presiding officer.[3]
- August 8, 2018 – earliest date on which the rehearing may commence.[4]
- September 7, 2018 – latest date on which the rehearing may commence.

Amicus curiae may file a petition to participate in such capacity at any time before the hearing begins. Accordingly, an interested party could file an amicus petition as early as June 8, 2018, following the State's submission of its request for reconsideration.

## IV. Tribal Response Strategy: Direct Intervention and Amicus Briefs

Washington's proposed SPA represents presents a critical opportunity to expand access to on-reservation oral healthcare in the State, as well as to raise awareness on the

[3] A Petition to Participate as a party is distinct from a petition to participate as an amicus curiae ("friend of the court"). In the former, a party directly participates in the hearing as a party, with certain procedural and substantive rights, while in the latter a party provides supplemental information and evidence for the hearing officer's consideration.

[4] CMS and the State may agree in writing to an earlier or later date on which to begin the hearing. However, August 8 and September 7 represent the bookends of the earliest and latest dates that the hearing can begin according to the federal regulation.

urgent need for these services nationwide. CMS's denial will significantly and negatively impact the financial viability of the DHAT program. Further, the reasoning adopted by CMS in Washington will likely be used by CMS to negatively impact the expansion of DHAT through SPAs in other states in the future.

As a result, it is essential for tribes, the NPAIHB and AIHC-WS to fight, alongside with the State, CMS's incorrect and improper denial of the SPA. It is also very important tribes coordinate their efforts to the maximum extent possible to ensure that the message coming from Indian Country is consistent: the DHAT program has demonstrated success in addressing the underserved oral healthcare needs of Native communities in Alaska and will serve as a cost-effective, highly effective means of achieving similar results in the Lower 48.

The NPAIHB and the AIHC-WS have been working closely with the Swinomish Indian Community and the State to develop a common strategy to participate in the SPA rehearing process on behalf of all tribes in the region. An important aspect of the strategy is to coordinate among all interested tribal advocates to make sure that the message that is presented in the appeal on behalf of Indian country is consistent, framed in the most effective manner possible and succinct. The key elements of the strategy that have been discussed to date are as follows:

- The Swinomish Indian Tribal Community, who has been the most deeply involved in establishing a DHAT program in Washington State and has worked closely with the State throughout the SPA process, is so far, the only tribe that has decided to intervene and participate as a party in the case. The Tribe intends to present a full defense of the SPA in collaboration with other interested tribes.

- The NPAIHB and the AIHC-WS will coordinate with and support the State and the Swinomish Indian Tribal Community in the appeal at every stage of the process, including filing an amicus brief on behalf of all interested member tribes. We urge any tribe that is interested in supporting these efforts financially or by signing on to the amicus brief to contact us.

- Other tribes and tribal organizations interested in supporting the tribal position on these issues are urged to consider collaborating and working closely with the NPAIHB and the AIHC-WS and the Swinomish Indian Tribal Community as they develop their arguments in the appeal to ensure that they accurately and persuasively reflect the views of all tribal stakeholders.

## V. Conclusion

We have scheduled a conference call on June 15 from 10:30 – 11:30 am to discuss the contents of this memorandum and next steps. We hope that you can join the call. In the meantime, if you have any questions please contact: Christina Peters, NPAIHB, 503-416-3294 or Vicki Lowe, AIHC, 360-460-3580.

**Conference Call Information**:

**Via computer:** https://www.gotomeet.me/NPAIHB

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