



Susana Martinez, Governor
Brent Earnest, Secretary
Nancy Smith-Leslie, Director

RE: Tribal Consultation Letter: 15-22: 8.314.6 NMAC Mi Via Home and Community Based Services

Dear Tribal Leadership, IHS, Tribal Facility or other interested parties,

Consultation with the New Mexico's Indian Nations, Tribes, Pueblos, and their healthcare providers is an important component of the government-to-government relationship with the State of New Mexico. In accordance with the New Mexico Human Services Department's (HSD) Tribal Consultation requirements, this letter is to inform you that HSD, through the Medical Assistance Division (MAD), is accepting written comments through January 4, 2016, regarding proposed amendments to the Mi Via services rule (8.314.6) of the New Mexico Administrative Code (NMAC).

Promulgation proceedings were initiated in November 2014 for this rule. Public comments for this rule were previously accepted through January 23, 2015. Due to delays in the Mi Via Waiver renewal through the Centers for Medicare and Medicaid Services (CMS), promulgation of this rule was withdrawn in February 2015. HSD received approval of the Mi Via Waiver Renewal on September 9, 2015 with an effective date of October 1, 2015. Public comments are once again requested. This rule includes amendments that were initially proposed for public comment in January 2015. A number of the proposed amendments are to bring the Mi Via rule into alignment with the CMS Mi Via Home and Community Based Services Transition Plan and the approved Waiver Renewal (Tribal Consultation Letters 14-10 and 11).

Language that is new from the previously proposed rule of 2014 is *italicized*.

Throughout the rule:

1. Adds language that clarifies an eligible recipient's Mi Via Employer of Record (EOR) roles, responsibilities and qualifications to ensure the EOR meets the MAD provider qualifications and understands the limits of his or her role.
2. Adds language to ensure that services are delivered in the least restrictive environments and that the use of restraints, restrictive interventions or seclusions is not allowed in any Mi Via service.
3. Adds language that providers and practitioners render services within their respective practice board's scope of practice or within their licensing agency's requirements.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments throughout the rule. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 7

Subsection B - aligns the term ‘authorized representative’ with MAD’s current definition utilized in all other NMAC MAD rules.

Subsection L – aligns the term ‘legally responsible individual’ with MAD’s current definition utilized in all other NMAC MAD rules.

Subsection O - defines the term ‘personal representative’ with MAD’s current definition utilized in other NMAC MAD rules.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in Section 7. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 11

The Department’s proposed changes to this section will help to strengthen the caliber and accountability of Mi Via providers and update waiver service names.

Subsection A - replacing ‘homemaker/companion workers’ with ‘homemaker or *direct support* workers in order to be in line with the waiver service names included in the Mi Via 1915(c) waiver as approved by CMS.

Subsection B Paragraph (1) – adding the requirement for providers to pass a nationwide caregiver criminal history screening prior to the initial hire and every three years after initial hire. The additional language aligns the rule with the Mi Via 1915(c) waiver as approved by CMS.

Subsection B Paragraph (2) – adding new language to vendor qualifications and requirements. The additional language provides increased accountability from a vendor to a Mi Via eligible recipient and aligns the rule with the Mi Via 1915(c) waiver as approved by CMS.

Subsection B Paragraph (5) (c) - strengthening language prohibiting a provider from soliciting an eligible recipient in any manner concerning his or her Mi Via services and benefits. The additional requirement will provide a level of protection to Mi Via eligible recipients from unethical business practices and ensure unbiased freedom of choice of providers.

Subsection E Paragraph (3) - removing “*customized*” in-home living supports to “*in-home living supports*” to be in line with the service name included in the Mi Via 1915(c) waiver as approved by CMS.

