

NEW MEXICO 
Commission of Public Records
at the State Records Center and Archives
Your Access to Public Information

New Mexico Register

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

Volume XXVII - Issue 18 - September 30, 2016

COPYRIGHT © 2016
BY
THE STATE OF NEW MEXICO

ALL RIGHTS RESERVED

New Mexico Register

Volume XXVII, Issue 18

September 30, 2016

Table of Contents

Notices of Rulemaking and Proposed Rules

General Services Department	
Notice of Proposed Rulemaking.....	695
Human Services Department	
Income Support Division	
Notice of Public Hearing.....	695
Public Regulation Commission	
Notice of Proposed Rulemaking Case No. 16-00090-TRP.....	695
Public Safety, Department of	
Notice of Public Hearing.....	696
Regulation and Licensing Department	
Athletic Commission	
Public Rule Hearing and Regular Commission Meeting.....	697
Pharmacy, Board of	
Notice to the Public - Regular Board Meeting.....	697
Respiratory Care Advisory Board	
Public Rule Hearing and Regular Board Meeting.....	698
Workforce Solutions, Department of	
Notice of Public Hearing.....	698

Adopted Rules

A = Amended, E = Emergency, N = New, R = Repealed, Rn = Renumbered

Albuquerque-Bernalillo County Air Quality Control Board	
20.11.49 NMAC A Excess Emissions.....	699
Children, Youth and Families Department	
8.8.3 NMAC R Governing Background Checks and Employment History Verification.....	703
8.15.2 NMAC R Requirements for Child Care Assistance Programs for Clients and Child Care Providers.....	703
8.16.2 NMAC R Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs.....	703
8.17.2 NMAC R Requirements Governing Registration of Non-Licensed Family Child Care Homes.....	703
8.8.3 NMAC N Governing Background Checks and Employment History Verification.....	703
8.15.2 NMAC N Requirements for Child Care Assistance Programs for Clients and Child Care Providers.....	709
8.16.2 NMAC N Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs.....	721
8.17.2 NMAC N Requirements Governing Registration of Non-Licensed Family Child Care Homes.....	772

DNA Identification System Oversight Committee

10.14.200 NMAC R DNA Identification System.....782
10.14.200 NMAC N DNA Identification System.....782

Educational Retirement Board

2.82.2 NMAC A Membership.....789

Human Services Department

Income Support Division

8.102.500 NMAC A/E Eligibility Policy - General Information.....790
8.106.500 NMAC A/E Eligibility Policy - General Information.....792
8.139.500 NMAC A/E Financial Eligibility - Need Determination.....793

Regulation and Licensing Department

Public Accountancy Board

16.60.1 NMAC A Public Accountants - General Provisions.....794
16.60.4 NMAC A Firm Permit, Peer Review Requirements, and Business Name Prohibitions.....798

Workers' Compensation Administration

11.4.2 NMAC R Data Reporting and Safety Requirements.....803
11 NMAC 4.11 R Proof of Coverage.....803
11.4.2 NMAC N Data Reporting and Safety Requirements.....803
11.4.11 NMAC N Proof of Coverage.....807
11.4.4 NMAC A Claims Resolution.....808
11.4.7 NMAC A Payments For Health Care Services.....819
11.4.8 NMAC A Individual Self-Insurance.....828

Other Material Related To Administrative Law

Workers' Compensation Administration

Response to Public Comment on Proposed Rulemaking.....835

The New Mexico Register

Published by the Commission of Public Records,
Administrative Law Division
1205 Camino Carlos Rey, Santa Fe, NM 87507

The *New Mexico Register* is published twice each month by the Commission of Public Records, Administrative Law Division. The cost of an annual subscription is \$270.00. Individual copies of any Register issue may be purchased for \$12.00. Subscription inquiries should be directed to: The Commission of Public Records, Administrative Law Division, 1205 Camino Carlos Rey, Santa Fe, NM 87507.

Telephone: (505) 476-7942; Fax: (505) 476-7910; E-mail: staterules@state.nm.us.

The *New Mexico Register* is available free at <http://www.nmcpr.state.nm.us/nmregister>

Notices of Rulemaking and Proposed Rules

GENERAL SERVICES DEPARTMENT

NOTICE OF PROPOSED RULEMAKING

The New Mexico General Services Department, State Purchasing Division, (“GSD” or “Department”) hereby gives notice that the Department will conduct a public hearing as indicated to obtain input on the repealing of the current rule and replacing it with the following rule:

1.4.1.94 NMAC “CHIEF PROCUREMENT OFFICER REGISTRATION AND CERTIFICATION”

The proposed rules and hearing agenda have been published and are also posted for public view on the State Purchasing Division website: <http://www.generalservices.state.nm.us/statepurchasing/>. A public hearing regarding the rules will be held on Tuesday, November 15, 2016 in the Auditorium in the Harold Runnels Building, 1190 S. St. Francis Drive, Santa Fe, New Mexico 87505. The time for the hearing on the proposed rules is 3:30 P.M. M.T.

Interested individuals may testify at the public hearing or submit written comments regarding the proposed rulemaking relating to **1.4.1.94 NMAC “CHIEF PROCUREMENT OFFICER REGISTRATION AND CERTIFICATION”** to Mark Hayden, State Purchasing Division, Bureau Chief, New Mexico General Services Department, Room 2016, 1100 St. Francis Drive, Santa Fe, New Mexico 87505 or Mark.Hayden@state.nm.us, 505-827-2331, fax 505-827-2484. Written comments must be received no later than 5:00 P.M. M.T. on Tuesday, November 8, 2016.

The public hearing agenda and proposed rulemaking actions specific to the State Purchasing Division may be accessed on the Division’s website <http://www.generalservices.state.nm.us/statepurchasing/>

[state.nm.us/statepurchasing/](http://www.state.nm.us/statepurchasing/) or obtained from Mark Hayden (contact information provided above). Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this hearing are asked to contact Mark Hayden as soon as possible. The Department requests at least seven days advanced notice (by close of business 5:00 P.M. M.T. on Tuesday, November 8, 2016) for requests regarding special accommodations.

HUMAN SERVICES DEPARTMENT INCOME SUPPORT DIVISION

NOTICE OF PUBLIC HEARING

The Human Service Department (HSD) will hold a public hearing to allow public comment on the finalized Federal Poverty Level (FPL) regulations published September 30, 2016. The hearing will be held on Monday, October 31, 2016, from 9:30 a.m. to 10:30 a.m., at the HSD Income Support Division (ISD) conference room, 2009 S. Pacheco Street, Santa Fe, NM. The conference room is located in Room 120 on the lower level of Pollon Plaza.

New Mexico administers programs according to the Federal Poverty Guidelines of the United States Department of Agriculture (USDA), Food and Nutrition Services (FNS) that are adjusted yearly and effective October 1, 2016.

The Human Services Register Vol. 39 No. 17 outlining the final regulations is available on the HSD’s website at: <http://www.hsd.state.nm.us/LookingForInformation/income-support-division-registers.aspx>.

Individuals wishing to testify or to request a copy of the final regulations should contact the Income Support Division, P.O. Box 2348, Pollon Plaza, Santa Fe, NM 87504-2348, or

by calling 505-827-7254.

If you are a person with a disability and you require this information in an alternative format, or you require a special accommodation to participate in any HSD public hearing, program, or service, please contact the Assistant General Counsel/American Disabilities Act Coordinator, at 505-827-6201 or through the New Mexico Relay system, at 711 or toll free at 1-800-659-1779. The Department requests at least a 10-day advance notice to provide requested alternative formats and special accommodations.

Individuals who do not wish to attend the hearing may submit written comments which must be received by 5:00 p.m. on the date of the hearing, Monday, October 31, 2016. Please send comments to:

Human Services Department
P.O. Box 2348, Pollon Plaza
Santa Fe, New Mexico 87504-2348

You may also send comments electronically to: HSD-isdrules@state.nm.us.

PUBLIC REGULATION COMMISSION

NOTICE OF PROPOSED RULEMAKING CASE NO. 16- 00090-TRP

The Public Regulation Commission (“PRC” or “Commission”) gives notice of its initiation of a proposed rulemaking promulgating **revisions to Motor Carrier Rules 18.3.1.7(L) Definition of Small Passenger Vehicle, 18.3.2.9(A)-(B) and (G)-(H) Cleanup and Temporary Removal of Current Standards Pending Review, 18.3.2.21(A) In-Taxi Rate Posting, 18.3.2.22, 18.3.2.26(C) Continuous and Adequate Service for Full-Service Transportation Services in Competition with TNCs, 18.3.4.10(A)-(B) Driver Drug and Alcohol Testing/Hours of Service,**

18.3.4.12(B) Driver/Vehicle Safety Requirements, 18.3.4.14 Vehicle Repair/Add-On Equipment and Parts, 18.3.6.12 Taxicab/Shuttle Tariffs, 18.3.7.2 Records, 18.3.9.8, 18.3.9.9, and 18.3.9.10 Vehicle Leasing.

Copies of the Order Establishing Rulemaking and Requiring Staff Response containing additional information, a copy of the proposed rule, and filing instructions may be downloaded from the Proposed Rulemaking section of the Commission's website at <http://www.nmprc.state.nm.us> under Case No. 16-00090-TR-P or by calling the Commission's Records Management Bureau at (505) 827-6968 (Melanie Sandoval) or (505) 827-6970 (Heather Cordova).

Written Initial Comments and written Response Comments shall be filed by the deadlines below with the NMPRC's Record's Management Bureau at P.O. Box 1269, Santa Fe, NM 87504-1269 or by hand delivery to the NMPRC Records Management Bureau at 1120 Paseo de Peralta, Room 406, Santa Fe, NM 87501 as follows: Written comments not later than **October 14, 2016** and written responses not later than **October 28, 2016**. Comments shall refer to Case No. 16-00090-TRP.

A public hearing will be held on **November 2, 2016, beginning at 1:30 p.m.** at the offices of the Commission located in the 4th Floor Hearing Room of the old PERA Building, at 1120 Paseo de Peralta, in Santa Fe, NM. The purpose of the hearing is to give interested individuals an opportunity to give oral comments. The Commission may limit the time for each comment to five minutes. The record of this case will close on **November 7, 2016**.

Interested persons should contact the Commission to confirm the date, time, and place of this public hearing because hearings are occasionally rescheduled. Any person with a disability requiring special assistance in order to participate in the hearing

should contact Ms. Kathleen Segura at (505) 827-4501 at least 48 hours prior to the commencement of the hearing.

Constitutional and Statutory Authority: N.M. Const. art. XI, Section 2, and under NMSA 1978, Paragraph (1) of Subsection B of Section 8-8-4 NMSA 1978 (1998), Section 8-8-15 NMSA 1978 (1999, amended 2001), Paragraph (11) of Section 65-2A-4 NMSA 1978 (2003, amended 2013) and Section 65-2A-6 NMSA 1978 (2003, amended 2013).

PUBLIC SAFETY, DEPARTMENT OF

NOTICE OF PUBLIC HEARING

The New Mexico Department of Public Safety will hold a public hearing at the Law Enforcement Academy Auditorium, 4491 Cerrillos Road, Santa Fe, NM, 87507, on November 1, 2016 at 1:00 p.m.

The purpose of this public hearing is to receive public comment and input on the proposed repeal and replacement of Rule 10.8.2 NMAC, Carrying Concealed Handguns, that implements the Concealed Handgun Carry Act, and establishes requirements and procedures regarding licenses to carry concealed handguns and instructors and firearms training courses. All sections within the rule contain changes as part of the repeal and replacement, and sections are added to or removed from the existing rule.

Changes to the existing rule include, and are not limited to, amendments and additions regarding: the objective of the rule and citations of statutory authority; definitions; procedures for filings, correspondence, and inquiries; filings considered incomplete; proof of residency requirements; proof of disposition of charges; application requirements for a license; documents required for a license; license application review and issuance; requirements

for reciprocity, recognition, and transfer of license; documents required to be submitted; forms to be submitted to the Department and how obtained; electronic fingerprinting; firearms training requirements and exceptions; procedures for additional categories and for higher caliber handguns on license; procedures for renewal and replacement of licenses; when licensees may be disarmed and have license confiscated; terms and conditions of license; conditions for denial, suspension or revocation of a license; conditions for approval of instructors and firearms training; procedures for background investigations; conditions for suspension or revocation of an instructor permit; responsibilities of approved instructors; hearing procedures; appeals procedures; departmental immunity; refresher course requirements; training requirements for instructors; mounted patrol officers, retired law enforcement, and military persons qualifications for a license; payments and fees; and other clarifications and modifications as allowed by applicable law.

Interested persons may comment at the public hearing or submit written statements to the Department c/o Kathleen Romero, 4491 Cerrillos Road, P.O. Box 1628, Santa Fe, NM 87504, or by electronic mail to: Kathleen.Romero@state.nm.us. All written statements must be received no later than November 1, 2016 at the public hearing. Early submission of written statements is encouraged.

Copies of the proposed rule may be obtained prior to the hearing by contacting Kathleen Romero by telephone at (505) 827-9269 during normal business hours, by email at Kathleen.Romero@state.nm.us, or at the following website: <http://www.dps.state.nm.us>.

Individuals with disabilities who need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Kathleen Romero. The Department of Public Safety

requires at least ten calendar days advance notice to provide special accommodations.

**REGULATION AND
LICENSING DEPARTMENT
ATHLETIC COMMISSION**

**Public Rule Hearing and Regular
Commission Meeting**

LEGAL NOTICE

The New Mexico Athletic Commission, (“Commission”) will hold a public rule hearing on Tuesday, November 8, 2016, at the New Mexico Regulation and Licensing Department, 5500 San Antonio Dr. NE, Albuquerque, New Mexico. The rule hearing will begin at 2:00 p.m. followed by the regular scheduled Commission Meeting in which the Commission will adopt the rules and discuss items on the agenda.

The purpose of the rule hearing is to consider adoption of proposed amendments and additions to the following Commission Rules and Regulations found in NMAC Title 15, Chapter 6: Part 1 General Provisions, Part 2 Contracts, Part 3 Tickets For Contests and Exhibitions, Part 4 Duties And Conduct Of Licensees, Part 5 Requirements To Safeguard Health, Part 7 The Premises, Its Facilities and Equipment, and Part 16 Disciplinary Actions.

The Commission’s proposed rules will be available by October 1, 2016, on the Commission’s website at: http://www.rld.state.nm.us/boards/Athletic_Commission.aspx. Individuals requesting copies of the proposed rules may also contact the Commission Office at the Toney Anaya Building, 2550 Cerrillos Road, P.O. Box 25101, Santa Fe, New Mexico 87504, or by calling (505) 476-4622. A copy of the agenda for the regular commission meeting will be available at least seventy-two (72) hours prior to the meeting and will be posted on the commission’s website. The agenda may also be obtained by

contacting the Commission Office.

In order for the Commission Members to review public comments in their meeting packets prior to the meeting, individuals who do not wish to attend the hearing may submit written or recorded comments. Written or recorded comments must be received no later than October 28, 2016, by 5:00 P.M. Individuals wishing to present their comments at the hearing need to provide ten (10) copies of any comments or proposed changes for distribution to the Commission and staff.

Persons with a disability who need a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting may contact the Commission Office at (505) 476-4622 at least ten (10) days in advance notice to provide requested alternative formats and special accommodations.

**REGULATION AND
LICENSING DEPARTMENT
PHARMACY, BOARD OF**

NOTICE TO THE PUBLIC

**REGULAR BOARD MEETING –
OCTOBER 20th & 21st, 2016**

The New Mexico Board of Pharmacy will convene on October 20th & 21st, 2016 at 9:00 a.m. and continue until finished in the Board of Pharmacy Conference Room located at 5500 San Antonio Dr., NE, Albuquerque, NM 87109 for the purpose of conducting a regular board meeting.

You may view and obtain copies of the agenda (tentative) starting October 14, 2016 through the board’s website: www.rld.state.nm.us/boards/pharmacy.aspx.

Individuals petitioning the board regarding requests/waivers and/or interested persons wishing to comment on proposed language regarding rule hearings must submit

documentation for presentation; via fax (505) 222-9845, mail or email to the Executive Director, Ben Kesner, ben.kesner@state.nm.us no later than Monday, October 14, 2016, if in attendance must provide 12 copies of the documentation for distribution to board members. (Board staff is not required to make copies.)

The Board will address:

Rule Hearings:

16.19.6 NMAC

PHARMACIES

16.19.20 NMAC

CONTROLLED

SUBSTANCES

16.19.29 NMAC

CONTROLLED

SUBSTANCE

PRESCRIPTION

MONITORING PROGRAM

Disciplinary Hearings:

CASE NO. 2015-055

CHRISTOPHER TRUJILLO

- RP7033

CASE NO. 2015-082

ERIC JUDE ARTIAGA – PT

APPLICANT

*Executive Director’s

Report:

Any special needs accommodations for board meetings or hearings should contact Debra Wilhite, Administrative Secretary, at (505) 222-9835 or e-mail debra.wilhite@state.nm.us as soon as possible.

*The board may go into Executive Session to discuss these items and any other items pursuant to Section 10-15-1H(1), Section 10-15-1H(2), Section 10-15-1H(3) or Section 10-15-1H(7) of the Open Meeting Act. Agenda items may be executed at any time during the meeting to accommodate hearings.

Published in the Albuquerque Journal
September 16, 2016

REGULATION AND LICENSING DEPARTMENT
RESPIRATORY CARE ADVISORY BOARD

PUBLIC RULE HEARING AND REGULAR BOARD MEETING

LEGAL NOTICE

The New Mexico Respiratory Care Advisory Board will hold a Rule Hearing on Friday, December 02, 2016. Following the Rule Hearing, the New Mexico Respiratory Care Advisory Care Board will convene a Regular Meeting to adopt the rules and take care of regular business. The New Mexico Respiratory Care Advisory Board Rule Hearing will begin at 10:00 a.m. and the Regular Meeting will convene immediately following the Rule Hearing. The meetings will be held at the Regulation and Licensing Department, 2550 Cerrillos Rd., located in Hearing Room 1, Santa Fe, New Mexico.

