

# New Mexico Register

The official publication for all official notices of rulemaking  
and filing of proposed, adopted and emergency rules.

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## **The New Mexico Register**

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# New Mexico Register

Volume XXX, Issue 4

February 26, 2019

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## Notices of Rulemaking and Proposed Rules

### REGULATION AND LICENSING DEPARTMENT OPTOMETRY, BOARD OF

#### PUBLIC RULE HEARING AND REGULAR BOARD MEETING

The New Mexico Board of Optometry will hold a rule hearing on Friday, March 29, 2019, at 1:00 p.m. Following the rule hearing, the Board will convene a board meeting to adopt the rules and take care of regular business. The rule hearing and board meeting will be held at the New Mexico Regulation and Licensing Department, 5500 San Antonio Dr., NE, Albuquerque, New Mexico, in the Sandia Conference Room.

The purpose of the rule hearing is to consider proposed amendments to the following rules:

16.16.4 NMAC - Requirements for Licensure  
16.16.11 NMAC - License Expiration Due to Non- Renewal; Reactivation  
16.16.13 NMAC - Continuing Education

To obtain and review copies of the proposed changes you may go to the Board's website at: [http://www.rld.state.nm.us/boards/Optometry\\_Rules\\_and\\_Laws.aspx](http://www.rld.state.nm.us/boards/Optometry_Rules_and_Laws.aspx), or contact the Boards and Commissions Division at (505) 476-4622.

The Board is currently accepting public comments on the proposed amendments. Please submit written comments on the proposed changes to Martha Gallegos, Acting Board Administrator, via electronic mail at [optometry.bd@state.nm.us](mailto:optometry.bd@state.nm.us) or by regular mail at P.O. Box 25101, Santa Fe, NM 87504, no later than Thursday, March 28, 2019. Persons will also be given the opportunity to present their comments at the rule hearing. All written comments will be posted to the Board's website at: [http://www.rld.state.nm.us/boards/Optometry\\_Rules\\_and\\_Laws.aspx](http://www.rld.state.nm.us/boards/Optometry_Rules_and_Laws.aspx), no more than three business days

following receipt to allow for public view.

An individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or other form of auxiliary aid or service to attend or participate in the hearing, please contact Martha Gallegos, Acting Board Administrator at (505) 476-4622.

**Statutory Authority:** Legal authority for this rulemaking can be found in the Optometry Act, Sections 61-2-1 through -18, NMSA 1978 (1985, as amended through 2010) which, among other provisions, specifically authorizes the Board to "adopt rules necessary to implement the provisions of the Optometry Act." Subsection D of Section 61-2-6, NMSA 1978.

#### Summary of Proposed Changes:

##### 16.16.4 NMAC - Requirements for Licensure

Requirements for Licensure by Endorsement states that practitioners from other states go through all the same requirements as new graduates. This change will expedite licensure for applicants by endorsement.

##### 16.16.11 NMAC - License Expiration Due to Non-Renewal; Reactivation

Clarify penalty fee to reflect fee for reinstatement by reducing the fees associated with Non-renewal reactivation, in order to make it easier for previously licensed optometrists to resume practicing in New Mexico. This would help with the current shortage of Optometrists.

##### 16.16.13 NMAC - Continuing Education

Proposed change is a semantic change only and will have no impact on licensed Doctors of Optometry to Paragraph (2) of Subsection A of 16.16.13.8 NMAC.

### REGULATION AND LICENSING DEPARTMENT PODIATRY, BOARD OF

#### PUBLIC RULE HEARING AND REGULAR BOARD MEETING LEGAL NOTICE

The New Mexico Board of Podiatry will hold a rule hearing on Friday, March 29, 2019, at 1:30 p.m. Following the rule hearing, the Board will convene a board meeting to adopt the rules and take care of regular business. The rule hearing and board meeting will be held at the New Mexico Regulation and Licensing Department, 2550 Cerrillos Road, Santa Fe, NM, in the Rio Grande Conference Room.

The Board of Podiatry is proposing the following amendments listed below to the New Mexico Podiatry rules and regulations to correct and update language, definitions and requirements. The proposed amendments include changed provisions applicable to all types of licensees. The amendments are intended to update continuing medical education, clarify definitions and provide uniformity in the application of the following rules. The amendments to the following rules listed below will be achieved through a repeal and replacement:

16.21.1 NMAC - General Provisions  
16.21.3 NMAC - License by Exam  
16.21.4 NMAC - License by Reciprocity  
16.21.5 NMAC - Temporary License and Emergency License  
16.21.8 NMAC - Continuing Education  
16.21.10 NMAC - Lapse of License and Reinstatement  
16.21.11 NMAC - Disciplinary Proceedings  
16.21.12 NMAC - Management of Medical Records

To obtain and review copies of the proposed changes and public comments, you may go to the Board's

website at: [http://www.rld.state.nm.us/boards/Podiatry\\_Rules\\_and\\_Laws.aspx](http://www.rld.state.nm.us/boards/Podiatry_Rules_and_Laws.aspx), or contact the Boards and Commissions Division at (505) 476-4622.

The Board is currently accepting public comments on the proposed amendments. Please submit written comments on the proposed changes to Roberta Perea, Board Administrator, via electronic mail at [podiatryboard@state.nm.us](mailto:podiatryboard@state.nm.us), or by regular mail at P.O. Box 25101, Santa Fe, NM 87504, no later than Thursday, March 28, 2019. Persons will also be given the opportunity to present their comments at the rule hearing. All public comments received in the board office will be posted on the board's website at: [http://www.rld.state.nm.us/boards/Podiatry\\_Rules\\_and\\_Laws.aspx](http://www.rld.state.nm.us/boards/Podiatry_Rules_and_Laws.aspx).

An individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or other form of auxiliary aid or service to attend or participate in the hearing, please contact Roberta Perea, Board Administrator at (505) 476-4622.

**Statutory Authority:** Legal authority for this rulemaking can be found in the Podiatry Act, Sections 61-8-1 through -17 NMSA 1978 (1977, as amended through 2015), which, among other provisions, specifically authorizes the Board to “adopt, publish and file, in accordance with the Uniform Licensing Act and the State Rules Act, all rules for the implementation and enforcement of the provisions of the Podiatry Act.” Paragraph (2) of Subsection E of Section 61-8-6 NMSA 1978. The Board also shall, “adopt and promulgate rules setting standards of preliminary and professional qualifications for the practice of podiatry,” Paragraph (10) of Subsection E of Section 61-8-6 NMSA 1978, and “determine by rule all qualifications and requirements for applicants seeking licensure as podiatrists or podiatric assistants,” Paragraph (12) of Subsection E of Section 61-8-6 NMSA 1978.

The Board may adopt regulations regarding temporary licensure. *See* Subsection D of Section 61-8-8, NMSA 1978 (“A podiatrist duly licensed in another state may, on a temporary basis, consult, advise or cooperate in patient treatment with a podiatrist licensed in New Mexico, subject to rules adopted and promulgated by the board.”); and Subsection B of Section 61-8-14, NMSA 1978 (“In cases of emergency, as defined by board rule, the board may grant a temporary license to practice podiatry”). The Board may adopt rules regarding licensure by reciprocity. *See* Section 61-8-9, NMSA 1978.

#### **Summary of Proposed Changes:**

**16.21.1.1 NMAC, 16.21.3.1 NMAC, 16.21.4.1 NMAC, 16.21.5.1 NMAC, 16.21.8.1 NMAC, 16.21.10.1 NMAC, 16.21.11.1 NMAC, 16.21.12.1**

The changes for the above removed the word “NM” before “Board of Podiatry”, which is consistent with the title used in Podiatry Act.

#### **16.21.1 NMAC - General Provisions**

New “Board” definition was added for clarification throughout the document. A change to the “Scope of Practice” to bring increased clarification as to the anatomic location covered by the practice of podiatry. Also a change to “Responsibility of Licensee” adding “mailing” prior to address for clarification and “or email address” to update to current acceptable communication methods. “Public Records” and “Non-Public Records” were removed, In *Republican Party v. N.M. Taxation & Revenue Dep’t*, 2012-NMSC-026, 13, 283 P.3d 853, the New Mexico Supreme Court noted that the provision of the Inspection of Public Records Act that allows an agency to withhold public records “as otherwise provided by law” may include “regulatory bars to disclosure.” However, administrative rules only rarely provide an adequate justification to redact or withhold records. As noted in the Office of the New Mexico Attorney General’s Inspective of Public Records Act

Guide, at 20 (8th ed. 2015), “In most cases, a regulation or ordinance, by itself, may not be used to deny access to public records.” Therefore, requests to inspect public records should be handled as provided by statute. Renumbering had to be made due to removing these sections.

#### **16.21.3 NMAC - License by Exam**

Updates have been made to the rule to align with current CPME residency training requirements. Clarifying the process for when applicants apply for licensure which will facilitate more expedient credentialing with hospitals and insurance plans.

#### **16.21.3 NMAC - License by Exam; 16.21.5 NMAC - Temporary License and Emergency License; 16.21.8 NMAC - Continuing Education; 16.21.10 NMAC - Lapse of License and Reinstatement; 16.21.11 NMAC - Disciplinary Proceedings**

Updating language to align rules with current board structure and expedite board processes.

#### **16.21.4 NMAC - License by Reciprocity**

Clarifying and updating rule language to align with current national testing requirements and practices. Also, updating language to align rules with current board practices and expedite board processes.

#### **16.21.5 NMAC - Temporary License and Emergency License**

Updating language and types of training programs that may be conducted in New Mexico. Clarifying temporary types of licenses. Removing redundant language and citing rules pertaining to temporary licenses. Updating language to align rules and expedite board processes.

#### **16.21.8 NMAC - Continuing Education**

Removing confusing language for clarification purposes. Updating language to align rules with current board structure and expedite board processes. Updating language and aligning process to current standards. Renumbering rules and updating syntax to be in correct format.



**16.21.11 NMAC - Disciplinary Proceedings**

Updating syntax, deleting unclear rule and renumbering.

**16.21.12 NMAC - Management of Medical Records**

Updating language, syntax and clarifying language

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## SUPERINTENDENT OF INSURANCE

### NOTICE OF PROPOSED RULEMAKING

NOTICE IS HEREBY GIVEN that the Superintendent of Insurance ("Superintendent") upon the Superintendent's own motion proposes to repeal and replace certain rules found in 13.21 NMAC, previously issued as emergency rules, effective 3/1/2019.

The purpose of these rules are to ensure that the Patient's Compensation Fund is organized, administered, and operated on a financially and actuarially sound basis so as to achieve the purpose for which it was established.

Statutory authority for promulgation of the proposed amended rule is found at Sections 41-5-25 NMSA 1978.

The proposed replacement rules may be found posted on the Patient's Compensation Fund <https://www.osi.state.nm.us/patient-compensation-fund/index.html> website and are incorporated by reference into this Notice of Proposed Rulemaking. Copies of the Notice of Proposed Rulemaking and proposed rules are available by requesting a copy in person at the NM Office of Superintendent of Insurance, 1120 Paseo de Peralta, Santa Fe, NM 87501.

The Superintendent will hold a public hearing on the proposed rule on April 1, 2019, at 10:00: a.m. at the NM Office of Superintendent of Insurance,

4th Floor Hearing Room Conference Room, Old PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico. The Superintendent or his designee shall act as the hearing officer for this rulemaking. Oral comments will be accepted at the public hearing from members of the public and any interested parties.

