

May 17, 2018

RE: Tribal Notification Letter 18-02 8.314.6 NMAC Mi Via Home and Community-Based Services

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, through the Medical Assistance Division (MAD), is accepting written comments through June 28, 2018, regarding proposed amendments to the Mi Via Home and Community-Based Services rule (8.314.6) of the New Mexico Administrative Code (NMAC). Currently there are 106 Native American participants out of 1,204 unduplicated participants receiving services under the Mi Via waiver program.

On April 11, 2017, the Department received approval from the Centers for Medicare and Medicaid Services (CMS) of an amendment to its Mi Via 1915 (c) Home and Community-Based (HCBS) waiver with an effective date of April 15, 2017. The rule is being amended to align services and definitions with the approved amendment and the CMS HCBS Settings Final Rule.

Throughout the Rule

Language that a recipient may not be his or her own Employer of Record (EOR) if he or she has an authorized representative over financial matters in place is removed and replaced with the requirement that a recipient may be his or her own EOR unless the recipient is a minor or has a plenary or limited guardianship or conservatorship over financial matters in place. Language was added that states if the recipient is his or her own EOR and delegates any EOR responsibilities through a Power of Attorney (POA) or other legal instrument, the delegee must be designated as the EOR. Additionally, a POA may not be used to assign the responsibilities of an EOR, in part or in full, to another individual and may not be used to circumvent the requirements of the EOR as designated in this rule.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with the EOR amended language throughout the rule. The changes remove more restrictive language that prohibited a recipient from being his her own EOR when he or she had an authorized representative over financial matters.*

Section 8

This section is updated to align the program mission statement with the Human Services Department mission statement.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 8. The changes are primarily for clarity and consistency with other HSD programs.*

Section 11

Subsection A - Requirements for independent contractors are updated to clarify that an individual seeking to provide services as an independent contractor must submit the nature of services questionnaire and be determined by the Financial Management Agent (FMA) to be an independent contractor.

Subsection B - General qualifications for employees are updated to include four additional required background screenings; clarification added that a Legally Responsible Individual (LRI) may not be paid to provide transportation services for a minor or individual directed goods and services; requirement of an EOR questionnaire is added; and clarifying language regarding EOR responsibilities is added.

Subsection E- Language added to clarify responsibilities and roles of in-home living supports providers.

Subsection H- Language added to identify vendors for individual directed goods and 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. Of the 106 Native American participants currently receiving services in the Mi Via program ten are minors. None of these participants are currently receiving transportation services. The changes are primarily for clarity and to align with the waiver as approved by CMS.*

Section 14

This section is updated to include EOR responsibility to submit Mi Via employee timesheets online, unless exempted by HSD.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 14. The changes are primarily for clarity.*

Section 15

This section is updated to align with the CMS HCBS Settings Final Rule. The following language has been added clarifying the recipient's right to privacy, dignity, and respect: Mi Via services must be provided in integrated settings and facilitate full access to the community; ensure the individual receives services in the community to the same degree of access as those individuals not receiving HCBS services; maximize independence in making life choices; be chosen by the individual in consultation with the guardian as applicable; ensure the right to privacy, dignity, respect, and freedom from coercion and restraint; optimize individual initiative, autonomy and independence in making life choices; provide an opportunity to seek competitive employment; and facilitate choice of service and who provides them.

Subsection C – Conflict of interest is updated to align with Code of Federal Regulations (CFR) requirements.

Subsection E – Language added to clarify that living supports must be provided in the individual’s own home or in the community and may not be provided in residential facilities or agency owned homes. Home health aide services covered under the waiver are clarified to differ in nature and scope from those in the State Plan. Home health aide services under the waiver may be provided on a long-term basis for the recipient’s habilitative supports whereas, state plan home health aide services address acute conditions the purpose of which is curative and restorative.

Subsection H – Scope of transportation service and respite services are aligned with the approved Mi Via Waiver. The restriction disallowing transportation for minors is removed. Language added that respite services are to provide intermittent support to the recipient and give the unpaid primary caregiver relief from his or her duties on a short-term basis. Respite services must only be provided on an intermittent or short-term basis because of the absence or need for relief of those persons normally providing care to the recipient. Related goods is renamed Individual Directed Goods and Services and the scope of this service is aligned with the scope outlined in the waiver as approved by CMS. Services and goods that are recreational or diversional in nature are excluded. Recreational and diversional in nature is defined as inherently and characteristically related to activities done for enjoyment. Grab bars are removed from environmental modifications as this is an item covered under the State Plan

Tribal Impact: *There are currently four Native American participants who are receiving respite services. These participants may be impacted during their next budget cycle if utilization review determines that the request does not meet the definition that respite is provided on an intermittent or short-term basis. HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with the amended language to transportation services or related goods. The changes are made to align with CMS Final Settings Rule and the waiver as approved by CMS.*

Section 16

Subsection G – Language is added to clarify goods and services considered recreational and diversional in nature. Specific non-covered recreational and diversional services are added to include, but not limited to, tickets for movies, theatrical and musical performance, sporting events, zoos, or museums.

Subsection T – Language is added to specify adaptive clothing or accessories are exempt from non-covered goods.

Tribal Impact: *There are currently five Native American participants receiving goods or services that will be a non-covered service under the proposed language in subsection G and who would be impacted by this change.*

Section 17

Subsection B – Language is added to clarify that waiver rates are defined in the Mi Via waiver and approved by CMS. Requirements for requesting an exception to the approved range of rates is added. The need for an exception to the approved range of rates must be demonstrated through exceptional behavioral conditions, medical conditions, specialized supports, or location.

Subsection F – Language is added that Mi Via budgets are developed by service. A recipient may request an increase to his or her budget as applicable if services necessary for health and safety cannot be met within the budget. Requests for additional funding are built in the annual budget and are specific to the service requested.

Subsection G – Language specifying use of a debit card for the purchase of related goods is removed.

Subsection H – Timeline for a recipient to submit additional information requested by the Third Party Assessor as part of a request for information (RFI) is increased from 15 to 21 working days.

Tribal Impact: *HSD does not anticipate a service or financial impact to individuals, tribes or their healthcare providers with these amendments in section 17. There are no Native American participants who have requested an exception to the approved range of rates in their current budget. The changes are made primarily for clarity and to align with the waiver as approved by CMS.*

Tribes and their healthcare providers may view the proposed 8.314.6 NMAC, on the HSD webpage at: <http://www.hsd.state.nm.us/providers/written-tribal-consultations.aspx>, *Notification Letter 18-02.*

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 June 28, 2018 from 10:30 a.m. to 11:30 a.m., Mountain Daylight Time (MDT).**
- **Written comments must be submitted by 5:00 p.m. Mountain Daylight Time (MDT) on June 28, 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.
- All comments and responses will be compiled and available **July 12, 2018**.

Sincerely,



Nancy Smith-Leslie, Director
Medical Assistance Division

CC: Theresa Belanger
PPIB