The purpose of the Rule Hearing is to consider adoption of proposed amendments and additions to the following Board Rules and Regulations in 16.23.2 NMAC - Fees, 16.23.3 NMAC - Qualifications for Practitioners License, 16.23.4 NMAC - Application Procedures for Practitioners License, 16.23.6 NMAC - Temporary Permits, 16.23.7 NMAC - Temporary Permit Renewal, 16.23.8 NMAC - Renewal and Expiration of Practitioner License, 16.23.9 NMAC - Inactive Status for Practitioner License, 16.23.11 NMAC - License Reactivation; License Lapse, 16.23.12 NMAC - Continuing Education, 16.23.14 NMAC - Scope of Practice Guidelines for Non-Licensed, Non-Exempted Persons.

You can contact the board office at the Toney Anaya Building located at the Toney Anaya Bldg., 2550 Cerrillos Road, 2nd Floor in Santa Fe, New Mexico 87505, (505) 476-4622, or copies of the proposed rules are available on the Respiratory Care Advisory Board’s website:

www.RLD.state.nm.us/boards/Respiratory_Care.aspx. In order for the Board members to review the comments in their meeting packets prior to the meeting, persons wishing to make comments regarding the proposed rules must present them to the Board office in writing **no later than November 17, 2016**. Persons wishing to present their comments at the hearing will need 10 copies of any comments or proposed changes for distribution to the Board and staff.

The Board may enter into Executive Session pursuant to Subsection H of Section 10-15-1 NMSA of the Open Meetings Act, to discuss matters related to the issuance, suspension, renewal or revocation of licenses.

If you have questions, or if you are an individual with a disability who wishes to attend the Hearing or Meeting, but you need a reader, amplifier, qualified signed language interpreter, or any other form of auxiliary aid or service to participate, please call the Board office at (505) 476-4622 at least two weeks prior to the meeting or as soon as possible.

Thank you,
Cynthia Salazar, Board Administrator
P.O. Box 25101, Santa Fe, NM 87504

WORKFORCE SOLUTIONS, DEPARTMENT OF

NOTICE OF PUBLIC HEARING

The New Mexico Department of Workforce Solutions (“Department”) hereby gives notice that the Department will conduct a public hearing in the auditorium of the State Personnel Office located at 2600 Cerrillos Road, Santa Fe, New Mexico on November 3, 2016 from 1:00 P.M. until 3:00 P.M. The purpose of the public hearing will be to obtain input on the repeal of old rules and the adoption of proposed new rules to the New Mexico Administrative Code (NMAC) for 11.3.400.1 NMAC through 11.3.400.427 NMAC.

Interested individuals may testify at the public hearing or submit written comments to State of New Mexico Department of Workforce Solutions, 401 Broadway NE, P.O. Box 1928, Albuquerque, N.M., 87103, attention Rudolph Arnold. Written comments must be received no later than November 3, 2016. However, the submission of written comments as soon as possible is encouraged.

Copies of the amended rules may be accessed at <http://www.dws.state.nm.us/> or obtained from Rudolph Arnold Tel.: (505) 841-8672 rudolph.arnold@state.nm.us. The proposed new rules for adoption will be made available at least thirty days prior to the hearings.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Mr. Rudolph Arnold as soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

End of Notices of Rulemaking and Proposed Rules

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.

ALBUQUERQUE- BERNALILLO COUNTY AIR QUALITY CONTROL BOARD

This is an amendment to 20.11.100 NMAC, Sections 6, 13, 14, 15, 16, 17, and 18, effective 10/15/2016.

20.11.49.6 OBJECTIVE:

To implement requirements for the reporting of excess emissions [and establish affirmative defense provisions for facility owners and operators for excess emissions:] for facility owners and operators. [20.11.49.6 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.13 APPLICABILITY:

A. Any source:
(1) whose operation results in an emission of a regulated air pollutant, including a fugitive emission, in excess of the quantity, rate, opacity or concentration specified by an air quality regulation or permit condition; or

(2) subject to the requirements of 20.11.47 NMAC, *Emissions Inventory Requirements*, 20.11.41 NMAC [~~Authority-To-Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*, 20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

B. Deviations under 20.11.42 NMAC, *Operating Permits*, which do not result in excess emissions, are not subject to the provisions of 20.11.49 NMAC.

C. 20.11.49 NMAC does not create a separate cause of action for failure to obtain a permit under 20.11.41 NMAC [~~Authority-To-Construct~~], *Construction Permits*, 20.11.42 NMAC, *Operating Permits*,

20.11.61 NMAC, *Prevention of Significant Deterioration*, or 20.11.60 NMAC, *Permitting In Nonattainment Areas*.

[20.11.49.13 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.14 OPERATION RESULTING IN AN EXCESS EMISSION:

The emission of a regulated air pollutant in excess of the quantity, rate, opacity, or concentration specified in an air quality regulation or permit condition that results in an excess emission is a violation of the air quality regulation or permit condition and may be subject to an enforcement action.

[~~The owner or operator of a source having an excess emission shall, to the extent practicable, operate the source, including associated air pollution control equipment, in a manner consistent with good air pollution control practices for minimizing emissions.~~] If the owner or operator of a source having an excess emission chooses to continue to operate it while the excess emission continues, the owner or operator shall take all appropriate measures consistent with good air pollution control practices for minimizing emissions. The duration and extent of any excess emission and the owner or operator's efforts to minimize the excess emission may be considered by the department in any resulting enforcement action.

[20.11.49.14 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.15 NOTIFICATION:

A. The owner or operator of a source having an excess emission shall report the following information to the department on forms provided by the department. The department may authorize the submittal of such reports in electronic

format. [~~The department may require that the owner or operator of a source provide supplemental information in addition to that already required by 20.11.49.15 NMAC. The additional information shall be reported by the by a deadline specified by the department.~~] The department may require that the owner or operator of a source provide further information in addition to that already required by 20.11.49.15 NMAC by a deadline specified by the department.

(1) **Initial excess emission report:** The owner or operator shall file an initial report, no later than the end of the next regular business day after the time of discovery of an excess emission. The initial report shall include all available information regarding each item required by Subsection B of 20.11.49.15 NMAC.

(2) **Final excess emission report:** No later than 10 days after the end of the excess emission, the owner or operator shall file a final report that contains specific and detailed information for each item required by Subsection B of 20.11.49.15 NMAC.

B. [~~The~~] Each excess emission report shall include the following information:

- (1) the name of the source;
- (2) the name of the owner and operator of the source;
- (3) the name and title of the person preparing the report;
- (4) identifying information for the source (e.g. permit and database numbers);
- (5) the specific date(s), [~~and time(s) the excess emission occurred;~~] time(s), and duration of the excess emission;
- (6)

identification of the equipment involved and the emission point(s) (including bypass) from which the excess emission occurred;

(7) the air quality regulation or permit condition that was exceeded;

(8) identification of the air contaminant(s) and the magnitude of the excess emission expressed in the units of the air quality regulation or permit condition;

(9) the method for determining the magnitude and duration of the excess emission;

(10) the cause and nature of the excess emission;

(11) the steps taken to limit the duration and magnitude of the excess emission;

(12) the corrective action(s) taken to eliminate the cause of the excess emission; if one or more corrective actions are required, the report shall include a schedule for implementation of those actions, with associated progress reports; if no corrective actions are required, the report shall include a detailed explanation for that conclusion.

(13) the corrective action(s) taken to prevent a recurrence of the excess emission;

(14) whether the owner or operator attributes the excess emission to malfunction, startup [~~or shutdown~~], shutdown or emergency;

(15) whether the owner or operator [~~will claim an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC; if claiming an affirmative defense, an analysis and the supporting evidence for each reason shall be submitted no later than 30 days after submittal of the final report required by 20.11.49.15 NMAC; no later than 30 days after the earlier of the department's receipt of the final report or the deadline for submitting the final report, if the department receives a request for an extension from the owner or operator of the source, the department may grant an extension to complete the analysis not to exceed~~

~~30 additional days; and] intends to file a supplemental report under Subsections A, B, or C of 20.11.49.16 NMAC; and~~

(16) [~~the contents of the final report shall contain a signed certification of truth, accuracy, and completeness; the certification shall be signed by the person who is reporting the excess emission;] the person signing the final report shall certify that it is true, accurate, and complete.~~

C. If the period of an excess emission extends beyond 10 days, the owner or operator shall submit the final report required by Subsection B of 20.11.49.15 NMAC to the department within 72 hours of the date and time the excess emission ceased.

D. Alternative reporting. If an owner or operator of a source is subject to both the excess emission reporting requirements of 20.11.49.15 NMAC and the reporting requirements of 40 CFR Parts 60, 61, and 63, and the federal reporting requirements duplicate the requirements of 20.11.49.15 NMAC, then the federal reporting requirements shall suffice. [20.11.49.15 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.16 [~~**AFFIRMATIVE DEFENSES:**~~] **EXCESS EMISSIONS DURING STARTUP, SHUTDOWN, MALFUNCTION, OR EMERGENCY:** All periods of excess emissions regardless of cause are violations [~~of the act and the rules promulgated thereunder, the New Mexico Air Quality Control Act and rules promulgated thereunder, and applicable permit or other authorization of the air board. 20.11.49 NMAC provides an affirmative defense to owners and operators for civil or administrative penalty actions brought for excess emissions during periods of startup, shutdown malfunction or emergency, unless otherwise prohibited by Subsection D of 20.11.49.16 NMAC. 20.11.49.15 NMAC shall not be construed as limiting EPA's or citizens' authority under the act.~~

The department may require the owner or operator of a source to provide supplemental information in addition to that already required by 20.11.49.16 NMAC. The additional information shall be reported by the deadline specified by the department.] of the state Air Quality Control Act and rules promulgated thereunder, and any applicable permit. The owner or operator of a source who contends that an excess emission occurred during startup, shutdown, malfunction, or emergency may submit to the department a supplemental report addressing the criteria described in Subsections A, B, or C of 20.11.49.16 NMAC. To be considered by the department, the appropriate supplemental report described in Subsections A, B, or C of 20.1.49.16 NMAC below must be submitted to the department no later than 30 days after the final excess emissions report submitted pursuant to 20.11.49.15 NMAC. The department may grant written extensions to this deadline for good cause shown. An owner or operator of a source who contends that enforcement action for an excess emission is not warranted must provide information in a supplemental report as described in Subsections A, B, or C of 20.11.49.16 NMAC. If no supplemental report is timely received, the department will not consider the criteria described in Subsections A, B, and C of 20.11.49.16 NMAC. The department may require the owner or operator of a source to provide further information in addition to that already contained in the supplemental report or otherwise specified in 20.11.49.16 NMAC. The information in the supplemental report may be considered by the department at its sole discretion and is not intended to be enforceable in a legal proceeding by any party or to limit the enforcement authority of any party. 20.11.49.16 NMAC shall not be construed to preclude EPA or federal court jurisdiction under Section 113 of the federal act to assess civil penalties or other forms of relief for periods of excess emissions, to prevent EPA

or the courts from considering the statutory factors for the assessment of civil penalties under Section 113 of the federal act, or to interfere with the rights of litigants to pursue enforcement consistent with their rights under the citizen suit provision of Section 304 of the federal act.

A. ~~[Affirmative defense]~~ Supplemental report for an excess emission during malfunction:

~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during malfunction, against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during malfunction, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during malfunction, shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during malfunction addressing the following criteria:

- (1) the excess emission was caused by a malfunction;
- (2) the excess emission:
 - (a) did not stem from any activity or event that could have been foreseen and avoided, or planned for; and
 - (b) could not have been avoided by better operation and maintenance practices;
- (3) to the maximum extent practicable the air pollution control equipment or processes were maintained and operated in a manner consistent with good practice for minimizing emissions;
- (4) repairs were made in an expeditious fashion when the operator knew or should have known that applicable emission limitations were being exceeded; off-shift labor and overtime must

have been utilized, to the extent practicable, to ensure that such repairs were made as expeditiously as practicable;

(5) the amount and duration of the excess emission (including any bypass) were minimized to the maximum extent practicable during periods of such emissions;

(6) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(7) all emission monitoring systems were kept in operation if at all possible;

(8) the owner or operator's actions in response to the excess emission were documented by properly signed, contemporaneous operating logs, or other relevant evidence;

(9) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance; and

(10) the owner or operator complied with ~~[the]~~ all notification requirements in 20.11.49.15 NMAC.

B. ~~[Affirmative defense]~~ Supplemental report for an excess emission during startup or shutdown:

~~[The owner or operator of a source subject to 20.11.49 NMAC may claim an affirmative defense for an excess emission during startup or shutdown against a civil penalty imposed in an administrative or judicial enforcement action. There shall be no affirmative defense for an excess emission during startup or shutdown, from the owner or operator's liability or the department's claim for injunctive relief for the excess emission. The owner or operator claiming an affirmative defense for an excess emission during startup or shutdown shall bear the burden of proof including the demonstration of the following criteria:]~~ The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during startup or shutdown, addressing the following

- (1) the excess emission occurred during a startup or shutdown;
- (2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;
- (3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;
- (5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;
- (6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;
- (7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;
- (8) all emissions monitoring systems were kept in operation if at all possible;
- (9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and
- (10) the owner or operator complied with ~~[the]~~ all notification requirements in 20.11.49.15 NMAC.

criteria:

(1) the excess emission occurred during a startup or shutdown;

(2) the periods of excess emissions that occurred during startup or shutdown were short and infrequent and could not have been prevented through careful planning and design;

(3) the excess emissions were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;

(4) if the excess emissions were caused by a bypass (an intentional diversion of control equipment), then the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

(5) at all times, the source was operated in a manner consistent with good practices for minimizing emissions;

(6) the frequency and duration of operation in startup or shutdown mode was minimized to the maximum extent practicable;

(7) all possible steps were taken to minimize the impact of the excess emission on ambient air quality;

(8) all emissions monitoring systems were kept in operation if at all possible;

(9) the owner or operator's actions during the period of excess emissions were documented by properly signed, contemporaneous operating logs, or other relevant evidence; and

(10) the owner or operator complied with ~~[the]~~ all notification requirements in 20.11.49.15 NMAC.

C. ~~[Affirmative defense for an emergency:~~

~~(1) An emergency constitutes an affirmative defense to an action brought for noncompliance with a technology-based emission limitation if the owner or operator of the source demonstrates through properly signed, contemporaneous operating logs, or other relevant evidence that:~~

(a) an emergency occurred and that the owner or operator can identify the cause(s) of the emergency;

(b) the source was being properly operated at the time;

(c) during the period of the emergency the owner or operator took all reasonable steps to minimize levels of emissions that exceeded the technology-based emission limitation; and

(d) the owner or operator fulfilled the notification requirements under Subsection A of 20.11.49.15 NMAC, including a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(2) In any enforcement proceeding, the owner or operator seeking to establish the occurrence of an emergency has the burden of proof.

D. Affirmative defenses prohibited. The affirmative defense provisions of this section shall not be available for:

- (1) claims for injunctive relief;
- (2) SIP limits or permit limits that have been set taking into account potential emissions during startup and shutdown, including, but not limited to, limits that indicate they apply during startup and shutdown, and limits that explicitly indicate they apply at all times or without exception;
- (3) excess emissions that cause an exceedance of the NAAQS or PSD increments;
- (4) failure to meet federally promulgated emission limits, including, but not limited to, 40 CFR Parts 60, 61 and 63; or
- (5) violations of requirements that derive from 40 CFR Parts 60, 61 and 63 or any other federally enforceable performance standard or emission limit.

may issue a determination regarding an owner or operator's assertion of the affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC on the basis of any relevant information, including but not limited to information submitted pursuant to 20.11.49 NMAC or obtained through an inspection. Any such determination is not a final action and is not reviewable, shall not be a prerequisite to the commencement of an administrative or judicial enforcement action, does not constitute a waiver of liability pursuant to 20.11.49.18 NMAC, and shall not preclude an enforcement action by the federal government or a citizen pursuant to the federal Clean Air Act. A source may not assert an affirmative defense under Subsections A, B or C of 20.11.49.16 NMAC in an administrative or judicial enforcement action unless it asserted such defense pursuant to Paragraph (15) of Subsection B of 20.11.49.15 NMAC.]

Supplemental report for an emergency: The owner or operator of a source subject to 20.11.49 NMAC may file a supplemental report for an excess emission during an emergency addressing the following criteria:

- (1) an emergency occurred;
- (2) the excess emission occurred during the emergency;
- (3) the owner or operator has identified the cause of the emergency;
- (4) the excess emission resulted from the emergency;
- (5) the excess emission and resulting emergency could not have been prevented through careful planning and design;
- (6) the excess emission and resulting emergency were not part of a recurring pattern indicative of inadequate design, operation, or maintenance;
- (7) at the time the excess emission and emergency occurred, the source was being properly operated;
- (8) during the period of the excess emission, the

owner or operator took all reasonable steps to minimize levels of emissions that exceeded the applicable standard, regulation, or permit condition; and

(9) the owner or operator complied with all notification requirements in 20.11.49.15 NMAC, including a description of the emergency, any steps to mitigate emissions, and corrective actions taken.

