

21 April 2021**FILE REF: SHA/24420****DECISION MAKING BODY: NHS ENGLAND - MIDLANDS**Tel: 0203 928 2000
Fax: 0207 821 0029
Email: appeals@resolution.nhs.uk**GDS CONTRACTOR: MS H BAKER
("THE CONTRACTOR")
MELBOURNE DENTAL PRACTICE
CASTLE STREET
MELBOURNE
DERBYSHIRE
DE73 8JA****DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE
(GENERAL DENTAL SERVICES
CONTRACTS) REGULATIONS 2005****RE: RECONCILIATION OF UNITS OF
DENTAL ACTIVITY ("UDAS") FOR
THE YEAR APRIL 2019 TO MARCH 2020****1 Outcome**

- 1.1 Following a review of the Contractor's particular circumstances, NHS England ought to have considered the high likelihood that the Contractor would have performed more than 1 UDA following the temporary suspension over the actual activity provided and that discretion ought to have been applied to managing this particular case. In the absence of a clear rationale for taking the approach it did, I am of the view that the methodology used to calculate the UDAs for the Contractor was not fair and proportionate based on the information before me.
- 1.2 I conclude that NHS England, working with the Contractor, should review this matter and apply their discretion to give an increased total UDA for March 2020.
- 1.3 I note that NHS England has served a breach notice on the Contractor regarding the under delivery of the required number of UDAs. Having regard to the difference between the required and actually performed (not adjusted) number of UDAs and the exceptional circumstances of the pandemic, I do not consider that NHS England has demonstrated why this was appropriate. In the absence of evidence that NHS England approached the Contractor's position in a way that was demonstrably fair and reasonable, I determine that NHS England shall increase the total UDA for March 2020 and that the breach notice is not accurate and must be withdrawn by NHS England. Should NHS England consider that a breach notice is required following its review and application of discretion to give an increased total UDA for March 2020, I would expect NHS England to detail the rationale for this, in these individual, exceptional circumstances, in such a notice.

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- 1.4 I note that no party has not submitted a claim for interest with regard to this dispute so I make no determination in this regard.

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DISPUTE RESOLUTION: NATIONAL HEALTH SERVICE
(GENERAL DENTAL SERVICES
CONTRACTS) REGULATIONS 2005

RE: RECONCILIATION OF UDAS
FOR THE YEAR APRIL 2019
TO MARCH 2020

1 INTRODUCTION

- 1.1 The Contractor has referred the dispute in relation to its General Dental Services ("GDS") Contract for dispute resolution under the provisions of Paragraph 54 and Paragraph 55 of Schedule 3 of the National Health Service (General Dental Services Contracts) Regulations 2005 (the "Regulations").
- 1.2 The Secretary of State for Health and Social Care has directed that NHS Resolution exercise the functions of dispute resolution on his behalf. I, as an authorised officer of NHS Resolution, have made this determination.

2 APPLICATION FOR DISPUTE RESOLUTION

- 2.1 By letter dated 29 September 2020 the Contractor applied to NHS Resolution for dispute resolution.
- 2.2 I have had regard to the following documents made available to me in consideration of this matter to ensure the just, expeditious, economical and final determination of this dispute: -
 - 2.2.1 Letter of 29 September 2020 with enclosures from the Contractor;
 - 2.2.2 Email of 4 November 2020 together with enclosure from the Contractor; Email of 10 November 2020 from the Contractor;
 - 2.2.3 Email of 16 November 2020 with attachments from the Contractor;
 - 2.2.4 Email of 3 December 2020 from NHS England together with enclosures;
 - 2.2.5 Email of 7 December 2020 from the Contractor together with enclosure;

- 2.2.6 Email of 21 December 2020 from NHS England together with enclosure;
- 2.2.7 Email of 28 December 2020 from the Contractor; and
- 2.2.8 Email of 16 March 2021 from the Contractor together with enclosure.

