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**A. GENERAL INFORMATION**

1. Date

02/15/2019

2. Department

Health Care Services

3. Organizational Placement (Division/Branch/Office Name)

Office of Administrative Hearings and Appeals

4. CEA Position Title

Chief of Administrative Appeals

5. Summary of proposed position description and how it relates to the program's mission or purpose. (2-3 sentences)

The Department of Health Care Services (DHCS), Office of Administrative Hearings and Appeals (OAHA), is requesting the establishment of a CEA Level A to serve as the Chief of Administrative Appeals (Chief) for the Department. The proposed CEA will operate independently to ensure the Department fulfills its federal and state responsibilities to provide first-level due process to providers (including state and federal counties) and vulnerable California residents affected by certain policy actions and departmental decisions made by various department programs. In addition to overseeing the informal hearing process and making decisions that affect a wide range of departmental policies, this CEA would supervise a staff of hearing officers, managers, analysts, and support staff.

6. Reports to: (Class Title/Level)

CEA Level B, Deputy Director and Chief Administrative Law Judge, OAHA

7. Relationship with Department Director (Select one)

- Member of department's Executive Management Team, and has frequent contact with director on a wide range of department-wide issues.
- Not a member of department's Executive Management Team but has frequent contact with the Executive Management Team on policy issues.

(Explain): This position would answer directly to the Deputy Director and Chief Administrative Law Judge (ALJ), OAHA. While interaction with the Director would be limited, this position would interface routinely with other CEAs, such as division and branch chiefs within the Audits and Investigations (A&I) Division, the Safety Net Financing Division (SNFD), and the Provider Enrollment Division (PED).

8. Organizational Level (Select one)

- 1st
- 2nd
- 3rd
- 4th
- 5th (mega departments only - 17,001+ allocated positions)

## B. SUMMARY OF REQUEST

### 9. What are the duties and responsibilities of the CEA position? Be specific and provide examples.

Health and Safety Code section 100171 requires that DHCS provide a hearing process to adjudicate disputes concerning policy actions or decisions made by various department programs. All the appeals filed with OAHA revolve around policy and fiscal issues that have a visceral and, at times, devastating impact upon litigants. Appeals brought to OAHA include disputes regarding actions taken by DHCS' PED, A&I, Third Party Liability and Recovery Division, SNFD, California Children's Services program, Women, Infants and Children (WIC) program, the California Department of Public Health's (CDPH) Licensing and Certification Division, and the Department of Social Services' Foster Care program. Ultimately, most of OAHA's appeals originate from Medi-Cal audit challenges.

By statute and regulation, when the reimbursement of a Medi-Cal provider has been adjusted by the state after audit, due process rights attach, and the provider is authorized to pursue an administrative appeal through OAHA. Importantly, unlike other administrative hearing forums, the adjudication of audit cases is strictly regulated and failure to meet specific timeframes results in financial penalties.

Under the Director's delegated authority, the Chief would have substantive authority to influence and determine policy for the Department, from the beginning of the process until the adjudication concludes. State law authorizes the provider to contest audit reductions, whether in amount or as a matter of policy and process. Such a challenge would be submitted directly to the Chief, and it would be this position that determines whether OAHA has jurisdiction and whether the appellant has articulated a cause of action sufficient to offer the Department a fair opportunity to prepare and respond to litigation. The Chief would determine whether the appeal is timely submitted or whether the claim should be rejected out of hand.

Moreover, the Chief would be responsible for determining the breadth of due process owed to the litigant and the time and place of the hearing. Many of these responsibilities carry a monetary penalty for delay or indecision, and the Chief's decisions are only subject to review by Superior Court. The Chief would routinely interface with the Department's business partners, stakeholders, legislative staff, provider networks, counties, public entities, sister departments, and contractors.