D. Department's determination of adequacy of supplemental report: Nothing in 20.11.49 NMAC creates an affirmative defense or entitles a source to relief from penalties for any excess emission including, but not limited to, any exceedance of a limit which already takes into account startup and shutdown emissions, any NAAQS or PSD increment, or any federally promulgated limit or any requirement derived from such a limit, including 40 CFR Parts 60, 61, and 63. However, the department in its sole discretion may consider any relevant information, including information submitted in a supplemental report, in connection with a demand for corrective action or injunctive relief, or the assessment or negotiation of a penalty in an enforcement action. The department's determination of how much weight to give information in a supplemental report is based on its sole discretion. [20.11.49.16 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.17 ROOT CAUSE AND CORRECTIVE ACTION ANALYSIS:

A. Upon receipt of a written demand by the department, the owner or operator of a source having an excess emission, shall prepare an analysis that uses analytical tools determined by the department to be appropriate. The analysis shall contain the following information:

- (1) an analysis describing the root cause and all contributing causes of the excess emission; and
- (2) an analysis of the corrective actions implemented or available to reduce the likelihood

of a recurrence of the excess emission resulting from the causes identified under Paragraph (1) of Subsection A of 20.11.49.17 NMAC, including, as applicable:

- (a) identification of implemented or available corrective action alternatives, such as changes in design, operation and maintenance;
- (b) the estimated cost associated with each corrective action alternative;
- (c) the probable effectiveness of each corrective action alternative;
- (d) if no corrective action alternatives are available, a clear explanation providing an adequate justification for that conclusion; and
- (e) if one or more corrective actions are identified, a schedule for implementation and progress reports.

B. The department shall make the demand for ~~[an]~~ a root cause and corrective action analysis no later than 90 days after receipt of the final report required by Subsection A of 20.11.49.15 NMAC.

C. The department may require the analysis authorized by Subsection A of 20.11.49.17 NMAC after considering relevant factors. Examples of relevant factors include the significance of the excess emission, the nature or pattern of excess emissions, and the history of the source, as well as any other factors determined to be relevant by the department.

D. The completed analysis shall be submitted to the department no later than 60 days after the department's demand is received by the owner or operator of the source, pursuant to Subsection A of 20.11.49.17 NMAC. For good cause shown, the department may grant an extension to submit the analysis.

E. The owner or operator of a source complying with 20.11.49.17 NMAC may assert a claim for confidential information protection. [20.11.49.17 NMAC - N, 10/13/09; A, 10/15/16]

20.11.49.18 ~~[FUTURE ENFORCEMENT ACTION:—~~
~~The department may commence an administrative or judicial enforcement action against the owner or operator of a source for an excess emission for which the department has made a determination pursuant to Subsection E of 20.11.49.16 NMAC if the department determines that the excess emission is related to a pattern of excess emission events, poor maintenance, careless or marginal operation, or other appropriate reason.]~~ **[RESERVED]**
 [20.11.49.18 NMAC - N, 10/13/09; Repealed, 10/15/16]

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

On September 12, 2016, the Children, Youth and Families Department, repealed 8.8.3 NMAC, Governing Background Checks and Employment History Verification and replaced it with 8.8.3 NMAC, Governing Background Checks and Employment History Verification, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.15.2 NMAC, Child Care Assistance Requirements for Client and Child Care Providers and replaced it with 8.15.2 NMAC, Child Care Assistance Requirements for Client and Child Care Providers, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.16.2 NMAC, Child Care Licensing, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs and replaced it with 8.16.2 NMAC, Child Care Licensing, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and Other Early Care and Education Programs, effective October 1, 2016.

On September 12, 2016, the Children, Youth and Families Department, repealed 8.17.2 NMAC, Non-Licensed Child Care, Requirements Governing Registration of Non-Licensed Family Child Care Homes and replaced it with 8.17.2 NMAC, Non-Licensed Child Care, Requirements Governing Registration of Non-Licensed Family Child Care Homes, effective October 1, 2016.

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

TITLE 8 SOCIAL SERVICES
CHAPTER 8 CHILDREN, YOUTH AND FAMILIES
GENERAL PROVISIONS
PART 3 GOVERNING BACKGROUND CHECKS AND EMPLOYMENT HISTORY VERIFICATION

8.8.3.1 ISSUING AGENCY: Children, Youth and Families Department
 [8.8.3.1 NMAC - Rp, 8.8.3.1 NMAC, 10/1/16]

8.8.3.2 SCOPE: This rule has general applicability to operators, volunteers, including student interns, staff and employees, and prospective operators, staff and employees, of child-care facilities, including every facility, CYFD contractor, program receiving CYFD funding or reimbursement, the administrative office of the courts (AOC) supervised visitation and safe exchange program, or other program that has or could have primary custody of children for twenty hours or more per week, juvenile treatment facilities, and direct providers of care for children including, but not limited to the following settings: Children's behavioral health services and licensed and registered child care, including shelter care.
 [8.8.3.2 NMAC - Rp, 8.8.3.2 NMAC, 10/1/16]

8.8.3.3 STATUTORY AUTHORITY: The statutory

authority for these regulations is contained in the Criminal Offender Employment Act, Section 28-2-1 to 28-2-6 NMSA and in the New Mexico Children's and Juvenile Facility Criminal Records Screening Act, Section 32A-15-1 to 32A-15-4 NMSA 1978 Amended.

[8.8.3.3 NMAC - Rp, 8.8.3.3 NMAC, 10/1/16]

8.8.3.4 DURATION:

Permanent

[8.8.3.4 NMAC - Rp, 8.8.3.4 NMAC, 10/1/16]

8.8.3.5 EFFECTIVE

DATE: October 1, 2016, unless a later date is cited at the end of a section.

[8.8.3.5 NMAC - Rp, 8.8.3.5 NMAC, 10/1/16]

8.8.3.6 OBJECTIVE:

A. The purpose of these regulations is to set out general provisions regarding background checks and employment history verification required in settings to which these regulations apply.

B. Background checks are conducted in order to identify information in applicants' backgrounds bearing on whether they are eligible to provide services in settings to which these regulations apply.

C. Abuse and neglect screens are conducted by BCU staff and include a screen of abuse and neglect information in databases in New Mexico and in each state where the applicant resided during the preceding five years in order to identify those persons who pose a continuing threat of abuse or neglect to care recipients in settings to which these regulations apply.

[8.8.3.6 NMAC - Rp, 8.8.3.6 NMAC, 10/1/16]

8.8.3.7 DEFINITIONS:

A. AOC means administrative office of the courts.

B. ADMINISTRATIVE REVIEW means an informal process of reviewing a decision that may include an informal

conference or hearing or a review of written records.

C. ADMINISTRATOR means the adult in charge of the day-to-day operation of a facility. The administrator may be the licensee or an authorized representative of the licensee.

D. ADULT means a person who has a chronological age of 18 years or older, except for persons under medicaid certification as set forth in Subsection K below.

E. APPEAL means a review of a determination made by the BCU, which may include an administrative review or a hearing.

F. APPLICANT means any person who is required to obtain a background check under these rules and NMSA 1978, Section 32A-15-3.

G. ARREST means notice from a law enforcement agency about an alleged violation of law.

H. BCU means the CYFD background check unit.

I. BACKGROUND CHECK means a screen of CYFD's information databases, state and federal criminal records and any other reasonably reliable information about an applicant.

J. CARE RECIPIENT means any person under the care of a licensee.

K. CHILD means a person who has a chronological age of less than 18 years, and persons under applicable medicaid certification up to the age of 21 years.

L. CONDITIONAL EMPLOYMENT means a period of employment status for a new applicant prior to the BCU's final disposition of the applicant's background check.

M. CRIMINAL HISTORY means information possessed by law enforcement agencies of arrests, indictments, or other formal charges, as well as dispositions arising from these charges.

N. DIRECT, PHYSICAL SUPERVISION means continuous visual contact or live video observation by a direct provider

of care who has been found eligible by a background check of an applicant during periods when the applicant is in immediate physical proximity to care recipients.

O. DIRECT PROVIDER OF CARE means any individual who, as a result of employment or, contractual service or volunteer service has direct care responsibilities or potential unsupervised physical access to any care recipient in the settings to which these regulations apply.

P. ELIGIBILITY means the determination that an applicant does not pose an unreasonable risk to care recipients after a background check is conducted.

Q. EMPLOYMENT HISTORY means a written summary of the most recent three-year period of employment with names, addresses and telephone numbers of employers, including dates of employment, stated reasons for leaving employment, and dates of all periods of unemployment with stated reasons for periods of unemployment, and verifying references.

R. LICENSED means authorized to operate by the licensing authority by issuance of an operator's license or certification certificate.

S. LICENSEE means the holder of, or applicant for, a license, certification, or registration pursuant to 7.20.11 NMAC, 7.20.12 NMAC, 8.16.2 NMAC, 7.8.3 NMAC; 8.17.2 NMAC or other program or entity within the scope of these regulations, including AOC supervised visitation and safe exchange program providers. CYFD LICENSEE means program or entity within the scope of these regulations except the AOC supervised visitation and safe exchange program providers.

T. LICENSING AUTHORITY means the CYFD division having authority over the licensee.

U. MORAL TURPITUDE means an intentional crime that is wanton, base, vile or depraved and contrary to the accepted rules of morality and

duties of a person within society. In addition, because of the high risk of injury or death created by, and the universal condemnation of the act of driving while intoxicated, a crime of moral turpitude includes a second or subsequent conviction for driving while intoxicated or any crime involving the use of a motor vehicle, the elements of which are substantially the same as driving while intoxicated. The record name of the second conviction shall not be controlling; any conviction subsequent to an initial one may be considered a second conviction.

V. **RELEVANT CONVICTION** means a plea, judgment or verdict of guilty, no contest, nolo contendere, conditional plea of guilty, or any other plea that would result in a conviction for a crime in a court of law in New Mexico or any other state. The term **RELEVANT CONVICTION** also includes decrees adjudicating juveniles as serious youthful offenders or youthful offenders, or convictions of children who are tried as adults for their offenses. Successful or pending completion of a conditional discharge under Section 31-20-13 (1994) NMSA 1978, or Section 30-31-28 (1972) NMSA 1978, or a comparable provision of another state's law, is not a relevant conviction for purposes of these regulations, unless or until such time as the conditional discharge is revoked or rescinded by the issuing court. The term **RELEVANT CONVICTION** does not include any of the foregoing if a court of competent jurisdiction has overturned the conviction or adjudicated decree and no further proceedings are pending in the case or if the applicant has received a legally effective pardon for the conviction. The burden is on the applicant to show that the applicant has a pending or successful completion of any conditional discharge or consent decree, or that the relevant conviction has been overturned on appeal, or has received a legally effective pardon.

W. **UNREASONABLE RISK** means the quantum of risk that a reasonable person would be

unwilling to take with the safety or welfare of care recipients. [8.8.3.7 NMAC - Rp, 8.8.3.7 NMAC, 10/1/16]

8.8.3.8 APPLICABILITY:

These regulations apply to all licensees and direct providers of care in the following settings:

- A. behavior management skills development;
- B. case management services;
- C. group home services;
- D. day treatment services;
- E. residential treatment services;
- F. treatment foster care services agency staff;
- G. licensed child care homes;
- H. licensed child care centers;
- I. registered child care homes;
- J. licensed shelter care;
- K. licensed before and after school care;
- L. non-licensed or exempt after school programs participating in the at risk component of the child and adult care food program;
- M. comprehensive community support services;
- N. CYFD contractors and any other programs receiving CYFD funding or reimbursement; and
- O. AOC supervised visitation and safe exchange program providers.

[8.8.3.8 NMAC - Rp, 8.8.3.8 NMAC, 10/1/16]

8.8.3.9 NON-APPLICABILITY:

A. These regulations do not apply to the following settings, except when otherwise required by applicable certification requirements for child and adolescent mental health Services 7.20.11 NMAC or to the extent that such a program receives funding or reimbursement from CYFD:

- (1) hospitals or infirmaries;
 - (2) intermediate care facilities;
 - (3) children's psychiatric centers;
 - (4) home health agencies;
 - (5) diagnostic and treatment centers; and
 - (6) unlicensed or unregistered child care homes.
- B. These regulations do not apply to the following adults:
- (1) treatment foster care parents;
 - (2) relative care providers who are not otherwise required to be licensed or registered;
 - (3) foster grandparent volunteers; and
 - (4) all other volunteers for any program or entity within the scope of these regulations if the volunteer spends less than six hours per week at the program, is under direct physical supervision, and is not counted in the facility ratio. [8.8.3.9 NMAC - Rp, 8.8.3.9 NMAC, 10/1/16]

8.8.3.10 COMPLIANCE:

- A. Compliance with these regulations is a condition of licensure, registration, certification or renewal, or continuation of same or participation in any other program or contract within the scope of these regulations.
- B. The licensee is required to:
- (1) submit an electronic fingerprint submission receipt and the required forms for all direct providers of care, household members in licensed and registered child care homes, or any staff member, employee, or volunteer present while care recipients are present, or other adult as required by the applicable regulations prior to the commencement of service, whether employment or, contractual, or volunteer. In the case of a licensed child care home and a registered home, the licensee must submit an electronic fingerprint submission receipt and the required forms for

new household members or for any adult who is required to obtain a background check pursuant to 8.16.2 NMAC or 8.17.2 NMAC as applicable. However, in the case of a registered family child care food-only home, all household members are only required to undergo a criminal history and child abuse and neglect screening.

(2) verify the employment history of any prospective direct provider of care by contacting references and prior employers/agencies to elicit information regarding the reason for leaving prior employment or service; the verification shall be documented and available for review by the licensing authority; EXCEPTION: verification of employment history is not required for registered home providers or child care homes licensed for six or fewer children.

(3) submit an adult household member written statement form for each adult household member in a registered family child care food-only home setting in order to conduct criminal history and child abuse and neglect screens on such household members; an adult household member is an adult living in the household or an adult that spends a significant amount of time in the home; the licensee must submit the required forms for new adult household members pursuant to 8.17.2 NMAC.

(4) provide such other information BCU staff determines to be necessary; and

(5) maintain documentation of all applications, correspondence and eligibility relating to the background checks required; in the event that the licensee does not have a copy of an applicant's eligibility documentation and upon receipt of a written request for a copy, the BCU may issue duplicate eligibility documentation to the original licensee provided that the request for duplicate eligibility documentation is made within one year of the applicant's eligibility date.

C. If there is a need for any further information from an

applicant at any stage of the process, the BCU shall request the information in writing from the applicant. If the BCU does not receive the requested information within fifteen calendar days of the date of the request, the BCU shall deny the application and send a notice of background check denial.

D. Any person who knowingly makes a materially false statement in connection with these requirements will be denied eligibility.

[8.8.3.10 NMAC - Rp, 8.8.3.10 NMAC, 10/1/016]

8.8.3.11 COMPLIANCE EXCEPTIONS:

A. An applicant may not begin providing services prior to obtaining background check eligibility unless all of the following requirements are met:

(1) the CYFD licensee may not be operating under a corrective action plan (childcare), sanctions, or other form of disciplinary action;

(2) until receiving background eligibility the applicant shall at all times be under direct physical supervision; this provision does not apply to registered child care home applicants;

(3) the licensee or applicant shall send the BCU a completed application form and an electronic fingerprint submission receipt prior to the commencement of supervised services; and

(4) no more than 45 days shall have passed since the date of the initial application unless the BCU documents good cause shown for an extension.

B. With the exception of the provision under 8.16.2.19 NMAC and 8.17.2.11 NMAC, if a direct provider of care has a break in employment or transfers employment more than 180 days after the date of an eligibility letter from the BCU, the direct provider of care must re-comply with 8.8.3.10 NMAC.

A direct provider of care may transfer employment, as permitted

by 8.16.2.19 NMAC and 8.17.2.11 NMAC, or for a period of 180 days after the date of an eligibility letter from the BCU without complying with 8.8.3.10 NMAC only if the direct provider of care submits a preliminary application that meets the following conditions:

(1) the direct provider of care submits a statement swearing under penalty of perjury that he or she has not been arrested or charged with any crimes, has not been an alleged perpetrator of abuse or neglect and has not been a respondent in a domestic violence petition;

(2) the direct provider of care submits an application that describes the prior and subsequent places of employment, registration or certification with sufficient detail to allow the BCU to determine if further background checks or a new application is necessary; and

(3) the BCU determines within 15 days that the direct provider of care's prior background check is sufficient for the employment or position the direct provider of care is going to take.

[8.8.3.11 NMAC - Rp, 8.8.3.11 NMAC, 10/1/16]

8.8.3.12 PROHIBITIONS:

A. Any CYFD licensee who violates these regulations is subject to revocation, suspension, sanctions, denial of licensure, certification, or registration or termination of participation in any other program within the scope of these regulations. AOC supervised visitation and safe exchange program providers will be monitored and sanctioned by the AOC.

B. Licensure, certification, registration or participation in any other program within the scope of these regulations is subject to receipt by the licensing authority of a satisfactory background check for the licensee or the licensee's administrator.

C. Except as provided in 8.8.3.13 NMAC below, licensure, certification, registration or participation in any other program

within the scope of these regulations may not be granted by the licensing authority if a background check of the licensee or the licensee's administrator reveals an unreasonable risk.

D. A licensee may not retain employment, volunteer service or contract with any direct provider of care for whom a background check reveals an unreasonable risk. The BCU shall deliver one copy of the notice of unreasonable risk to the facility or program by U.S. mail and to the licensing authority or the AOC by facsimile transmission, e-mail or hand delivery.

E. A licensee shall be in violation of these regulations if it retains a direct provider of care for more than ten working days following the mailing of a notice of background check denial for failure to respond by the BCU.

F. A licensee shall be in violation of these regulations if it retains any direct provider of care inconsistent with Subsection A of 8.8.3.11 NMAC.

G. A licensee shall be in violation of these regulations if it hires, contracts with, uses in volunteer service, or retains any direct provider of care for whom information received from any source including the direct provider of care, indicates the provider of care poses an unreasonable risk to care recipients.