3 CONTRACTOR'S APPLICATION

- 3.1 The English CDO, Sara Hurley, appeared before dentists via webinar on 3rd April 2020. She called on Matt Neligan, Director of Primary Care and System Transformation, to address dentists on the financial measures being implemented to mitigate the effects of disrupted dental services throughout the latter period in March, caused by Covid19 restrictions on dental practice. Mr Neligan outlined that a process of reconciliation of UDAs would be implemented to mitigate the effects of the lockdown on UDA provision. He acknowledged that any such reconciliation would be imperfect and that any resulting unfairness should be worked through with local commissioners. He said that he had sent a message to Local Area Teams underlining the principle that a "fair, sensible and proportionate approach should be taken, and one where the application of common sense should take precedence" (available to view on internet).
- 3.2 The Contractor has requested that their Local Area Team apply their discretion to amend the reconciliation figure, bearing in mind the existing methods of calculation have brought about mitigation of only 1 UDA (Financial value £23.69) to the Contract, in lieu of approximately 2 weeks of surgery time at the end of March, at which time the Contractor was performing at a level of more than 18 UDAs per week in order to meet their UDA target. As a direct result of this, the Contractor has been informed that their UDA target has not been met by an amount of 30 UDAs and that clawback of over £1200 will ensue, commencing this month (this figure includes carry forward from last year).
- 3.3 The Contractor believes that the reconciliation figure is not a true representation of their likely performance and as such they have been unfairly treated.
- 3.4 When the Contractor raised their concerns with the Dental Assurance Team, they were initially met with a denial that discretion over individual cases exists (see Appendix 1). The Contractor has more latterly received a reply from the Local Area Team saying that there is capacity for individual discretion, but that "*we cannot award additional UDA for planned treatment, only when treatment has actually been completed ... I appreciate that Ms Baker had made a great effort to complete her contracted UDA within the financial year, however unfortunately we cannot award UDA for activity which is planned and not completed*" (see Appendix 2).
- 3.5 The Contractor would like to challenge this position, on the basis that all the formulas for calculating the reconciliation of UDAs are estimates based on historical performance; they predict what is reasonable to suppose performance would have been had dentistry continued unabated for the remainder of March i.e. predictions of activity rather than actual completed UDAs.
- 3.6 The Contractor has fallen foul of this system because their performance in the three months prior to the lockdown had exceeded all previous levels of performance, to the extent where any average performance values, either relating to an individual month or group of three months, had already been surpassed in March before face-to-face dentistry was suspended ... with two weeks of high-performance surgery time, both planned and available, in which to achieve target UDA.
- 3.7 This was not a casual occurrence. As the Contractor outlined to the Local Area Team by email in April, they have a small Contract of 617 UDAs, which is somewhat tricky to manage as the 4% allowable leeway before clawback ensues, is actually a very small number of UDAs. For this reason, the Contractor does keep a very close eye on the UDAs achieved throughout the year, in order to ensure that the target is met but not exceeded. The Contractor was aware of a likely shortfall as early as September/October 2019 and raised this with their practice

principal. The Contractor identified that their regular patient cohort had diminished by approximately 70 over the last year or two, freeing up capacity, and that they would need to open limited appointments to new patients, to ensure that this capacity was met. To this end, 70 new patients were given appointments throughout January, February and March 2020. The effect of this change can be seen already from the activity figures through January and February, with performance showing a marked increase from January onwards, and the Contractor fully expected this to continue through March until the target was met. Decreasing activity in dental practice in March due to Covid19 sadly put an end to the best laid plans.

- 3.8 The Contractor's claim is supported by the figures provided by the Dental Assurance Team which clearly show the corresponding leap in monthly UDAs throughout January, February and March, with March having already reached the rolling average monthly value in spite of work being compromised and curtailed for a full two weeks due to Covid19 (see Appendix 3). The claim is further supported by the fact that over recent years the Contractor's planning has been excellent, having avoided any clawback due to underperformance for the past three years (see Appendix 4). In addition, having been asked to review the figures, the LAT has itself acknowledged the great efforts that the Contractor has made to complete the contracted UDAs (see Appendix 2). The Contractor stresses that only the exceptional circumstances of the cessation of face-to-face practice has prevented the UDA target range being met.
- 3.9 The Contractor believes that the proposed calculation of UDAs is therefore neither fair, sensible nor proportionate in their particular circumstances and the Contractor would appreciate [Primary Care Appeals] review of these figures in light of the above.
- 3.10 Ultimately, the three-month rolling figure that has been used on the Contract (January 2020-March 2020) does show the highest levels of activity, but applies to a period of 11 weeks, not the 13 weeks of a full month. This figure is therefore not fully representative of the true level of activity at that time. Respectfully, the Contractor would like to suggest that a rolling weekly figure from January to mid-March (195 UDAs over 11 weeks, average 17.7 UDAs per week) would seem fair and appropriate, and might provide a more realistic representation of the impact of cessation of practice over the last two weeks of March (i.e. reconciliation of 35.4 UDA).
- 3.11 This figure is within the Contractor's own expectation of performance and in line with the careful planning, executed by them and the practice, beforehand. Alternatively, if the LAT believe that an historic figure is required, the Contractor could suggest using the 2018/2019 figure in its entirety, which gives a similar outcome.

Summary

- 3.12 The consistent application of standard a process does not always result in a fair outcome and this was acknowledged by Matt Neligan from the outset.
- 3.13 Aim of reconciliation was to take into account the adverse effect that the cessation of dental services due to Covid 19 had on general dental practitioners' attainment of their contracted UDAs.
- 3.14 Provision was made for Local Area Team discretion to be applied in such cases where an unfair outcome had resulted from the application of standard procedure.
- 3.15 The Contractor believes that they are such a case, and that they have amply demonstrated that they have been disadvantaged by the current procedure.
- 3.16 A clawback of £1255.57, for which they are solely responsible, will have significant personal impact on the Contractor during these times of reduced dental activity.

4 REPRESENTATIONS

From NHS England and NHS Improvement

- 4.1 NHS England and NHS Improvement are writing in response to the above application for dispute resolution in relation to Mrs Helen Baker. As requested in [Primary Care Appeals] letter dated 18 November 2020 please find below representations from NHS England and NHS Improvement (NHSEI) - Midlands in respect of this matter.