The Chief would ultimately be responsible for ensuring that appeals are appropriately conducted at the informal level. All of OAHA's informal hearing staff, including those who hear Medi-Cal audit disputes, Transfer Discharge Appeal (TDA) and Refusal to Readmit Appeal (RTR) challenges, and hardship application denials, are to be managed by the Chief, who would bear the responsibility for their product. While the informal hearing process is not strictly controlled by the Administrative Procedure Act (APA), the informal proceedings do conform to basic concepts of due process. The parties are given an opportunity to discuss the audit materials, question the subject experts, and examine the validity and weight to be accorded to the submitted evidence. These hearings are sensitive and subject to significant interest from the federal Centers for Medicare and Medicaid Services (CMS) and advocates.

The purpose of the informal hearing process is to determine whether the facts and controlling concepts of accounting and expenditure authority support, justify and validate the audit adjustments taken. In short, the informal hearing decisions represent an objective and logical review of DHCS program policy by an independent third party with extensive health care reimbursement knowledge and audit experience. If the Chief concludes that the appeal has merit and that the adjustments were erroneous, the Chief would grant the appeal as the Department's "final decision." This decision would not be subject to further review by the Department, including division chiefs or the Directorate. Consequently, the Chief would have significant authority to independently alter and reverse the policy decisions made by any of the programs whose actions are, as required by law or contract, subject to review by OAHA.

The Chief would decide these cases by applying specialized expertise in auditing, accounting, enrollment requirements, and licensure/certification standards, as well as by relying upon an extensive working knowledge of the laws, regulations, policies and rules that control the implementation of the Department's programs. While this position would not require a license to practice law, the incumbent would be responsible for determining findings of fact on the basis of evidence submitted. Although the Department's programs may not be legally required to follow this position's decisions in future situations, it would be counterproductive for them to refuse to implement the Chief's new policy direction because, upon appeal, the Department's policy would continually be upended. Accordingly, in effect, all final decisions of the Chief would establish new policies on the issues addressed.

Further, when legislation establishes a new program or alters an existing rule or criterion, the Chief would develop new procedures for implementing the appeals processes. The Chief would be tasked with ensuring that the hearing officer staff are properly trained in departmental rules and policies regarding new hearing subject matter, as well as acting as a substantive resource for the Administrative Law Judge (ALJ) staff.

Finally, after the first level appeals are decided and issued, the incumbent would be responsible for overseeing the smooth transition of the cases taken to the second level review before an ALJ. The Chief would work closely with the Chief ALJ, and the ALJ staff, to ensure that the formal hearing decisions produced are issued in a timely, consistent, and equitable manner.

**B. SUMMARY OF REQUEST (continued)**

10. How critical is the program's mission or purpose to the department's mission as a whole? Include a description of the degree to which the program is critical to the department's mission.

- Program is directly related to department's primary mission and is critical to achieving the department's goals.
- Program is indirectly related to department's primary mission.
- Program plays a supporting role in achieving department's mission (i.e., budget, personnel, other admin functions).

Description: As a condition of participation in the Medicaid program, federal law imposes requirements on states, including the responsibility to audit providers in conformance with state and federal law and regulation, to ensure overpayments are recouped, and to protect the rights of Medicaid and Medicare beneficiaries. Federal financial participation in California's Medicaid program, Medi-Cal, is premised upon performing these functions. In short, offering an administrative forum is a requirement of the Medicaid program rules.

In California, DHCS is the single State Medicaid Agency charged with such duties; thus, the hearing and appeal processes provided by OAHA are critical to the Department's mission. Without an efficient and professional hearing process, the state would be out of compliance with its Medicaid State Plan and subject to financial dis-allowances and burdensome federal oversight. Thus, the Department's hearing program is critical to its overall mission.

A vigorous process for ensuring review of contested audit decisions is integral to the Department's mission to make the best use of the state and federal dollars spent on health care. By guarding against overpayments, verifying that funding is spent wisely, and providing an expert forum for providers to seek review of program decisions, the Department's credibility is enhanced and more providers are encouraged to participate in the Medi-Cal program.