H. Any firm, person, corporation, individual or other entity that violates this section shall be subject to appropriate sanctions up to and including immediate emergency revocation of license or registration pursuant to the regulations applicable to that entity or termination of participation in any other program within the scope of these regulations. [8.8.3.12 NMAC - Rp, 8.8.3.12 NMAC, 10/1/16]

8.8.3.13 ARRESTS, CONVICTIONS AND REFERRALS:

A. For the purpose of these regulations, the following information shall result in a conclusion that the applicant is an

unreasonable risk:

(1) a conviction for a felony, or a misdemeanor involving moral turpitude, and the criminal conviction directly relates to whether the applicant can provide a safe, responsible and morally positive setting for care recipients;

(2) a conviction for a felony, or a misdemeanor involving moral turpitude, and the criminal conviction does not directly relate to whether the applicant can provide a safe, responsible and morally positive setting for care recipients if the department determines that the applicant so convicted has not been sufficiently rehabilitated;

(3) a conviction, regardless of the degree of the crime or the date of the conviction, of trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse;

(4) a substantiated referral, regardless of the date, for sexual abuse or for a substantiation of abuse or neglect relating to a failure to protect against sexual abuse;

(5) the applicant's child is in CYFD or another state's custody at the time the application is processed by the BCU; or

(6) a registration, or a requirement to be registered, on a state sex offender registry or repository or the national sex offender registry established under the Adam Walsh Child Protection and Safety Act of 2006.

B. A disqualifying conviction may be proven by:

(1) a copy of the judgment of conviction from the court;

(2) a copy of a plea agreement filed in court in which a defendant admits guilt;

(3) a copy of a report from the federal bureau of investigation, criminal information services division, or the national criminal information center,

indicating a conviction;

(4) a copy of a report from the state of New Mexico, department of public safety, or any other agency of any state or the federal government indicating a conviction;

(5) any writing by the applicant indicating that such person has been convicted of the disqualifying offense, provided, however, that if this is the sole basis for denial, the applicant shall be given an opportunity to show that the applicant has successfully completed or is pending completion of a conditional discharge for the disqualifying conviction.

C. If a background check shows pending charges for a felony offense, any misdemeanor offense involving domestic violence, child abuse, any other misdemeanor offense of moral turpitude, or an arrest but no disposition for any such crime, there shall be a determination of unreasonable risk if a conviction as charged would result in a determination of unreasonable risk.

D. If a background check shows a pending child protective services referral or any other CYFD investigation of abuse or neglect, there shall be a determination of unreasonable risk.

E. If a background check shows that an applicant has an outstanding warrant, there shall be a determination of unreasonable risk. [8.8.3.13 NMAC - Rp, 8.8.3.13 NMAC, 10/1/16]

8.8.3.14 UNREASONABLE RISK:

A. The BCU may, in its discretion, use all reasonably reliable information about an applicant and weigh the evidence about an applicant to determine whether the applicant poses an unreasonable risk to care recipients. The BCU may also consult with legal staff, treatment, assessment or other professionals in the process of determining whether the cumulative weight of credible evidence establishes unreasonable risk.

B. In determining

whether an applicant poses an unreasonable risk, the BCU need not limit its reliance on formal convictions or substantiated referrals, but nonetheless must only rely on evidence with indicia of reliability such as:

- (1) reliable disclosures by the applicant or a victim of abuse or neglect;
- (2) domestic violence orders that allowed an applicant notice and opportunity to be heard and that prohibits or prohibited them from injuring, harassing or contacting another;
- (3) circumstances indicating the applicant is or has been a victim of domestic violence;
- (4) child or adult protection investigative evidence that indicates a likelihood that an applicant engaged in inappropriate conduct but there were reasons other than the credibility of the evidence to not substantiate; or
- (5) any other evidence with similar indicia of reliability.

[8.8.3.14 NMAC - Rp, 8.8.3.14 NMAC 10/1/16]

8.8.3.15 REHABILITATION

PETITION: Any applicant whom the BCU concludes is an unreasonable risk on any basis other than those described at Paragraphs (1), (3), (4), (5), or (6) of Subsection A of 8.8.3.13 NMAC, may submit to the BCU a rehabilitation petition describing with specificity all information that tends to demonstrate that the applicant is not an unreasonable risk. The petition may include, but need not be limited to, a description of what actions the applicant has taken subsequent to any events revealed by the background check to reduce the risk that the same or a similar circumstance will recur.

[8.8.3.15 NMAC - Rp, 8.8.3.15 NMAC 10/1/16]

8.8.3.16 ELIGIBILITY SUSPENSIONS, REINSTATEMENTS AND REVOCATIONS:

- A. An applicant’s

background check eligibility may be suspended for the following:

- (1) an arrest or criminal charge for any felony offense, any misdemeanor offense involving domestic violence, child abuse or any other misdemeanor offense of moral turpitude if a conviction as charged would result in a determination of unreasonable risk;
- (2) a pending child protective services referral or any other CYFD investigation of abuse or neglect; or
- (3) an outstanding warrant.

B. It is the duty of the administrator of a facility or the licensee and the background check eligibility holder, upon learning of any of the above, to notify the licensing authority immediately. Failure to immediately notify the licensing authority may result in the revocation of background check eligibility.

C. A suspension of background check eligibility shall have the same effect as a determination of unreasonable risk until the matter is resolved and eligibility is affirmatively reinstated by the BCU.

D. Background check eligibility may be reinstated as follows:

- (1) If the applicant can provide information relating to the disqualifying criminal charge that would show that a criminal conviction as charged would not lead to an unreasonable risk;
- (2) If the matter causing the suspension is resolved within six months of the suspension, the applicant may provide documentation to the BCU showing how the matter was resolved and requesting reinstatement of background check eligibility. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If, the applicant’s eligibility is revoked, the applicant may appeal the revocation.
- (3) If the matter causing the suspension is resolved after six months of the

suspension, the applicant may reapply for clearance for the same licensee by submitting an electronic fingerprint submission receipt and the required forms. After review, the BCU may reinstate background check eligibility or may revoke eligibility. If the applicant’s eligibility is revoked, the applicant may appeal the revocation. [8.8.3.16 NMAC - N, 10/1/16]

8.8.3.17 APPEAL RIGHTS:

A. Denials: Any applicant who is found ineligible after completion of background check may request an administrative review from CYFD. The request for an administrative review shall be in writing and the applicant shall cause the BCU to receive it within 15 days of the date of the BCU’s written notice of a determination of unreasonable risk. If the request is mailed, three days are added after the period would otherwise expire. The administrative review shall be completed by a review of the record by a hearing officer designated by the cabinet secretary. The hearing officer’s review is limited to:

- (1) whether the BCU’s conclusion of unreasonable risk is supported by any section of these regulations; and
- (2) whether the applicant has been erroneously identified as a person with a relevant conviction or substantiated referral. The review will be completed on the record presented to the hearing officer and includes the applicant’s written request for an administrative review and other relevant evidence provided by the applicant. The hearing officer conducts the administrative review and submits a recommendation to the cabinet secretary no later than 60 days after the date the request for administrative review is received unless CYFD and the applicant agree otherwise.

B. Suspensions and revocations: A previously cleared applicant whose eligibility has been suspended or revoked may appeal that decision to CYFD and shall be entitled to a hearing pursuant

to CYFD’s administrative hearing regulations at 8.8.4 NMAC. The request for appeal shall be in writing and the applicant shall cause the BCU to receive it within 15 days of the date of the BCU’s written notice of suspension. If the request is mailed, three days are added after the period would otherwise expire.
[8.8.3.17 NMAC - Rp 8.8.3.16, 10/1/16]

HISTORY OF 8.8.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:
HED 85-6 (HSD), Regulations Governing Criminal Records Check and Employment History of Licensees and Staff of Child Care Facilities, 8/30/85.

History of Repealed Material:

HED 85-6 (HSD), Regulations Governing Criminal Records Check and Employment History of Licensees and Staff of Child Care Facilities, filed - Repealed 7/30/2001.
8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification, filed 7/30/2001 - Repealed effective 3/29/2002.
8.8.3 NMAC, Governing Criminal Records Checks and Employment History Verification, filed 3/15/2002 - Repealed effective 10/30/03.
8.8.3 NMAC, Governing Background Checks and Employment History Verification, filed 10/16/2003 - Repealed effective 3/31/2006.
8.8.3 NMAC, Governing Background Checks and Employment History Verification, filed 3/31/2006 - Repealed effective 10/1/2016.

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

TITLE 8 SOCIAL SERVICES
CHAPTER 15 CHILD CARE ASSISTANCE
PART 2 REQUIREMENTS FOR CHILD CARE ASSISTANCE PROGRAMS FOR CLIENTS AND CHILD CARE PROVIDERS

8.15.2.1 ISSUING AGENCY: Children, Youth and Families Department.
[8.15.2.1 NMAC - Rp, 8.15.2.1 NMAC, 10/1/16]

8.15.2.2 SCOPE: This policy applies to all clients seeking child care assistance benefits, all child care providers who provide services to clients qualifying for assistance benefits, and employees of the department who determine eligibility for child care assistance benefits. (See 8.15.2.8 NMAC for detailed list.)
[8.15.2.2 NMAC - Rp, 8.15.2.2 NMAC, 10/1/16]

8.15.2.3 STATUTORY AUTHORITY: NMSA section 9-2A-7 (1991).
[8.15.2.3 NMAC - Rp, 8.15.2.3 NMAC, 10/1/16]

8.15.2.4 DURATION: Permanent
[8.15.2.4 NMAC - Rp, 8.15.2.4 NMAC, 10/1/16]

8.15.2.5 EFFECTIVE DATE: October 1, 2016, unless a later date is cited at the end of section.
[8.15.2.5 NMAC - Rp, 8.15.2.5 NMAC, 10/1/16]

8.15.2.6 OBJECTIVE:
A. To establish standards and procedures for the provision of child care assistance benefits to eligible clients and to establish the rights and responsibilities of child care providers who receive payment for providing child care services to clients receiving benefits. To establish minimum requirements for eligibility for program participation and for the provision of child care services to children whose families are receiving benefits and to allow children receiving these benefits access to quality child care settings that promote their physical, mental, emotional, and social development in a safe environment.

B. Permissive language such as “may or may be” when referring to actions taken by the

department, address situations where it is not always prudent or practical to apply these actions. It is not meant to reduce the weight of these actions nor should the intent of the policies be circumvented due to this wording. This language is intended to be construed in a fiscally responsible and equitable manner, keeping in mind that consistency in application is the ultimate goal.
[8.15.2.6 NMAC - Rp, 8.15.2.6 NMAC, 10/1/16]

8.15.2.7 DEFINITIONS:
A. “Attending a job training or educational program” means actively participating in a job training or educational program.
B. “At-risk child care” means a program for families at-risk of child protective services involvement as determined by the department.

C. “CACFP” means the child and adult care food program, administered by the children, youth and families department.

D. “Child with a disability or special needs” means a child with an identified disability, health, or mental health conditions requiring early intervention, special education services, or other specialized services and supports; or children without identified conditions, but requiring specialized services, supports, or monitoring.

E. “Child support enforcement division” means the child support enforcement program administered by New Mexico’s human services department, which collects child support from non-custodial parents.

F. “Closure” means the child care case is closed.

G. “Co-payment” means the portion of the approved and agreed upon monthly child care cost for clients receiving child care assistance that the client is required to pay to the child care provider. The department’s payment to the provider is reduced by the co-payment amount.

H. “Department” means the New Mexico children, youth and families department

(CYFD).

I. "Earned income" means income received as wages from employment or as profit from self-employment.

J. "Homeless children and youth" means individuals who lack a fixed, regular, and adequate nighttime residence, which includes:

(1) Children and youth who are temporarily sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks (excludes mobile homes), or camping ground due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(2) children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;

(3) children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(4) migratory children who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in Paragraphs (1) through (3) of this subsection.

K. "Incidental money" means earnings of a minor child for occasional work performed such as baby-sitting, cutting lawns, and other similar activities.

L. "Infant, toddler, preschool, school age" means the age categories used for assigning child care provider reimbursement rates, defined as follows:

(1) infant: zero - 23 months;

(2) toddler: 24 -35 months;

(3) preschool: three to five year olds; and

(4) school age: six year olds and older.

M. "Job training

and educational program" means participation in a short or long term educational or training program which provides specific job skills which allow the participant to enter the workforce and directly relates to enhancing job skills, including but not limited to the acquisition of a general equivalency diploma (GED), English as a second language, literacy training, vocational education training, secondary education including adult basic education and accredited high school programs, and post-secondary institutions.

N. "National accreditation status" means the achievement and maintenance of accreditation status by an accrediting body that has been approved by CYFD. To determine approval of national accrediting bodies, the following standards are used: for center based programs, CYFD uses the 2007 national association for the education of young children (NAEYC) program standards and accreditation criteria as well as NAEYC's 2007 accreditation process criteria; for family child care, CYFD uses the CYFD family child care accreditation standards; for before and after school care, CYFD uses the CYFD before and after school accreditation standards.

(1) The following are the only national accrediting bodies that are approved by CYFD:

(a) the association of Christian schools international (ACSI);

(b) the council on accreditation (COA) for early childhood education and after school programs;

(c) the international Christian accrediting association (ICAA);

(d) the national accreditation commission for early care and education programs (NAC);

(e) the national association for the education of young children (NAEYC) academy for early childhood program accreditation; or

(f) the national association of family child care (NAFCC).

(2) Effective July 15, 2014 accrediting bodies that have been previously approved by CYFD that are not on the above list will no longer be CYFD approved national accrediting bodies.

O. "Non-temporary change in activity" means the family has experienced a change in activity that does not meet the definition of a "temporary change in activity" as defined in Section CC below.

P. "Non-traditional hours of care" means care provided between the afterhours of 7:00 p.m. and 7:00 a.m. Monday through Friday or care provided during weekend hours between 12:00 a.m. Saturday morning and 12:00 a.m. Monday morning.

Q. "Open case" means a case that has not been closed as a result of a failure to recertify, or that has not been closed due to becoming otherwise ineligible for child care assistance benefits.

R. "Overpayment" means a payment of child care assistance benefits received by a client or provider for which they are ineligible based on incomplete or inaccurate information provided by either the client or the provider, or agency error.

S. "Child Protective services (CPS) child care" means child care services for children placed in the custody of the child protective services of the department.

T. "Provider types" means the characteristics of child care providers, which determine their approved reimbursement rate, capacity, staffing levels etc. as follows:

(1) "In-home" care means care provided in the child's own home.

(2) "Registered home" means child care provided in the home of a provider who is registered with the department to care for up to four children. All registered homes receiving child care assistance subsidies must be enrolled

and participate in the child and adult care food program (CACFP), unless they are exempt.

(3) "Licensed family child care home" means child care provided in the home of a provider who is licensed by the department to care for up to six children.

(4) "Licensed group child care home" means child care provided in the home of a provider who is licensed by the department to care for up to 12 children.

(5) "Licensed center" means child care provided in a non-residential setting, which is licensed by the department to provide such care.

(6) "Out-of-school time care" means child care provided to a kindergartner or school age child up to age 13 immediately before or immediately after a regularly scheduled school day or when regular school is not in session.

U. "Recertification" means the process by which a client's eligibility to continue to receive child care assistance benefits are determined.

V. "Registration/educational fee" means a fee charged to private pay and families receiving child care assistance for materials and supplies.

W. "SNAP" means the supplemental nutrition assistance program administered by the U.S. department of agriculture, which helps low-income families purchase healthy food. SNAP was previously referred to as food stamps employment and training program.

X. "Star level" means a license indicating the level of quality of an early childhood program. A greater number of stars indicates a higher level of quality.

Y. "Suspension" means that the child care case remains eligible, but benefits are not paid to the provider.

Z. "TANF" means the temporary assistance to needy families program administered by the U.S. department of health and human

services. TANF is the successor to the aid to families with dependent children (AFDC) program and provides cash assistance to qualified low-income families with dependent children.

AA. "Teen parent" means a biological parent under the age of 20 who is attending high school, working towards a general equivalency diploma (GED) or attending any other job skills training or educational programs directly related to enhancing employment opportunities.

BB. "Termination" means the child care case will be closed due to cause.

CC. "Temporary change of activity" means one of the following events that does not exceed three months:

(1) limited absence from work for employed parents for periods of family leave (including parental leave) or sick leave;

(2) interruption in work for a seasonal worker who is not working between regular industry work seasons;

(3) student holiday or break for a parent participating in training or education;

(4) reduction in work, training or education hours, as long as the parent is still working or attending training or education; and

(5) cessation of work or attendance at a training or education program less than 90 days.

DD. "Underpayment" means a payment made by the department for services provided which did not fully reimburse the client or provider.

EE. "Unearned income" means income in the form of benefits such as TANF, workmen's compensation, social security, supplemental security income; child support, pensions, contributions, gifts, loans, and grants which does not meet the definition of earned income.

FF. "Waiting list" means a list of families who have applied for child care services during a period of lack of funding.

GG. "Working" means employment of any type, including self-employment. For TANF recipients, this includes work experience or community service or any other activity that meets the TANF work activity requirements. [8.15.2.7 NMAC - Rp, 8.15.2.7 NMAC 10/1/16]

8.15.2.8 TYPES OF CHILD CARE: These policies apply to child care assistance benefits provided to eligible children for the following types of child care to ensure that parents have a variety of child care services from which to choose:

- A. licensed child care programs administered by public schools and post-secondary institutions that provide on-site care for the children of students;
- B. licensed child care programs administered by tribal entities;
- C. licensed child care programs administered by church or religious organizations;
- D. in-home care;
- E. licensed child care centers;
- F. registered family childcare homes;
- G. licensed family and group childcare homes;
- H. licensed out of school time programs; and
- I. licensed programs operated by employers for their employees.

[8.15.2.8 NMAC - Rp, 8.15.2.8 NMAC, 10/1/16]

8.15.2.9 PRIORITIES FOR ASSISTANCE: Any funds received by the department under the child care development fund and other sources are expended for child care assistance pursuant to the following priorities:

- A. Priority one: Clients receiving temporary assistance to needy families (TANF) benefits are considered priority one clients.