Subsection F Paragraph (1)(a-b) and (2) - adding requirements that job developer providers have experience or knowledge of the Department of Health/Developmental Disabilities Services Division resources, have substantial knowledge of the Americans with Disabilities Act, be at least of a specific age and have other job experience requirements. These updates to the qualifications reflect the need for job developers to have knowledge and resources specific to the Mi Via population.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in Section 11. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 13

Eligibility Requirements for Recipient Enrollment in Mi Via - removing Subsection A through C of the rule and inserting reference to 8.290.400 NMAC *Recipient Policies* for home and community-based services waiver eligibility requirements.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with this amendment in Section 13. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 15

Subsection C

Paragraph (1) Contact Requirements - adding language clarifying the requirements during monthly contact between the participant and consultant.

Paragraph (4) Critical incident management responsibilities and reporting requirements - adding (a) new responsible reporting individuals and renaming state agencies with current titles, and (b) the term “*suspicious injury*.” The additional language clarifies the process for critical incident management reporting and aligns the rule with the Mi Via 1915(c) waiver as approved by CMS.

Paragraph (5) Conflict of Interest - clarifies an eligible recipient’s Consultant/Consultant Agency’s roles, responsibilities and qualifications to ensure the Consultant/Consultant Agency meets the MAD provider qualifications, and understands the limits of his or her role, does not solicit an eligible recipient nor engage in activities where he or she may have a conflict of interest to the eligible recipient.

Subsection E

Paragraph (2) Home health aide services – adding language specifically stating a home health aide must meet new supervision requirements. In addition, new language requiring the registered nurse supervision of the home health aides at least once every 60 calendar days in the eligible recipient’s home. The additional language affords an eligible recipient increased professional supervision over his or her home health aide’s services and aligns the rule with the Mi Via 1915(c) waiver as approved by CMS.

Previous Paragraph (3) Assisted Living - removes references to Mi Via assisted living services and providers throughout the rule. The Department proposes to end this service based upon non-utilization by the developmental disabilities and medically fragile populations during the past three waiver years. This change will also bring the waiver into alignment with CMS’ final rule to maximize opportunities for an individual to have access to the benefits of community living and to receive services in the most integrated settings and aligns the rule with the Mi Via 1915(c) waiver as approved by CMS.

New Paragraph (3) In home living supports – clarification that In Home Living Supports must be provided in the home or apartment owned or leased by the eligible recipient or in the eligible recipient’s home, but excludes homes or apartments owned by agency providers. The additional language will strengthen the service requirement to safeguard participant’s freedom of choice when receiving this Mi Via service. Additional language clarifies that service coordination and nursing services are not included in this service as they are covered under other waiver services.

Subsection F

Paragraph (2) Employment Supports – providing additional detail into the function of employment supports, job development, job coaching, and related employment supports. The additional language will strengthen the service requirement to afford an eligible recipient a higher degree of professional support in entering the workforce and aligns the rule with the Mi Via 1915(c)

waiver as approved by CMS.

Paragraph (3) Customized Community Supports – (a) renaming this service to “Customized Community Group Supports” in order to be in line with the waiver service names included in the Mi Via 1915(c) waiver as approved by CMS, and (b) proposing new language to have services provided in an integrated setting to support access to the eligible recipient’s greater community. The Department is responding to CMS final regulations that require Mi Via services be rendered in integrated community settings whenever possible.

Subsection G

Paragraph (1) Health and Wellness (d) Behavior support consultation - adding “positive behavior support plan” to treatment plan development; and to (v) requiring the least restrictive environment and to prohibit of any form of restraints or seclusion of a Mi Via eligible recipient while services are rendered. The Department is responding to CMS final regulations that require Mi Via services be rendered in the least restrictive environment without the use of seclusion and restraints.

Paragraph (2) Specialized Therapies (e) Hippotherapy – clarification that hippotherapy must be performed by a Regulation and Licensing Department (RLD) licensed physical therapist, occupational therapist, or speech therapist. The additional language serves to bring the service in line with the providers’ practice board’s scope of practice or within their licensing agency’s requirements.