Background

- 4.2 In accordance with the NHS England Policy Book for Primary Dental services; Chapter 9 Financial Recovery and Reconciliation sets out the process to support the Commissioners to carry out their mid-year and year-end reviews as required by the terms of the General Dental Services (GDS) Contract and the Personal Dental Services (PDS) agreement, regardless of their legal entity.
- 4.3 This policy removes any deviation from the regulations and provides a fair and equitable process for all Contractors. It also provides an element of proportionality when dealing with Contractors.
- 4.4 This policy will be used to implement the contractual and regulatory processes required to:
- 4.4.1 review activity at both mid-year and year-end;
 - 4.4.2 make the required financial recovery; and
 - 4.4.3 issue a breach notice, in line with requirements as set out in paragraph 73 of Schedule 3 of the GDS Regulations, and the same provision in the PDS Regulations.

Year-End Review

- 4.5 In June of each financial year, NHSBSA Dental Services (NHSBSA DS) provides the Commissioners with Contract level data. This data provides the actual level of dental activity delivered against each Contract for the previous financial year. This figure is the total of the notifications sent by the Contractor to NHSBSA DS by way of FP17 submissions on completed courses of treatment.
- 4.6 When undertaking the year-end reconciliation process, the Commissioner will only use figures provided directly from NHSBSA DS as these are the claims that have been validated.
- 4.7 NHSBSA DS provides Contractors with a monthly total of the notifications sent by the Contractor to NHSBSA DS. If a Contractor disputes the total number of notifications sent by the Contractor to NHSBSA DS, they should liaise directly with NHSBSA DS for resolution.
- 4.8 The Contractor is responsible for providing written documentation and evidence of any dispute with the NHSBSA DS data and any outcome to the NHS England local office primary care dental lead to take into consideration when agreeing the level of activity that has been delivered for a particular year and to be aware of any claim submission issues.
- 4.9 The GDS and PDS regulations state that transmission of FP17s must be within two months of a completed course of treatment. Where the Contractor fails to provide a notification within the 2 months' time limit, the Commissioner does not have to pay for this activity, nor do they have to take into account its delivery and therefore it does not have to be included within the activity report.
- 4.10 While the Contract holder should aim to deliver their contracted units of activity to 100 percent there will be deviations from this which are dealt with as follows: -
- 4.10.1 Under-delivery below 96% - where a Contractor has delivered less than 96 percent of their contracted activity, NHS England will recover the full amount of money outstanding up to 100 percent of the Contract value and may also serve a breach notice.

- 4.10.2 Under-delivery between 96% and 100% - The GDS Contract / PDS Agreement has a tolerance within it which allows Contractors to carry forward an amount of up to 4% into the following year to be delivered within a period of no less than 60 days of the new Contract year.
- 4.10.3 Over delivery - if the Contract does not specify that over delivery is paid for, NHS England will allow a tolerance of up to two percent a year so a maximum of 102 percent delivery, this is allowable for UDAs only, NHS England may pay for the additional activity or it may be credited the following Contract year.
- 4.11 In exceptional circumstances, there may be instances in which a Contract holder is unable to fulfil its contractual requirement to deliver the contracted activity. These cases need to be considered on an individual basis and could include a decision by the Commissioner to waive its rights to recover overpayments in exceptional circumstances where agreement is reached on how the activity will be delivered or the funding repaid over a longer period than is set out above. Where appropriate the Commissioner should refer to the policy on adverse events. Annex 49 contains a table of some elements which could be considered exceptional circumstances. This list is not exhaustive.
- 4.12 In addition, the Commissioner should refer where appropriate to the dental force majeure provisions included in Chapter 17 Adverse Events of the Policy Book for Primary Dental Services.
- Position with the Contractor – Contract number 8194170001
- 4.13 The Contractor holds a dental Contract to deliver annually 617 units of dental activity (UDAs).
- 4.14 On 14 April 2020, after watching the CDO webinar directing practitioners to their local contacts with regards to UDA targets, the Contractor wrote to the local dental commissioning team expressing her concerns about not achieving her UDA targets due to the restrictions on general dental practices following the Covid-19 pandemic. The Contractor raised a query regarding the proposal to replace March 2020 UDAs with March 2019 UDAs and wrote that the proposal of replacing the UDAs as such would not represent the likely activity in her case for March 2020, as the planned activity she had in place was disrupted by the pandemic. The commissioning team responded to the Contractor's correspondence and advised that the query relating to the above was also being considered by NHSBSA, since there were a number of practices that have raised the same query.
- 4.15 On 29 July 2020, NHSBSA DS sent out the year-end reconciliation letter to the Contractor, on behalf of NHSEI to communicate the final year-end position for 2019/20 and take the appropriate actions to reconcile against the provider's contractual activity. The time period selected to report on each service line for contracts was by agreement with the Commissioning Teams and NHSBSA DS. For each Contract, the most appropriate time period was used so as not to financially disadvantage the Contractor due to Covid-19. A summary of the activity was provided and the under-delivery amount to be recovered was communicated. The possibility to provide further evidence within 28 days was offered if the provider believed that the details on the letter were incorrect.
- 4.16 On 29 July 2020, upon receipt of the year-end reconciliation letter, the Contractor wrote to NHSBSA DS stating that she believed that the proposed calculations for the UDAs were inappropriate and requested for the figures to be reviewed.
- 4.17 On 12 August 2020, NHSBSA DS responded to the Contractor's correspondence and provided a breakdown of the scheduled activity used for Option 3 to reconcile the year-end position. For clarity, Option 3 is calculated by using the standard methodology for the 2019/20 year, then treatment; where the date of completion (or date of last visit for incomplete treatment) is between 1 March 2020 and 31 March 2020, is removed and replaced with the MEAN of the agreed appropriate consecutive 3 month period.