(1) Participation exemption: The human services department grants participation exemptions to TANF

clients who cannot locate child care. The children, youth and families department is responsible for the verification of the TANF participant's inability to locate child care. Reasons for a participation exemption due to lack of child care are as follows:

- (a) the unavailability of appropriate child care within a reasonable distance from the individual's home or work site;
- (b) the unavailability or unsuitability of informal child care by a relative or under other arrangements; or
- (c) the unavailability of appropriate and affordable formal child care by a relative or under other arrangements.

(2) A person who applies for participation exemption for any or all of the above reasons is referred to the children, youth & families department child care resource and referral. The child care resource and referral assists the client with location of child care. The final validation/verification of a client's inability to locate child care is determined by the child care services bureau supervisor in conjunction with his/her supervisor. A client who receives a participation exemption due to lack of child care is required to re-apply for the exemption every six months. If a person disagrees with the determination of their eligibility for a participation exemption, they may apply for a fair hearing with the human services department (HSD). HSD is responsible for providing notice of the approval or denial of a participation exemption.

B. Priority one A:
[RESERVED]

C. Priority one B: Child care assistance for income eligible families whose income is at or below one hundred percent of the federal poverty level. If the number of eligible clients in this priority exceeds budget availability, the department may maintain a waiting list. The department prioritizes child care services within priority one B for children with special needs, homeless families, and for teen parents. If budget availability permits, the

department reserves the right to transfer priority one B families whose income exceeds one hundred percent of the federal poverty level but is at or below two hundred percent of the federal poverty level to the priority four category.

D. Priority two: Families transitioning off TANF. Clients must have received TANF for at least one month in the past 12 months in order to qualify for priority two. Only clients whose TANF cases are closed at least in part due to increased earnings or loss of earned income deductions or disregards are eligible for priority two. Priority two clients do not have to meet income eligibility requirements during their 12 consecutive month period of eligibility for priority two child care.

E. Priority three:
[RESERVED]

F. Priority four: Child care assistance for families whose income is above one hundred percent of the federal poverty level but at or below two hundred percent of the federal poverty level, adjusted annually in accordance with federal guidelines. These families are certified for a 12 month block of time subject to the availability of funds and renewable subject to the availability of funds. Exceptions to the 12 month certification period are included in 8.15.2.11 NMAC. The department reserves the right to expand the eligibility requirement up to two hundred percent of the federal poverty level based on budget availability. Families in any priority may be transferred to priority four if budget availability permits. If the number of eligible clients in this priority exceeds budget availability, the department may maintain a waiting list. The department prioritizes child care services within priority four for children with special needs, disabilities, teen parents and homeless families.

G. Child protective services (CPS) child care: The department pays for CPS child care as determined by the protective services of the department. Income requirements and copayments are

waived for clients in this priority.

H. At-risk child care: In addition to these priorities, the department pays for at-risk protective services child care as approved by the department. Child care benefits are provided for a minimum of six months to support the family. Income requirements and copayments are waived for clients in this priority. [8.15.2.9 NMAC - Rp, 8.15.2.9 NMAC, 10/1/16]

8.15.2.10 APPLICATION PROCESS:

A. Clients apply for child care assistance benefits by presenting the following documents to establish eligibility in person at the local child care office. Upon a need or request by the client, the department may approve a client to submit their initial application by fax, email, or mail. Clients shall have 14 calendar days after initial submission of an application to submit all other required forms. Under documented extenuating circumstances and with approval from the early childhood services director, clients may be given longer than 14 days but no more than 30 days to submit required documentation:

- (1) a completed signed application form;
- (2) current proof of earned income or participation in the temporary assistance to needy families (TANF) program; social security numbers or assigned TANF identification numbers may be used to verify TANF participation or receipt of child care support;
- (3) school schedule or verification of educational activity, if applicable;
- (4) verification of birth for all applicant's household children;
- (5) proof of unearned income;
- (6) proof of New Mexico home address; and
- (7) CYFD approved provider.

B. Assistance is provided effective the first day of

the month of application if all of the following apply:

- (1) the client is utilizing child care services;
- (2) the client is employed, attending school or a training program; and
- (3) the eligible provider to be paid was providing care from the first day of the month forward.

[8.15.2.10 NMAC - Rp, 8.15.2.10 NMAC, 10/1/16]

8.15.2.11 ELIGIBILITY REQUIREMENTS: Clients are eligible for child care assistance benefits upon meeting the requirements for eligibility as determined by the department and federal regulation.

A. Child care staff will initiate communication at the initial eligibility determination of their eligibility period to provide outreach and consumer education with a case management approach and coordination of services to support families.

B. Eligibility period: Based upon the client meeting all eligibility requirements, a 12-month certification period will be granted.

(1) Eligibility may be granted for less than 12 months at the parent or guardian's request.

(2) Eligibility for CPS and at-risk child care may be granted for less than 12 months as determined by the department.

(3) The client will remain eligible if a temporary change of activity occurs.

(4) If a client experiences a non-temporary change in activity, the client will no longer be eligible to receive assistance if another activity is not obtained within the three-month grace period.

C. Income eligibility determination:

(1) The household: The household includes biological parents, stepparents, and legal guardians living in the household, thereby constituting an economic unit, and any dependents

of the aforementioned who are under 18 years of age. Grandparents will be considered household members only if they are legal guardians of the children, are providing for the physical and emotional needs of the children, and are applying for child care benefits on behalf of the children.

(2) Allowed exclusions from the household for co-payment calculation only: Excluded from the household for co-payment calculation purposes only are grandparents or legal guardians who have taken custody/guardianship of children due to circumstances such as but not limited to death of biological parents or other documented circumstances such as mental or physical incapacity of biological parents to care for the child or children. Grandparents or legal guardians in this situation are required to qualify for child care assistance as per Paragraph (4) below and, upon qualification, have the required co-payment waived.

(3) Adult dependent children: 18 year old dependent children must be attending school to be counted in the household. Incidental money earned by dependent children is not to be counted as household income.

(4) Household income: Income eligibility for benefits is determined by the number of members in the household and the total countable gross earned and unearned income. Eligibility determinations will take into account irregular fluctuations of earnings to income based on the client's individual circumstances.

(5) Family assets: A family's assets may not exceed one million dollars.

(6) Countable earned and unearned income: The following sources of income are counted when computing a family's eligibility for assistance and for determining the co-payment (if applicable): income from employment by working for others or from self-employment; child support payments; alimony payments; veterans administration (VA)

payments except VA payments for educational purposes and disability; union payments; unemployment or workman's compensation; railroad retirement benefits; pensions; TANF benefits, including diversion payments; royalties; income from rental property; social security benefits; work study income; overtime shall be counted at CYFD's discretion if CYFD determines that the applicant is paid overtime on a regular basis.

(7) Exempt income: The types of income not counted when computing eligibility or co-payments include but are not limited to: earnings of a dependent child who is under 18 and in school; SNAP; military food and housing allowances; an increase in military salary or allowances due to "temporary national emergency status beginning September 11, 2001"; third party payments; energy assistance benefits; foster care payments; adoption subsidies; VA payments for educational purposes and disability; loans; child or adult nutrition programs; income tax refunds; payments for educational purposes; compensation under the Domestic Volunteer Services Act and the volunteers in service to America (VISTA) program or Americorp; Work Investment Act (WIA) payments made to dependent children; relocation payments; department of vocational rehabilitation (DVR) training payments; in-kind gifts; cash gifts; employer reimbursements; overtime, unless CYFD determines that the applicant is paid overtime on a regular basis; payments from special funds such as the agent orange settlement fund or radiation exposure compensation settlement fund; lump sum payments such as those resulting from insurance settlements and court judgments; or other resources such as savings, individual retirement accounts (IRAs), vehicles, certificates of deposits (CDs) or checking accounts.

(8) Verification of income: Clients applying for child care assistance benefits are required to verify income by providing current proof

of income for all members of the household who receive income. Self-employed clients must show proof of business expenses in order for the countable self-employment income to be determined. A self-employed individual who does not show a profit that is equal to federal minimum wage times the amount of hours needed per week within 24 months from the start date of receiving child care assistance will be evaluated by the child care assistance supervisor, at which point services may be discontinued.

D. Residency requirement: An applicant of child care assistance and a child care provider must be a resident of the state of New Mexico. Proof of residency is required.

E. Citizenship: Any child receiving child care assistance must be a citizen of the United States; or a qualified alien as determined by applicable federal laws. If a child is determined to be a citizen of the United States or a qualified alien, as approved by the New Mexico human services department, the child will be eligible provided all other eligibility requirements are met regardless of the citizenship or alien status of the child's parent or parents.

F. Age requirement: Child care benefits are paid for children between the ages of six weeks up to the day in which the child turns 13 years old. Eligibility determinations made prior to a child turning 13 years old may be granted a 12-month eligibility period or a lesser period of time as determined by the department for CPS or at-risk child care.

G. Failure to use authorized child care: If authorized child care has not been used for five consecutive scheduled days without a reason such as illness, sudden death, or family medical emergency, payment may discontinue to the provider and the client will remain eligible for the remainder of their eligibility period. The provider or the client shall notify the department within three business days after the fifth day of non-attendance. Upon receiving notice from the provider

or the client within the prescribed timeframe, the department shall issue a notice to the client stating when the client's placement will be closed and shall simultaneously issue a notice to the provider stating when the last date of payment will be made. Providers shall be paid through the 14th day following the first day of nonattendance provided that the department was notified within the timeframe prescribed above. If the department is not notified within the prescribed timeframe, the provider shall be paid through the last date of attendance.

H. Change in Provider: If the parent or guardian changes providers, the provider shall be paid through the 14th day following the first day of nonattendance provided that the department was notified within the timeframe prescribed. If the department is not notified within the prescribed timeframe, the provider shall be paid through the last date of attendance.

I. Work/education requirement: Child care benefits are paid only for families who are working, attending school or participating in a job training or educational program and who demonstrate a need for care during one or more of these activities. Clients who are receiving TANF are required to participate in a TANF-approved activity unless they are exempt by TANF. Clients and caseworkers shall negotiate a reasonable amount of study and travel time during the application or recertification process. Child care will not be paid during the hours in which a parent or guardian is attending graduate or post-graduate courses. Child care benefits for clients who are preparing for the acquisition of a GED shall be limited to one year.

J. Periods of absences: A household member may be absent from the home and will be considered as living in the home and be counted in the household composition as long as the absent household member plans to return to the home. Any parent or guardian who remains in the home

must be working, attending school, or participating in a job training or educational program. Temporary absence may include, but are not limited to, attending school, working, training, or military service.

K. Special supervision: Child care benefits may be provided to children between the ages of 13 and 18 who are under the supervision of a court of law, or who are determined by a medical professional to require supervision because of a diagnosis of a physical, emotional, or neurobiological impairment, or who are physically or mentally incapable of caring for themselves. Children with special needs are prioritized relative to budget availability.

L. Children enrolled in head start, kindergarten, school or other programs: Child care benefits are not paid during the hours that children are attending head start, kindergarten, New Mexico pre-K, school or other programs. [8.15.2.11 NMAC - Rp, 8.15.2.11 NMAC, 10/1/16]

8.15.2.12

RECERTIFICATION: Clients must recertify for services at the end of their eligibility period by complying with all requirements of initial certification. If recertification is not completed in a timely manner, the case may be closed on the last day of the month for which assistance is provided under the previous placement agreement. At time of recertification, clients must provide proof of income, or proof of school enrollment. Changes in income, household size, employment, training or educational status are noted in the client's record. Co-payment, if applicable, is re-determined at the time of recertification. [8.15.2.12 NMAC - Rp, 8.15.2.12 NMAC, 10/1/16]

8.15.2.13 CLIENT

RESPONSIBILITIES: Clients must abide by the regulations set forth by the department and utilize child care assistance benefits only while they are working, attending school or participating in a training or

educational program.

A. Co-payments: Co-payments are paid by all clients receiving child care assistance benefits, except for CPS child care, at-risk child care, and qualified grandparents or legal guardians as defined in Paragraph (2) of Subsection C of 8.15.2.11 NMAC. Co-payments are based upon the size and income of the household.

B. Co-payments for each additional child are determined at one half of the co-payment for the previous child.

C. Co-payments for children in part-time care are determined based upon the block of time that the child is in care.

D. Clients pay co-payments directly to their child care provider and must remain current in their payments. A client who does not pay co-payments may be subject to sanctions.

E. The co-payment for a child shall not exceed the monthly provider reimbursement rate. If this situation arises, the co-payment may be reduced in the amount by which it exceeds the monthly provider reimbursement rate.

F. In-home providers: Parents who choose to use an in-home provider become the employer of the child care provider and must comply with all federal and state requirements related to employers, such as the payment of all federal and state employment taxes and the provision of wage information. Any parent who chooses to employ an in-home provider releases and holds the department harmless from any and all actions resulting from their status as an employer. Payments for in-home provider care are made directly to the parent.

G. Notification of changes: Clients must notify the department of changes that affect the need for care, which include but are not limited to any non-temporary change in activity, or household members moving in or out, within five business days of the change. Clients who do not comply with this requirement may be sanctioned.

H. Required application with New Mexico human services department's child support enforcement division (CSED):
 (1) When one or both of the child's parents are absent from the home, the client shall apply for child support through CSED within 12 months of initial application with the child care assistance program.

(2) The following exceptions include but are not limited to: the client is receiving TANF; the client is already receiving child support; the client is receiving financial support, including but not limited to housing, clothing, food, transportation and funds, from the non-resident parent; there is a joint custody agreement and neither parent is ordered to pay support; parental rights have been terminated; the parent is a foster parent to the child; the parent is an adoptive parent and provides proof of a single parent adoption; at-risk child care; a parent is temporarily out of the home and is still considered part of the household; the client is a teen parent; the client is a grandparent; guardian; parent is deceased or when good cause exists.

(3) Good cause for refusal to apply may be granted when such application is not in the best interest of the child or parent, including but not limited to the following circumstances:

(a) there is possible physical or emotional harm to the child, parent or guardian;

(b) the child was conceived as a result of incest or rape;

(c) legal proceedings for adoption of the child are pending before a court; or
 (d) the client is currently being assisted by a public or licensed private social agency to resolve the issue of whether to keep the child or relinquish the child for adoption.

(4) The applicant or recipient who makes a claim for good cause shall supply written documentation to establish the claim. The caseworker shall not deny,

delay, or discontinue subsidized child care benefits pending a determination of good cause if the applicant or recipient has complied with the requirements to furnish information.

(5) If the client is not exempted from applying with CSED and has not applied within the required timeframe, the client's case will be closed.
 [8.15.2.13 NMAC - Rp, 8.15.2.13 NMAC, 10/1/16]

8.15.2.14 CASE SUSPENSIONS AND CLOSURES:

A. A case may be suspended by the client if child care benefits are not being utilized for a period not to exceed three months with payment being discontinued to the provider. The client will remain eligible for child care assistance through the remainder of their eligibility period.

B. If the client experiences a non-temporary change of activity including the loss of employment, no longer attending school, or no longer participating in a job training or education program, the client will be granted a three-month grace period in which the client will remain eligible. This three-month grace period is for the purpose of giving the client an opportunity to secure new employment or another approved activity. The three-month grace period will start on the date of required notification for the non-temporary change of activity pursuant to section 8.15.2.13 G NMAC.

C. A case will be closed if the following conditions apply:

(1) any non-temporary change in activity and failure to obtain an activity after the three-month grace period;

(2) income in excess of two hundred percent federal poverty level or eighty-five percent state median income, whichever is greater;

(3) moving out of state;

(4) failing to recertify at the end of approved eligibility period;

(5) at the option of the client;
 (6) being disqualified from participation in the program; or
 (7) failure to use authorized child care.
 [8.15.2.14 NMAC - Rp, 8.15.2.14 NMAC, 10/1/16]

8.15.2.15 PROVIDER

REQUIREMENTS: Child care providers must abide by all department regulations. Child care provided for recreational or other purposes, or at times other than those outlined in the child care agreement, are paid for by the client.

A. All child care providers who receive child care assistance reimbursements are required to be licensed or registered by the department and meet and maintain compliance with the appropriate licensing and registration regulations in order to receive payment for child care services. Beginning July 1, 2012, child care programs holding a 1-star license are not eligible for child care assistance subsidies. The department honors properly issued military child care licenses to providers located on military bases and tribal child care licenses properly issued to providers located on tribal lands.

B. Child care providers collect required co-payments from clients and provide child care according to the terms outlined in the child care agreement.

C. Child care providers must notify the department within three business days after the fifth day of non-attendance if the child is disenrolled or is absent for five consecutive scheduled days. Providers who do not comply with this requirement are sanctioned and may be subject to recoupment or disallowance of payments as provided by Subsection G of 8.15.2.11 NMAC.

D. Child care providers accept the rate the department pays for child care and are not allowed to charge families receiving child care assistance above the department rate for the hours listed on the placement

agreement. Failure to comply with this requirement may result in sanctions or suspension of the child care assistance agreement.

(1) In situations where an incidental cost may occur such as field trips, special lunches or other similar situations, the child care provider is allowed to charge the child care assistance family the additional cost, provided the cost does not exceed that charged to private pay families.

(2) Providers may charge a registration/educational fee to a child care assistance family comparable to but not to exceed that charged to private pay families. The registration/educational fee shall be charged no more than once every six months and shall be limited to materials and supplies. If the department determines that the provider is charging fees that are unreasonable and pose an undue burden to child care assistance families, the department may suspend the child care assistance contract.

(3) Child care providers are allowed to charge child care assistance families the applicable gross receipts tax for the sum of the child care assistance benefit and co-payment.