Written comments and proposals will be accepted through 4:00 pm on Thursday, March 28, 2019. Responsive comments will be accepted through 4:00 pm on April 4, 2019. Comments may be submitted via email to [melissa.martinez2@state.nm.us](mailto:melissa.martinez2@state.nm.us) or may be filed by sending original copies to:

Patient's Compensation Fund  
Attention: Melissa Martinez  
1120 Paseo de Peralta, P.O. Box 1689,  
Santa Fe, NM 87504-1689 **Docket No.: 19-00001-PCF**

Only signed statements, proposals or comments will be accepted. scanned or facsimile signatures or electronic signatures conforming to federal and state court requirements will be accepted with the understanding that if there is any dispute regarding a signature, OSI reserves the right to require that original signatures be provided to verify the electronic or facsimile signature. All filings must be received between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday, except on state holidays. Any filings received after 4:00 p.m. will be filed to the docket the next business day.

Any person with a disability requiring special assistance in order to participate in the hearing should contact Melissa Martinez, Law Clerk, Office of General Counsel, at 505-476-0333 at least 48 hours prior to the commencement of the hearing.

The Superintendent will consider all oral comments, and will review all timely submitted written comments and responses. The record shall close on the earlier of thirty (30) days

following the Public Hearing or the date a Final Order is issued in this case.

DONE AND ORDERED this 26th day of February 2019.  
/S/JOHN G. FRANCHINI

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## End of Notices of Rulemaking and Proposed Rules



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## Adopted Rules

### Effective Date and Validity of Rule Filings

Rules published in this issue of the New Mexico Register are effective on the publication date of this issue unless otherwise specified. No rule shall be valid or enforceable until it is filed with the records center and published in the New Mexico Register as provided in the State Rules Act. Unless a later date is otherwise provided by law, the effective date of the rule shall be the date of publication in the New Mexico Register. Section 14-4-5 NMSA 1978.

### HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

**This is an amendment to 8.102.500, Section 8, effective 3/1/2019.**

#### 8.102.500.8 GENERAL REQUIREMENTS:

##### A. Need

**determination process:** Eligibility for NMW, state funded qualified aliens and EWP cash assistance based on need requires a finding that:

(1) the benefit group's countable gross monthly income does not exceed the gross income limit for the size of the benefit group;

(2) the benefit group's countable net income after all allowable deductions does not equal or exceed the standard of need for the size of the benefit group;

(3) the countable resources owned by and available to the benefit group do not exceed the \$1,500 liquid and \$2,000 non-liquid resource limits;

(4) the benefit group is eligible for a cash assistance payment after subtracting from the standard of need the benefit group's countable income, and any payment sanctions or recoupments.

##### B. Gross income

**limits:** The total countable gross earned and unearned income of the benefit group cannot exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group.

(1) Income eligibility limits are revised and adjusted each year in October

(2) The gross income limit for the size of the benefit group is as follows:

(a)  
one person [854] \$860

(b)  
two persons [1,151] \$1,166

(c)  
three persons [1,447] \$1,472

(d)  
four persons [1,743] \$1,778

(e)  
five persons [2,039] \$2,084

(f)  
six persons [2,335] \$2,390

(g)  
seven persons [2,631] \$2,696

(h)  
eight persons [2,927] \$3,002

(i)  
add [296] \$306 for each additional person.

**C. Eligibility for support services only:** Subject to the availability of state and federal funds, a benefit group that is not receiving cash assistance but has countable gross income that is less than one hundred percent of the federal poverty guidelines applicable to the size of the benefit group may be eligible to receive services. The gross income guidelines for the size of the benefit group are as follows:

(1) one person  
[1,005] \$1,012

(2) two  
persons [1,354] \$1,372

(3) three  
persons [1,702] \$1,732

(4) four  
persons [2,050] \$2,092

(5) five  
persons [2,399] \$2,452

(6) six persons  
[2,747] \$2,812

(7) seven  
persons [3,095] \$3,172

(8) eight  
persons [3,444] \$3,532

(9) add [349]  
\$360 for each additional person.

##### D. Standard of need:

(1) The standard of need is based on the

number of participants included in the benefit group and allows for a financial standard and basic needs.

(2) Basic needs include food, clothing, shelter, utilities, personal requirements and the participant's share of benefit group supplies.

(3) The financial standard includes approximately \$91 per month for each participant in the benefit group.

(4) The standard of need for the NMW, state funded qualified aliens, and EWP cash assistance benefit group is:

(a)  
one person \$266

(b)  
two persons \$357

(c)  
three persons \$447

(d)  
four persons \$539

(e)  
five persons \$630

(f)  
six persons \$721

(g)  
seven persons \$812

(h)  
eight persons \$922

(i)  
add \$91 for each additional person.

##### E. Special needs:

(1) **Special clothing allowance:** A special clothing allowance may be issued to assist in preparing a child for school, subject to the availability of state or federal funds and a specific allocation of the available funds for this allowance.

(a)  
For purposes of determining eligibility for the clothing allowance, a child is considered to be of school age if the child is six years of age or older and less than age 19 by the end of August.

(b)

The clothing allowance shall be allowed for each school-age child who is included in the NMW, TBP, state funded qualified aliens, or EWP cash assistance benefit group, subject to the availability of state or federal funds.

(c)

The clothing allowance is not allowed in determining eligibility for NMW, TBP, state funded qualified aliens, ~~[or]~~ EWP cash assistance, or wage subsidy.

(2) **Layette:**

A one-time layette allowance of \$25 is allowed upon the birth of a child who is included in the benefit group. The allowance shall be authorized by no later than the end of the month following the month in which the child is born.

(3) **Special**

**circumstance:** Dependent upon the availability of funds and in accordance with the federal act, the HSD secretary, may establish a separate, non-recurring, cash assistance program that may waive certain New Mexico Works Act requirements due to a specific situation. This cash assistance program shall not exceed a four month time period, and is not intended to meet recurrent or ongoing needs.

**F. Non-inclusion of legal guardian in benefit group:**

Based on the availability of state and federal funds, the department may limit the eligibility of a benefit group due to the fact that a legal guardian is not included in the benefit group. [8.102.500.8 NMAC - Rp 8.102.500.8 NMAC, 07/01/2001; A, 10/01/2001; A, 10/01/2002; A, 10/01/2003; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 11/15/2007; A, 01/01/2008; A/E, 10/01/2008; A, 08/01/2009; A, 08/14/2009; A/E, 10/01/2009; A, 10/30/2009; A, 01/01/2011; A, 01/01/2011; A, 07/29/2011; A/E, 10/01/2011; A/E, 10/01/2012; A/E, 10/01/2013; A/E, 10/01/2014; A, 10/01/2015; A, 10/01/2016; A/E, 10/01/2017; A, 2/01/2018; A/E, 10/01/2018; A, 3/1/2019]

## HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

**This is an amendment to 8.106.500, Section 8, effective 3/1/2019.**

### 8.106.500.8 GA - GENERAL REQUIREMENTS:

**A. Limited state** funds may result in a suspension or reduction in general assistance benefits without eligibility and need considered.

**B. Need determination process:** Eligibility for the GA program based on need requires a finding that the:

(1) countable resources owned by and available to the benefit group do not exceed either the \$1,500 liquid or \$2,000 non-liquid resource limit;

(2) benefit group's countable gross earned and unearned income does not equal or exceed eighty-five percent of the federal poverty guideline for the size of the benefit group; and

(3) benefit group's countable net income does not equal or exceed the standard of need for the size of the benefit group.

**C. GA payment determination:** The benefit group's cash assistance payment is determined after subtracting from the standard of need the benefit group's countable income and any payment sanctions or recoupments.

**D. Gross income test:** The total countable gross earned and unearned income of the benefit group cannot exceed eighty-five percent of the federal poverty guidelines for the size of the benefit group.

(1) Income eligibility limits are revised and adjusted each year in October

(2) The gross income limit for the size of the benefit group is as follows:

one person	[ <del>\$854</del> ] <u>\$860</u>
two persons	[ <del>\$1,151</del> ] <u>\$1,166</u>
three persons	[ <del>\$1,447</del> ] <u>\$1,472</u>

(d)

four persons [~~\$1,743~~] \$1,778

(e)

five persons [~~\$2,039~~] \$2,084

(f)

six persons [~~\$2,335~~] \$2,390

(g)

seven persons [~~\$2,631~~] \$2,696

(h)

eight persons [~~\$2,927~~] \$3,002

(i)

add [~~\$296~~] \$306 for each additional person.

**E. Standard of need:**(1) **As**

published monthly by the department, the standard of need is an amount provided to each GA cash assistance benefit group on a monthly basis and is based on availability of state funds, the number of individuals included in the benefit group, number of cases, number of applications processed and approved, application approval rate, number of case closures, IAR caseload number and expenditures, and number of pending applications.

(2) **Basic**

needs include food, clothing, shelter, utilities, personal requirements and an individual benefit group member's share of supplies.

(3) **Notice:**

The department shall issue prior public notice identifying any change(s) to the standard of need amounts for the next quarter, as discussed at 8.106.630.11 NMAC.

**F. Net income test:**

The total countable earned and unearned income of the benefit group after all allowable deductions cannot equal or exceed the standard of need for the size of the GA benefit group. After the countable net income is determined it is rounded down prior to the comparison of the household's income to the standard of need to determine the households monthly benefit amount.

**G. Special clothing allowance for school-age dependent children:** A special clothing allowance may be issued to assist in preparing a child for school, subject to the availability of state or federal funds and a specific allocation of the available funds for this allowance.

(1) For purposes of determining eligibility for the clothing allowance, a child is considered to be of school age if the child is six years of age or older and less than age 19 by the end of August.

(2) The clothing allowance shall be allowed for each school-age child who is included in the GA cash assistance benefit group, subject to the availability of state or federal funds.

(3) The clothing allowance is not counted in determining eligibility for GA cash assistance.

**H. Supplemental issuance:** A one-time supplemental issuance may be distributed to recipients of GA for disabled adults based on the sole discretion of the secretary of the human services department and the availability of state funds.

(1) The one time supplemental issuance may be no more than the standard GA payment made during the month the GA payment was issued.

(2) To be eligible to receive the one time supplement, a GA application must be active and determined eligible no later than the last day of the month in the month the one time supplement is issued.  
[8.106.500.8 NMAC - N, 07/01/2004; A/E, 10/01/2004; A/E, 10/01/2005; A, 7/17/2006; A/E, 10/01/2006; A/E, 10/01/2007; A, 01/01/2008; A, 06/16/2008; A/E, 10/01/2008; A, 07/01/2009; A/E, 10/01/2009; A, 10/30/2009; A, 12/01/2009; A, 01/01/2011; A, 07/29/2011; A/E, 10/01/2011; A/E, 10/01/2012; A, 07/01/2013; A/E, 10/01/2013; A/E, 10/01/2014; A, 10/01/2015; A, 10/01/2016; A/E, 10/01/2017; A, 2/01/2018; A/E, 10/01/2018; A, 3/1/2019]

## SUPERINTENDENT OF INSURANCE

### TITLE 13 INSURANCE CHAPTER 21 PATIENT'S COMPENSATION FUND PART 2 QUALIFICATIONS AND ADMISSIONS

**13.21.2.1 ISSUING AGENCY:** The New Mexico Superintendent of Insurance (the superintendent).  
[13.21.2.1 NMAC – N/E, 03/01/2019]

**13.21.2.2 SCOPE:** The rules in Chapter 21 govern the organization and administration of the *New Mexico Patient's Compensation Fund* (the fund or PCF).  
[13.21.2.2 NMAC – N/E, 03/01/2019]

**13.21.2.3 STATUTORY AUTHORITY:** Section 41-5-25 NMSA 1978.  
[13.21.2.3 NMAC – N/E, 03/01/2019]

**13.21.2.4 DURATION:** Permanent.  
[13.21.2.4 NMAC – N/E, 03/01/2019]

**13.21.2.5 EFFECTIVE DATE:** March 1, 2019, unless a later date is cited at the end of a section.  
[13.21.2.5 NMAC – N/E, 03/01/2019]