- 4.18 On 14 August 2020, the Contractor wrote back to NHSBSA DS to reconsider the figures in line with the measures that she had implemented within the practice, which included 70 further patients that were accepted onto the practice's list through January to March 2020.
- 4.19 On 14 August 2020, NHSBSA DS responded to the Contractor advising that the year-end reconciliation was outlined on a national basis by NHSEI, to mitigate the impact of Covid-19 on dental contracts and has been applied fairly and consistently across all contracts in England. Hence it would not be possible to reconcile the year-end position outside the methodology set by NHSEI, as described in the Dental Preparedness letters. NHSBSA DS offered an additional, seventh instalment to recover underperformance.
- 4.20 On 23 August 2020, the Contractor requested that NHSBSA DS advanced her appeal for reconsideration to exercise discretion with respect to her specific case.
- 4.21 On 24 August 2020, NHSBSA DS wrote to the local dental team advising that the Contractor wishes to appeal, explaining that the provider felt the methodology applied had penalised them due to planned completion of activity.
- 4.22 On 16 September 2020, the local dental commissioning team wrote back to NHSBSA DS advising that team discretion can be allowed on completed treatment only and not on planned treatment. The decision stands as UDA cannot be awarded on planned activity that had not been completed.
- 4.23 On 17 September 2020, NHSBSA DS advised the Contractor that the NHSEI team was unable to apply local discretion to planned activity, and that discretion can be applied to completed activity only. Emphasising that this methodology has been used consistently across England to least disadvantage providers. The Contractor was then given the option to refer the matter in writing to NHS Resolution.
- 4.24 NHSEI Midlands hopes the above has clarified their position regarding this matter, should NHS Resolution require any further information, please do not hesitate to contact NHSEI.

From the Contractor

- 4.25 With respect to the above appeal, [Primary Care Appeals] already have the original letter of appeal outlining the case, together with the supporting documentation. The Contractor would like to make limited further representations to support their case and update the Appeal Committee with their current position and to provide additional communications from NHSBSA, for the sake of completeness.

Correction

- 4.26 Would the Appeal Committee please note that the sum involved was incorrectly reported in the original letter as £1255.57. It should have read £1213.44. However, the supporting documentation to the original letter, does show the correct figure. (Original letter of appeal Appendix 4, fifth page)

Letter from NHSBSA outlining exceptional circumstances 01 October 2020 (page 3)

- 4.27 The Contractor has received a further letter from NHSBSA. It recognised that some practitioners had been disadvantaged by the previous methodologies of calculating reconciliation and alternative methodology would now be employed to address unfairness to this cohort of practitioners. The letter spells out that extra measures are being taken *'to ensure that we are not disadvantaging Contractors due to Covid19 and to ensure that all exceptional circumstances have been addressed'*.
- 4.28 The Contractor's own case did not fall within this cohort of practitioners, but the Contractor draw this to the Committee's attention to underline the fact that, as recently as October 2020, the NHS BSA still recognised that some practitioners' needs were not being met by the existing

provisions and that the overreaching aim of the reconciliation was to ensure that no Contractor should be disadvantaged due to Covid-19. This is completely in-line with Matt Neligan's original statement in the Webinar of 3 April 2020 and his assurance that individual practitioners should not be disadvantaged and could seek redress if they were.

Current situation

- 4.29 Underperformance recoveries have already commenced. The amount is scheduled to be reclaimed in equal instalments from September 2020 to March 2021. (Pay statements, pages 7- 9). In addition, the Contractor has been issued with a breach notice, despite this appeal being unresolved, which carries implications for the security of the Contract in the future (pages 4-6).
- 4.30 In all other respects, the Contractor stands by the case made out in their original letter.

5 OBSERVATIONS

From NHS England

- 5.1 Following confirmation from NHS BSA, the least disadvantageous option to reconcile the Contractor's Contract - 8194170001 is Option 3. The Contractor has been provided with a breakdown of the scheduled activity. NHS BSA have also advised that all dental contracts across England were reviewed to take into account the exceptional circumstances methodology and where this resulted in a less disadvantageous position, the service line was reconciled as such.
- 5.2 The Clawback is for £1,213.44.
- 5.3 NHSEI Midlands hopes the above has clarified their position regarding this matter, should [you] require any further information, please do not hesitate to contact NHSEI.