Along with protecting the state's fiscal interests, OAHA furthers the Department's core mission by protecting the rights of fragile and vulnerable California residents by providing hearings for the WIC program, as well as hearings for CDPH's Licensing and Certification Division. The Chief is integral to the provision of hearing rights as it serves an essential adjudicative hearing function of performing the first level review of filed appeals.

## B. SUMMARY OF REQUEST (continued)

11. Describe what has changed that makes this request necessary. Explain how the change justifies the current request. Be specific and provide examples.

Established more than 50 years ago, Medi-Cal has changed significantly in recent years, especially in response to the federal Affordable Care Act which, among other things, expanded coverage to include 13.3 million people. In accordance with its mission to provide Californians with access to affordable, integrated, high-quality health care, including medical, dental, mental health, substance use treatment services and long-term care, Medi-Cal enrolls nearly 150,000 providers. For Fiscal Year 2018-19, Medi-Cal has an estimated budget of \$103.9 billion (\$22.9 billion general fund).

Due to the influx of federal dollars and the correlating impact on the budgets of both the state and many counties, the Department has a substantial financial and public interest in ensuring that its dollars are properly expended. To address this interest, the Department engages in a robust auditing program, which in turn triggers a right to an administrative hearing for providers against which a reimbursement adjustment is made. As the need for administrative review and hearing occurs, the role and responsibility of the proposed Chief becomes more imperative.

OAHA hearing staff have been tasked with absorbing at least ten new case types over the last three years---arising from the enrollment of substance use treatment providers, electronic health record reimbursement audits, nurse-to-patient staff ratio disputes, Mental Health Services Act (MHSA) audits, recovery of Substance Abuse Prevention and Treatment (SAPT) block grant funds, and Medicaid Integrity Contractor audits. Each of these areas comes with specific statutory and regulatory criteria that must be identified and understood as part of the appeal process, and it will be the responsibility of the Chief to ensure that staff are properly prepared for such hearings and the policy issues being contested.

Reimbursement methodologies for federally-qualified health centers (FQHC), rural hospitals, nursing facilities, emergency transportation providers, and county mental health programs have all been recently revised, and the audit appeals workload in OAHA has increased as providers shift their manner of claiming reimbursement. These alterations in reimbursement theory increase the responsibility of this position to develop hearing policy to best address the issues raised at hearing and resolve them in the manner that serves the mission of the Department.

Due to the internal reorganization of the Department, and to reduce the cost of litigating appeals, many programs within the Department have made regulatory changes to authorize OAHA's hearing officers to preside over appeal cases, rather than ALJs. The hearing officers, under the direction of the proposed Chief, now conduct appeals of provider suspensions, withholds of money from providers due to possible fraud, provider enrollment denials, hardship waivers of estate recovery claims, Nurse-to-Patient Staffing Ratio Penalty violations and WIC participant eligibility determinations.

As Medi-Cal perfects its payment methodologies and systems, the caseload attributed to this position has grown more political and sensitive. For example, as growth in the demand for nursing home services surges, the scrutiny has heightened in regard to disputes involving the involuntary transfer of nursing home residents (TDA) and the refusal of nursing facilities to accept its residents after a stay in acute care hospitals (RTR). These hearings are conducted state-wide and the responsibility for the final decisions is within the purview of this position. Hotly contested, this caseload involves consistent interaction with the Directorate, Office of Legal Services, CDPH, the California Health and Human Services Agency, CMS, nursing home advocacy groups and the Bureau of Medi-Cal Fraud and Elder Abuse.

Over the course of more recent years, state government has become much more transparent and accountable, both for the delivery of services and the management of public funds under its control. The state has done much to publicly disclose its policies and decisions, and the same is certainly true for OAHA. With billions of reimbursement dollars at stake, the Department has the responsibility to equitably manage and reimburse its providers. Consequently, the hearings conducted by OAHA are often the subject of Public Records Act disclosures, as the provider community wants to examine OAHA decisions so that it might better predict the broader implications of those decisions on audit authority and policy. Hence, OAHA's decisions have become more visible and meaningful as they are generally circulated and examined for policy alterations and litigation patterns.