**13.21.2.6 OBJECTIVE:** The rules in this chapter are intended to ensure that the *Patient's Compensation Fund* is organized, administered, and operated on a financially and actuarially sound basis so as to achieve the purpose for which it was established.  
[13.21.2.6 NMAC – N/E, 03/01/2019]

**13.21.2.7 DEFINITIONS:** This rule adopts the definitions found in Section 41-5-3 NMSA 1978, in Section 14-4-2 NMSA 1978, and in 1.24.1.7 NMAC. In addition:

**A. "Consulting actuary"** means a person contracted by the superintendent to provide actuarial services to the fund;

**B. "Fund" or "PCF"** means the *Patient's Compensation Fund* established by Section 41-5-25 NMSA 1978;

**C. "Hospital"** means a person who is licensed to operate one or more facilities located in New Mexico that provide inpatient and outpatient medical or surgical services, or both;

**D. "Individual"** means a human being;

**E. "Insured"** means a health care provider insured under a medical malpractice liability insurance policy;

**F. "MMA"** means the New Mexico Medical Malpractice Act, Sections 41-5-1 through 41-5-29 NMSA 1978;

**G. "Occurrence coverage"** means malpractice liability insurance for medical malpractice that occurs during the policy term, regardless of when the claim was reported;

**H. "Outpatient health care facility"** means a person who is licensed to operate one or more facilities located in New Mexico that provide outpatient medical or surgical services, or both;

**I. "Person"** includes an individual and every other form of legal entity;

**J. "Qualified health care provider" or "QHP"** means a "health care provider" who is admitted to the fund pursuant to these rules; and

**K. "Self-insured"** means a person who satisfies, or seeks to satisfy, the requirements for becoming a "qualified health care provider" by depositing funds with the superintendent.  
[13.21.2.7 NMAC – N/E, 03/01/2019]

### 13.21.2.8 POWERS OF THE SUPERINTENDENT:

Without limiting any of the superintendent's powers, the superintendent shall have the power to:

**A.** receive and process health care provider requests for admission to the fund;

**B.** determine whether applicants for admission satisfy the standards of financial responsibility and possess the other qualifications for admission specified by these rules;



C. timely collect surcharges from, or paid by insurers on behalf of, health care providers;

D. certify periods of admission of qualified health care providers;

E. process claims against qualified health care providers or the fund in accordance with the MMA and these rules;

F. collect and maintain claims experience and surcharge data;

G. purchase insurance for the fund and its obligations;

H. pay judgments, settlements, arbitration awards, and medical expenses for which the fund is responsible;

I. retain actuarial, legal and claim adjusting services for the fund;

J. discharge and perform such other duties, responsibilities, functions, and activities as are expressly or impliedly imposed on the superintendent by the MMA or as specified by these rules.

[13.21.2.8 NMAC – N/E, 03/01/2019]

#### **13.21.2.9 EXPENSES OF ADMINISTRATION AND DEFENSE:**

All expenses incurred for, by, or on behalf of the superintendent in the administration, operation, and defense of the fund shall be borne by the fund.

[13.21.2.9 NMAC – N/E, 03/01/2019]

#### **13.21.2.10 REFERENCE TO OTHER DOCUMENTS:**

When a rule issued by the superintendent relating to the MMA or the PCF refers to another rule, regulation, statute, or other document, the reference, unless stated specifically to the contrary, is continuous and intended to refer to all amendments of the rule, regulation, statute, or document.

[13.21.2.10 NMAC – N/E, 03/01/2019]

#### **13.21.2.11 ADDRESS FOR FILING DOCUMENTS:**

The mailing address for the fund shall be posted at: <https://osi.state.nm.us/patient-compensation-fund/index.html>

[13.21.2.11 NMAC – N/E, 03/01/2019]

#### **13.21.2.12 BASIC QUALIFICATIONS FOR ADMISSION TO THE FUND:**

To be eligible for admission to the fund, a person shall:

A. be a health care provider, as defined by the MMA or by these rules, who or which is engaged in the provision of health care services within the state of New Mexico, and which is not organized solely or primarily for the purpose of qualifying for admission to the fund;

B. demonstrate and maintain, to the satisfaction of and in the manner specified by the superintendent and in accordance with the standards prescribed by these rules, or as otherwise provided by law, financial responsibility for, and with respect to, malpractice or professional liability claims asserted against the person or institution;

C. apply for admission pursuant to these rules; and

D. pay the applicable surcharges to the fund.

[13.21.2.12 NMAC – N/E, 03/01/2019]

#### **13.21.2.13 FINANCIAL RESPONSIBILITY INSURANCE:**

A. To establish and maintain financial responsibility using insurance, the health care provider, or authorized representative of the health care provider, shall submit proof that the health care provider is or will be insured under a policy of malpractice liability insurance with indemnity limits of \$200,000 per occurrence.

B. To be acceptable as evidence of malpractice liability insurance, an insurance policy:

(1) shall be issued by an insurer:

(2) shall be on an occurrence coverage form approved by the superintendent;

(3) shall provide for the insurer's assumption of the defense of any covered claim, without limitation on the insurer's maximum obligation respecting the cost of defense;

(4) shall, except for a hospital or outpatient health care facility, provide coverage for three separate occurrences;

(5) shall be nonassessable; and

(6) shall not be subject to a retention or deductible payable by the insured health care provider, with respect to liability, costs of defense or claim adjustment expenses; and

C. The proof required by Subsection A of this section shall be issued and executed by an officer or authorized agent of the applicant health care provider's insurer and shall specifically identify the policyholder, the named insureds under such policy, the policy period, and the limits of coverage. Upon request by the superintendent, such certification shall be accompanied by a certified true copy of the policy, or identification of the SERFF numbers of the specific policy form(s) previously filed with and approved by the superintendent.

D. Upon request, the superintendent shall advise applicants as to whether any specified policy form has been approved pursuant to this rule, or provide a list of all policy forms so approved.

E. The occurrence coverage required by this rule to demonstrate the requisite financial responsibility for qualification with the fund shall be deemed to be continuing without a lapse in coverage by the fund, provided that the health care provider meets the premium payment conditions of the underlying coverage and timely meets the surcharge payment conditions of these rules, as applicable.

[13.21.2.13 NMAC – N/E, 03/01/2019]

#### **13.21.2.14 FINANCIAL RESPONSIBILITY SELF-INSURANCE:**

A health care provider, except for a hospital or outpatient health care facility, may qualify for admission to the fund by having continuously on deposit the sum of \$600,000 in cash, as long as the following conditions are met:

A. The deposit shall be conditioned only for, dedicated exclusively to, and held in trust for the benefit and protection of and as

security for the prompt payment of all medical malpractice claims arising or asserted against the health care provider.

**B.** For purposes of this rule, upon approval by the superintendent of an application filed by the group, any group of health care providers organized to and actually practicing together or otherwise related by ownership, whether as a corporation, partnership, limited liability partnership or limited liability company, shall be deemed a single health care provider and shall not be required to post more than one deposit. Proof of such status may include a notarized copy of the articles of incorporation, partnership agreement, articles of organization, joint or consolidated entity tax returns, or other documents demonstrating the ownership relation among or between the members of the group, or other evidence which indicates that the members of the group actually practice together for the purpose of health care delivery.

(1) This proof of group status shall be submitted to the superintendent:

(a) with the group's original application;

(b) within 30 days of any change in the group's status, organization, or membership; and

(c) within 10 calendar days of receipt of a written demand therefor from the superintendent.

(2) It shall be insufficient for qualification under this rule if a group is organized solely or primarily for the purpose of qualifying for admission to the fund.

**C.** A self-insured health care provider shall be required to execute a pledge agreement for the money on deposit prescribed and supplied by the superintendent.

**D.** Sums on deposit with the superintendent pursuant to this rule shall not be assigned, transferred, mortgaged, pledged, hypothecated, or otherwise encumbered by the health care provider nor shall any such deposit

be subject to writ of attachment, sequestration, or execution except pursuant to a final judgment or court-approved settlement issued or made in connection with and arising out of a malpractice claim against the health care provider.

**E.** To maintain financial responsibility for continuing qualification with the fund, a self-insured health care provider shall at all times maintain the sum on deposit provided for by this rule at not less than \$600,000. The value of the health care provider's deposit shall be deemed impaired when any portion is seized or released pursuant to judicial process.

**F.** In the event that a self-insured health care provider's deposit provided for by this rule becomes impaired, the superintendent shall give written notice of such impairment to the self-insured health care provider, and the self-insured health care provider shall, unless a longer period is provided for by the superintendent, have five days from receipt of such notice to make such additional deposit as will restore the minimum deposit value prescribed by this rule. A self-insured health care provider's qualification with the fund shall terminate on and as of the later of the last day set by these rules or, if applicable, by the superintendent, if the self-insured health care provider has not on or prior to such date restored the minimum deposit value prescribed by this rule. In the case of multiple self-insured health care providers approved by the superintendent to post one deposit, as set forth in Subsection B of this section, the admission to the fund of each member of the group or each related entity shall terminate on and as of the last day set by these rules or, if applicable, by the superintendent, if the self-insured health care provider has not on or prior to such date restored the minimum deposit value prescribed by this rule.

**G.** A self-insured health care provider shall, within 120 days of receiving notice of a request for review of a malpractice claim,

submit a report to the superintendent of the anticipated exposure to the fund and the self-insured health care provider and containing sufficient details supporting the anticipated exposure. In addition, said self-insured health care provider shall provide updates to the superintendent when significant changes in anticipated exposure occur.

**H.** A self-insured health care provider who has evidenced financial responsibility pursuant to this rule may withdraw the deposit prescribed by this rule upon authorization of the superintendent. All money shall remain on deposit and pledged to the PCF during the term of the health care provider's admission as a self-insured health care provider with the fund and for the longer of a three-year period following termination of such admission or as long as any medical malpractice claim is pending, whether with the medical review commission or in a court of competent jurisdiction. After this time period, authorization may be given when the health care provider files with the executive director, not less than 30 days prior to the date such withdrawal is to be effected, a certificate signed by the health care provider, certifying:

(1) the date the health care provider terminated admission to the fund as a self-insured health care provider;

(2) that there are no medical malpractice claims pending with the medical review commission or in a court of competent jurisdiction;

(3) that there are no unpaid final judgments or settlements against or made by the health care provider in connection with or arising out of a malpractice claim; and

(4) that there are no unasserted medical malpractice claims which are probable of assertion against the health care provider.

**I.** Effective as of the date on which a self-insured health care provider's deposit is withdrawn pursuant to this rule, the health

care provider's admission to and qualification with the fund shall be terminated.

**J.** The deposit with the superintendent shall provide coverage for not more than three separate occurrences, and the limit that shall be paid from the deposit for each occurrence is \$200,000.

**K.** The acceptance by the superintendent of the self-insurance deposit described in this rule does not create in the superintendent or the PCF a duty to defend any health care provider making a deposit under this rule. [13.21.2.14 NMAC – N/E, 03/01/2019]

#### **13.21.2.15 ADDITIONAL QUALIFICATIONS FOR HOSPITALS AND OUTPATIENT HEALTH CARE FACILITIES:**

**A.** The superintendent shall perform a risk assessment for each applicant hospital or outpatient health care facility. If the hospital or outpatient care facility will establish and maintain financial responsibility with medical malpractice liability insurance, the risk assessment shall be based on the policy application, information and documents that the applicant submitted to its insurer, all of which shall also be provided to the superintendent by, or on behalf of, the hospital or outpatient care facility. If the hospital or outpatient care facility will be self-insured, the risk assessment shall be based on information requested by the superintendent upon forms prescribed and supplied by the superintendent. The superintendent may request and consider any additional information pertinent to a risk assessment.