From the Contractor

- 5.4 Please find its observations on the NHS England representations for the above case, noted against their original statements.

Position with the Contractor – Contract number 8194170001

In response to paragraphs 4.13 – 4.15 above:

- 5.5 The Contractor believes that they have suffered financial disadvantage due to Covid-19 and have amply demonstrated this in its original letter of appeal and supporting documentation.

In response to paragraph 4.16 above:

- 5.6 The Contractor stated that the calculations led to financial disadvantage for them, and that was against the intention of reconciliation which was always to mitigate the financial impact of restrictions to dental practice due to Covid19.

In response to paragraphs 4.17 – 4.18 above:

- 5.7 The Contractor stated that a deliberate strategy was in operation to meet their target UDAs and this included accepting 70 new patients and working at an unprecedented level of activity throughout January, February and March 2020. This level of activity has been illustrated in the relevant attachment to the original letter of appeal.

In response to paragraph 4.19 above:

- 5.8 The Contractor has demonstrated that provision exists outside the standard methodologies in order to address unfairness to individuals. This was outlined from the outset by Matt Neligan. The Local Dental Team have since agreed that they do have discretion over individual cases. Furthermore, additional methodologies have come into effect as recently as October 2020, when unfairness to a group of practitioners was recognised.

In response to paragraphs 4.20 – 4.21 above:

- 5.9 The methodology has resulted in unfairness to the Contractor due to the fact that they had already worked at an unprecedented level of activity throughout January, February and early March 2020, leading to figures which already equalled any historic activity, in spite of there being almost two working weeks (part-time) remaining in March.

In response to paragraph 4.22 above:

- 5.10 The provision of face-to-face dentistry reduced rapidly over the two weeks under consideration, to a position where no face-to-face dentistry was being performed at all. No UDAs were being completed by any practitioner at this time. UDAs have been awarded to other practitioners based on historical performance i.e. UDAs that have been previously completed, claimed and already recompensed. The Contractor has suggested two different historical intervals which could be taken into account to provide a more realistic outcome in my own circumstances.... notably the 11 weeks immediately prior to the commencement of dental restrictions. These are outlined in detail in the Contractor's original letter of appeal.

In response to paragraph 4.23 above:

- 5.11 This is the first time that the phrase "to least disadvantage providers" has been used with respect to this process. It implies that providers will be disadvantaged to some extent and the Local Area Team are comfortable with this. All previous letters stress "so as not to financially disadvantage the Contractor".
- 5.12 Referring back to Matt Neligan's original statement "a fair, sensible and proportionate approach should be taken, and one where the application of common sense should take precedence". It appears that this difference of interpretation is at the heart of the disagreement.

6 ADDITIONAL INFORMATION

- 6.1 In accordance with my power at paragraph 55(13) of Schedule 3 of Regulations which permit 'the adjudicator wide discretion in determining the procedure of the dispute resolution to ensure the just, expeditious, economical and final determination of the dispute' I required the parties to provide copies of the NHS England (or other) letters and guidance issued to dental contractors in relation to the matter in dispute and confirmation as to whether the breach notice is disputed or agreed.
- 6.2 NHS England did not provide any further information or comments.
- 6.3 The Contractor did not provide copies of the letters or guidance but did refer me to a YouTube video of the 3 April 2020 webinar which is referenced in this application for NHS dispute resolution. The contractor has also confirmed that she does dispute that she should have been found in breach.

7 CONSIDERATION

- 7.1 I note that the application for dispute resolution is in relation to the underperformance of UDAs for the period 2019/2020. The Contractor seeks to dispute NHS England's decision to not use its discretion regarding the methodology used to calculate the total UDAs for the year and also disputes the recovery of monies resulting from this underperformance for the year 2019/2020.

