

**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, 3/01/2019; Rp, 13.21.4.1 NMAC 4/30/2019]

**13.21.4.2 SCOPE:** Except as otherwise provided, the rules in this part govern every adjudicatory proceeding, except any 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, 3/01/2019; Rp, 13.21.4.2 NMAC 4/30/2019; A, 01/01/2022]

**13.21.4.3 STATUTORY AUTHORITY:** Section 41-5-25 NMSA 1978.  
[13.21.4.3 NMAC – N/E, 3/01/2019; Rp, 13.21.4.3 NMAC 4/30/2019]

**13.21.4.4 DURATION:** Permanent.  
[13.21.4.4 NMAC – N/E, 3/01/2019; Rp, 13.21.4.4 NMAC 4/30/2019]

**13.21.4.5 EFFECTIVE DATE:** April 30, 2019, unless a later date is cited at the end of a section.  
[13.21.4.5 NMAC – N/E, 3/01/2019; Rp, 13.21.4.5 NMAC 4/30/2019]

**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, 3/01/2019; Rp, 13.21.4.6 NMAC 4/30/2019]

**13.21.4.7 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 13.21.1.7 NMAC. In addition:

**A. "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 before the superintendent or the 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 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 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, 3/01/2019; Rp, 13.21.4.7 NMAC 4/30/2019; A, 01/01/2022]

**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 OSI 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, 3/01/2019; Rp, 13.21.4.8 NMAC 4/30/2019; A, 01/01/2022]

**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 to the OSI’s electronic docket 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 issue an order denying the request with an explanation.
- (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.** 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. Intervenors.** 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, 3/01/2019; Rp, 13.21.4.9 NMAC 4/30/2019; A, 01/01/2022]

**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, 3/01/2019; Rp, 13.21.4.10 NMAC 4/30/2019]

#### **13.21.4.11 ELECTRONIC DOCKET AND FILING OF PLEADINGS:**

**A. Electronic docket.** Individuals or their counsel may access OSI's free electronic docket to view cases and filed pleadings. Registration of a free user account is required to file pleadings into a docket or to request a hearing. Every written document that is submitted to a hearing officer or exchanged between 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 electronic docket.

**B. Opening the docket.** A docket shall be opened by the superintendent at the superintendent's discretion or by request for hearing filed in the OSI's electronic docket.

**C. 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.

**D. Filing restrictions and service.**

(1) The OSI docket administrator will review all filings for compliance with these rules. Non compliance with filings will be returned to submitter for correction..

(2)

The OSI's electronic docket does allow for electron service. All parties of record shall be listed on the initial request for hearing and shall be selected for service with each additional filing.

(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) In-person filing shall be accepted on business days between 8:00 am. and 4:00 pm. In-person pleadings will be marked as filed on the business day that the OSI 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 OSI, 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, 3/01/2019; Rp, 13.21.4.11 NMAC 4/30/2019; A, 01/01/2022]

#### **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, 3/01/2019; Rp, 13.21.4.12 NMAC 4/30/2019]

#### **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 the 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 OSI,

(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, 3/01/2019; Rp, 13.21.4.13 NMAC 4/30/2019; A, 01/01/2022]

**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 hearings 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 interfere 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, 3/01/2019; Rp, 13.21.4.14 NMAC 4/30/2019]

**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 OSI, 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, 3/01/2019; Rp, 13.21.4.15 NMAC 4/30/2019; A, 01/01/2022]

**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, 3/01/2019; Rp, 13.21.4.16 NMAC 4/30/2019]

**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 copies 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 hearing 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, 3/01/2019; Rp, 13.21.4.17 NMAC 4/30/2019]

**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, 3/01/2019; Rp, 13.21.4.18 NMAC 4/30/2019]

**13.21.4.19 HEARING OFFICER POWERS AND RESPONSIBILITIES:**

**A. General authority.** The superintendent may preside over OSI, 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;
- (14) if acting on behalf of the superintendent, to issue a recommendation to the superintendent regarding the final resolution of the matter; and
- (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 TPA, 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 TPA 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, 3/01/2019; Rp, 13.21.4.19 NMAC 4/30/2019; A, 01/01/2022]



**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 with, 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, 3/01/2019; Rp, 13.21.4.20 NMAC 4/30/2019]

**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 hearing 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, 3/01/2019; Rp, 13.21.4.21 NMAC 4/30/2019]

**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 Americans with Disabilities Act shall be provided for by the superintendent.

[13.21.4.22 NMAC – N/E, 3/01/2019; Rp, 13.21.4.22 NMAC 4/30/2019]

**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, 3/01/2019; Rp, 13.21.4.23 NMAC 4/30/2019]

#### **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, 3/01/2019; Rp, 13.21.4.24 NMAC 4/30/2019]

**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 may appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978. Each order issued by the superintendent after an adjudicatory 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 OSI records manager can prepare and submit the proper record.

[13.21.4.25 NMAC – N/E, 3/01/2019; Rp, 13.21.4.25 NMAC 4/30/2019; A, 01/01/2022]

#### **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 OSI 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, 3/01/2019; Rp, 13.21.4.26 NMAC 4/30/2019; A, 01/01/2022]

#### **History of 13.21.4 NMAC:**

13.21.4 NMAC, Administrative Hearings, effective 3/1/2019.

#### **History of Repealed Material:**

13.21.4 NMAC, Administrative Hearings, effective 3/1/2019 was repealed and replaced by 13.21.4 NMAC, Administrative Hearings, effective 4/23/2019.