



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

July 26, 2018

**RE: Tribal Notification Letter 18-06: Proposed Amendments to 8.314.5 NMAC Developmental Disabilities Waiver Program Rule**

Dear Tribal Leadership, Indian Health Service, Tribal Health Providers and other interested parties,

Consultation with 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 is proposing to amend 8.314.5 NMAC Developmental Disabilities Home and Community-Based Services Waiver Program Rule. Currently, there are 357 Native American participants out of 3,580 unduplicated participants receiving services under the Developmental Disabilities Waiver program.

On June 21, 2017, the Department received approval from the Centers for Medicare and Medicaid Services (CMS) for a renewal of the 1915 (c) Home and Community-Based Services (HCBS) Developmental Disabilities Waiver with an effective date of July 1, 2016. The program rule, 8.314.5 NMAC is being amended to align services and definitions with the approved Waiver renewal and the CMS HCBS Settings Final Rule.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: August 14, 2018

Hearing Date: September 13, 2018

Adoption Date: Proposed as December 1, 2018

Technical Citations: 42 CFR 438 subparts A through J

**The Department proposes the following amendments to the rule:**

**Section 7**

Definition language was updated throughout this section: clarification that activities of daily living include bathing, dressing, transferring, toileting, mobility and eating; description and clarification of person centered planning process; and removal of the definition for the Supports Intensity Scale.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 7.*

### **Section 8**

The language in this section has been removed.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 8.*

### **Section 9**

This section was updated to align with the CMS HCBS Settings Final Rule. Language has been added clarifying the recipient's right to privacy, dignity and respect and that the Developmental Disabilities Waiver (DDW) services must be provided in a setting that: is integrated in and facilitates full access to the greater community; ensures the individual receives services in the community to the same degree of access as individuals not receiving Medicaid Home and Community-Based services; maximizes independence in making life choices; is chosen by the individual (in consultation with the guardian if applicable) from among residential and day options, including non-disability specific settings; ensures the right to privacy, dignity, respect and freedom from coercion and restraint; optimizes individual initiative, autonomy and independence in making life choices; provides an opportunity to seek competitive employment; provides individuals an option to choose a private unit in a residential setting; and facilitates choice of services and who provides them.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 9.*

### **Section 10**

**Subsection C-** Clarifying language was added to provider agency oversight and supervision of subcontractors and employees.

**Subsection D-** Clarifying language was added to the qualifications for case management provider agencies.

**Subsection F-** Clarifying language was added to qualifications of adult nursing provider agencies.

**Subsection H-** Clarifying language was added detailing when direct support staff personnel employed by or subcontracting with the provider agency must be approved through a home study; requirement for supported living agencies to supervise specific nurse functions.

**Subsection T-** Inclusion of LCSW, LMFT and LISW under qualifications for licensed behavioral health practitioners that can be employed by preliminary risk screening and consultation (PRSC) related to inappropriate sexual behavior agencies.

**Subsection U-** Clarifying language added to qualifications of socialization and sexual education providers.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 10.*

## Section 11

This section was updated with language on conflict of interest, including the requirements for provider agencies and case management agencies to mitigate real or perceived conflicts of interest. This language is consistent with the DDW service standards.

**Subsection C** - Language was added detailing conflict of interest requirements and prohibitions for DDW providers with regard to guardians, family members and spouses of eligible recipients.

**Subsection D** - Language was added detailing conflict of interest requirements and prohibitions for case management agency owners and individually employed or contracted case managers with regard to: relation by blood or affinity to the eligible recipient or to any paid caregiver of the eligible recipient; material financial interest in any entity that is paid to provide DDW or Mi Via services; making financial or health related decisions for eligible recipients on their caseload; relation by blood or affinity to any DDW service provider for eligible recipients on their caseload; and holding caseloads with DDW and Mi Via eligible recipients.

Language was added detailing conflict of interest requirements and prohibitions for case management provider agencies with regard to being a provider agency for any other DDW service and providing guardianship services to an eligible recipient receiving case management services from that same agency.

Language was added detailing conflict of interest requirements and prohibitions for a case manager or director of a case management provider agency with regard to serving on the board of directors of any DDW provider agency and training staff of DDW provider agencies.