**B.** Based on the risk assessment the superintendent shall determine each hospital's or outpatient health care facility's base coverage, or, if self-insured, deposit, pursuant to the procedures of this section.

**C.** The risk assessment for each hospital or outpatient health care facility shall be required when the hospital or outpatient health

care facility applies the first time for admission to the fund, and may be required at any other time the superintendent deems it necessary or advisable.

[13.21.2.15 NMAC – N/E, 03/01/2019]

#### **13.21.2.16 ADMISSION PROCEDURE:**

**A.** An application for admission to the fund shall be made through the PCF website, which shall require the applicant to provide a legal name; professional license, certification, or registration number; information relating to the nature and scope of the applicant's practice sufficient to identify the class or category of the practitioner, information on malpractice claims previously concluded or then pending against the applicant, and such other information as the superintendent may require.

**B.** The application shall be accompanied by evidence of financial responsibility in the form prescribed by these rules, and the applicable surcharge.

**C.** If the superintendent determines that an applicant is not eligible for admission to the fund, the superintendent shall notify the applicant within 15 days of receipt of the completed application. The applicant may within 15 days of receipt of the notice, appeal the determination to the superintendent by mailing a notice of appeal to the superintendent. The provisions of 13.21.3 NMAC shall apply to the appeal.

[13.21.2.16 NMAC – N/E, 03/01/2019]

#### **13.21.2.17 ORDER OF ADMISSION:**

**A.** Upon approval for admission into the fund, the superintendent shall issue and deliver to the health care provider an order of admission to the fund, which shall:

- (1) identify the health care provider;
- (2) state that the health care provider has qualified

for admission to the fund pursuant to Section 41-5-5 NMSA 1978; and

(3) specify the effective date and term of such admission.

**B.** Duplicate or additional orders of admission shall be available to and upon the request of a qualified health care provider or the qualified health care provider's attorney, or professional liability insurance underwriter, when such certification is required to evidence admission to or qualification with the fund in connection with an actual or proposed malpractice claim against the health care provider.

**C.** A copy of each order of admission shall be available for public inspection at the main office of the superintendent on the day it is issued. Any party aggrieved by the admission of any qualified health care provider to the fund may, within 15 days of issuance of the order, appeal the admission to the superintendent by mailing a notice of appeal to the superintendent. The provisions of 13.21.3 NMAC shall apply to the appeal.

**D.** On the effective date of these rules, or as soon thereafter as practicable, the superintendent shall issue an order of admission (and if applicable a subsequent order of admission renewing the admission) pursuant to this rule for every qualified health care provider first admitted to the fund since January 1, 2017.

[13.21.2.17 NMAC – N/E, 03/01/2019]

#### **13.21.2.18 EXPIRATION OF ADMISSION AND RENEWAL OF ADMISSION:**

**A.** Admission to the fund expires:

(1) as to a health care provider evidencing financial responsibility other than by self-insurance, on and as of:

(a) the effective date and time of termination or cancellation of the policy of the health care provider's malpractice liability coverage; or



(b) the last day of the applicable period for which the prior annual surcharge applied in the event that the annual surcharge for renewal coverage is not paid by the health care provider to the insurer on or before 30 days following the expiration of the prior admission period.

(2) as to a self-insured health care provider on and as of:

(a) the effective date and time of termination, cancellation or impairment of the health care provider's financial responsibility; or

(b) the last day of the applicable period for which the prior surcharge applied in the event that the surcharge for renewal coverage is not paid by the health care provider to the superintendent on or before 30 days following the expiration of the prior admission period.

**B.** Admission to the fund must be renewed by each qualified health care provider on or before expiration of the admission period in accordance with these rules. [13.21.2.18 NMAC – N/E, 03/01/2019]

### **13.21.2.19 TERMINATION OF ADMISSION:**

**A.** A health care provider's admission to the fund shall terminate:

(1) as to a health care provider evidencing financial responsibility by proof of insurance pursuant to these rules, on and as of the effective date of cancellation of the health care provider's occurrence coverage;

(2) as to a self-insured health care provider on and as of any date on which:

(a) the health care provider ceases to maintain financial responsibility in the amount and form prescribed by these rules; or

(b) the health care provider fails, within the allowed time after notice by the superintendent, to provide additional security for financial responsibility

when existing financial responsibility security is impaired as provided in these rules.

(3) on any date that the health care provider's professional or institutional license, certification, or registration is suspended or revoked or that the health care provider ceases to be a health care provider as defined by the MMA or these rules or otherwise ceases to be eligible for admission to the fund.

**B.** Upon written notice to a health care provider, or such provider's authorized representative, the superintendent may terminate a health care provider's admission to the fund, effective 30 days following the mailing by registered or certified mail, return receipt requested, or giving of such notice in the event that a qualified health care provider has failed or refused to timely provide any reports or submit any information or data required to be reported or submitted by these rules. If, within 30 days of receipt of such a notice, a health care provider furnishes to the superintendent any and all delinquent reports, information, and data, as specified by such notice, the health care provider's admission to the fund may be continued in effect, provided that the health care provider remains otherwise qualified for admission to the fund.

**C.** If the superintendent terminates a health care provider's admission to the fund, the superintendent shall notify the provider within 15 days of receipt of the cancellation or termination. The health care provider may, within 15 days of receipt of the notice, appeal the determination by mailing a notice of appeal to the superintendent. The provisions of 13.21.3 NMAC shall apply to the appeal. [13.21.2.19 NMAC – N/E, 03/01/2019]

### **13.21.2.20 PCF ACTUARY:**

**A.** In accordance with the provisions of law applicable to contracting for personal, professional, or consulting services, the superintendent may employ or hire a qualified and competent actuary

(the "superintendent's actuary") to advise and consult the superintendent on all aspects of the superintendent's administration, operation, and defense of the fund which require application of actuarial science.

**B.** The superintendent's actuary may be asked to evaluate and recommend:

(1) the claims experience data required for risk assessments;

(2) the establishment, maintenance, and adjustment of reserves on individual claims against the fund and the establishment, maintenance, and adjustment of reserves for incurred but not reported claims;

(3) surcharges, rated and classified according to the several classes or risks against which the fund provides compensation, that shall reasonably ensure that the fund is sufficiently funded so as to be and remain financially and actuarially capable of providing the compensation for which it is organized;

(4) each hospital's or outpatient health care facility's base coverage upon initial admission into the fund, and whether additional charges need to be made for initial admission to the fund; and

(5) any other actuarial questions affecting the administration, operation, and defense of the fund.

[13.21.2.20 NMAC – N/E, 03/01/2019]

### **13.21.2.21 BI-ANNUAL ACTUARIAL STUDY:**

**A.** At least bi-annually, as required by Section 41-5-25 NMSA 1978, the superintendent shall cause the superintendent's actuary to perform an actuarial study of the fund, and of the surcharges necessary and appropriate to ensure that it is and remains financially and actuarially sound.

**B.** In the performance of the actuarial study, the superintendent's actuary shall employ sound actuarial principals.

[13.21.2.21 NMAC – N/E, 03/01/2019]

**13.21.2.22 SURCHARGES:**

**A.** For a health care provider other than a hospital or outpatient care facility, surcharges shall be based on classifications and categories of medical malpractice liability risks underwritten by the fund with respect to practice type or specialties as determined and specified in an actuarial study pursuant to Subsection 21 of this rule;

**B.** For a hospital or outpatient care facility, surcharges shall be determined using the process or directions specified in an actuarial study, pursuant to Subsection 21 of this rule.

**C.** Surcharges, rates and classifications used, assessed, imposed or collected by the fund prior to the effective date of these rules shall remain valid and effective until superseded by order issued pursuant to 13.21.3 NMAC, or for 180 days after the effective date of these rules, whichever first occurs. Subsequent adoption or amendment of surcharges, rates and classifications shall be effective only upon issuance of an order pursuant to 13.21.3 NMAC. [13.21.2.22 NMAC – N/E, 03/01/2019]

**13.21.2.23 PAYMENT OF SURCHARGES:**

**A.** An insured health care provider must pay the applicable surcharge to the medical malpractice liability insurer within 30 days of the inception of coverage, and within 30 days of the inception of each period of renewal coverage;

**B.** A self-insured health care provider must pay the applicable surcharge within 30 days of the requested date for admission into the fund, and within 30 days of the inception of each renewal period. [13.21.2.23 NMAC – N/E, 03/01/2019]

**13.21.2.24 ADMISSION DATE:**

**A.** A health care provider who applied for admission to the fund prior to the effective date of these rules, and who is approved for admission pursuant to these rules, shall be admitted to the fund as of the date of initial application.

**B.** A health care provider whose first application for admission to the fund is made after the effective date of these rules, and who is approved for admission pursuant to these rules, will be admitted to the fund as of the date of initial application.

**C.** Under Sections A and B of this Section, the admission date for an insured health care provider who applies to participate in the fund, and who pays all applicable surcharges to the fund, within 60 days of the inception of the base coverage shall relate back to the inception date of the base coverage. [13.21.2.24 NMAC – N/E, 03/01/2019]

**13.21.2.25 SEVERABILITY:**

If any provision of Chapter 21 of these rules, or the application or enforcement thereof, is held invalid, such invalidity shall not affect other provisions or applications of Chapter 21 these rules which can be given effect without the invalid provisions or applications, and to this end the several provisions of Chapter 21 of these rules are hereby declared severable. [13.21.2.25 NMAC – N/E, 03/01/2019]

**History of 13.21.2 NMAC: [RESERVED]****SUPERINTENDENT OF INSURANCE**

**TITLE 13 INSURANCE**  
**CHAPTER 21 PATIENT'S COMPENSATION FUND**  
**PART 3 PROCEDURAL RULES FOR PUBLIC RULE HEARINGS**

**13.21.3.1 ISSUING AGENCY:** New Mexico Superintendent of Insurance. [13.21.3.1 NMAC – N/E, 03/01/2019]

**13.21.3.2 SCOPE:** This rule applies to all proceedings relating to the Patient Compensation Fund (the fund or PCF) in which the

superintendent adopts rules pursuant to the Administrative Procedures Act, Sections 12-8-1 to -25 NMSA 1978, or the State Rules Act, Sections 14-4-1 to -11 NMSA 1978.

[13.21.3.2 NMAC – N/E, 03/01/2019]

**13.21.3.3 STATUTORY**

**AUTHORITY:** Section 14-4-5.8 NMSA 1978.

[13.21.3.3 NMAC – N/E, 03/01/2019]

**13.21.3.4 DURATION:**

Permanent.

[13.21.3.4 NMAC – N/E, 03/01/2019]

**13.21.3.5 EFFECTIVE**

**DATE:** March 1, 2019, unless a later date is cited at the end of a section.

[13.21.3.5 NMAC – N/E, 03/01/2019]

**13.21.3.6 OBJECTIVE:**

To provide procedural rules for public rule hearings for use by the superintendent consistent with the State Rules Act in the organization, administration, and defense of the PCF and to facilitate public engagement with the superintendent's rulemaking process in a transparent, organized, and fair manner.