Subsection H

Paragraph (1) Transportation – *addition that transportation services for minors is not a covered service as these are services that a legally responsible individual would ordinarily provide for household members of the same age who do not have a disability or chronic illness.*

Paragraph (3) Respite – *addition of language that clarifies respite as a service and how it is to be utilized.*

Paragraph (5) Environmental Modifications (f) – reducing the available allocation from \$7,000 to \$5,000 every five years to bring the rule in line with the Mi Via 1915(c) waiver as approved by CMS. The spending limit brings equity to the environmental modifications allocations among the Mi Via Waiver, the Developmental Disabilities Waiver, and the MAD Centennial Care Managed Care Self-Directed Community Benefit. HSD proposes to include any MAD reimbursed environmental modification the eligible recipient received from the previous five years into the five-year allocation limitations of \$5,000. Reviews of the utilization patterns for this service show that the proposed amount of \$5,000 is reasonable to meet the needs of Mi Via eligible recipients.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in Section 15. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 16

Subsection F - addition of home schooling materials and/or related supplemental materials and activities as a non-covered good as these are services that a legally responsible individual would ordinarily provide for household members of the same age who do not have a disability or chronic illness.

Subsection G - *clarification of activities that are primarily recreational or diversional in nature. Clarification is provided to be in line with the Centers for Medicare and Medicaid Services Waiver Technical Guide.*

Subsection K - *addition that cell phone insurance is not a covered service as this is a service that a household that does not include a person with disabilities would be expected to pay for as a routine*

household or personal expense.

Subsection P – clarification that mileage or driver time reimbursement for vacation travel by automobile is a non-covered service as this is a service that a household that does not include a person with disabilities would be expected to pay for as a routine household or personal expense.

Subsection W – including laptops or any electronic tablets to keep current with technological advances. HSD proposes to apply the three year replacement limit to eligible recipients transferring into Mi Via. This ensures equitable spending for these types of goods among all MAD programs that cover this benefit.

Subsection X - *addition that cell phones and cell phone services for eligible recipients who are minors is a non-covered service as these are services that a legally responsible individual would ordinarily provide for household members of the same age who do not have a disability or chronic illness.*

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in Section 16. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 17

Subsection F Modifications to the annual budget - this section has been reformatted and edited in order to delete repetitive and lengthy language to clarify for recipients the requirements for modifications to the annual budget.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with this amendment in Section 17. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 21

Continuation of Benefits Pursuant to Timely Appeal – adding language to bring rule into alignment with 8.352.2 NMAC HSD administrative hearing rights and responsibilities.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with this amendment in Section 21. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Section 22

Grievance/Complaint System: removing of subsections A through D which describe the grievance and complaint process that only applies to consultant providers. Language in this section now affords participants and/or participant's families a primary contact to file complaints regarding any component of the program.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with this amendment in Section 22. The changes are primarily for clarity and consistency with the waiver as approved by CMS, not to reduce services.*

Tribal Consultation Comments -

Tribes and their healthcare providers may view the proposed rule, 8.314.6 NMAC, on the HSD webpage at <http://www.hsd.state.nm.us/providers/written-tribal-consultation-letters.aspx>. Letter 22

Important Dates

- **Written comments must be submitted by 5:00 p.m. Mountain Standard Time (MST) on January 4, 2016.** Please send your comments and questions to the MAD Native American Liaison, **Theresa Belanger**, at (505) 827-3122 or by email at: Theresa.Belanger@state.nm.us.
- All comments and responses will be compiled and available *after January 18, 2016*.
- **A public hearing** to receive testimony on this proposed rule will be held in the Rio Grande Room, Toney Anaya Building, 2550 Cerrillos Road, Santa Fe, New Mexico January 4, 2016 from 1 p.m. to 3 p.m., Mountain Standard Time (MST).

Sincerely,



Nancy Smith-Leslie
Director, Medical Assistance Division

cc: Theresa Belanger, Native American Liaison, MAD
HSD/MAD/Exempt Bureau
HSD/MAD/PPB-Program Management/Communications Unit