- 7.2 I note that I have been provided, in the representations from the Contractor, with a copy of the breach notice as issued by NHS England dated 4 December 2020. I note that this is dated after the date of the Contractor's application for NHS dispute resolution.
- 7.3 I note that I have been provided with background to the dispute. I also note the reference to the NHS England Policy Book for Primary Dental Services, which I have not been provided with a copy of; however there is no dispute between the parties that the provisions set out in the Policy Book apply. Parties have also made reference to the financial measures which were implemented to mitigate the effects of disruption to dental services in March 2020 and the Dental Preparedness letters; however whilst I have not been provided with copies of these letters by either party I do note that there is a link in the letter of 29 July 2020 from NHS England to the Contractor, however I have not been directed to these by either party.
- 7.4 I note that the end of year reconciliation statement, dated 29 July 2020, was sent to the Contractor and subsequent to receiving this, the Contractor wrote to NHS BSA Dental Services asking for the figures to be reviewed. I note that there is reference in the papers to correspondence between the Contractor and NHS England/NHS BSA Dental Services following the issuing of the end of year reconciliation statement. Following correspondence between NHS BSA Dental Services, on behalf of NHS England and the Contractor, NHS BSA Dental Services wrote to the Contractor on 17 September 2020 advising that they were unable to apply local discretion to planned activity and that local discretion could only be applied to completed activity. The Contractor was advised that if they remained dissatisfied they could refer the matter to NHS Resolution.
- 7.5 I am of the view, from the information before me and copies of correspondence, that there has been some attempt at local dispute resolution as set out in the GDS Contract; however the parties have been unable to resolve this and therefore the Contractor has referred the matter in dispute to NHS Resolution. There is no dispute from either party that local dispute resolution has not been entered into and therefore I will proceed to consider the matters before me.
- 7.6 I note that the Contractor holds a GDS Contract, a copy of which was provided and has not been disputed.
- 7.7 From the information provided I note that there is no dispute that the Contractor was required to provide 617 UDAs in the financial year 2019/20 and further that the Contractor did not manage to complete all of the scheduled appointments which has resulted in a shortfall of UDAs for the year 2019/2020.
- 7.8 I note that routine, non-urgent dental treatment was suspended with effect from March 2020 as a result of the Covid-19 pandemic. However neither party has provided me with the date on which the temporary suspension took place or provided me with copies of the letters and/or guidance which was provided to dentists by NHS England (or others). I note that much information can be accessed on the NHS England website where there is "Letters, updates and additional guidance for dental teams"; however I cannot locate a copy of the first letters from NHS England to dentists effecting the suspension. I note from the NHS England letter on the resumption of services dated 28 May 2020, that this states "On 25 March we wrote to NHS dental practices setting out the immediate changes to services due to the overriding need to limit transmission of Covid-19. These included: deferring routine, not urgent dental care including orthodontics..." I note that there is no dispute from parties that treatment had to cease in March 2020 as a result of the Covid-19 pandemic and that the cessation of treatment followed instructions from NHS England that all treatment should cease. I believe that this was from 25 March 2020.
- 7.9 I note that NHS England quotes the NHS England Policy Book for Primary Dental Services and in particular Chapter 9 Financial Recovery and Reconciliation and goes on to state "*this sets out the process to support the Commissioners to carry out their mid-year and end-year reviews as required by the terms of the GDS Contract and PDS Agreement, regardless of their legal entity*".

7.10 I note that NHS England go on to state that “This policy removes any deviation from the regulations and provides a fair and equitable process for all Contractors.”

7.11 Whilst I note the references and quotes from the Policy Book for dentists, I am mindful that the reconciliation for 2019/2020 is an exceptional circumstance, in a national response to a pandemic in that no dental services were provided for the last days of March 2020. I also note the reference of Matt Neligan in the webinar on 3 April to a “fair, sensible and proportionate approach” which seems entirely appropriate in these exceptional circumstances.

7.12 The Year-end reconciliation letter of 29 July 2020, against which the Contractor seeks to apply for dispute resolution states:

“As agreed by your Commissioning Team the most appropriate time period has been used for each service line (i.e. UDAs, UOAs etc.) as to not financially disadvantage your contract delivery due to Covid-19.”

7.13 The letter of 29 July 2020 contained the following table showing the year end reconciliation and confirming that these details are available in the Year-End Statement on CoPASS.

Scheduled UDA 2019/20	Less brought forward UDA from 2018/19	Adjusted Scheduled UDA 2019/20	Contracted UDA 2019/20	% Delivered UDA 2019/20	Carry forward UDA into 2021/21	UDA Value (£)	Clawback (£)
586.80	21.00	565.80	617.00	91.7	0.00	£23.70	£1,213.44

7.14 The letter went on to state:

“The following time period was used to calculate your UDA activity for the 2019/20 financial year to mitigate the impact of Covid-19 on your contract:

April 2019 to February 2020, plus an average UDA delivery over an appropriate three-month period in 2019/20.

These details are available in your Year-End statement in compass.”

7.15 I note that there are 3 options as to how the total UDAs can be calculated for the year 2019/2020; however neither party has provided me with what these 3 options are.

7.16 In the email from NHS BSA Dental Services of 12 August 2020, they provided the breakdown of the scheduled activity used for Option 3 to reconcile the “Year-End 1920 [sic]” position.

7.17 The email went on to state that Column 2 highlights the UDAs delivered for each month and that this was calculated by treatment completion date. Column 4 shows the rolling average for each 3 consecutive months. The box highlighted green [by the Contractor] shows the figure that has been selected to calculate the “Year-End 1920 [sic]” position. This figure is then used in place of the March 2020 activity and added to the standard April 2019 – February 2020 activity (inclusive of any claims submitted up to June 2020).

Contract number	UDA Delivered	Treatment Year	Treatment Month	Rolling average
819417001	45	2019/2020	201904	0
819417001	44	2019/2020	201905	0
819417001	39	2019/2020	201906	43
819417001	57	2019/2020	201907	47
819417001	56	2019/2020	201908	51

819417001	42	2019/2020	201909	52
819417001	47	2019/2020	201910	48
819417001	43	2019/2020	201911	44
819417001	17	2019/2020	201912	36
819417001	71	2019/2020	202001	44
819417001	60	2019/2020	202002	49
819417001	64	2019/2020	202003	65
Apr 19 – Feb 20	522			
Jan 20 – Mar 20 average	65			
Option 3 Total ex Carry forward	587			

7.18 I note that there is no dispute from the Contractor with regard to the methodology used in general by NHS England and further that the Contractor agrees with the calculations that have resulted as a consequence of this methodology. This is confirmed by the Contractor in her email to NHS BSA Dental Services of 14 August 2020. However, the Contractor is disputing the application and fairness of this methodology being used in her particular circumstances and the lack of flexibility of NHS England to consider her circumstances.