E. Under emergency circumstances, when CYFD has reason to believe that the health, safety or welfare of a child is at risk, the department may immediately suspend or terminate assistance payments to a licensed or registered provider. The child care resource and referral will assist clients with choosing another CYFD approved provider.

F. Providers who are found to have engaged in fraud relating to any state or federal programs, or who have pending charges for or convictions of any criminal charge related to financial practices will not be eligible to participate in the subsidy program.
 [8.15.2.15 NMAC - Rp, 8.15.2.15 NMAC, 10/1/16]

8.15.2.16 DEPARTMENT RESPONSIBILITIES:

A. The department will initiate mid-certification communication with the client to provide outreach and consumer education with a case management approach and coordination of services to support families.

B. The department pays child care providers who provide child care services to department clients in a timely manner.

C. Child care assistance workers perform all casework functions in a timely manner, including the processing of payments and notifications of case actions.

D. Child care assistance workers will perform all eligibility and recertification determinations within 10 working days upon receipt of all required documentation from the client.

E. Child care assistance workers notify clients and providers in writing of all actions, which affect services, benefits, or provider payments or status, citing the applicable policy.

F. Child care assistance workers determine eligibility for all child care assistance programs except for TANF. Eligibility for TANF is determined by the New Mexico human services department.

G. Child care assistance workers must inform parents of their right to choose their child care providers and provide information on how to look for quality child care in a provider.

H. The department and other organizations approved by the department provide information and orientation programs regarding child care assistance benefits, quality child care issues, and the impact of child care on the child's physical, mental, social and emotional development to parents and providers.

I. The department and other organizations approved by the department offers provider education programs consisting of training on program participation requirements, parent and provider responsibilities, licensing and registration

requirements, payment issuance and background check processing, the competency areas for child care providers as outlined by the office of child development, or the department, the importance of providing quality child care, and other topics of interest to parents and providers. These education programs count toward the continuing education hours required of providers by registration and licensing regulations.

[8.15.2.16 NMAC - Rp, 8.15.2.16 NMAC, 10/1/16]

8.15.2.17 PAYMENT FOR

SERVICES: The department pays child care providers on a monthly basis, according to standard practice for the child care industry. Payment is based upon the child's enrollment with the provider as reflected in the child care placement agreement, rather than daily attendance. As a result, most placements reflect a month of service provision and are paid on this basis. However, placements may be closed at any time during the month. The following describes circumstances when placements may be closed and payment discontinued at a time other than the end of the month:

A. When the child care placement agreement expires during the month, or when the provider requests that the client change providers or the provider discontinues services; payment will be made through the last day that care is provided.

B. Upon a change of provider the client and former provider have three days after the fifth day of nonattendance to notify the department. If this requirement for notification was met, the provider will be paid through the 14th day following the first date of nonattendance. If notification requirement is not met, the provider will be paid through the last date of attendance. The agreement with the new provider shall become effective when payment to the previous provider ceases. If the client notifies the department of the change in providers fewer than 14 days before

the change will take place or after the change has taken place, the client is responsible for payment to the new provider beginning on the start date at the new provider and continuing up until the final date of payment to the former provider, as described above. Payment to the former provider will be made through the last day that care is provided if the child is withdrawn from the provider because the health, safety or welfare of the child is at risk, as determined by a substantiated complaint against the child care facility.

C. The amount of the payment is based upon the age of the child and average number of hours per week needed per child during the certification period. The number of hours of care needed is determined with the parent at the time of certification and is reflected in the provider agreement. Providers are paid according to the units of service needed which are reflected in the child care agreement covering the certification period.

D. The department pays for care based upon the following units of service:

**Continued On The Following
Page**

Full time	Part time 1	Part time 2 (only for split custody or in cases where a child may have two providers)	Part time 3
Care provided for an average of 30 or more hours per week per month	Care provided for an average of 8-29 hours per week per month	Care provided for an average of 6-19 hours per week per month	Care provided for an average of 7 or less hours per week per month
Pay at 100% of full time rate	Pay at 75 % of full time rate	Pay at 50 % of full time rate	Pay at 25% of full time rate

E. Hours of care shall be rounded to the nearest whole number.

F. Monthly reimbursement rates:

Licensed child care centers			
Infant	Toddler	Pre-school	School-age
\$720.64	\$589.55	\$490.61	\$436.27
Licensed group homes (capacity: 7-12)			
Infant	Toddler	Pre-school	School-age
\$586.07	\$487.11	\$427.13	\$422.74
Licensed family homes (capacity: 6 or less)			
Infant	Toddler	Pre-school	School-age
\$566.98	\$463.50	\$411.62	\$406.83
Registered homes and in-home child care			
Infant	Toddler	Pre-school	School-age
\$289.89	\$274.56	\$251.68	\$251.68

G. The department pays a differential rate according to the license or registration status of the provider, national accreditation status of the provider if applicable, and star level status of the provider if applicable.

H. Providers holding and maintaining CYFD approved national accreditation status will receive the differential rate listed in Subsection I. below, per child per month for full time care above the base rate for type of child care (licensed center, group home or family home) and age of child. All providers who maintain CYFD approved national accreditation status will be paid at the accredited rates for the appropriate age group and type of care. In order to continue at this accredited reimbursement rate, a provider holding national accreditation status must meet and maintain licensing standards and maintain national accreditation status without a lapse. If a provider holding national accreditation status fails to maintain these requirements, this will result in the provider reimbursement reverting to a lower level of reimbursement.

(1) Providers who receive national accreditation on or before December 31, 2014 from an accrediting body that is no longer approved by CYFD will no longer have national accreditation status, but will remain eligible to receive an additional \$150 per child per month for full time care above the base rate for type of child care (licensed center, group home or family home) and age of child until December 31, 2017.

(a) In order to continue at this reimbursement rate until December 31, 2017 a provider holding accreditation from accrediting bodies no longer approved by CYFD must maintain licensing standards and maintain accreditation without a lapse.

(b) If the provider fails to maintain their accreditation, the provider reimbursement will revert to the base reimbursement rate unless they have achieved a FOCUS star level or regain national accreditation status approved by CYFD.

(2) The licensee shall notify the licensing authority within 48 hours of any adverse action by the national accreditation body against the licensee's national accreditation status, including but not limited to expiration, suspension, termination, revocation, denial, nonrenewal, lapse or other action that could affect its national accreditation status. All providers are required to notify the department immediately when a change in accreditation status occurs.

I. The department will pay a differential rate per child per month for full time care above the base reimbursement rate to providers achieving higher Star levels by meeting FOCUS essential elements of quality as follows:

2+ Star FOCUS Child Care Centers, Licensed Family and Group Homes			
Infant	Toddler	Pre-school	School-age
\$88.00	\$88.00	\$88.00	\$88.00
3 Star FOCUS Child Care Centers, Licensed Family and Group Homes			
Infant	Toddler	Pre-school	School-age
\$100.00	\$100.00	\$100.00	\$100.00
4 Star FOCUS Licensed Family and Group Homes			
Infant	Toddler	Pre-school	School-age
\$180.00	\$180.00	\$180.00	\$180.00
5 Star FOCUS or CYFD approved national accreditation Licensed Family and Group Homes			
Infant	Toddler	Pre-school	School-age
\$250.00	\$250.00	\$250.00	\$250.00
4 Star FOCUS Child Care Centers			
Infant	Toddler	Pre-school	School-age
\$280.00	\$280.00	\$250.00	\$180.00
5 Star FOCUS or CYFD approved national accreditation Child Care Centers			
Infant	Toddler	Pre-school	School-age
\$550.00	\$550.00	\$350.00	\$250.00

J. In order to continue at the FOCUS reimbursement rates, a provider must meet and maintain the most recent FOCUS eligibility requirements and star level criteria. If the provider fails to meet the FOCUS eligibility requirements and star level criteria the provider reimbursement will revert to the FOCUS criteria level demonstrated.

K. Differential rates determined by achieving higher star levels determined by AIM HIGH essential elements of quality will be discontinued effective December 31, 2017. The department will pay a differential rate to providers achieving higher star levels determined by the AIM HIGH essential elements of quality until December 31, 2017 as follows: 3-Star at \$88.00 per month per child for full time care above the base reimbursement rate; 4-Star at \$122.50 per month per child for full time care above the base reimbursement rate, and 5-Star at \$150.00 per child per month for full time care above the base reimbursement rate. In order to continue at these reimbursement rates, a provider must maintain and meet most recent AIM HIGH star criteria and basic licensing requirements. If the provider fails to meet the requirements, this will result in the provider reimbursement reverting to the base reimbursement rate.

L. The department pays a differential rate equivalent to five percent, ten percent or fifteen percent of the applicable full-time/part-time rate to providers who provide care during non-traditional hours. Non-traditional care will be paid according to the following charts:

	1-10 hrs/wk	11-20 hrs/wk	21 or more hrs/wk
After hours	5%	10%	15%

	1-10 hrs/wk	11-20 hrs/wk	21 or more hrs/wk
Weekend hours	5%	10%	15%

M. If a significant change occurs in the client’s circumstances, (see Subsection G of 8.15.2.13 NMAC) the child care placement agreement may be modified and the rate of payment is adjusted. The department monitors attendance and reviews the placement at the end of the certification period when the child is re-certified.

N. The department may conduct provider or parent audits to assess that the approved service units are consistent with usage. Providers found to be defrauding the department are sanctioned. Providers must provide all relevant information requested by the department during an audit.

O. Payments are made to the provider for the period covered in the placement agreement or based on the availability of funds.

[8.15.2.17 NMAC - Rp, 8.15.2.17 NMAC, 10/1/16]

8.15.2.18 UNDER PAYMENTS: If a client or provider is underpaid for child care services, the department may issue a one-time payment within 15 calendar days of the department’s knowledge or receipt of notification. Notification

of the department by the client or provider must occur within 90 calendar days of the occurrence of alleged underpayment.
[8.15.2.18 NMAC - Rp, 8.15.2.18 NMAC, 10/1/16]

8.15.2.19 OVER PAYMENT AND RECOUPMENT: If a provider receives payment for services for which he/she is not entitled, or a client receives benefits on behalf of their child for which he/she is not entitled, and this results in an overpayment, the child care worker will initiate recoupment procedures unless the early childhood services director deems otherwise in exceptional circumstances. The client or provider must repay the amount of the overpayment to the department within 30 calendar days of notification, unless the department determines that the amount is so large that it cannot be paid in one lump sum. In this case, the department may allow the client or provider to repay the amount over a payment period, negotiated between the client and the department, usually not to exceed four months. Failure to pay the overpayment within 30 days of the notice or failure to make regular payments under an agreed upon payment schedule may result in sanctions including termination of benefits or referral of the account to a collection agency or legal action.
[8.15.2.19 NMAC - Rp, 8.15.2.19 NMAC, 10/1/16]

8.15.2.20 FRAUD: The purposeful misrepresentation of facts relating to eligibility for benefits, or knowingly omitting information that affects eligibility is fraud and appropriate sanctions, including recoupment, termination of benefits, and referral to law enforcement, are initiated by the department. Fraudulent cases are reported to the department, which will take such action as is deemed necessary. The case remains open at the same rate of benefits until the investigation is concluded and disposition is determined.
[8.15.2.20 NMAC - Rp, 8.15.2.20 NMAC, 10/1/16]

8.15.2.21 SANCTIONS: If a client or provider fails to meet programmatic requirements that affect benefits and result in an overpayment, sanctions may be imposed according to the severity of the infraction as determined by the department and detailed below.

A. Providers or clients who fail to make timely payments in the case of recoupment of overpayments may be referred to a collection agency

B. Providers who fail to report in a timely manner that a child is not in attendance for five consecutive, scheduled days will have the payment recoupment process initiated.

C. Providers who allow their registration or license to lapse without renewal will not be paid during the periods for which the license or registration is not current. Providers who lose national accreditation status or lose eligibility for payment at any level of reimbursement for failure to maintain the standards required to be paid at that level of reimbursement, will not be paid at that level of reimbursement beginning with the first day of the month during which the loss of accreditation or eligibility occurred. Payment recoupment will be sought for any period for which excessive benefits have been paid.

D. Clients who fail to notify the department of any non-temporary change of activity may be placed on conditional eligibility status up to one year on the following eligibility period. Any further violations within the conditional eligibility period may result in termination.

E. Clients who fail to pay co-payments may be disqualified until the co-payment is paid or until an agreement is made between the client and the provider to bring the co-payment current. The department assists the provider in collecting the co-payment only if the co-payment has been in arrears 30 calendar days or less.

[8.15.2.21 NMAC - Rp, 8.15.2.21 NMAC, 10/1/016]

8.15.2.22 FAIR HEARINGS: Clients who have been denied benefits, whose benefits have been reduced, terminated, or who have been sanctioned or disqualified from the program, or providers who have been sanctioned, disqualified from the program, had assistance payments suspended or terminated, or from whom a payment recoupment is being sought may request a fair hearing. The request for a fair hearing must be made in writing within 30 calendar days from the date the department took the adverse action affecting the claimant's benefits.

A. The department reviews the request for hearing and determines if the matter can be resolved without proceeding to a fair hearing. If the matter cannot be resolved without a fair hearing, the department conducts the fair hearing within 60 calendar days of receipt of the letter requesting the hearing and notifies the claimant of the date of the hearing no less than 14 calendar days prior to the hearing. The location of the hearing must be easily accessible to the claimant. Conducting the fair hearing by telephone is permitted. The claimant may request a change of date, provided that the 60 calendar day time limit is not exceeded.

B. The department appoints a hearing officer. The department is not responsible or liable for a claimant's travel costs, legal costs, or any other costs associated with the claimant's request for a fair hearing.

C. The hearing officer reviews all of the relevant information and makes a final decision within 30 calendar days of the hearing. The final decision is binding upon the department and claimant and implemented within 14 calendar days of the hearing decision. The claimant is notified in writing of the hearing officer's decision within 14 calendar days of the hearing decision.

D. At the claimant's option the case may remain open at the same benefit level until disposition. If the decision is in favor of the department, the claimant is responsible for repayment of all

monies received to which the claimant was not entitled, unless the hearing decision provides otherwise or the early childhood services director authorizes otherwise in exceptional circumstances. The fair hearing process is not intended as a means to extend the time for receipt of child care assistance payments to which the recipient is not otherwise entitled, and therefore exceptional circumstances must be explicitly stated.

E. Child care assistance workers determine eligibility for all child care assistance programs except for TANF. Eligibility for TANF is determined by the New Mexico human services department. If TANF benefits are modified or terminated by HSD, then the client applies for a fair hearing to HSD.

[8.15.2.22 NMAC - Rp, 8.15.2.22 NMAC, 10/1/16]

8.15.2.23 COMPLAINTS:

Clients or providers who are dissatisfied with the services provided by the department may express their complaints orally or in writing to the local field office, the central office, the director's office or the office of the department secretary. The department's toll free number is posted in each office and made available to clients and providers upon request. The local supervisor, bureau chief, director or secretary responds to complaints by clients or providers orally or in writing as is deemed appropriate in each case.

[8.15.2.23 NMAC - Rp, 8.15.2.23 NMAC, 10/1/16]

8.15.2.24 CO-PAYMENT SCHEDULE:

The department will develop and publish an annual co-payment schedule based on the federal poverty guidelines.

[8.15.2.24 NMAC - Rp, 8.15.2.24 NMAC, 10/1/16]

8.15.2.25

CONFIDENTIALITY: Client files are established and maintained solely for use in the administration of the child care assistance program. Information contained in the records

is confidential and is released only in the following limited circumstances:

- A. to the client upon request;
- B. to an individual who has written authorization from the client;
- C. to department employees and agents who need it in connection with program administration, including program auditors; or
- D. to other agencies or individuals including law enforcement officers who satisfy the following conditions:

(1) agency or individual is involved in the administration of a federal or a federally-assisted program, which provides assistance in cash, in kind or in services directly to individuals on the basis of need;

(2) information is to be used for the purpose of establishing eligibility, determining amount of assistance or for providing services for applicants or recipients;

(3) agency or individual is subject to standards of confidentiality comparable to those contained herein; and

(4) agency or individual has actual or implied consent of the applicant or recipient to release the information; in an emergency, information may be released without permission, but the client must be informed of its release immediately thereafter; consent may be considered as implied if the client has made application to the inquiring agency for a benefit of service;

E. as requested in a subpoena or subpoena duces tecum. [8.15.2.25 NMAC - Rp, 8.15.2.25 NMAC, 10/1/16]

HISTORY OF 8.15.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the Commission of Public Records B State Records Center and Archives:

ISD CCAP 200, Child Care Assistance Programs, 11/4/91.
ISD CCAP 300, Hours Of Child Care,

11/4/91.

ISD CCAP 700, Working Family Child Care Assistance Eligibility, 11/4/91.

ISD CCAP 800, Income Eligible Child Care Assistance, 2/10/92.

History of Repealed Material:

8 NMAC 15.2 Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 8/1/99.

8 NMAC 15.2 Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 8/1/00.

8 NMAC 15.2 Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 8/1/01.

8.15.2 NMAC Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 11/01/02.

8 15.2 NMAC Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 2/14/05.

8 15.2 NMAC Requirements for Child Care Assistance Programs for Clients and Child Care Providers, - repealed, 10/1/16.

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

TITLE 8 SOCIAL SERVICES

CHAPTER 16 CHILD CARE LICENSING

PART 2 CHILD CARE CENTERS, OUT OF SCHOOL TIME PROGRAMS, FAMILY CHILD CARE HOMES, AND OTHER EARLY CARE AND EDUCATION PROGRAMS

8.16.2.1 ISSUING

AGENCY: Children, Youth and Families Department (CYFD).

[8.16.2.1 NMAC - Rp, 8.16.2.1 NMAC, 10/1/16]

8.16.2.2 SCOPE:

All child care centers, out of school time programs, family child care homes, and other early care and education

programs within the state of New Mexico.