[13.21.3.6 NMAC – N/E, 03/01/2019]

**13.21.3.7 DEFINITIONS:**

This rule adopts the definitions found in Section 41-5-3 NMSA 1978, in Section 14-4-2 NMSA 1978, in 1.24.1.7 NMAC, and in 13.21.1.8 NMAC. In addition:

**A. "Final order"** also means "concise explanatory statement" as described in Section 14-4-5.5 NMSA 1978;

**B. "Logical outgrowth"** occurs when a final rule differs from the proposed rule if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period;

**C. "Recommended decision"** means the written decision of any designated hearing officer which contains a description of the rulemaking proceeding, a summary of any written comments submitted

to the superintendent, a summary of any oral comments made at the public hearing, any analysis or conclusions of the designated hearing officer, and recommendations to the superintendent concerning adoption, rejection, or amendment of the proposed rule.

[13.21.3.7 NMAC – N/E, 03/01/2019]

### **13.21.3.8 INITIATION OF THE RULEMAKING PROCESS BY THE SUPERINTENDENT:**

**A.** The rulemaking process may be initiated by the superintendent through a notice for a rule hearing that is publicly posted pursuant to this rule.

**B.** The superintendent shall proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing in accordance with the State Rules Act and any other applicable law.

**C.** Once the superintendent initiates the rulemaking process, the superintendent must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[13.21.3.8 NMAC – N/E, 03/01/2019]

### **13.21.3.9 INITIATION OF THE RULEMAKING PROCESS BY THE PUBLIC:**

**A.** Any person may file a petition for rulemaking with the superintendent.

**B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule. A petition shall include a citation to the legal authority authorizing the superintendent to adopt the rule and a copy of or citation to technical information, if any, that serves as the basis for the proposed rule. A petition should be as clear as possible and may include the proposed rule in underline and strikethrough format, consistent with requirements of the state records administrator.

**C.** The superintendent shall, if required by law, consider the

petition and make a determination within 30 calendar days whether to grant or deny the petition. If the superintendent denies the petition, the superintendent shall issue a final order explaining the reason for denial. No affirmative duty to respond to a public petition is created by these rules. If a public right to petition the superintendent exists under the MMA, the superintendent must follow all timelines or responses governed by the MMA.

**D.** Once the superintendent initiates the rulemaking process, the superintendent must maintain a record as prescribed in Section 14-4-5.4 NMSA 1978.

[13.21.3.9 NMAC – N/E, 03/01/2019]

**13.21.3.10 RULEMAKING NOTICE:** The superintendent shall provide to the public, as defined in Section 14-4-2 NMSA 1978, notice of the proposed rulemaking a minimum of 30 calendar days prior to the public rule hearing and in accordance with requirements of Section 14-4-5.2 NMSA 1978.

[13.21.3.10 NMAC – N/E, 03/01/2019]

### **13.21.3.11 WRITTEN COMMENT PERIOD:**

**A.** The public comment period must be at least 30 calendar days, beginning after publication of the notice in the New Mexico register and issuance of the rulemaking notice. The superintendent shall not adopt a proposed rule before the end of the public comment period.

**B.** As long as the public comment period is at least 30 calendar days, the public comment period will close for initial comments at 4:00 p.m. on the day of the public hearing, or on the last day of the public hearing if the public hearing extends for more than one day. For purposes only of responses to written comments or oral comments at the public hearing, the public comment period will extend at least 10 calendar days beyond the public hearing or close of the 30 day comment

period, whichever is later, unless the necessity of adopting or publishing the rule by a certain date makes the extension of the public comment period impractical.

**C.** A person may submit, by mail or electronic form, written comments or responses to comments on a proposed rule, and those comments or responses shall be made part of the record. Written comments may be submitted through the end of the public comment period, and responses to comments may be submitted for an additional 10 days, unless the necessity of adopting or publishing the rule by a certain date makes a response period impractical.

**D.** The superintendent may decide to amend the comment period, or response period, if the superintendent provides to the public, as defined in Section 14-4-2 NMSA 1978, notice of the changes.

**E.** The superintendent shall post all written comments and responses on the PCF website, as soon as practicable, and no more than three business days following receipt to allow for public review. All written comments and responses received by the superintendent shall also be available for public inspection at the main office of the superintendent.

[13.21.3.11 NMAC – N/E, 03/01/2019]

### **13.21.3.12 PUBLIC HEARING:**

**A.** Prior to adopting a proposed rule, the superintendent must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The superintendent, at the superintendent's discretion, directly or through a designated hearing officer, may determine whether to hold more than one hearing.

**B.** The superintendent may act as the hearing officer or designate an individual hearing officer to preside over the hearing. The

hearing officer may ask questions and provide comments for clarification purposes only, but should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented. All written comments submitted during the public comment period, as well as any written comments submitted during the hearing, will be made part of the record.

**C.** Individuals wishing to provide public comment or submit information at the hearing must state their name and any relevant affiliation for the record and be recognized before presenting. Public comment shall not be taken under oath unless required by law or separate rule. Any individual who provides public comment at the hearing may be questioned by the superintendent or hearing officer or, at the discretion of the superintendent or hearing officer, or as otherwise provided by law, by other persons at the hearing.

**D.** The hearing shall be conducted in a fair and equitable manner. The superintendent or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing will be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record.

**E.** The rules of evidence do not apply to public rule hearings and the superintendent or hearing officer may, in the interest of efficiency, exclude or limit comment or questions deemed irrelevant, redundant, or unduly repetitious.

**F.** The superintendent must hold the hearing in a venue that reasonably accommodates all persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Hearings shall be open to the public,

but are not subject to the New Mexico Open Meetings Act.

**G.** The hearing shall be recorded by any stenographic method in use in the district court or by audio recording.

[13.21.3.12 NMAC – N/E, 03/01/2019]

#### **13.21.3.13 RULEMAKING RECORD AND ADOPTION OF RULE:**

**A.** The superintendent shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the record during the rule hearing shall be labeled clearly. Pre-filed written comments are part of the rulemaking record without the need for formal admission. Pre-filed comments include, but are not limited to: the petition; public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; the proposed rule in underline and strikethrough format; and any written comment submitted during the comment period prior to the rule hearing. Written comments or other documents introduced during the hearing should be admitted into the record after being marked as an exhibit.

**B.** If the rule hearing is conducted by a designated hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the superintendent with sufficient time to review. The superintendent shall review the rulemaking record or the hearing officer's recommended decision before rendering a final decision on the proposed rule.

**C.** The superintendent may adopt, amend, or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. Amendments to a proposed rule are within the scope of the rulemaking if the amendments:

(1) are a logical outgrowth of the rule proposed in the notice; or

(2) are proposed, or are reasonably suggested, by comments made during the comment period, and the 10 day response period after the close of the comment period has been provided, and

(a) any person affected by the adoption of the rule, if amended, should have reasonably expected that any change from the published proposed rule would affect that person's interest; or

(b) the subject matter of the amended rule or the issues determined by that rule are the same as those in the published proposed rule.

**D.** The date of adoption of the proposed rule shall be the date the final order is signed by the superintendent, unless otherwise specified in the final order.

**E.** The final order may adopt by reference some or all of any recommended decision and shall include by reference or otherwise, but not be limited to, the following:

(1) citation to specific statutory or other authority authorizing the rule;

(2) effective date of the rule;

(3) date of adoption of the rule, if different than the date of the final order;

(4) reasons for adopting the rule, including any findings otherwise required by law of the superintendent, and a summary of any independent analysis done by the superintendent;

(5) reasons for any change between the published proposed rule and the final rule; and

(6) reasons for not accepting substantive arguments made through public comment.

[13.21.3.13 NMAC – N/E, 03/01/2019]

#### **13.21.3.14 FILING AND PUBLICATION; EFFECTIVE DATE:**



**A.** Within 15 calendar days after the date of adoption of a rule, the superintendent shall file the adopted rule with the state records administrator and shall provide to the public the adopted rule and final order in accordance with the State Rules Act.

**B.** Unless another date is stated in the superintendent's final order, or otherwise provided by law, the effective date of the rule shall be the date of publication in the New Mexico register.

[13.21.3.14 NMAC – N/E, 03/01/2019]

**13.21.3.15 EMERGENCY RULES:** The superintendent shall comply with the rulemaking procedures in Section 14-4-5.6 NMSA 1978, regarding the promulgation of emergency rules.  
[13.21.3.15 NMAC – N/E, 03/01/2019]

**History of 13.21.3 NMAC:**  
[RESERVED]

## SUPERINTENDENT OF INSURANCE

### TITLE 13 INSURANCE CHAPTER 21 PATIENT'S COMPENSATION FUND PART 4 ADMINISTRATIVE HEARINGS

**13.21.4.1 ISSUING AGENCY:** New Mexico Superintendent of Insurance.  
[13.21.4.1 NMAC – N/E, 03/01/2019]

**13.21.4.2 SCOPE:** Except as otherwise provided, the rules in this part govern every adjudicatory proceeding and every surcharge rate proceeding conducted pursuant to a notice of hearing issued by the superintendent on any matter delegated to the superintendent under the Medical Malpractice Act (MMA) or the rules adopted in Chapter 21 of Title 13 of the New Mexico Administrative Code, and to any request for hearing submitted to the superintendent, unless a more specific

statutory or regulatory provision applies to the specific hearing type being conducted.  
[13.21.4.2 NMAC – N/E, 03/01/2019]

**13.21.4.3 STATUTORY AUTHORITY:** Section 41-5-25 NMSA 1978.  
[13.21.4.3 NMAC – N/E, 03/01/2019]

**13.21.4.4 DURATION:** Permanent.  
[13.21.4.4 NMAC – N/E, 03/01/2019]

**13.21.4.5 EFFECTIVE DATE:** March 1, 2019, unless a later date is cited at the end of a section.  
[13.21.4.5 NMAC – N/E, 03/01/2019]

**13.21.4.6 OBJECTIVE:** The purpose of this rule is to provide procedures to govern administrative hearings held before the superintendent in his capacity administering the MMA.  
[13.21.4.6 NMAC – N/E, 03/01/2019]

**13.21.4.7 DEFINITIONS:**  
**A. "Attorney"** for purposes of this rule, "attorney" means only an individual who is licensed to practice law in New Mexico or who has requested temporary licensure under the New Mexico Supreme Court's *pro hac vice* rules.

**B. "Day or Days"** shall be interpreted as follows, unless otherwise specified:

- (1) "Business day" means Monday through Friday, excluding any days that state offices are officially closed;
- (2) one to five days means only business days; and
- (3) six days or more means calendar days, including weekends and state holidays.

**C. "Hearing"** means an on-the-record adjudicatory proceeding or surcharge rate proceeding before the superintendent or the before a hearing officer appointed by the superintendent.

**D. "Hearing officer"** is the superintendent, or a person designated by the superintendent, to serve as a neutral decision maker in a proceeding.

**E. "Order"** means any directive, command, determination of a disputed issue, or ruling on a disputed matter issued by the superintendent or a hearing officer in a proceeding governed by these rules.

**F. "OSI"** means the New Mexico office of superintendent of insurance.

**G. "Party"** means an entity who participates in a proceeding governed by these rules by order of the superintendent.

**H. "Pleading"** means any written request, motion, or proposed action filed by a party in a docketed proceeding, as set forth in 13.21.4.10 NMAC.

**I. "Proceeding"** means any formal adjudicatory or surcharge rate proceeding, case, or hearing conducted by the superintendent pursuant to these rules.

**J. "Request for hearing"** means a formal written request for an opportunity to appear before the superintendent and offer testimony, to call witnesses, present evidence and ask questions, that is submitted by a person with respect to a particular matter where the superintendent has statutory or regulatory authority to conduct an adjudicatory or surcharge rate proceeding.

**K. "Sua Sponte"** means any determination of the superintendent or of his designee made without prompting of the parties.