7.19 The Contractor states in her email of 14 August 2020 to NHS BSA Dental Services that “*recent and specific measures had been implemented within the practice which should have culminated in the correct UDA total being achieved by the end of March. These measure included accepted 70 further patients onto my list through Jan, Feb. and March*”. The email goes on to state “*My claims is supported by your figures which clearly show the corresponding leap in monthly UDAs, with March having already reached the rolling average value in spite of work being compromised and curtailed for a full two weeks due to Covid.*” and further “*I feel that the application of historical data and averages in these circumstances have led to an unrealistically low UDA Figure and have unfairly disadvantage me. I would very much appreciate if you would reconsider the UDA figure in light of my claims and the supporting evidence, in order to truly reflect my circumstances and provide me with a fair and realistic outcome.*”

7.20 I note that in an email of 14 August 2020 from NHS BSA Dental Services in response to the Contractor it was stated that “*option 3 has been identified as the financial position that would disadvantage you the least in terms of performance*” and this is confirmed by NHS England in their representations. I also note that in the email of 14 August 2020 to the Contractor, NHS BSA Dental Services states “*it will not be possible to change the selected option*”. I note that the email goes on to state:

“The process for the Year –End 2019/20 reconciliation was decided centrally by NHS England and NHS Improvement to mitigate the impact of Covid-19 on dental contracts and has been applied fairly and consistently across England. It is not possible to reconcile your Year-End 2019/20 position outside of the methodology decided by NHS England and NHS Improvement, as described in the Dental Preparedness letters.”

7.21 The Contractor, in response to this email to NHS BSA Dental Services states:

“When the CDO originally addressed dentists on this matter via webinar, she specifically referenced LAT discretion with respect to cases where application of any of the three existing calculation methodologies lead to unfairness. I have contacted the BDA following you[r] reply and they have confirmed that this is the case. However, your letter suggests that this is not the case. Please will you advance my appeal for reconsideration to someone who is able to exercise the discretion outlined above, if it is not within your own remit.

7.22 The Contractor went on to state:

“In summary, it has resulted in an allowance of 1 UDA for the last two weeks of March 2020 when dentistry was suspended. The earlier period of March 2020 had resulted in 60 UDAs,

which does show that I was working at a previously unprecedented level of activity in order to meet my target and avoid clawback. This was a carefully planned crescendo of activity which was due to continue to year end. You will also find that over the many years of the current system, my planning has been excellent, having only been subject to clawback on one occasion. These claims are all supported by your own figures, charts and records.”

7.23 I note that this was escalated by NHS BSA Dental Services to the Local Area Team who confirmed in an email of 17 September 2020 that:

“Whilst there is some local area team discretion which can be allowed, we cannot award additional UDA for planned treatment, only when treatment has actually been completed. We understand that this is a difficult time for providers, and the 3 option system was designed to assist them and prevent a clawback wherever possible. I appreciate that Ms Baker had made a great effort to complete her contracted UDA within the financial year, however unfortunately we cannot award UDA for activity which is planned and not completed.”

7.24 I note, from the information before me that the rolling average for the 3 month period used has resulted in only an additional 1 UDA being credited to the Contractor for the whole of March 2020 when they had already completed 64 UDAs in March 2020 prior to the practice closing and no further treatment being able to be provided in the last days of March 2020.

7.25 The Contractor is of the view that they would therefore have completed more than an additional 1 UDA in the days that there were forced to close if there had been no such closure and dental services had continued as planned. This position is not disputed by NHS England.

7.26 I note the comments from the Contractor in their application for dispute resolution that the rolling average, as calculated, only takes into account 11 weeks for the period January 2020 to March 2020 rather than the full 13 weeks that a full month of March 2020 would give. I note the suggestion from the Contractor that this rolling figure should be divided by the number of weeks (in this case 11) which would then give an average per week and that it is this figure (times 2 for the last 2 weeks in March 2020) which should be added to the actual number of UDAs which were completed in March 2020.

7.27 I am of the view, based on the UDAs delivered for March 2020 as well as the confirmation from the Contractor that they had taken on additional patients and the UDA delivery in January and February 2020, that it is more likely than not that the Contractor would have completed more than 1 UDA in the last days of March 2020 (following the temporary suspension of routine, non-urgent dental care) under normal circumstances.

