



January 28, 2008

Mr. Randy Pate
Department of Health and Human Services
200 Independence Ave., S.W., Room 415F
Washington, DC 20201

Re: Revisions to Procedures for the Departmental Appeals Board and Other Departmental Hearings

The American Public Human Services Association and its affiliates the National Association of State Medicaid Directors, the National Association of Public Child Welfare Administrators, the National Association of State TANF Administrators, and the National Association of State Child Care Administrators respectfully submit this comment letter regarding the Notice of Proposed Rule Making on *Revisions to Procedures for the Departmental Appeals Board and Other Departmental Hearings*, published in the December 28, 2007, *Federal Register* (72 FR 73708) for the Centers for Medicare and Medicaid Services.

Please be assured that APHSA and its affiliates share your strong commitment to protecting the integrity of federally funded programs. Although the NPRM contains certain appropriate technical corrections, this proposed rule also will significantly alter the way in which disputes between states and the federal government are adjudicated by the Department of Health and Human Services' Departmental Appeals Board (DAB). Since 1978, disputes between states and the federal government have been decided by the DAB, whose ruling has constituted the final decision. The proposed rule would give jurisdiction to the Secretary of Health and Human Services to review any DAB case decision and overturn it, making the Secretary the final decision maker.

Congress commissioned the DAB to give states a venue in which to seek reconsideration of Secretarial decisions and purposely refrained from giving the Secretary the authority to review the reconsideration of his own motion. In its current form, the Appellate Division provides an impartial tribunal that adjudicates disputes between the states and the federal government. Though the DAB successfully fulfills the role Congress intended, the NPRM proposes significant changes to the current processes with limited justification.

An additional component of this NPRM that would deviate greatly from current practice is the requirement that the DAB be obligated to follow published guidance that is not inconsistent with applicable statutes and regulations and unpublished guidance such as legal arguments made in briefs

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filed by HHS components. This requirement is not currently practiced in the courts and there is no justification to apply a different rule in the administrative process.

In addition to the above concerns, APHSA respectfully submits that states have not been given an appropriate opportunity to fully review this rule and generate pertinent comments. The proposed rule was published during a time when most businesses were not operating and provides only a 30-day comment period. This time frame severely limits the ability of states to determine the full implications of the NPRM. To compound the difficulties of the abbreviated comment period, this regulation was published through the Centers for Medicare and Medicaid Services, however, upon further examination there is nothing limiting its scope to CMS and the proposed rule appears to be applicable to all departments within HHS. This misleading publication has further shortened the comment period for concerned citizens.

The changes made by this rule significantly weaken the DAB for no stated reason. There simply is no justification to change a process that has worked for 30 years.

45 C.F.R. § 16.14 Applicability of statutes, regulations, and published guidance

Current policy requires that the DAB “be bound by all applicable laws and regulations.” (45 C.F.R. § 16.14) According to the NPRM, it is not enough to be bound by all applicable laws and regulations since, “[t]his provision . . . does not address the weight to be afforded interpretations of statutes and regulations that have been adopted by the Secretary either directly or through the Departmental component with delegated authority to administer the program whose decision is the subject of Board review.” (72 FR 73710)

HHS proposes to further restrict the DAB’s interpretive authority by amending §16.14 to state, “The Departmental Appeals Board may not find invalid or refuse to follow federal statutes, regulations, or Secretarial delegations of authority and must follow published guidance to the extent not inconsistent with statute or regulation.” However, the NPRM also requires the Board to follow “unpublished guidance” such as legal arguments made in federal government briefs and letters. The DAB would have to consider these “in the absence of contrary published guidance or conflicts with other agency statements.” (72 FR 73710)