[8.16.2.2 NMAC - Rp, 8.16.2.2 NMAC, 10/1/16]

8.16.2.3 STATUTORY

AUTHORITY: The regulations set forth herein, which govern the licensing of facilities providing child care to children, have been promulgated by the secretary of the New Mexico children, youth and families department, by authority of the Children, Youth and Families Department Act, Section 9-2A-1 to 9-2A-16 NMSA 1978, and Sections 24-1-2 (D), 24-1-3 (I) and 24-1-5 of the Public Health Act, Sections 24-1-1 to 24-1-22, NMSA 1978, as amended. [8.16.2.3 NMAC - Rp, 8.16.2.3 NMAC, 10/1/16]

8.16.2.4 DURATION:

Permanent. [8.16.2.4 NMAC - Rp, 8.16.2.4 NMAC, 10/1/16]

8.16.2.5 EFFECTIVE

DATE: October 1, 2016, unless a later date is cited at the end of a section. [8.16.2.5 NMAC - Rp, 8.16.2.5 NMAC, 10/1/16]

8.16.2.6 OBJECTIVE:

The objective of 8.16.2 NMAC is to establish standards and procedures for the licensing of facilities and educators who provide child care to children within New Mexico. These standards and procedures are intended to: establish minimum requirements for licensing facilities providing non-residential care to children in order to protect the health, safety, and development of the children; monitor facility compliance with these regulations through surveys to identify any areas that could be dangerous or harmful to the children or staff members; monitor and survey out of school time programs; and encourage the establishment and maintenance of child care centers, homes and facilities for children that provide a humane, safe, and developmentally appropriate environment. These regulations apply

during all hours of operation for child care centers, homes and out of school time programs.

[8.16.2.6 NMAC - Rp, 8.16.2.6 NMAC, 10/1/16]

8.16.2.7 DEFINITIONS:

A. "Abuse" means any act or failure to act, performed intentionally, knowingly or recklessly, which causes or is likely to cause harm to a child, including:

(1) physical contact that harms or is likely to harm a child;

(2) inappropriate use of a physical restraint, isolation, medication or other means that harms or is likely to harm a child; and

(3) an unlawful act, a threat or menacing conduct directed toward a child that results or might be expected to result in fear or emotional or mental distress to a child.

B. "Activity area" means space for children's activities where related equipment and materials are accessible to the children.

C. "Adult" means a person who has a chronological age of 18 years or older.

D. "AIM HIGH" is a voluntary quality child care improvement program that is no longer open to new registered or licensed child care programs. Recognition of AIM HIGH will terminate on December 31, 2017.

E. "Assessment of children's progress" means children's progress is assessed informally on a continuous basis using a series of brief anecdotal records (descriptions of the child's behavior or skills in given situations). Children's progress also can be assessed formally at least twice a year using a developmental checklist (checklist of behaviors that indicate physical, motor, language, cognitive, social and emotional development/progress).

F. "Attended" means the physical presence of a staff member or educator supervising children under care. Merely being

within eyesight or hearing of the children does not meet the intent of this definition (See Supervision, Subsection TTT, 8.16.2.7 NMAC).

G. "Capacity" means the maximum number of children a licensed child care facility can care for at any one time.

H. "Child" means a person who is under the chronological age of 18 years.

I. "Child care center" means a facility required to be licensed under these regulations that provides care, services, and supervision for less than 24-hours a day to children. A child care center is in a non-residential setting and meets the applicable state and local building and safety codes.

J. "Child with a disability or special needs" means a child with an identified disability, health, or mental health conditions requiring early intervention, special education services, or other specialized services and support; or children without identified conditions, but requiring specialized services, supports, or monitoring.

K. "Class A deficiency" means any abuse or neglect of a child by a facility employee or volunteer for which the facility is responsible, which results in death or serious physical or psychological harm; or a violation or group of violations of applicable regulations, which results in death, serious physical harm, or serious psychological harm to a child.

L. "Class B deficiency" means any abuse or neglect of a child by a facility employee or volunteer for which the facility is responsible; or a violation or group of violations of applicable regulations which present a potential risk of injury or harm to any child.

M. "Class C deficiency" means a violation or group of violations of applicable regulations as cited by surveyors from the licensing authority which have the potential to cause injury or harm to any child if the violation is not corrected.

N. "Clean" means

to physically remove all dirt and contamination.

O. "Conditions of operation" means a written plan that applies to a licensed facility and is developed by the licensing authority when the licensing authority determines that provisions within these regulations have been violated. The plan addresses corrective actions that the licensee must take within a specified timeframe in order to come into compliance with licensing requirements. During this timeframe the licensing authority may increase its level of monitoring.

P. "Core hours" means the daily hours of operation of the child care facility.

Q. "Corrective action plan" means the plan submitted by the licensee addressing how and when identified deficiencies will be corrected.

R. "Curriculum" is what happens every day in the classroom and on the playground. It includes every aspect of the daily program. Curriculum derives from the program's mission statement, philosophy (which, in turn, is based on assumptions about young children's development and learning), and program goals and objectives. It includes how materials and equipment are used, activities that children and adults participate in, and interactions among children and between children and adults.

S. "Deficiency" means a violation of these regulations.

T. "Direct provider of care" means any individual who, as a result of employment or contractual service or volunteer service has direct care responsibilities or potential unsupervised physical access to any care recipient in the settings to which these regulations apply.

U. "Director" means the person in charge of the day-to-day operation and program of a child care center.

V. "Disinfect" means to destroy or inactivate most germs on any inanimate object, but not bacterial spores. Mix four tablespoons of bleach with one gallon of cool water

or use an environmental protection agency (EPA) registered disinfectant.

W. "Drop-in" means a child who attends a child care facility on an occasional or unscheduled basis.

X. "Educator" means an adult who directly cares for, serves, and supervises children in a licensed child care facility. Educators are considered staff members.

Y. "Environment" means that the environment meets all required local, state, and federal regulations. It includes space (both indoors and outdoors) with appropriate equipment and materials that encourage children to engage in hands-on learning.

Z. "Exploitation" of a child consists of the act or process, performed intentionally, knowingly, or recklessly, of using a child's property for another person's profit, advantage or benefit without legal entitlement to do so.

AA. "Expulsion" means the involuntary termination of the enrollment of a child or family.

BB. "Facility" means any premises licensed under these regulations where children receive care, services, and supervision. A facility can be a center, home, program, or other site where children receive childcare.

CC. "Family child care home" means a private dwelling required to be licensed under these regulations that provides care, services and supervision for a period of less than 24 hours of any day for no more than six children. The licensee will reside in the home and be the primary educator.

DD. "FOCUS" is a voluntary tiered quality rating and improvement program that is open to all registered and licensed child care programs.

EE. "Group child care home" means a home required to be licensed pursuant to these regulations, which provides care, services, and supervision for at least seven but not more than 12 children. The licensee will reside in the home and be the primary educator.

FF. "Group size" is the number of children assigned to an educator or team of educators occupying an individual classroom or well-defined space within a larger room.

GG. "Guidance" means fostering a child's ability to become self-disciplined. Guidance shall be consistent and developmentally appropriate.

HH. "Home" means a private residence and its premises licensed under these regulations where children receive care, services, and supervision. The licensee will reside in the home and be the primary educator.

II. "Homeless children and youth" means individuals who lack a fixed, regular, and adequate nighttime residence, which includes:

(1) Children and youth who are temporarily sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks (excludes mobile homes), or camping ground due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;

(2) children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;

(3) children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(4) migratory children who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in Paragraphs (1) through (3) of this subsection.

JJ. "Infant" means a child age six weeks to 12 months.

KK. "License" means a document issued by CYFD to a child care facility licensed and governed by these regulations and granting the

legal right to operate for a specified period of time, not to exceed one year.

LL. "Licensee" means the person(s) who, or organization which, has ownership, leasehold, or similar interest in the child care facility and in whose name the license for the child care facility has been issued and who is legally responsible for compliance with these regulations.

MM. "Licensing authority" means the child care services bureau - licensing section of the early childhood services division of the New Mexico children, youth and families department which has been granted the responsibility for the administration and enforcement of these regulations by authority of Children, Youth and Families Department Act, Section 9-2A-1 to 9-2A-16 NMSA 1978, as amended.

NN. "Mission statement," describes what the program aspires to do and whom the program aspires to serve.

OO. "National accreditation status" means the achievement and maintenance of accreditation status by an accrediting body that has been approved by CYFD. To determine approval of national accrediting bodies, the following standards are used: for center based programs, CYFD uses the 2007 national association for the education of young children (NAEYC) program standards and accreditation criteria as well as NAEYC's 2007 accreditation process criteria; for family child care, CYFD uses the CYFD family child care accreditation standards; for before and after school care, CYFD uses the CYFD before and after school accreditation standards.

(1) The following are the only national accrediting bodies that are approved by CYFD:

(a) the association of Christian schools international (ACSI);

(b) the council on accreditation (COA) for early childhood education and after school programs;

(c)

the international Christian accrediting association (ICAA);

(d)

the national accreditation commission for early care and education programs (NAC);

(e)

the national association for the education of young children (NAEYC) academy for early childhood program accreditation; or

(f)

the national association of family child care (NAFCC).

(2) Effective

July 15, 2014 accrediting bodies that have been previously approved by CYFD that are not on the above list will no longer be CYFD approved national accrediting bodies.

PP. "Night care" means the care, services and supervision provided by a licensed child care facility to children between the hours of 10:00 p.m. to 6:00 a.m.

QQ. "Neglect" means the failure to provide the common necessities including but not limited to: food, shelter, a safe environment, education, emotional well-being and healthcare that may result in harm to the child.

RR. "Notifiable diseases" means confirmed or suspected diseases/conditions as itemized by the New Mexico department of health which require immediate reporting to the office of epidemiology which include but are not limited to: measles, pertussis, food borne illness, hepatitis and acquired immune deficiency syndrome.

SS. "Orientation" means a process by which the employer informs each new employee, volunteer and substitute, in advance of assuming their duties, of the mission, philosophy, policies, and procedures of the program, including clear direction about performance expectations.

TT. "Out of school time program" means a school age program at a specific site, usually a school or community center, offering on a consistent basis a variety of developmentally appropriate activities

that are both educational and recreational.

UU. "Parent handbook" is a written communication tool that provides valuable information to families of the children the program serves. It includes all matters of relevance to family members regarding the program and is updated annually, or as needed.

VV. "Pest" means any living organism declared a pest pursuant to the Pesticide Control Act.

WW. "Pesticide" means any chemical substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest.

XX. "Philosophy statement" describes how the program's mission will be carried out. It reflects the values, beliefs, and convictions of the program about how young children learn and describes the components of the program that contribute to that learning. It provides the program's perspective on early care and education and the nature of how children learn. The program's philosophy is implemented through the curriculum.

YY. "Policy" is a written directive that guides decision-making. Policies form the basis for authoritative action.

ZZ. "Premises" means all parts of the buildings, grounds, and equipment of a child care facility licensed pursuant to these regulations.

AAA. "Procedure" is a series of steps to be followed, usually in a specific order, to implement policies.

BBB. "Professional development" is an on-going plan for continued professional development for each educator, including the director.

CCC. "Program administrator" means the person responsible for planning or implementing the care of children in the program. This includes but is not limited to making contact with parents, keeping appropriate records, observing and evaluating the child's development, supervising staff members and volunteers, and

working cooperatively with the site director and other staff members toward achieving program goals and objectives. This definition applies to out of school time programs only.

DDD. "Punishment" means the touching of a child's body with the intent of inducing pain. This includes but is not limited to pinching, shaking, spanking, hair or ear pulling. It also includes any action which is intended to induce fear, shame or other emotional discomfort.

EEE. "Ratio" is the maximum number of children one educator can be responsible for.

FFF. "Requirements" means the criteria and regulations developed by children, youth and families department in 8.16.2 NMAC; to set minimum standards of care, education and safety for the protection and enhancement of the well-being of children receiving care, services or supervision.

GGG. "Restriction" means to control enrollment, service type, capacity, activities, or hours of operation.

HHH. "Revocation" means the act of making a license null and void through its cancellation.

III. "Sanction" means a measure imposed by the licensing authority for a violation(s) of these standards.

JJJ. "Sanitize" means to reduce germs on inanimate surfaces to levels considered safe by public health codes or regulations. Mix one and one half teaspoons of bleach with one gallon of cool water or use an EPA registered sanitizer.

KKK. "Serious injury" means the death of a child or accident, illness, or injury that requires treatment by a medical professional or hospitalization.

LLL. "School-age" means a child in care who is age five to 18 years.

MMM. "Staff evaluation" means that each staff member is evaluated by the director, using criteria from the individual's job description. The individual being evaluated knows ahead of time the criteria and procedures (which may

include self-evaluation) for which they are being evaluated. The director discusses evaluation results with each staff member, and results are considered when determining salary increments and are incorporated into the individual's professional development plan.

NNN. "Staff member" means any person, including educators, who are employed by the licensee and who are present at any time when children are present.

OOO. "Substitute" means an adult who directly cares for, serves, and supervises children in a licensed child care facility, who works in place of the regular educator, and who works less than an average of 40 hours per month in a six month period.

PPP. "Suspension" means a temporary cancellation of a license pending an appeal hearing or correction of deficiencies.

QQQ. "Site director" means the person at the site having responsibility for program administration and supervision of an out of school time program. This definition applies to out of school time programs only.

RRR. "Star level" means a license indicating the level of quality of an early childhood program. A greater number of stars indicates a higher level of quality.

SSS. "Substantiated complaint" means a complaint determined to be factual, based on an investigation of events.

TTT. "Supervision" means the direct observation and guidance of children at all times and requires being physically present with them. The only exception is school-age children who will have privacy in the use of bathrooms.

UUU. "Survey" means a representative of the licensing authority enters a child care facility, observes activity, examines the records and premises, interviews parents and staff members and records deficiencies.

VVV. "Toddler" means a child age 12 months to 24 months.

WWW. "U/L" means the

underwriters laboratory, which is a standards organization which tests electrical and gas appliances for safety.

XXX. "Unattended" means an educator is not physically present with a child or children under care.

YYY. "Unsubstantiated complaint" means a complaint not determined to be factual based on an investigation of events.

ZZZ. "Variance" means an allowance granted by the licensing authority to permit non-compliance with a specified regulation for the period of licensure. The granting of variances is at the sole discretion of the licensing authority.

AAAA. "Volunteer" means any person who is not employed by the child care facility, spends six hours or less per week at the facility, is under direct physical supervision and is not counted in the facility ratio. Anyone not fitting this description must meet all requirements for staff members or educator.

BBBB. "Waiver" means an allowance granted by the licensing authority to permit non-compliance with a specified regulation for a specified, limited period of time. The granting of waivers is at the sole discretion of the licensing authority. [8.16.2.7 NMAC - Rp, 8.16.2.7 NMAC, 10/1/16]

8.16.2.8 RELATED REGULATIONS AND CODES:

Facilities subject to these regulations are also subject to the current versions of the following regulations and codes:

A. New Mexico health department regulations, control of disease and conditions of public health significance, 7.4.3 NMAC.

B. New Mexico health department regulations, control of communicable disease in health facility personnel, 7.4.4 NMAC.

C. New Mexico health department regulations, governing public access to information in the department records, 7.1.3 NMAC.

D. New Mexico department of health regulations,

health facility licensure fees and procedures, 7.1.7 NMAC.

E. New Mexico children, youth and families department regulations, administrative appeals, 8.8.4 NMAC.

F. New Mexico department of health regulations, health facility sanctions and civil monetary penalties, 7.1.8 NMAC.

G. New Mexico children, youth and families department regulations, governing background check and employment history of licensees and staff of child care facilities, 8.8.3 NMAC.

H. New Mexico environment department, food service and food processing, 7.6.2 NMAC.

I. Latest edition adopted by the New Mexico state fire board of the national fire protection association life safety code handbook 101.

J. Latest edition adopted by the New Mexico state fire board of the international fire code.

K. Latest edition adopted by the New Mexico construction industries division of the uniform building code enacted by the international conference of building officials.

L. Latest edition of the New Mexico building, plumbing/mechanical and electrical codes adopted by the New Mexico construction industries division.

M. New Mexico department of health regulations governing immunizations required for school attendance immunization requirement, 7.5.2 NMAC.

N. Federal Americans with Disabilities Act (ADA).

O. New Mexico department of agriculture Regulations Pesticide Control Act, Chapter 76, Article 4, Sections 1 through 39, NMSA 1978 and 21.17.50 NMAC.

P. Latest edition of critical heights of playground equipment for various types and depths of resilient surfaces based on information from the U.S. consumer product safety commission (CPSC Publication No.325), handbook for public playground safety.

Q. Any code, ordinance, or rule of a governing body, including but not limited to cities, towns, or counties having jurisdiction over the area in which the facility is situated.

[8.16.2.8 NMAC - Rp, 8.16.2.8 NMAC, 10/1/16]

8.16.2.9 APPLICATION:

These regulations apply to public or private facilities and homes that provide care, education, services, and supervision to children less than 24 hours of any day, come within the statutory definition of "health facilities" set out in Section 24-1-2 (D) of the Public Health Act, Section 24-1-1 to 24-1-22 NMSA 1978 as amended, and are required to be licensed by the licensing authority.

These regulations do not apply to any of the following.

A. Facilities providing child care for 24 hours on a continuous basis. Such facilities are covered by other regulations promulgated by the children, youth and families department that are available upon request from the licensing authority.

B. Child care facilities operated by the federal government or a tribal government.

C. Child care facilities operated by a public school system and governed by the local school board.

D. Private schools accredited or recognized by the New Mexico department of education, operated for educational purposes only for children age five years or older.

E. Child care facilities provided exclusively for children of parents who are simultaneously present in the same premises.

