Submitted Via E-mail: jetta.whittaker@alaska.gov

September 22, 2016

Jetta Whittaker
Alaska Department of Health and Social Services
240 Main Street
Juneau, AK 99801

RE: Tribal consultation regarding proposed changes to personal care services regulations, 7 AAC 125.010 – .199

Dear Ms. Whittaker:

The Alaska Native Tribal Health Consortium (ANTHC) is a statewide tribal health organization that co-manages the Alaska Native Medical Center (ANMC), a tertiary care hospital and level II trauma center in Anchorage, that serves more than 150,000 Alaska Natives and American Indians (AN/AI) throughout Alaska. ANTHC also provides a wide range of public health, community health, and environmental health programs and services for Alaska Natives and their communities throughout the State. ANTHC's Environmental Health and Engineering programs provide Alaska Native Villages with planning, design, and construction and operations support for clean water and sanitation projects statewide.

We are commenting separately on the Department's proposal as part of the general public comment process under the Administrative Procedure Act (APA). We incorporate those comments here by this reference. In this letter, we highlight and expand on issues that uniquely affect tribal health programs.

Personal care services are essential to ensure that elderly and disabled individuals are able to remain in supportive environments and avoid institutionalization. This is especially true in rural areas where institutionalization means moving far away from family and community. Despite the importance of these services, however, the ability to provide them in remote areas is already hampered by the realities of life there: finding personnel is difficult, staff and operating costs are high, access to the internet is inconsistent, and training and other program supports are often hours away by road, plane, boat, snow-machine or ATV. These realities, and the chronically low reimbursement rate for personal care services, means the services are not now available in large segments of the State. While the Alaska Tribal Health System continues to work to expand those services, some of the proposed changes to the regulations will make it more difficult for us to do so. We therefore urge the Department to revise, clarify, and in some cases abandon, many of the proposed changes as described further below and in our APA comments.

1. **The Regulations Should Clarify That Health Professionals Working for a Tribal Organization and Licensed in Any State May Perform the Same Functions as Health Professionals Licensed by the State of Alaska.**

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There are a number of provisions in the proposed regulations that require a health professional to perform certain duties, such as verify the health condition of an applicant, *see* 7 AAC 125.012(c)(4)(B), or prescribe certain exercises, *see* 7 AAC 125.030(d)(5)(B)(i). These provisions, however, make no allowance for health professionals who are employed or contracted by tribal organizations to perform such duties.

Federal law exempts tribal health programs from any State Medicaid requirement that their health professionals be licensed by the State. (See Section 221 of the Indian Health Care Improvement Act, 25 § U.S.C. 1621(t).) They are similar in this regard to federal health professionals assigned to work in a tribal health program. Like their federally-employed counterparts, health professionals working for tribal health programs and licensed in any State are fully qualified to perform the duties contemplated by the regulations. We suggest that wherever the regulations discuss the need for a licensed health professional to perform such duties, the following language be added: *"or licensed by any State and employed by or under contract with a tribal health program."*

2. The Regulations Should Clarify that Tribal Organizations Are Not Subject to the Provisions Regarding the Alaska Barrier Crimes Act.

A number of the proposed provisions require agencies and PCA workers to comply with the Alaska Barrier Crimes Act (ABCA), AS 47.05.300–.390, and to meet the character standards of that law. We understand the Department is poised to clarify that tribal organizations are generally not subject to the ABCA. This has been the Department's position previously, as reflected in departmental advice to tribal organizations, and is consistent with the language of the ABCA.

Under the ABCA, organizations are subject to its requirements if they are entities required to be licensed by the Department, *see* AS 47.05.300(a) *and* AS 47.05.390(6), or if they are eligible to receive payments, "in whole or in part, from the department to provide for the health, safety and welfare of persons who are served by the programs administered by the department" *see* AS 47.05.300(a). Tribal organizations are not required to be licensed by the Department, *see* 7 AAC 12.611(b), and the Department has previously interpreted the type of payments considered by AS 47.05.300(a) to be grant payments, which is in keeping with the language of the ABCA. Further, even if the ABCA would otherwise apply to tribal organizations, the ABCA specifically exempts organizations that are subject to more stringent federal requirements. *See* 7 AAC 10.905(k). Tribal organizations that receive funding under the Indian Self-Determination Act, 25 U.S.C. § 5301 *et seq.*, are subject to the Indian Child Protection and Family Violence Prevention Act (ICPA), 25 U.S.C. § 3201 *et seq.*, which imposes background check requirements that are in many ways more stringent than the ABCA. Consequently, the Department has found that tribal organizations subject to the ICPA are exempt from the ABCA. For these reasons, we request that the upcoming clarification either specifically extend to these regulations or be written broadly enough to include them.

3. Tribal Health Organizations and Other Governmental Entities Should be Authorized to Conduct Assessments.

The proposed regulations would reserve to the Department alone the responsibility and authority to undertake assessments of recipients and applicants. Tribal Health Organizations have

suggested in the past—and we suggest again—that this is a task that could and should be delegated to us. We have the qualifications, knowledge, experience, access, and familiarity with our recipients that are essential to making an informed assessment. We can conduct the assessments in a culturally competent way for our Alaska Native beneficiaries. Allowing us to assess our people will help lighten the administrative and fiscal burden on the State. It may also allow more personal care services to qualify for 100% FMAP and further alleviate the Department's budgetary woes.

We recognize that various federal requirements, including those for conflict-free case management services, may present challenges to this, but the special status of Alaska Natives and American Indians and the government-to-government relationships among Tribal Organizations, the Department, and the United States Department of Health and Human Services may provide pathways to achieving this common-sense and positive change. If consistent with the current application of the applicable federal laws, we urge the Department to modify the proposed regulations to authorize assessments by Tribal Health Organizations and other governmental entities. If there is doubt about the Department's authority to do so, we encourage the Department to explore this possibility with CMS as needed, confer with Tribal Health Organizations regarding how the activity can be conducted and sustained, and modify the State Plan and regulations accordingly.

4. **To the Extent Allowed Under Federal Law, Conflict-of-Interest Provisions Should Be Waived for Tribal Health Organizations and Other Governmental Entities.**

As drafted, the proposed regulations impose conflict-of-interest requirements on providers that provide both personal care services and case management services. We understand this change is being driven by the conflict free case management rules implemented by Congress. However, these rules will create significant hurdles for tribal programs, many of which operate in rural areas. We therefore request that, to the extent consistent with federal requirements, the Department waive or modify these requirements for tribal health programs. Specifically, we suggest:

> that (d) be revised to provide that *"The department will not certify a provider agency as both provider of personal care services under this section and care coordination services under 7 AAC 130.220(a)(2) unless <u>the provider is a tribal health program or</u> the Department grants an exception ….;"* and
>
> that (f) be revised to state that *"An agency certified as a provider of both personal services and care coordination services [IN ACCORDANCE WITH] <u>under</u> an exception granted by the Department under (c) of this section shall…"*

Thank you again for the opportunity to work with the Department to craft regulations that will ensure individuals have access to services that protect their health and welfare. We are happy to discuss any of the proposed changes in further detail at the Department's request.

Sincerely,

Gerald Moses
Senior Director of Intergovernmental Affairs

cc: Renee Gayhart, DHSS Tribal Program Manager
Courtney O'Bryne King, MS, Medicaid State Plan Coordinator