This requirement on guidance runs counter to due process, which requires, at a minimum, prior notice of a change in policy or procedure and an opportunity for those affected to provide input on the proposed change. To comply with the Constitutional mandate for due process, Congress enacted the federal Administrative Procedure Act, codified in Title 5 of the United States Code. Title 5 specifically states that no individual (including states) can be held to a rule unless it was properly distributed (e.g., published in the *Federal Register*) or the party receives timely and actual notice of said rule (5 U.S.C. § 553). In addition, Title 5 requires public participation in rulemaking. The proposed rules are problematic in that the DAB would be required to follow what has been referred to as “published guidance.” The NPRM definition of published guidance involves any guidance that has been publicly disseminated, including items that have not been published in the *Federal Register* and those which require proactive steps to receive, such as simple and unannounced postings on the HHS website. Additionally, the NPRM requirement for the DAB to follow “unpublished guidance” includes items that have not been disseminated and have not been developed with the mandated public participation. In such a scenario, the DAB may be required to

consider as persuasive a CMS argument based on a position that CMS took with respect to one state, and about which no other state may know. Accordingly, the proposed rule would have the DAB hold states accountable to rules which were not properly released or were released without timely and actual notice. Both of these requirements run counter to the statutory requirements as well to any notion of procedural and substantive due process.

In addition, allowing the use of unpublished guidance is not generally practiced in administrative law. As a result, disputes between states and HHS components will not be resolved administratively. Instead, the NPRM's regulatory revisions will provide states a reasonable basis for bypassing the DAB entirely. The DABs final decision would be subject to the Secretary's opinion, which is often the basis for the initial determination that is brought before the DAB.

45 CFR § 16.21 Secretarial Review of DAB Decisions Concerning Disputes

A. Secretarial Review Runs Counter to Congressional Intent

Congress has afforded states, not the Secretary, the right to seek a reconsideration of the Secretary's determination. Federal law has provided that

[w]henver the Secretary determines that any item or class of items on account of which federal financial participation is claimed under subchapter . . . XIX of this chapter, shall be disallowed for such participation, *the state* shall be entitled to and upon request shall receive a reconsideration of the disallowance.¹

In addition to the lack of clear authorization for Secretarial review, Congress has a history of making it explicit when it intends to give the Secretary the authority to review and overturn decisions made by an adjudicative body. Most notable is the authority Congress has given the Secretary regarding decisions issued by the Provider Review Reimbursement Board (PRRB), a body that adjudicates payment disputes involving Medicare providers. The law specifically states that

[a] decision of the [PRRB] shall be final unless the Secretary, on his own motion, and within 60 days after the provider of services is notified of the [PRRB]'s decision, reverses, affirms, or modifies the [PRRB]'s decision.²

Congress has not included such a mandate in the provision of federal law governing DAB review. As a result, there is no evidence that Congress intends to give the Secretary authority to reverse, affirm, or modify DAB decisions on his own motion.

¹ Social Security Amendments of 1965, Pub. L. No. 89-97, § 404(a), 79 Stat. 286 (codified at Social Security Act § 1116(d), 42 U.S.C. § 1316(d)) (emphasis added).

² Social Security Act § 1878oo(f)(1), 42 U.S.C. § 1395oo(f)(1); *see also* 42 U.S.C. § 300gg-22(b)(2)(D)(ii) ("If a hearing is requested, the initial agency decision shall be made by an administrative law judge, and such decision shall become the final order unless the Secretary modifies or vacates the decision.").

B. There Is No Justification for Secretarial Review of Board Decisions

The DAB is widely recognized as an expert in the public assistance programs that it reviews. Congress has acknowledged the high standards of the DAB by adding to its jurisdiction, further substantiating its satisfaction with the role of the DAB and the manner in which it conducts its functions. The DAB has also received broad judicial approval of its decisions, demonstrated by the very high rate of DAB's decisions upheld upon judicial appeals. The longevity of its members and the quality of its staff assures that decisions are made with knowledge of previous decisions as well as of agency policies and interpretations. Even the NPRM gives credit for the Board's record by stating that the DAB has "responded to the challenges posed [by an increased workload] with considerable diligence and sophistication. In particular, DAB members have developed great expertise in dispute resolution, hearing procedures, and many aspects of the subject Departmental programs." (72 *FR* 73709) Additionally, the notice does not include any instances of a DAB ruling being incorrect or inconsistent with any established law or policy. Therefore, because of the strong track record of the DAB including its staff, allowing Secretarial review can only lead to inconsistent decision making.