7.28 I note the comments from the Contractor that provision was made for Local Team discretion to be applied in cases where an unfair outcome resulted from the application of the standard procedure. Whilst I accept that NHS England adopted a standard methodology to calculate the UDAs of contractors having regard to the temporary suspension of routine, non-urgent dental care towards the end of March 2020 and I acknowledge that there was a three option approach with NHS England adopting the most favorable of these three options to contracts, I am also of the view that there must, in these exceptional circumstances, be the ability for the Contractor to have their particular situation reviewed and the approach to the adjustment considered using a fair, sensible and proportionate approach. Whilst NHS England have established a fair and reasonable approach to managing the UDAs notionally awarded during the temporary suspension of routine, non-urgent dental treatment due to the Covid-19 pandemic, this does not prohibit a discretion being exercised in individual, exceptional circumstances.

7.29 From the information before me, I am of the view that the outcome for the Contractor has resulted in an unfair position in that the methodology used has only credited the Contractor with a single additional UDA for the month of March 2020 in addition to the actual UDAs that they had already completed. It is unhelpful that neither party has provided me with copies of the NHS England (or other) letters and/or guidance in relation to communications on this point or the date on which dental treatment was temporarily suspended due to the Covid-19

pandemic. Assuming that treatment stopped on 25 March 2020, which was the date that I understand NHS England wrote to dental practices regarding the temporary suspension of routine, non-urgent dental care, I am satisfied that the Contractor would have delivered more than 1 UDA between this date and the end of the financial year. I am satisfied that this is a matter where NHS England should have reviewed the matter and noted this position. I am satisfied that NHS England should have exercised their discretion to increase the allowance from 1 additional UDA. I note that the Contractor has provided details of planning to meet the UDA requirements during the year and the actions taken to achieve this. The information provided to me evidences the actions the Contractor took to increase activity to meet the UDA requirement from January 2020.

- 7.30 I note the representations from NHS England; however these appear to be generic and do not appear to take into account the exceptional circumstances of the contract year 2019/20 and the impact that Covid-19 had on the calculation of the Year End reconciliation following the closure of all dental practices. Further, I note that NHS England has not addressed the specific points of the Contractor's dispute but has instead provided a chronology of events, which matches to the information provided by the Contractor in their original application for dispute resolution. I note that this chronology sets out their position but NHS England has not provided information to support their position.
- 7.31 I note that NHS England states that in exceptional circumstances there may be instances where a Contract holder is unable to fulfill their contractual requirement and makes reference to Annex 49 of the Policy Book in which there is a table showing some circumstances and it is acknowledged by NHS England that this list is not exhaustive.
- 7.32 I note that the Contractor has not sought to make an application for a *Force Majeure* as set out in the Policy Book in Chapter 17. I am of the view that as the process had been outlined by the Chief Dental Officer for England as well as reassurances from the Director of Primary Care and System Transformation that there would be financial measures implemented to mitigate the effects of disruption of dental services throughout the latter period in March 2020, the Contractor was of the view that the exceptional circumstances pertaining to the end of year reconciliation would be taken into account as the situation with regard to Covid-19 was a national issue which had been addressed by the CDO for England and was not a specific issue relating to just their practice.
- 7.33 Whilst I note that the list given in Annex 49 is not exhaustive, I am of the view that the reasons given by the Contractor for failure to meet the UDAs of the Contract are an exceptional circumstance which could have been considered by the Commissioner.
- 7.34 I note, from an email from NHS BSA Dental Services, which was sent out to all providers that an exceptional circumstances report had been produced for those Contractors who had been disadvantaged by the three options agreed previously. From the information before me, I note that the Contractor has not been contacted and therefore is not eligible to be considered for this revised methodology. I have no information before me as to why this is the case as I have not been provided with the UDAs that are now being considered for the period in question.
- 7.35 Whilst the Contractor has not been considered eligible under the exceptional circumstances report, I remain of the view that the Contractor has been unfairly disadvantaged by the methodology used to calculate the year end reconciliation for the 2019/20.

8 DECISION

- 8.1 Following a review of the Contractor's particular circumstances, NHS England ought to have considered the high likelihood that the Contractor would have performed more than 1 UDA following the temporary suspension over the actual activity provided and that discretion ought to have been applied to managing this particular case. In the absence of a clear rationale for taking the approach it did, I am of the view that the methodology used to calculate the UDAs for the Contractor was not fair and proportionate based on the information before me.

- 8.2 I conclude that NHS England, working with the Contractor, should review this matter and apply their discretion to give an increased total UDA for March 2020.
- 8.3 I note that NHS England has served a breach notice on the Contractor regarding the under delivery of the required number of UDAs. Having regard to the difference between the required and actually performed (not adjusted) number of UDAs and the exceptional circumstances of the pandemic, I do not consider that NHS England has demonstrated why this was appropriate. In the absence of evidence that NHS England approached the Contractor's position in a way that was demonstrably fair and reasonable I determine that NHS England shall increase the total UDA for March 2020 and that the breach notice is not accurate and must be withdrawn by NHS England. Should NHS England consider that a breach notice is required following its review and application of discretion to give an increased total UDA for March 2020, I would expect NHS England to detail the rationale for this, in these individual, exceptional circumstances, in such a notice.
- 8.4 I note that no party has not submitted a claim for interest with regard to this dispute so I make no determination in this regard.

Head of Operations, Primary Care Appeals