**L. "Superintendent"** means the superintendent of insurance, the office of superintendent of insurance, or employees of the office of superintendent of insurance acting within the scope of the superintendent's official duties and with the superintendent's authorization.  
[13.21.4.7 NMAC – N/E, 03/01/2019]

**13.21.4.8 REVISION OF STANDING ORDERS:** The superintendent may issue or withdraw standing procedural orders addressing general practice issues and filing protocols for the handling of matters to be adjudicated before the

superintendent. Such standing orders will be available for public inspection at OSI office facilities, on the PCF website, and in any applicable information provided with a notice of hearing. Parties appearing before the superintendent are expected to comply with standing orders.

[13.21.4.8 NMAC – N/E, 03/01/2019]

#### **13.21.4.9 REQUESTING A HEARING:**

**A. Written request required.** Any person seeking a hearing before the superintendent shall file a written request for a hearing using the form available on the PCF website or as otherwise directed by the superintendent. The request shall include all of the following:

- (1) a brief summary identifying the nature of the dispute;
- (2) the applicable statute, rule, bulletin, or order in dispute in the matter;
- (3) a statement of the jurisdictional basis for the superintendent to adjudicate the matter;
- (4) the triggering action of the superintendent, such as an order, denial, suspension, revocation, penalty, fine, rule, or interpretative publication;
- (5) the requestor's reason for challenging that action or inaction; and
- (6) the mailing address of the requestor.

**B. Request rejected.** The superintendent may reject any request for hearing if the superintendent lacks jurisdiction to adjudicate the matter; the matter is moot; or the request for hearing is procedurally or substantively deficient.

- (1) If a request for hearing is rejected, the superintendent will notify the requestor in writing with a brief explanation of the rejection.

(2) If the request for hearing is deficient for any reason other than lack of subject matter jurisdiction of mootness, the requestor may correct any deficiency and resubmit the request for hearing.

**C. Designation of hearing officer and docket.** Upon receipt of a request for hearing that contains all information required by Subsection A of this section and over which the superintendent has jurisdiction, the superintendent may designate a hearing officer to preside in the matter based on the knowledge, expertise, experience, efficiency, and staffing needs of the office. The superintendent may subsequently reassign the matter to a different hearing officer, if necessary. The superintendent shall assign a docket number to be referenced in all subsequent communications and filings concerning the matter.

**D. Intervenor.** Any person who claims an interest relating to the subject of a notice of hearing, and is so situated that the hearing may impair or impede the person's ability to protect that interest, may apply to intervene in the proceeding.

(1) In determining whether to allow or deny intervention, the superintendent shall consider the nature of the claimed interest of the applicant, the potential impact of the superintendent's decision on the applicant's ability to protect that interest, the timeliness of the application, the potential disruption of the proceedings and prejudice to existing parties if intervention were allowed.

(2) Whether to allow intervention at the sole discretion of the superintendent.

(3) OSI staff may intervene in any proceeding as a matter of right by filing a notice of intervention.

[13.21.4.9 NMAC – N/E, 03/01/2019]

#### **13.21.4.10 REPRESENTATION AT HEARING, FORMAL ENTRY OF APPEARANCE, SUBSTITUTION OF COUNSEL, AND WITHDRAWAL FROM REPRESENTATION:**

##### **A. Representation.**

Unless otherwise expressly authorized by statute, only the person challenging the action or a bona fide majority owner if the party is a business entity, or that person's attorney may represent the person in a proceeding.

##### **B. Entry of**

**appearance.** Any attorney wishing to represent a party must file a formal written entry of appearance in the docket of the proceeding. The entry of appearance must list the attorney's mailing address, phone and fax number (if any), and an email address (if any). Any attorney wishing to substitute in for a previous attorney must file a substitution of counsel containing the same information required in the initial entry of appearance.

**C. Withdrawal.** An attorney who intends to withdraw from representation of a party must do so in accordance with the rules of professional conduct.

(1) Withdrawing counsel must file in the docket a written request to withdraw from representation that indicates when counsel notified the party of the withdrawal, and of the date and time of the scheduled hearing.

(2) The superintendent may deny a request to withdraw from representation only when withdrawal would have a clear, materially adverse effect on the represented party's interests and impede the conduct of a full, fair, and efficient hearing.

[13.21.4.10 NMAC – N/E, 03/01/2019]

#### **13.21.4.11 FILING OF PLEADINGS:**

**A. Opening the docket.** A docket shall be opened in the PCF records management system immediately upon the superintendent's determination that the requestor shall be granted a hearing.

(1) The superintendent shall direct that the requestor's original request for hearing be filed to the docket.

(2) The superintendent shall establish the caption for the docket, which caption shall be used thereafter for any matters pertaining to the hearing. The caption shall establish the nature of the matter and shall include the docket number.

(3) Every written document that is submitted to the superintendent or exchanged between the parties for consideration, including pleadings such as motions, responses and objections, all evidentiary documents and any other filings shall include the caption and shall be filed to the docket.

**B. Public access.**

Unless otherwise determined by the superintendent upon consideration of a request by a party for confidentiality, all dockets shall be open for public inspection.

**C. Filing restrictions and service.**

(1) The PCF will accept filings through mail, facsimile, or electronic mail.

(2) Any item that is filed to the docket shall also be contemporaneously served upon all parties of record and on the hearing officer.

(3) All filings shall include a certificate of service that documents the method of service used. A represented party shall only be served through counsel.

(4) Electronic and in-person filing shall be accepted on business days between 8:00 am. and 4:00 pm. Pleadings will be marked as filed on the business day that the PCF receives the pleading.

**D. Filing requirements.**

(1) All motions, except motions made on the record during the hearing or a continuance request made in a genuine unforeseen emergency circumstance (such as an unexpected accident, force majeure, or major medical emergency occurring in such close proximity to the date of the scheduled hearing that a written motion could not be completed), shall be in writing and shall state with

particularity the grounds and the relief sought.

(2) Absent any order to the contrary, no pleading shall exceed 10 pages, excluding the caption and certificate of service, of double-spaced (except for block quotations), 12-point font. Only relevant excerpts of a motion exhibit shall be filed, with the pertinent portions highlighted, underlined, or otherwise emphasized. All exhibits and attachments shall identify the total number of pages, and consecutive page numbers (e.g., "Page 1 of 10"). Only single-sided documents will be accepted for filing or into a record at a hearing.

**E. Request for concurrence.** Before submission of any motion, request for relief or request for continuance, the requesting party should make reasonable efforts to consult with each other party about that party's position on the motion unless the nature of the pleading is such that it can be reasonably assumed the requested relief would be opposed. The moving party shall state the position of each other party in the pleading.

**F. Responses to pleadings.**

(1) Unless a different deadline has been established by the hearing officer, each non-moving party shall have 10 calendar days to file a written response to a pleading.

(2) If a deadline for filing falls on a non-business day, the deadline falls on the next business day.

(3) The hearing officer has the discretion to extend or shorten the response deadline.

(4) Failure to file a response in opposition may be presumed to be consent to the relief sought.

(5) The hearing officer is not required to make a default ruling on any motion if the relief sought could be contrary to the facts or law on the issues.

**G.** In the event of a procedural defect or other error with

the manner, method, or content of a submitted pleading, the hearing officer or records manager may communicate such error to the filing party and withhold filing of the pleading until the moving party remedies the procedural defect. Examples of a procedural defect include, but are not limited to, failure to certify service, failure to comply with the page limitations, failure to confer with other parties, failure to use the form or follow the specific filing method required by the PCF, submission of double-sided documents, failing to properly number pages, failure to use the correct caption of reference the assigned docket number, or failure to comply with an applicable standing order. [13.21.4.11 NMAC – N/E, 03/01/2019]

**13.21.4.12 PREHEARING CONFERENCES, STATUS CONFERENCES, AND STATUS CHECKS:**

**A. Purpose of prehearing conferences.** The hearing officer may direct representatives for all parties to meet together or with the hearing officer present for a prehearing conference to consider any or all of the following:

(1) simplify, clarify, narrow or resolve the pending issues;

(2) stipulations and admissions of fact and of the contents and authenticity of documents;

(3) expedition in the discovery and presentation of evidence, including, but not limited to, restriction on the number of exhibits and expert, economic or technical witnesses;

(4) matters of which administrative notice will be taken; and

(5) such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and the identity of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.



**B. Conduct of prehearing conferences.**

(1) Prehearing conferences conducted by the hearing officer may be electronically, but not stenographically, recorded. Should a party request that the recording be transcribed, that party shall pay any costs of transcription.

(2) The hearing officer may issue a written order that recites the results of the conference. Such order shall include rulings upon matters considered at the conference, together with appropriate directions to the parties. The order shall control the subsequent course of the proceeding, unless superseded by a subsequent order.

**C. Status conferences.**

(1) The hearing officer may require the parties to submit a written report of any conference ordered to be conducted between the parties updating the status of the proceeding in light of the conference.

(2) The hearing officer may conduct a status conference upon the request of either party or on the hearing officer's own initiative, at which time the hearing officer may require the parties, attorneys, or authorized representatives, to provide information regarding the status of a proceeding.  
[13.21.4.12 NMAC – N/E, 03/01/2019]

**13.21.4.13 HEARING LOCATION, TIME AND PLACE, NOTICE OF HEARING:**

**A. Location.**

(1) In the absence of any statutory requirements to the contrary, all hearings conducted by superintendent shall occur in Santa Fe, at the office of superintendent of insurance, unless the hearing officer orders the parties to appear at another location in New Mexico.

(2) The parties may express a mutual preference for location of the hearing in their request for hearing.

(3) In selecting a location other than Santa Fe, the

hearing officer shall consider and give weight to the location and wishes of the parties, witnesses, access for a hearing officer with expertise in the matter, and the scheduling and staffing needs of the PCF.

(4) If selecting a location other than Santa Fe would cause an unreasonable, undue burden to any party, that party may file a written objection to the selected location within 10 days of issuance of the notice of hearing, articulating the reasons supporting the objection. The hearing officer will promptly review the objection and, upon a showing of an unreasonable, undue burden, may move the hearing to another more reasonable location and the superintendent may designate another hearing officer if necessary.

**B. Notice.** The superintendent will notify the parties to the hearing of the date, time and place scheduled for the hearing at least seven days before the scheduled hearing. This notice will be directed to the party's attorney, or to the last known address of any unrepresented party. Notice will be sent via US mail unless the parties have requested an alternate method of notification that is acceptable to the superintendent.  
[13.21.4.13 NMAC – N/E, 03/01/2019]

**13.21.4.14 TELEPHONIC, VIDEOCONFERENCE AND OTHER EQUIVALENT ELECTRONIC METHOD HEARINGS:**

**A.** If not otherwise prohibited by statute, rule, or court ruling, the hearing officer may conduct the hearing in person or by telephone, videoconference, or other equivalent electronic method. The hearing officer shall cause a stenographic or audio recording to be made of all proceedings involving the presentation of evidence, points, authorities or argument pertaining to the merits of the matter before the hearing officer.

**B.** If the hearing is to be conducted by telephone, videoconference or other equivalent electronic method, the notice shall so inform the parties. Either party

may file a written objection to conducting the hearing by telephone, videoconference, or other equivalent electronic method within 10 days of the notice of hearing. Failure to timely object to the conduct of a telephone, videoconference, or other equivalent electronic method hearing constitutes consent to the hearing proceeding in that manner and waiver of any other applicable statutory in county hearing requirement.

**C.** Upon receipt of a timely objection, the hearing officer shall consider the applicable legal requirements, the location of the parties and witnesses, the complexity of the particular matter, the availability of necessary electronic equipment for conduct of a full and fair hearing by telephone, videoconference, or other equivalent electronic method, and the basis of the objection in determining whether the hearing should occur at a specific location rather than via telephone, videoconference, or other equivalent electronic method.

