



Memo

Cherokee Nation

To: Cabinet and Sub-Cabinet Officials; Executive Officers
From: Chuck Hoskin, Jr., Principal Chief
CC: Bryan Warner, Deputy Principal Chief; Mike Shambaugh, Speaker Council of the Cherokee Nation
Date: May 17, 2024

ADMINISTRATION MEMORANDUM ON IMPLEMENTATION OF THE PUBLIC HEALTH AND WELLNESS FUND ACT 7% EARMARK AND BEHAVIORAL HEALTH CAPITAL FUND

The purpose of this memorandum is to provide guidance on the implementation of the [Public Health and Wellness Fund Act](#) as it relates to an annual spending plan as well as interpretation of broad eligible uses of the 7% earmark¹ and the “Behavioral Health Capital Fund.” As discussed more fully, below, the Act should be liberally interpreted to meet the purposes and policies of the Act and to maximize flexibility, but with a more conservative approach as it relates to the administration of grants to third parties. The Chief of Staff, Secretary of State and Treasurer should provide the Principal Chief Annually with a recommended spending framework for the 7% earmark and the Behavioral Health Capital Fund.

I. The Public Health and Wellness Fund Act

PHWFA was enacted in 2021 and amended in 2022 and 2023, with the 2023 amendments outlining the use of certain opioid and e-cigarette industry settlement funds. The Act earmarks 7% of certain third party revenue for the purposes outlined in the Act with, as noted, specified uses of certain settlement proceeds.

¹ The “7% earmark” herein is the 7% set aside of third-party Health revenue, as more fully defined in the Act and as interpreted in this memorandum. Although the phrase “Third Party revenue” describes how certain funds are generated, the dollars themselves are like any Cherokee Nation revenue source: subject to spending only by Council appropriation, subject to particular external restrictions (eg, Medicare collections) or internal restrictions (eg, PHWFA). Not a penny of “third party revenue” belongs to a particular department, per se. Rather, it is general fund revenue subject to Council appropriation, which in turn is subject to various internal and external laws, regulation, etc. The Administration disfavors the assumption that revenue generated by health programs, or any programs, is inherently set aside for the collecting department’s use.

Relevant to the 7% earmark funds, the Act states:

§ 1003

Collection of Third-Party Revenue Funds.

- A. *Each year, seven percent (7%) of Third Party Revenue collected by Cherokee Nation Health Services shall be set aside for public health and behavioral health services, provided that nothing herein shall compel the expenditure of any third party revenue in a manner that violates any lawful restrictions on such funding.*
- B. *Within ten (10) days after the end of each month during which this act is in effect, Health Services shall prepare and submit to the Treasurer a report identifying the collection of Third Party Revenue generated through the patient visits in the Cherokee Nation Health system. Based on the reporting, the Treasurer may submit budget modifications, for approval by the Council of the Cherokee Nation, as needed to reflect the change in revenue collection.*
- C. *Nothing contained within this Act shall prevent Cherokee Nation from acquiring other funds, including public and private funding, to use toward the betterment of public and individual health of Cherokee Nation citizens and meeting the intent of this Act.*

§ 1004

Uses of Third Party Revenue Funds.

- A. *Revenue collected under § 1003 of this Act shall be used for both capital investments and operational expenses for Wellness Centers and Addiction Treatment facilities, other behavioral health programs, or grant programs in support of activities consistent with the purposes of this Act by third party entities for the benefit of Cherokee Nation citizens. Budget and intended use of the funds shall be appropriated by the Council of the Cherokee Nation through the comprehensive annual budget. The Principal Chief shall prioritize and plan the use of funds to address the public health and wellness needs of citizens and communities.*
- B. *Annually, unspent or unused funds collected under this Act shall be carried over into the following fiscal year. The carryover funds shall be used only for the expenditures consistent with the purposes of this Act.*
- C. *Funds collected under § 1003 of this Act may be used as cash match for other funding sources, including Federal, State or private grant or funding programs, so long as the funding or grant opportunity is consistent with intent of this Act. Cash match shall not surpass twenty-five percent (25%) of the seven percent (7%) revenue collected from Third Party Revenue.*

Elsewhere, in Section 1005.A, the Act establishes the “Behavioral Health Capital Fund,” dedicating specified opioid industry settlement funds for or the purposes of behavioral health capital projects relating to addiction treatment or prevention within the Cherokee Nation reservation.”

The Act does not define “public health,” “behavioral health services” or “behavioral health” and does not expressly restrict the 7% funding to a particular department.

II. Administration of 7% Earmark and Behavioral Health Capital Funds

a. Annual Spending Framework

On an annual basis the Chief of Staff, Secretary of State and Treasurer should, on annual basis, provide the Principal Chief with “Annual Recommended Framework for PHWFA 7% Earmark and Behavioral Health Capital Fund Spending.” Those cabinet members should determine the timing of the report to allow the Administration to understand, make or modify spending of those sections of the PHWFA. The report should succinctly and simply identify, for the time period under review:

- i. Revenue available under the 7% earmark
 - 1. Recommended (and already appropriated or designate) spending of the 7% earmark.
- ii. Settlement funding available under the Behavioral Health Capital Fund
 - 1. Recommended (and already appropriated or designate) spending of the Behavioral Health Capital Fund.

