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MEMORANDUM

February 27, 2016

TO: Tribal Health Clients

FROM: Hobbs, Straus, Dean & Walker, LLP

Re: *CMS Issues State Health Official Letter on 100% FMAP Policy*

On February 26, 2016, the Centers for Medicare & Medicaid Services (CMS) issued a much-anticipated State Health Official (SHO) Letter announcing significant changes in the agency's interpretation of its policy regarding when 100% Federal Medical Assistance Percentage (FMAP) is available for services furnished to Medicaid-eligible American Indians and Alaska Natives (AI/ANs). Most significantly, the SHO Letter provides that 100% FMAP will be extended to services rendered by a provider that is not an Indian Health Service (IHS) or Tribal provider so long as certain conditions are met. We will be providing a more comprehensive analysis of the SHO Letter and its implications for Tribes, Tribal Medicaid managed care organizations, Tribal referral arrangements, and managed care.

The federal government pays states a certain percentage of the cost of providing Medicaid services. Generally, the federal government pays between 50–72% for these services, with a maximum match of 82%. For the Medicaid expansion population, the federal government pays 100% until 2016 and then gradually phases this match down to 90% in years 2020 and beyond. However, section 1905(b) of the Social Security Act provides that the federal government will pay 100% FMAP for services "received through" the IHS or a Tribe or Tribal organization. 42 U.S.C. § 1396d(b).

CMS has previously interpreted section 1905(b) to mean that 100% FMAP does not apply to services rendered through Purchased/Referred Care (PRC) or by urban Indian health programs. The states of South Dakota and Alaska, and to a lesser extent Oklahoma, proposed Tribal Medicaid waivers seeking to expand the scope of CMS's interpretation of the 100% FMAP rule. IHS, Tribes, and Tribal organizations have supported this call for the expanded application of 100% FMAP.

Services Rendered Through PRC

The SHO Letter extends 100% FMAP to services rendered through PRC. The letter provides that services will be considered to be "received through" an IHS or Tribal

facility "when an IHS/Tribal facility practitioner requests the service, for his or her patient, from a non-IHS/Tribal provider (outside of the IHS/Tribal facility), who is also a Medicaid provider, in accordance with a care coordination agreement."

For 100% FMAP to apply, the following three criteria must be met:

- (1) Both the IHS/Tribal facility and the non-IHS/Tribal provider must be enrolled in the State's Medicaid program as rendering providers;
- (2) There must be an established relationship between the patient and a qualified practitioner at an IHS/Tribal facility; and
- (3) Care must be provided pursuant to a written care coordination agreement between the IHS/Tribal facility and the non-IHS/Tribal provider under which the IHS/Tribal facility remains responsible for overseeing patient care and retains control of the medical record.

Additionally, the SHO Letter provides that care coordination must involve the IHS/Tribal facility practitioner providing a request for specific services and relevant information; receiving information about the care provided to the patient; continuing to assume responsibility for the patient's care; and incorporating the patient's information in the medical record.

The SHO Letter also seeks to provide an avenue for extending 100% FMAP to services rendered by urban Indian organizations. The letter provides that 100% FMAP will apply when the non-IHS/Tribal provider from which an IHS/Tribal facility requests services is a Medicaid-participating urban Indian organization.

Expanded Scope of Services

CMS's SHO Letter expands the scope of services that will be covered by the 100% FMAP policy to include any services that the IHS/Tribal facility is authorized to provide under both IHS rules and the State Medicaid plan. The SHO Letter clarifies that this can include long-term services and supports as well as transportation and other related travel expenses.

Billing and Payments

CMS's guidance provides that services rendered by a non-IHS/Tribal provider may be billed to Medicaid either by the non-IHS/Tribal provider billing Medicaid directly or by the IHS/Tribal facility handling all of the billing. The SHO Letter states that the billing arrangement should be reflected in the written agreement between the provider and facility and that applicable payment and rate methodologies must be set forth in the State Medicaid plan.

Managed Care

CMS's SHO Letter provides that when AI/ANs are enrolled in Medicaid managed care organizations (MCOs), prepaid inpatient health plans (PIHPs), or prepaid ambulatory health plans (PAHPs), the 100% FMAP applies to the portion of the capitation payment attributable to services "received through" an IHS/Tribal facility under certain conditions. The letter clarifies that:

- (1) The service must be furnished to an AI/AN Medicaid beneficiary who is enrolled in the managed care plan;
- (2) The service must meet the same requirements as would apply in a fee-for-service delivery system;
- (3) The non-IHS/Tribal provider must be a network provider of the managed care plan;
- (4) The non-IHS/Tribal provider must be paid by the managed care plan consistent with the network provider's contractual agreement with the managed care plan; and
- (5) The State must have complied, in accordance with CMS guidance, with section 1932(h)(2)(C)(ii) of the Social Security Act, which governs managed care plan payment rates to Indian health providers.

Conclusion

The SHO Letter also addresses documentation requirements and clarifies that the new policy applies to services covered under section 1115 demonstration waivers. Additionally, the SHO Letter states that CMS intends to provide additional guidance on its 100% FMAP policy. CMS has also separately announced that it will be holding an All Tribes Call at a later date to discuss the policy and answer any questions.

If you would like any further information, please contact Elliott Milhollin (emilhollin@hobbsstrauss.com or 202-822-8282) or Geoff Strommer (gstrommer@hobbsstrauss.com or 503-242-1745).