**D.** Provided that the requesting party has not previously demanded an in-person hearing or otherwise objected to conducting the matter via telephone, videoconference, or other equivalent electronic methods, any party may request to appear directly or have a witness on their behalf appear via telephone, videoconference, or alternative electronic means by filing a request at least three business days before the scheduled hearing. The filing of a request to appear via telephone, videoconference, or other alternative electronic method shall be deemed as a total and complete waiver of any in-person, in-county hearing requirement and deemed as consent for all parties, all witnesses, and the hearing officer to appear via telephone, videoconference, or other equivalent electronic methods.

**E.** All parties appearing via telephone, videoconference, or other electronic method shall provide the hearing officer with a working email address or facsimile number for the exchange of all documentary evidence before or during the hearing.

**F.** Failure to follow the hearing officer's instructions for participating in the hearing via telephone, videoconference, or other equivalent electronic method will be treated as a non-appearance at the hearing.

**G.** Any technical issues shall be promptly reported to the hearing officer.

**H.** In the event that technical or other computer problems prevent a hearing by videoconference or other electronic method from occurring or otherwise interferes with maintaining or developing a complete record at the hearing, the parties agree and consent that the assigned hearing officer may continue the matter to a different time before expiration of the statutory deadline, may order the parties to appear for an in-person hearing, or may conduct the remaining portion of the hearing via telephone.

**I.** If the assigned hearing officer determines during the course of the hearing, either *sua sponte* or upon argument of a party, that an in-person hearing is necessary to adequately complete the record, address credibility issues, or is otherwise necessary to ensure a full or fair hearing process, the hearing officer may recess a hearing occurring by telephone, videoconference, or other equivalent electronic method and reconvene the proceeding as an in-person hearing.  
[13.21.4.14 NMAC – N/E, 03/01/2019]

#### **13.21.4.15 CONTINUANCES:**

**A.** At the request of a party, a witness, or upon the hearing officer's own determination, a hearing may be continued for good cause. The hearing officer shall consider only written continuance requests made at least three working days prior to the scheduled hearing absent extraordinary, unforeseen circumstances that the requesting party or witness could not have known earlier. An order to grant or deny the request may be issued prior to the scheduled hearing or if

there is insufficient time to issue an order prior to the scheduled hearing, the hearing officer may grant or deny the request on the record at the hearing. No continuance request may be granted unless there is adequate time to provide notice to the parties, subpoena witnesses and conduct the rescheduled hearing before expiration of any statutory jurisdictional deadline.

**B.** Within the jurisdictional time limits set by statute, the superintendent or hearing officer may *sua sponte* continue any matter as necessary to address PCF staffing needs, to ensure efficient and adequate use of state resources, and to manage the hearing docket. To this end, the hearing officer may contact the parties to inquire about the status of a scheduled case.

**C.** No case shall be continued, even with a showing of good cause or an emergency circumstance, beyond any mandatory, applicable jurisdictional time limit on the case.

[13.21.4.15 NMAC – N/E, 03/01/2019]

#### **13.21.4.16 ATTIRE AT**

**HEARING:** All attorneys and other authorized representatives must be attired in a dignified, professional manner at all times during the hearing. Witnesses shall dress in a respectful manner. No attire or dress so flamboyant, disheveled, inflammatory, obscene, offensive or revealing as to create a distraction to the orderly conduct of the hearing will be permitted.

[13.21.4.16 NMAC – N/E, 03/01/2019]

#### **13.21.4.17 BURDEN OF PROOF, PRESENTATION OF CASE, EVIDENCE:**

##### **A. Burden of proof.**

Unless otherwise specified by statute, the burden of proof in a proceeding is the preponderance of evidence.

##### **B. Presentation order.**

The party with the burden of proof in the case will ordinarily present their case first, followed by the opposing party, if any, unless the hearing officer

makes reasonable exceptions related to the availability of the witnesses and representatives or other scheduling concerns.

**C. Opening statements.** The hearing officer may require or allow opening statements as the circumstances justify. Opening statements are not ordinarily evidence, but without objection, may be adopted as evidence by sworn oath of the party-witness who made the opening statement.

**D. Testimony under oath.** All testimony must be given under oath and will be subject to questioning of each other party. The hearing officer may also ask questions of the witness as appropriate. At the hearing officer's discretion, redirect and re-cross may be allowed.

**E. Closing arguments.** The parties may make closing arguments, either orally at the conclusion of the case or, upon order of the hearing officer, in writing after conclusion of the hearing.

**F. Post-hearing briefs.** The hearing officer may also order the parties to submit further briefing on any issue in the case, and to submit proposed findings of fact and conclusions of law. The hearing officer will establish a timeline for submission of any post-hearing pleadings, including time for the parties to exchange briefs, as the hearing officer finds necessary. No decision-writing deadline commences until the parties have submitted any ordered post-hearing briefing or submission.

#### **G. Rules of evidence.**

**(1) Formal** rules of evidence and civil procedure shall not apply in a proceeding unless otherwise expressly and specifically required by statute, regulation, or order of the hearing officer.

**(2) Relevant** and material evidence shall be admissible. Irrelevant, immaterial, unreliable, or unduly repetitious evidence may be excluded.

**(3)** A party may offer exhibits, such as records of transactions.

**(a)**

The party shall have the exhibits numbered by the stenographer prior to the hearing.

**(b)**

The party shall provide copies of the evidence to the stenographer, all parties and to the hearing officer.

**(c)**

Exhibits must be introduced and explained by a witness, who must be prepared to answer questions from the parties and the hearing officer.

**(d)**

The hearing officer shall be asked by the party offering an exhibit to accept the exhibit into evidence. The hearing officer may be asked to consider all exhibits introduced by a witness at the conclusion of that witness's testimony or at the conclusion of that party's case.

**(e)**

The stenographer shall retain on copy of all exhibits that are admitted and shall make them a part of the record.

**(4) The**

hearing officer shall consider and give appropriate weight to all relevant and material evidence admitted in rendering a final decision on the merits of a matter.

**H. Hearsay evidence.**

Hearsay evidence may be admitted in a proceeding.

**I. Taking notice.****(1)**

The hearing officer may take administrative notice of facts not subject to reasonable dispute that are generally known within the community, capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably disputed, or as provided by an applicable statute.

**(2)**

The hearing officer may take administrative notice at any stage in the proceeding, whether *sua sponte* or at the request of a party.

**(3) A party**

may dispute the propriety of taking administrative notice, including the opportunity to refute a noticed fact.

**J. Objections.****(1) A party**

objecting to evidence, qualifications

of an expert, a line of questioning, or the response shall timely and briefly state the grounds for the objection.

**(2) Rulings**

on objections may be addressed on the record at the time of the objection, reserved for ruling in a subsequent written order, or noted as a continuing, ongoing objection for which ruling is reserved to later in the proceeding.

**K. Audio or video**

**evidence.** Any party wishing to submit a video or audio recording into the record must provide a complete tangible, playable copy that can be retained as part of the record.

**L. Size of exhibits.**

In general, documentary evidence should be no larger than 8.5 inches by 11 inches unless expressly allowed by the hearing officer. The hearing officer may admit larger documentary exhibits presented at hearing, provided the proponent of such exhibits provides the hearings officer with a copy of the exhibit reduced to 8.5 inches by 11 inches. After the hearing at which the exhibit was admitted, the reduced copy shall be substituted for the larger exhibit and made part of the record of the hearing. Arrangements to provide a reduced copy of a large exhibit shall be undertaken in advance of the hearing. Failure by the proponent to provide a reduced copy shall be deemed a withdrawal of the exhibit.

**M. Substitutions for**

**objects.** In lieu of the introduction of tangible objects as exhibits, the hearing officer may require the moving party to submit a photograph, video, or other appropriate substitute such as a verbal description of the pertinent characteristics of the object for the record.

[13.21.4.17 NMAC – N/E,  
03/01/2019]

**13.21.4.18 WITNESSES,  
EXPERT WITNESSES, AND  
INVOCATION OF THE RULE:**

**A. Use of witnesses.**

Any person having relevant, material knowledge related to one of the issues in a hearing may testify as a witness under oath in a proceeding. Upon

affirming the oath, the witness may be questioned by any party and by the hearing officer.

**B. Method of**

**appearance.** Unless a more specific provision applies, witnesses are ordinarily expected to appear in the same manner or by the same method as the parties in a proceeding, absent express preapproval of the hearing officer allowing an appearance by a different method. For example, if the hearing is scheduled to be conducted in person in a specific place, the witnesses are also ordinarily expected to appear in person at that same place; however, if the matter is set to occur by telephone or videoconference, then the witnesses may ordinarily appear by telephone or videoconference.

**C. Hearing officer as**

**a witness.** The current or previously assigned hearing officer in a matter shall not be called and shall not be a witness in the proceeding.

**D. Use of expert**

**witnesses.**

**(1) If either**

party intends to call and treat a particular witness as an expert witness in the proceeding, the party must identify the purported expert to the other parties and to the hearing officer at least seven days before the scheduled hearing, or with sufficient time before completion of the discovery deadline specified in a scheduling order to allow for deposition.

**(2) The party**

shall include the scope of that expert's purported testimony relative to the proceeding, the expert's credentials, and a listing of any materials the expert reviewed as part of reaching his or her expert opinion.

**(3) The**

opposing party may file a response in opposition before the hearing or challenge the designation of the witness as an expert during the course of the hearing.

**E. Use of**

**exclusionary rule.** At the hearing, any party can invoke the exclusionary rule, excluding all witnesses other than the real party in interest, their representative, one main case agent,

and any designated expert witness from the proceeding until the time of their testimony. If the rule has been invoked, the witnesses shall not discuss their testimony with each other until the conclusion of the proceeding. When the rule has been invoked, any witness who remains in the hearing after conclusion of their testimony may not be recalled as a witness in the proceeding, except that any witness may observe the testimony of an expert witness and be recalled to provide any subsequent rebuttal testimony.

**F. OSI staff as experts.**

(1) The hearing officer may request one or more members of OSI staff to be present at the hearing to assist the hearing officer with any matters within the expertise of the staff person.

(2) The staff person may be called as a witness by the hearing officer and examined by the parties and the hearing officer.

(3) Any party may call the staff person as a witness.

(4) Each other party will have the opportunity to cross-examine a staff person who is called as a witness. In the discretion of the hearing officer, the hearing officer may permit re-direct or re-cross examination of the staff person.

(5) The hearing officer shall not discuss the case with the staff person outside the hearing or off the record.

(6) Any staff person requested to be present by the hearing officer shall not be subject to the exclusionary rule.

[13.21.4.18 NMAC – N/E, 03/01/2019]

**13.21.4.19 HEARING OFFICER POWERS AND RESPONSIBILITIES:**

**A. General authority.**

The superintendent may preside over PCF hearings or may designate a hearing officer to preside instead.

**B. Duties of the hearing officer.** The hearing officer shall conduct fair and impartial

hearings, take all necessary action to avoid delay in the proceedings and maintain order. The hearing officer shall have the powers necessary to carry out these duties, including the following:

(1) to administer or have administered oaths and affirmations;

(2) to cause depositions to be taken;

(3) to require the production or inspection of documents and other items;

(4) to require the answering of interrogatories and requests for admissions;

(5) to rule upon offers of proof and receive evidence;

(6) to regulate the course of the hearings and the conduct of the parties and their representatives therein;

(7) to issue a scheduling order, schedule a prehearing conference for simplification of the issues, or any other proper purpose;

(8) to schedule, continue and reschedule hearings;

(9) to consider and rule upon all procedural and other motions appropriate in proceeding, including qualification of expert witnesses and admission of exhibits;

(10) to require the filing of briefs on specific legal issues prior to or after the hearing;

(11) to cause a docket to be opened and a complete record of a hearing to be made;

(12) to make and issue decisions and procedural orders;

(13) to issue subpoenas in the name of the superintendent; and

(14) if acting on behalf of the superintendent, to issue a recommendation to the superintendent regarding the final resolution of the matter.