Language was added outlining requirements for case management provider agencies to disclose familial relationships between employees/subcontract case managers and providers of other DDW services.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 11.*

## Section 12

This section was updated with language that notes the eligibility criteria for DDW services are found in 8.290.400 NMAC.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 12.*

## Section 13

This section was updated to remove all language related to the Recipient Standardized Assessment and Supports Intensity Scale (SIS).

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 13.*

## Section 14

**Subsection A** - Supplemental Dental was removed as a covered service for eligible recipients ages birth to 18 years as this service is covered under the Early Periodic Screening Diagnosis and Treatment (EPSDT) program under the state plan.

**Subsection C** - Preliminary risk screening and consultation was added to the list of service options that are allowed outside of the Annual Resource Allotment (ARA) for eligible recipients ages birth to 18 years.

**Tribal Impact:** *There were no Native American participants accessing Supplemental Dental. HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 14.*

## **Section 15**

**Subsection A** - This section was updated with the removal of SIS language. Language was added on the use of Proposed Budget Levels (PBL) and corresponding suggested budget dollar amount based on the type of living care arrangement, assumptions about types and amounts of services, intensity of staffing needs, and support needs in each level.

**Subsection B** - The H Authorization language was removed and replaced with the Exception Authorization Process. Clarifying language was added to outline the requirements and process for the Exception Authorization Process. This process allows DDW individuals who have extenuating circumstances, including extreme complex clinical needs, to receive services beyond what is authorized in their current ISP/budget level or to allow individual exceptions to the DDW service standards.

**Subsection C (1)** - Clarifying language was added to the functions required under case management services including the addition of health care coordination and activities that support the person-centered planning process such as: supporting informed choice and participant self-advocacy; allowing participants to lead their own meetings, program and plan development; increasing an individual's experiences with other paid, unpaid, publicly-funded and community support options; increasing self-determination; demonstrating that the approved budget is not replacing other natural or non-disability specific resources available; and documenting efforts demonstrating choice of non-waiver and non-disability specific options in the Individual Service Plan (ISP), Intermediate Disciplinary Team (IDT) meeting minutes or companion documents when an individual has only DDW funded supports.

**Subsection C (4)** - Language was added to clarify that for all medically necessary therapy services accessed under the state plan by eligible recipients under 21 years of age, the services under the waiver are services not otherwise covered under the state plan, and consistent with waiver objectives to support the recipient to remain in the community and prevent institutionalization.

**Subsection C (5)** - Clarifying language was added noting that Living Support services are available up to 24 hours per day; the section on Family Living service was reformatted.

**Subsection C (6)** - Clarifying language was added for Customized Community Supports settings.

**Subsection C (7)** - This section was updated with additional language describing the services available through the various Community Integrated Employment models.

**Tribal Impact:** *There were no Native American participants under 21 accessing waiver therapy services. HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 15.*

### Section 17

This section was updated with the addition of language on the person-centered planning process and requirements as it pertains to the development of the ISP. Language on the SIS process was deleted.

**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 17.*

### Section 20

This section was updated with clarifying language on agency review conferences and the fair hearing process; language on the denial of services through H authorization was replaced with exception authorization process.

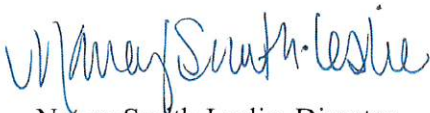
**Tribal Impact:** *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments to section 20.*

Tribes and their healthcare providers may view the proposed 8.314.5 NMAC on the HSD webpage at: <http://www.hsd.state.nm.us/providers/written-tribal-consultations.aspx>, *Notification Letter 18-06.*

### Important Dates:

- **A public hearing** on this rule is scheduled be held in the Rio Grande Conference room, Toney Anaya Building, 2550 Cerrillos Road, Santa Fe, NM on **September 13, 2018 from 11 a.m. to 12 p.m., Mountain Daylight Time (MDT).**
- **Written comments must be submitted by 5:00 p.m., Mountain Daylight Time (MDT) on September 14, 2018.** 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](mailto:Theresa.Belanger@state.nm.us).
- All comments and responses will be compiled and available *after September 28, 2018.*

Sincerely,



Nancy Smith-Leslie, Director  
Medical Assistance Division

CC: Theresa Belanger  
PPB