In terms of ensuring that policies are correctly implemented, the NPRM cites that "under the current rules, the DAB does not have access to the full range of policy considerations that the Secretary and the relevant component may have in interpreting applicable statutes and regulations." (72 *FR* 73709) This statement leads to the conclusion that the inconsistency rests with the HHS components for failing to present their case by giving the DAB all the information it needs. The solution to this problem is not for the Secretary to exercise own-motion veto authority, but for the HHS components to ensure the DAB receives all the supporting documents for their arguments. The NPRM does not list a single instance in which the DAB has issued a decision contrary to the reasoned interpretation of the Secretary or an HHS component as issued after notice-and-comment rule making.

The NPRM also does not include criteria to determine which DAB decisions are subjected to Secretarial review. Additionally, the rule does not define the scope of the review or list safeguards to ensure impartiality of the review. For instance, there is no requirement for a reviewer to be recused even if the individual was involved in the decision that is under review. The rule also does not include a prohibition on ex parte communication from the component agency to the reviewer. Nor are there requirements that the reviewer give weight to an Administrative Law Judge or the DAB's first-hand observation of the demeanor of witnesses. In addition, states are not given an opportunity to address any changes in the fact finding or legal conclusions that the Secretary may make to the DAB decision. Without these protections that are included in the DAB proceedings, the impartiality of the Secretarial review can be called into question.

It should also be noted that Secretarial review at the request of grantees was considered but rejected as "administratively undesirable" when 45 CFR Part 16 was first issued. (38 *FR* 9906, at 9907) In rejecting this option, HHS stated that Secretarial review "would create an additional layer for review, without any corresponding benefit . . ." (38 *FR* 9906, at 9907) Since there is no evidence of any change in the underlying factors, APHSA agrees with the original determination from HHS that such review of DAB decisions is unnecessary and would be administratively burdensome.

Collectively, these points demonstrate the value of an independent DAB and the need to maintain such an existence. Inserting Secretarial review would create instability and unreliability in a stable and just process that has been in place for over 30 years, and which has gained a reputation for integrity, fairness, and impartiality.

Increased State Litigation

Currently, the DAB is an administrative adjudicative body that was created to provide a relatively rapid, streamlined mechanism to settle disputes which would otherwise require full litigation. For this adjudicative process to properly function, the participants must be confident that the administrative forum delivers fair and unbiased decisions, both in practice as well as perception. If states are not satisfied that the administrative forum provides a “level playing field,” they will seek redress in the overburdened federal court system. The proposed rule changes could undermine a state’s confidence that it will receive impartial adjudication before the DAB and/or the Secretary. This increased litigation will inevitably lead to increased costs to both the states and the federal government. This will represent a loss of resources that could otherwise be used to provide benefits. Further, it is common for litigation to last years, if not decades. Litigation rarely yields a definitive answer in the short term. Thus, the time delays involved will increase uncertainty with respect to important policy matters in the federal programs at both the state and federal level.

45 CFR 1303.17(a) Timing for Head Start Appeals

APHSA is concerned that the current timeline requirements of a 60-day rendering of the DAB decision in writing for Head Start appeals will be extended if the NPRM is made final. The current 60-day timeframe allows for Head Start programs to respond in a timely manner to programmatic issues and decisions. Changing the language to state that the Board’s decision must be rendered within 60 days, rather than the “final” decision, could likely lead to extensive delays in the issuance of a final resolution.

45 CFR Part 16, Technical Changes

We support the effort to remove outdated information from the Code of Federal Regulations.

APHSA is concerned with a number of the provisions included in this proposed rule and encourages HHS to withdraw the rule. Thank you for the opportunity to comment on the proposed rule. If you have any additional questions, please contact Barbara Coulter Edwards, NASMD Interim Director, at (202) 682-0100.

Sincerely,



Jerry W. Friedman
Executive Director
American Public Human Services Association