(15) to appropriately sanction, up to exclusion, indecorous, obstinate, recalcitrant, obstreperous, unethical,

unprofessional or other improper conduct that interferes with the conduct of a fair and orderly hearing or the development of a complete record.

**C. Independence of the hearing officer.** In the performance of these functions, the hearing officer shall not be responsible to or subject to the direction of any other officer, employee or agent of OSI or the PCF, except that a hearing officer appointed by the superintendent shall be subject to the direction of the superintendent.

**D. Ex parte communication.** In the performance of these functions, the hearing officer is prohibited from engaging in any improper *ex parte* communications about the substantive issues with any party on any matter. An improper *ex parte* communication occurs when the hearing officer discusses or otherwise communicates regarding the substance of a case without the opposing party being present, except that it is not an improper *ex parte* communication for the hearing officer to go on the record with only one party when the other party has failed to appear at a scheduled hearing.

**E. Final order.** After a thorough review of the record and any recommendation prepared by a designated hearing officer, the superintendent shall issue a final order. No party or member of OSI or PCF staff shall engage in any *ex parte* communication with the superintendent in an attempt to influence his final decision.

[13.21.4.19 NMAC – N/E, 03/01/2019]

**13.21.4.20 CLOSED OR PUBLIC HEARING, SEALED RECORDS, AND DELIBERATIVE NOTES OF HEARING OFFICER:**

**A. Closed hearings.**

Unless otherwise provided by law, ordered by the hearing officer for good cause, or required to prevent disclosure of confidential information, all hearings and the record are open to the public. Any party to a proceeding may submit a written request to close the hearing and the record to



the public, which shall be granted if authorized by statute, regulation, to preserve confidentiality or to protect a party from harassment or reprisal. Any proceedings and records that involve an individual's medical issues shall be closed to the public.

#### **B. Open hearings.**

If the hearing is open to the public, members of the public and the media may attend the hearing so long as they do not interrupt, interfere, or impede the orderly, fair, and efficient hearing process. With prior consent of the hearing officer, media members may record the proceeding from a fixed location in the hearing room. The hearing officer may direct any member of the public, including media members, to leave the proceeding if they engage in any conduct that interferes with the hearing officer's ability to maintain order, develop the record, and provide a fair and efficient hearing process. The proceedings shall be made available telephonically to members of the public, including the media, upon prior request.

#### **C. Sealed records.**

Upon request of any party, and upon a showing of good cause, the hearing officer may seal a particular exhibit, document, or portions of a witness's testimony from public disclosure if such items contain statutorily-protected confidential information, privileged information, or otherwise contain private identification information of a party or third party that is immaterial to a substantive issue in the proceeding or if its materiality is substantially outweighed by the prejudice of public release of the information. Upon issuance of an order sealing such documents or exhibits, these records will remain under seal throughout the proceeding and shall be returned to the submitting party at the conclusion of the appeal period or the appeal. The opposing party shall be entitled to promptly review these documents in preparing for the hearing, and may rely on those documents during the hearing as necessary to ensure a fair hearing process; however, the opposing party shall not maintain its

own copy of the sealed document after conclusion of the hearing nor reveal, discuss, or disclose the contents of these sealed documents to any other party outside of the hearing process.

#### **D. Notes of**

**deliberation.** The hearing officer's notes taken during the course of the hearing, notes generated during the decision-making process, and any draft orders or draft decisions are confidential as part of the deliberative process and are not subject to public disclosure.

[13.21.4.20 NMAC – N/E, 03/01/2019]

#### **13.21.4.21 SUBPOENAS:**

Any request for issuance of subpoenas in matters subject to these rules shall be guided by Rule 45 of the rules of civil procedure for the district courts of New Mexico, except where provisions of that rule conflict with the powers of the superintendent. Any subpoena issued shall be in the name of the superintendent. The party requesting the subpoena shall prepare a proposed subpoena, submit the proposed subpoena to each other party and to the hearings officer for approval, and shall timely and reasonably serve the subpoena on the person or entity subject to the subpoena. Unless good cause is shown for a shorter period, a subpoena shall provide at least 10 days-notice before compelled attendance at a hearing or deposition, and at least 10 days-notice before compelled production of materials. All returns or certificates of service on served subpoenas shall be filed in the docket of the proceeding, copied to the opposing party, and shall be made part of the record of the proceeding.

[13.21.4.21 NMAC – N/E, 03/01/2019]

#### **13.21.4.22 LANGUAGE**

**INTERPRETERS:** A party to a proceeding who needs language interpreter services for translation of one language into another is responsible for arranging such service for the hearing. While the person serving as an interpreter need not

be a court-certified interpreter in order to provide interpretation at a hearing, any person serving as an interpreter in a matter before the superintendent must be approved by the hearing officer and must affirm the interpreter's oath applicable in New Mexico courts. Upon reasonable notice by the party, any interpreter required to be provided under the American with Disabilities Act shall be provided for by the superintendent. [13.21.4.22 NMAC – N/E, 03/01/2019]

#### **13.21.4.23 FAILURE TO APPEAR:**

##### **A. Entry of default**

**order.** If a party fails to appear for a properly noticed hearing, either in person, through a permissible representative or telephonically with prior approval of the hearing officer, the person waives the right to protest or challenge superintendent's action that is the subject of the hearing notice. The matter shall go on the record for the limited purpose of addressing notice and non-appearance, and a final order shall be entered based on the waiver of the hearing by failing to appear.

##### **B. Evidence of notice.**

In considering the non-appearance and whether the person received appropriate notice necessitating issuance of the order, the hearing officer may consider the contents of the docket, information conveyed to or known by the superintendent, information related to mailing, including mail tracking, returned receipt information, and notes written on returned envelopes of the United States postal service or other mail tracking services, and arguments offered by any present party, all of which may be addressed on the record of the hearing or in any subsequent order.

##### **C. Written order**

**required.** Oral rulings based on a party's failure to appear are not final until reduced to writing. The hearing officer may issue a different written order as new information arises after the hearing regarding whether the notice of hearing was properly sent

to the correct address or otherwise properly served.

[13.21.4.23 NMAC – N/E, 03/01/2019]

#### **13.21.4.24 RECONSIDERATION:**

##### **A. Time to file.**

A party may file a motion for reconsideration within 15 days after the date of the final order. Any other party may file a response no more than 15 days after the motion for reconsideration was filed. Motions for reconsideration that are not filed within this deadline may be denied automatically. A timely filed motion for reconsideration should be decided based on the merits, whether or not a response is filed.

**B. Posture.** The prevailing party shall not file a motion for reconsideration. However, if a requested action is granted in part and denied in part, either party may file a motion for reconsideration.

##### **C. Basis for motion.**

Motions for reconsideration shall not endeavor to present new evidence previously available, or discoverable through reasonable diligence, to the parties before the hearing. Motions for reconsideration shall not reargue the weight of evidence already ruled upon and shall not reiterate legal arguments already ruled upon. However, a motion for reconsideration may address gross factual or legal errors or omissions contained in the final decision and order.

[13.21.4.24 NMAC – N/E, 03/01/2019]

#### **13.21.4.25 APPEALS FOLLOWING HEARING:**

Any party who has exhausted all administrative remedies available under these rules and who is adversely affected by a final order or decision in an adjudicatory proceeding or surcharge rate proceeding may appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978. Each order issued by the superintendent after an adjudicatory proceeding or surcharge rate proceeding shall include information about the appeal process for the type of case at issue. Once the

appeal is filed in the appropriate court, the appealing party shall promptly provide a court-endorsed copy of the appeal to the superintendent so that the PCF records manager can prepare and submit the proper record.

[13.21.4.25 NMAC – N/E, 03/01/2019]

#### **13.21.4.26 REQUESTING COPIES OF EXHIBITS, AUDIO, OR THE ADMINISTRATIVE RECORD:**

Any party may access and copy any written document filed to the docket. Copies of an audio recording or written transcript of the proceeding shall be arranged through the stenographic service. The PCF may charge a reasonable fee for copies made, consistent with OSI's fee schedule under the Inspection of Public Records Act. The superintendent may also require the requesting party to submit a computer storage device, such as a compact disc, dvd disc, blu-ray disc, or usb drive, or other tangible device for copying of any audio or video recording that is part of the administrative record.

[13.21.4.26 NMAC – N/E, 03/01/2019]

**History of 13.21.4 NMAC:**  
**[RESERVED]**

## **TAXATION AND REVENUE DEPARTMENT**

**This is an amendment to 3.1.4 NMAC, Section 17, effective 2/26/2019.**

#### **3.1.4.17 APPROVED ELECTRONIC MEDIA:**

Department approved electronic media includes [±

~~A.~~ ] an electronic transmission of the personal income tax return data submitted in an approved format using a computer language designated by the department [±or

~~B.~~ a paper return with a PDF 2D barcode printed on the form, which contains the tax return information in a department approved format].

[3.1.4.17 NMAC - N, 1/31/08; A, 2/26/2019]

## **End of Adopted Rules**

## Other Material Related to Administrative Law

**SUPERINTENDENT OF  
INSURANCE****NOTICE OF MINOR,  
NONSUBSTANTIVE  
CORRECTION**

The Office of Superintendent of Insurance gives Notice of a Minor, Nonsubstantive Correction.

Pursuant to the authority granted under State Rules Act, Subsection D of Section 14-4-3 NMSA 1978, please note that the following minor, non-substantive corrections to spelling, grammar and format have been made to all published and electronic copies of the following rules:

For rule 13.21.2 NMAC, the erroneous section number “27” was corrected and re-numbered to “25”.

Example of change:

**“13.21.2.27**

**SEVERABILITY” changed to  
“13.21.2.25 SEVERABILITY”**

For all sections in 13.21.3 NMAC, the erroneous chapter number “2” in the section number was corrected and re-numbered to “21”. Example of change:

**“13.2.3.1 ISSUING**

**AGENCY” changed to “13.21.3.1  
ISSUING AGENCY”**

All history notes and footers were also corrected with the correct chapter number.

For 13.21.3.12 NMAC:  
Subsections D through H are renumbered and corrected to Subsections C through G;

For 13.21.3.13 NMAC: Subsection F is renumbered and corrected to Subsection E.

A copy of this Notification was filed with the official version of the above rule.

**End of Other Material  
Related to Administrative  
Law**



# 2019 New Mexico Register

## Submittal Deadlines and Publication Dates

### Volume XXX, Issues 1-24

Issue	Submittal Deadline	Publication Date
Issue 1	January 4	January 15
Issue 2	January 17	January 29
Issue 3	January 31	February 12
Issue 4	February 14	February 26
Issue 5	February 28	March 12
Issue 6	March 14	March 26
Issue 7	March 28	April 9
Issue 8	April 11	April 23
Issue 9	April 25	May 14
Issue 10	May 16	May 28
Issue 11	May 30	June 11
Issue 12	June 13	June 25
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Issue 19	September 26	October 15
Issue 20	October 17	October 29
Issue 21	October 31	November 12
Issue 22	November 14	November 26
Issue 23	December 5	December 17
Issue 24	December 19	December 31

The *New Mexico Register* is the official publication for all material relating to administrative law, such as notices of rulemaking, proposed rules, adopted rules, emergency rules, and other material related to administrative law. The Commission of Public Records, Administrative Law Division, publishes the *New Mexico Register* twice a month pursuant to Section 14-4-7.1 NMSA 1978.

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