When such matters arise, the Chief is the first to respond to inquiries posed by provider groups and stakeholders. More than ever, the Chief has the autonomy to make independent decisions that have an abiding impact on the Department's programs and provider communities.

### C. ROLE IN POLICY INFLUENCE

12. Provide 3-5 specific examples of policy areas over which the CEA position will be the principle policy maker. Each example should cite a policy that would have an identifiable impact. Include a description of the statewide impact of the assigned program.

The Chief will be the principal policy maker for the Department in regard to all informal hearing decisions involving cost-setting rate disputes and reimbursement adjustments for hospital, FQHC, rural hospitals, local educational agencies, county health plans and long term care providers. The Chief will, in fact, be the final decision-maker when the informal appeal results in a decision in favor of the provider and against the Department. More precisely, the Chief's final decision alters departmental policies because the provider community is keenly aware that OAHA can and will overturn the audit policy and actions of A&I, via appeal.

For example, OAHA received an appeal from a provider, which was a subdivision of a significantly larger non-profit organization, who claimed administrative expenses for fees paid as a related-party transaction to the non-profit organization. At audit, the Department adjusted the provider's reimbursement because it questioned both the basis and methodology for the allocation, specifically whether the provider had appropriately determined the actual cost of administrative services claimed. Although, subsequent to its submission of its cost report, the provider did offer supplemental information, the Department determined that it had no obligation to accept such material and to consider an alternative methodology for assignment of cost. At hearing, the hearing officer examined the guidance provided, the controlling law, and accounting principles. At the conclusion of the hearing, and upon consideration of the submitted evidence, the Chief (currently the HPAM III) overturned the policy decision made by the Department to reject supplemental material and granted the appeal. This policy decision resulted in a shift of the Department's policy concerning how subsidiaries or subdivisions of large organizations appropriately document and allocate costs when seeking reimbursement from Medi-Cal.

In another example, OAHA received a group of appeals contesting the Department's policy regarding its applied methodology in calculating reimbursement for targeted case management (TCM) services. Specifically, the TCM providers asserted that the Department incorrectly calculated prospective rates on the basis of a retroactive examination of provider costs in a prior year. Although the Department's original policy was to preclude a provider from claiming the full value of services to the extent that such "cost" had been reimbursed with federal funds, the hearing officer determined on appeal that this was an unfair policy interpretation and refused to uphold the Department's position. The Chief (currently the HPAM III) determined that once federal monies were received by a rendering TCM provider, these monies could be recharacterized and thereafter used to provide future services. Because of this interpretation of state and federal law and policy at informal hearing, the Department altered its policy and worked with the federal government to develop a rate calculation that was consistent with the informal hearing decision.

As another example, appeals are frequently brought by FQHCs and rural health clinics (RHC) both of which serve as primary care providers for under-served Medi-Cal populations and for those that are not covered by any form of insurance. These provider types are compensated via a Prospective Payment System (PPS) rate. During the course of one appeal, an RHC provider employed a specific methodology to calculate a global cost figure for all patients receiving the approved scope of service for that facility, a process largely controlled by CMS guidelines and the Medi-Cal cost reporting instructions. At audit, the Department took the position that federal law and guidance authorized it to apply FQHC reimbursement principles regarding a change in a scope of service when calculating rates for RHCs. When contested, the informal hearing decisions overturned this interpretation and the Department amended its policy to be consistent with the decisions issued at informal hearing.