The Annual Recommendation, and any “Supplement to the Annual Recommendation,” will assist Administration in identifying departmental requests for funding and prioritizing those requests. For example, there have been various requests this fiscal year to use PHWFA funds for sidewalk, which should be deemed a permissible use. However, our process for vetting and approving such requests are so far unclear. The

b. Administering the 7% Earmark

- i. ***The 7% earmark is expressly allocated to subject matters or purposes, not departments.***

Although the Act identifies “public health” and “behavioral health services,” as recipients of some unspecified allocation of the 7% earmark, this reference is plainly to subject matters, not departments. Health collects the funds, those funds are earmarked under PHWFA for the purposes set forth herein, not departments. Had the Council intended to restrict Section 1003 funds to only the Behavioral Health program within the Health Department, Council would have said so. When Council meant to do so elsewhere in the Act, it did. Thus, in Section 1005(B), (C)

and (D) as well as Section 1006, the Act specifies departments to receive funds. Likewise, Section 1005(A) Council did not expressly identify the “Behavioral Health Department as recipients of funds from the “Behavioral Health Capital Fund.”

Applying a department restriction to the 7% set aside where the Council did not so is an arguably permissible way to administer PHWFA, but it is certainly not required and is overly restricts the law in a way that Council chose not to. Section 1004 specifies that the 7% funds should be used “for both capital investments and operational expenses for Wellness Centers and Additional Treatment facilities, other behavioral health programs or grant programs... by third party entities...” Section 1004(A). The phrase “other behavioral health programs” plainly describes a subject matter, not a department. Accordingly, any department operating a program within the subject matter of behavioral health should have access to the 7% funds.

This interpretation resolves present uncertainty over the Department of Language’s requested use of 7% earmark funds to cover a Peer Recovery Support Specialists to further its Speaker Services mission. Setting aside, for the purposes of this memorandum, any concerns about redundancy, subject matter expertise, overlap, etc, nothing in PHWFA prohibits Language from using 7% funds for that purpose. The proposal should be evaluated as facially eligible under PHWFA.

i. Resolving Ambiguity Over “Public Health” Spending

There is some ambiguity as it relates to “public health” usage of the funds. The Act identifies revenue being set aside for “public health” in Section 1003. However, the Act is silent as to “public health” in Section 1004. Section 1004 makes clear that 7% earmark funds may be used to operate “Wellness Centers. In the absence of Council action to resolve this ambiguity, Administration interprets the Act to include a broad mandate to use 7% earmark funds on the subject of “public health.” Section 1003 includes express language supporting this. Section 1004’s silence is not enough to render Section 1003 meaningless, as Council could not have reasonably intended that.

This interpretation supports broad *subject matter* use of the 7% funds. For example, sidewalks, playground equipment or walking trails on Nation owned properties are examples of “public health” eligible spending, because they are investments that support and encourage physical activity and/or they enhance accessibility to other public health related assets. Any requests for such funding should be considered proper within the meaning of PHWFA.

ii. Section 1004 External Grants: CCO Policy Draft due June 3, 2024

PHWFA 7% have yet to be utilized for Section 1004 “grant programs in support of activities consistent with the purposes of this Act by third party entities for the benefit of Cherokee Nation citizens.” Although this language could be applied liberally to craft any number of relevant grants to third parties, a more conservative approach is warranted for the time being.

Administering grants to the numerous and wide array of third-party entities involved in activities within the subject matters covered by the Act would be difficult to manage. Administering grants via Cherokee Nation Community and Cultural Outreach is a better approach because the potential eligible entities are easily identifiable, have a clear connection to Cherokee community life and have an established relationship with Cherokee Nation. Accordingly, unless and until directed otherwise third-party grants under the PHWFA should be administered by CCO to CCO Participating Organizations. CCO should present a draft program to the Secretary of State by June 3, 2024.

Sidewalk / Public Access Exception: The Nation's specific interest in support public access, pedestrian safety, outdoor exercise opportunities and access to Nation owned properties and facilities across our reservation favors the installation of public sidewalks. Accordingly, the "sidewalk exception" to the general "CCO rule" supports Section 1004 grants in support of, or in kind provision of, public sidewalks on non-Nation owned property.

c. Administering the Behavioral Health Capital Fund

For the reasons set forth in Section II.b.i analyzing the 7% earmark, above, funds available under the Behavioral Health Capital Fund (Section 1005(A)) are not limited to the Behavioral Health program within the Health Department. Given the Nation's strong interest in the construction of drug addiction treatment and other behavioral health facilities and the finite and limited term nature of the Behavioral Health Capital Fund, use of the funds outside of the Behavioral Health program will require a very compelling basis. At present there are no pending requests to use Behavioral Health Capital Funds outside of the Behavioral Health Program of the Health Department. However, requests from other departments to use these funds should not be rejected on some perceived basis of statutory ineligibility.

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Chuck Hoskin Jr.
Cherokee Nation Principal Chief