As conceived, the Chief would be expected, on the basis of the Department's presentation at the informal hearing, to make determinations that comport with the controlling law, regulation, and auditing principles at play. There are no additional meetings or conversations with program executives (or even the Directorate). The Chief would be required to make his or her decision in relative isolation. To the extent that the ultimate decision runs afoul of existing or ongoing policy determinations, the Chief would be charged with making an independent decision that (if against the Department) cannot be overturned by any power. Certainly, when a particular appeal is resolved, the Chief would discuss, with other Department executives, the weaknesses presented in the audit process, but these conversations would only occur after the administrative decision had been rendered and issued.

Accordingly, it is vitally important to the Department that the Chief establish and implement policies that comport with the Department's mission of delivering quality health care services as economically as possible and within the constraints of federal and state law.

### **C. ROLE IN POLICY INFLUENCE (continued)**

#### **13. What is the CEA position's scope and nature of decision-making authority?**

The Chief would oversee the informal hearing process, review the tentative decisions of his or her hearing staff for adherence to law and policy, as well as consistency, and arrive at a final decision. Decisions issued by the Chief are binding when such decisions are issued in the provider's favor, or in situations where the provider does not choose to pursue a formal hearing.

The Chief autonomously exercises broad discretion to make independent decisions that have an abiding impact on the Department's programs and provider communities. The Chief cannot consult with subject matter experts in other divisions of the Department, but must make an independent evaluation based on the documents and other evidence produced at the hearing.

Legal requirements prohibit ex parte discussions between the decision-maker (in this case: the Chief) and program executives, such as the Deputy Directors for Mental Health and Substance Use Disorder Services, A&I, and PED, during pendency of the matter. The Chief would be expected, on the basis of the Department's presentation at the informal hearing, to make determinations that comport with the controlling law and regulation in question. There are no additional meetings or conversations, and the Chief is required to make his or her decision in relative isolation.

When the Chief determines that the Department's action runs afoul of existent or ongoing policy determinations, the Chief's decision (if against the Department) cannot be overturned. It is only after the decision is final that the Chief can provide general advice to the Directorate or the chiefs of the affected programs. For example, the Chief could brief executives within A&I as to weaknesses within the audit process to avoid problems in the future.

Despite the existence of a formal hearing process, the Chief's informal hearings are conducted independent of the formal hearing process. In fact, the financial/accounting expertise of the Chief, and his or her independence, is what makes the process so valuable to the Department and trusted by providers. Because of this expertise, the informal hearing decision is indispensable to the ALJs, who generally do not have a sophisticated auditing background.

In addition to accounting expertise, the Chief must have a keen understanding of the basic rules of due process, as well as an ability to study, interpret and apply state and federal law and regulations. Informal hearing decisions have a lasting impact on the reimbursement authority and audit policy of the Department. Since the impacted DHCS division has no recourse, it must address and resolve the policy determinations noted by the Chief. In short, the Chief's decisions will influence the reimbursement policy for entire communities of providers, and not just the single litigant coming before OAHA and the Chief for a decision.

#### **14. Will the CEA position be developing and implementing new policy, or interpreting and implementing existing policy? How?**

While this position does not develop and implement new policy in a traditional sense, the Chief issues and influences new policies through their decisions. Specifically, when the Chief grants appeals in favor of appealing providers, that position establishes new policy not previously reviewed or approved by the Department's executive staff. If the Chief concludes that the appeal has merit and that the adjustments were erroneous, the Chief would grant the appeal as the Department's "final decision." This decision would not be subject to further review by the Department, including division chiefs, the Chief ALJ, and/or the Directorate. Consequently, the Chief would be authorized to independently alter and reverse the policy decisions made by any of the programs that come before OAHA.

Of course, when an appeal is submitted to OAHA and the Chief reviews the matter, the Department is given ample opportunity to demonstrate that its actions comport with controlling law and audit standards. Upon review of these actions, the Chief must consider and apply existing policy to ascertain whether or not the Department's action did or did not comply with such policy. The Chief bears a duty to the parties and must consider whether overarching theories of reimbursement and accounting apply or should apply; and, as necessary, decide whether existing policy should be altered.