F. Summer religious schools held on a church, religious building or house of worship premises.

G. Summer camps, wilderness camps, and programs operated for recreational purposes only by recognized organizations such as churches, schools, and the boy and girl scouts, provided such camps and

programs are not conducted in private residences.

H. Any individual who in their own home provides care, services and supervision to four or fewer nonresident children.

I. Parent's day out programs held in a church, religious building or house of worship, or public building operating for no more than eight hours per week and no more than four hours on any given day. The program will be staffed by parents participating in the program, or by others who are members of the church or public affiliation.

[8.16.2.9 NMAC - Rp, 8.16.2.9 NMAC, 10/1/16]

8.16.2.10 LICENSING AUTHORITY (ADMINISTRATION AND ENFORCEMENT RESPONSIBILITY):

The child care services bureau, licensing section, of the early childhood services division of the New Mexico children, youth and families department, hereafter called the licensing authority, has been granted the responsibility for the administration and enforcement of these regulations by authority of Children, Youth and Families Department Act, Section 9-2A-1 to 9-2A-16, NMSA 1978, as amended. [8.16.2.10 NMAC - Rp, 8.16.2.10 NMAC, 10/1/16]

8.16.2.11 LICENSING:

A. TYPES OF LICENSES:

(1) ANNUAL LICENSE: An annual license is issued for a one-year period to a child care facility that has met all requirements of these regulations.

(a) 1-star level requires meeting and maintaining licensing requirements at all times, except for the requirements outlined in the following items: Items (i), (ii) and (iii) of Subparagraph (a) of Paragraph (1) of Subsection A of 8.16.2.11 NMAC. 1-star level is designated for programs not receiving child care subsidy. All 1-star educators receiving subsidy and licensed at the time of publication

of these rules shall have until July 1, 2012 to meet 2-star requirements included in the following sections of these regulations:

(i) for centers: Paragraph (16) of Subsection G of 8.16.2.22 NMAC, Paragraphs (5) through (9) of Subsection G of 8.16.2.24 NMAC, and Subsection H of 8.16.2.24 NMAC;

(ii) for licensed family and group child care homes: Paragraph (4) of Subsection E of 8.16.2.32 NMAC, Paragraph (14) of Subsection F of 8.16.2.32 NMAC, Paragraphs (4) through (8) of Subsection G. of 8.16.2.34 NMAC, and Subsection H of 8.16.2.34 NMAC;

(iii) for licensed out of school time programs: Subparagraph (k) of Paragraph (1) of Subsection E of 8.16.2.41 NMAC, Paragraph (14) of Subsection F of 8.16.2.41 NMAC, Paragraphs (5) through (9) of Subsection B of 8.16.2.43 NMAC and Subsection C of 8.16.2.43 NMAC.

(b) 2-star level requires meeting and maintaining licensing requirements at all times.

(c) 2+ star level is voluntary and requires meeting and maintaining licensing requirements as well as meeting the most recent FOCUS eligibility requirements and 2+ star criteria.

(d) 3-star level is voluntary and requires meeting and maintaining licensing requirements and AIM HIGH or FOCUS level 3 quality criteria at all times. AIM HIGH criteria will no longer be used for the determination of star level effective December 31, 2017.

(e) 4-star level is voluntary and requires meeting and maintaining licensing requirements and AIM HIGH or FOCUS levels 3 and 4 quality criteria at all times. AIM HIGH criteria will no longer be used for the determination of star level effective December 31, 2017.

5-star level is voluntary and requires meeting and maintaining licensing requirements, FOCUS levels 3, 4 and 5 quality criteria at all times and maintaining CYFD approved national accreditation status.

(2) TEMPORARY LICENSE: The licensing authority will, at its discretion, issue a temporary license when it finds the child care facility in partial compliance with these regulations.

(a) A temporary license can, at the discretion of the licensing authority, be issued for up to 120 days, during which time the child care facility will correct all specified deficiencies.

(b) The licensing authority will not issue more than two consecutive temporary licenses.

(c) After a second temporary license has been issued, a new application and the required application fee must be submitted within 30 days in order to renew the license for the remainder of that one year period.

(3) AMENDED LICENSE: A child care facility will submit a new notarized application to the licensing authority before modifying information required to be stated on the license. Examples of such modifications include dates, capacity, director and number of stars.

(a) A child care facility will apply to the licensing authority for an amended license in order to change the director. The child care facility must notify the licensing authority within 24 hours after the child care facility becomes aware of the need to name a new director, submit an application (Fee \$20) and, if necessary, appoint a temporary acting director with the minimum requirements of a high school diploma or GED and three years of experience. The temporary acting director's appointment is valid for 90 days.

(b) A notarized application must be submitted for a change of capacity

(Fee \$20). Application for an increase or decrease of capacity will not be approved nor an amended license issued until an on-site visit has been made by the licensing authority to determine that the child care facility meets all applicable codes and regulations. A child care facility must not accept additional children or change the layout of the child care facility until the licensing authority has approved and issued the amended license.

(c) A child care facility will apply to the licensing authority for an amended license in order to change the number of stars. An application for a different star level will not be approved nor an amended license issued until on-site visits have been made and it has been determined that the child care facility meets all applicable criteria.

(4) PROVISIONAL 2-STAR LICENSE: Newly licensed programs receiving child care subsidy will be given a provisional 2-star license for up to three months, pending observation by the licensing authority of the interactions between teachers and children in the classrooms.

B. RENEWAL OF LICENSE:

(1) A licensee will submit a notarized renewal application, indicating the number of stars requested, on forms provided by the licensing authority, along with the required fee, at least 30 days before expiration of the current license. CYFD-approved nationally accredited centers, homes and out of school time programs will submit copies of their current accreditation certificates along with their renewal application. Applications postmarked less than 30 days prior to the expiration date will be considered late and a \$25 late fee must be submitted with the renewal fee.

(2) All licensed facilities must maintain an original background check eligibility letter for all current employees and applicable volunteers, including a signed statement annually by each staff person certifying that they would

or would not be disqualified as a direct provider of care under the most current version of the background checks and employment history verification provisions pursuant to 8.8.3 NMAC. This will include all adults and teenage children living in a family child care or group child care home operated in a private residence. The teenage child's guardian shall sign the annual statement on behalf of the teenage child.

(3) Upon receipt of a notarized renewal application, the required fee and the completion of an on-site survey, the licensing authority will issue a new license effective the day following the date of expiration of the current license, if the child care facility is in compliance with these regulations.

(4) If a licensee fails to submit a notarized renewal application with the required fee before the current license expires, the licensing authority may require the agency to cease operations until all licensing requirements are completed.

C. POSTING OF LICENSE: A child care facility will post the license on the licensed premises in an area readily visible to parents, staff members, and visitors.

D. NON-TRANSFERABLE RESTRICTIONS OF LICENSE: A licensee will not transfer a license by assignment or otherwise to any other person or location. The license will be void and the licensee will return it to the licensing authority when:

- (1) the owner of the child care facility changes;
- (2) the child care facility moves;
- (3) the licensee of the child care facility changes; or
- (4) the child care facility closes.

E. AUTOMATIC EXPIRATION OF LICENSE: A license will expire automatically at midnight on the expiration date noted on the license unless earlier suspended or revoked, or:

- (1) on the day

a child care facility closes;

(2) on the day a child care facility is sold, leased, or otherwise changes ownership or licensee;

(3) on the day a child care facility moves.

F. ACCREDITED PROGRAMS: Accredited programs must meet and maintain all licensing standards and their CYFD-approved national accreditation without a lapse in order to be designated as a 5-star facility. The licensing authority may, at its option, notify the program's accrediting body of the program's failure to meet and maintain licensing standards.

[8.16.2.11 NMAC - Rp, 8.16.2.11 NMAC, 10/1/16]

8.16.2.12 LICENSING ACTIONS AND ADMINISTRATIVE APPEALS:

A. The licensing authority may revoke, suspend, or restrict a license, reduce star status, deny an initial or renewal license application, impose monetary sanctions pursuant to 7.1.8 NMAC, put in place conditions of operation, impose other sanctions or requirements against a licensee, or reduce to a base level of child care assistance reimbursement a licensee who is in receipt of a higher than base level of child care assistance reimbursement, for any of the following reasons:

- (1) violation of any provision of these regulations, especially when the licensing authority has reason to believe that the health, safety or welfare of a child is at risk, or has reason to believe that the licensee cannot reasonably safeguard the health and safety of children;
- (2) failure to allow access to the licensed premises by authorized representatives of the licensing authority;
- (3) misrepresentation or falsification of any information on an application form or any other form or record required by the licensing authority;
- (4) allowing

any person to be active in the child care facility who is or would be disqualified as a direct provider of care under the most current version of the background checks and employment history verification provisions pursuant to 8.8.3 NMAC; this will include all adults and teenaged children living in a family child care or group child care home operated in a private residence whether or not they are active in the child care operation;

(5) failure to timely obtain required background checks;

(6) failure to properly protect the health, safety and welfare of children due to impaired health or conduct or hiring or continuing to employ any person whose health or conduct impairs the person's ability to properly protect the health, safety, and welfare of the children;

(7) allowing the number of children in the child care facility to exceed its licensed capacity;

(8) substantiated abuse or neglect of children by an educator, staff member, volunteer, or household member as determined by CYFD or a law enforcement agency;

(9) failure to comply with provisions of the other related regulations listed in these regulations;

(10) discovery of repeat violations of the regulations or failure to correct deficiencies of survey findings in current or past contiguous or noncontiguous licensure periods;

(11) discovery of prior revocations or suspensions that may be considered when reviewing a facility's application for licensure or license renewal;

(12) loss of accreditation, regardless of reason, will result in a reduction in star status;

(13) possessing or knowingly permitting non-prescription controlled substances or illegal drugs to be present or sold on the premises at any time, regardless of

whether children are present;

(14) making false statements or representations to the licensing authority with the intent to deceive, which the licensee knows, or should know to be false; or

(15) background clearance suspension or denial.

B. Commencement of a children, youth and families department or law enforcement investigation may be grounds for immediate suspension of licensure pending the outcome of the investigation. Upon receipt of the final results of the investigation, the department may take such further action as is supported by the investigation results.

C. A suspension, revocation, or conditions of operations imposed pursuant to Part A of this Section may take effect immediately if in the discretion of the department that the health, safety or welfare of a child is at risk, or has reason to believe that the caregiver cannot reasonably safeguard the health and safety of children.

D. The children, youth and families department notifies the licensee in writing of any action taken or contemplated against the licensee/licensee. The notification shall include the reasons for the department's action.

E. The licensee may obtain administrative review of any action taken or contemplated against the licensee/licensee.

F. The administrative review shall be conducted by a hearing officer appointed by the department's secretary.

G. If the action is to take effect immediately, the department affords the licensee the opportunity for an administrative appeal within five working days. If the license is suspended pending the results of an investigation, the licensee may elect to postpone the hearing until the investigation has been completed.

H. If after the imposition of an immediate suspension the department takes

additional actions including additional suspension, revocation, or conditions of operations, the immediate action will stay in effect until the following action goes into effect or an appeal of the following action is concluded and the action is either upheld or overturned.

I. If the contemplated action does not take immediate effect, and the licensee is given advance notice of the contemplated action, the licensee is allowed 10 working days from date of notice to request an administrative appeal.

J. In circumstances in which Public Health Act NMSA 1978 Subsection N of Section 24-1-5 (2005) may apply, and in which other provisions of this regulation are not adequate to protect children from imminent danger of abuse or neglect while in the care of a licensee, the provisions of Subsection N of Section 24-1-5 shall apply as follows.

(1) The department shall consult with the owner or operator of the child care facility.

(2) Upon a finding of probable cause, the department shall give the owner or operator notice of its intent to suspend operation of the child care facility and provide an opportunity for a hearing to be held within three working days, unless waived by the owner or operator.

(3) Within seven working days from the day of notice, the secretary shall make a decision, and, if it is determined that any child is in imminent danger of abuse or neglect in the child care facility, the secretary may suspend operation of the child care facility for a period not in excess of 15 days.

(4) Prior to the date of the hearing, the department shall make a reasonable effort to notify the parents of children in the child care facility of the notice and opportunity for hearing given to the owner or operator.

(5) No later than the conclusion of the 15 day period, the department shall determine whether other action is warranted

under this regulation.

(6) Nothing in Subsection J of 8.16.2.12 NMAC shall be construed to require licensure that is not otherwise required in this regulation.

K. The licensing authority may require a direct provider of care to undergo an additional background check if information shows any of the following:

(1) that the direct provider of care has pending charges for any criminal offense;

(2) that the direct provider of care has a pending or substantiated CYFD protective services or juvenile justice service referral;

(3) that the direct provider of care has any criminal history or history of a referral to CYFD protective services or juvenile justice services discovered after the most recent background check; or

(4) that the direct provider of care is the subject of an allegation of abuse and neglect in any licensed facility.

L. There shall be no right to administrative review for reduction in star level resulting from loss of, or failure to maintain, national accreditation status. The licensee shall be bound by the rules, regulations, policies and procedures implemented by the national accreditation body that governs its accreditation process.

M. The licensee shall notify the licensing authority within 48 hours of any adverse action by the national accreditation body against the licensee's national accreditation status, including but not limited to expiration, suspension, termination, revocation, denial, nonrenewal, lapse or other action that could affect its national accreditation status. The licensing authority shall reduce the star level of a provider granted national accreditation status by the department to star level 2 until the licensee regains national accreditation status, or until the facility can be verified at a level

higher than star level 2. If a provider holding accreditation from an accrediting body no longer approved by CYFD fails to maintain these requirements, this will result in the provider reimbursement reverting to the base reimbursement rate. The provider may increase their star level only by meeting FOCUS criteria or by attaining CYFD approved national accreditation status. Child care subsidies shall be adjusted to correspond with any reductions or increases to star level.

[8.16.2.12 NMAC - Rp, 8.16.2.12 NMAC, 10/1/16]

8.16.2.13 CIVIL MONETARY PENALTIES:

A. The following factors shall be considered by the licensing authority when determining whether to impose civil monetary penalties:

- (1) death or serious injury to a child;
- (2) abuse, neglect or exploitation of a child;
- (3) regulatory violations which immediately jeopardize the health and safety of a child;
- (4) numerous violations, which combined, jeopardize the health and safety of a child;
- (5) repetitive violations of the same nature found during two or more consecutive on-site visits or surveys of a child care facility;
- (6) failure of a child care facility to correct violations found during previous surveys or visits;
- (7) intentional misrepresentation regarding condition of the facility;
- (8) effect of a civil monetary penalty on financial viability of the facility; or
- (9) extenuating circumstances, which allow the licensing authority greater discretion to consider both mitigating and exacerbating circumstances not specifically defined.

B. An initial base

penalty amount is assessed when a civil monetary penalty is imposed. The base penalty amount is calculated at the rate of the most serious deficiency. For example, the base penalty amount is assessed at the rate applicable to a class A deficiency when the survey or investigation results in citation of regulatory violations comprising class A, class B, and class C deficiencies, because the most serious regulatory violation is the class A deficiency. The base penalty is assessed once for the deficiencies cited by the licensing authority during any particular survey or investigation.

C. The licensing authority has the discretion to impose an initial base penalty at any amount within the range for each deficiency level.

(1) Class A deficiency: not less than \$500 and not greater than \$5,000.

(2) Class B deficiency: not less than \$300 and not greater than \$3,000.

(3) Class C deficiency: not less than \$100 and not greater than \$500.

[8.16.2.13 NMAC - Rp, 8.16.2.13 NMAC, 10/1/16]

8.16.2.14 WAIVERS:

A. Programs, facilities or homes licensed under these regulations may request a waiver from any of the requirements of these regulations by applying, in writing, to the licensing authority for a waiver. The request should identify the regulatory requirement for which a waiver is requested, the reason for the waiver, and any action proposed to meet the intent of the regulation.

B. Requests for waivers that involve construction of any type on a current licensed premise must be reviewed and approved by the licensing authority prior to the initiation of the construction.

C. Requests for waivers will be reviewed and approved or denied within 30 calendar days of receipt by the licensing authority.

D. Requests for

waivers may include temporary operating standards following a CYFD recognized disaster. [8.16.2.14 NMAC - Rp, 8.16.2.14 NMAC, 10/1/16]

8.16.2.15 VARIANCES - CURRENTLY LICENSED FACILITIES:

A. If a child care facility licensed on the date these regulations are promulgated provides the services prescribed but fails to meet all building requirements, the licensing authority will grant a variance, provided that the variances granted:

(1) will not create a hazard to the health, safety, or welfare of children and staff members; and

(2) is for building requirements that cannot be corrected without an unreasonable expense to the child care facility.

B. Variances granted will continue in force as long as the child care facility continues to provide services pursuant to these regulations and will not violate the criteria of Subsection A of this section.

C. The licensing authority will grant a variance for those requirements contained in 8.16.2.8 NMAC related regulations and codes if the licensee provides written documentation from the relevant authority identified in these regulations that the licensee complies with those requirements or has been granted a waiver or variance from them.

[8.16.2.15 NMAC - Rp, 8.16.2.15 NMAC, 10/1/16]

8.16.2.16 VARIANCES - NEW CHILD CARE FACILITY: A

A new child care facility may be located in an existing building or a newly constructed building.

A. If opened in an existing building, the licensing authority may grant a variance for those building requirements the child care facility cannot meet provided any variance is not in conflict with existing building and fire codes.

B. A new child care

facility opened in a newly constructed building will meet all requirements of these regulations.

C. The licensing authority will make all variances granted a permanent part of the child care facility file.

D. The licensing authority may grant a variance for those requirements contained in 8.16.2.8 NMAC related regulations and codes if the licensee provides written documentation from the relevant authority identified in these regulations that the licensee complies with those requirements or has been granted a waiver or variance from them.

[8.16.2.16 NMAC - Rp, 8.16.2.16 NMAC, 10/1/16]

8.16.2.17 SURVEYS FOR CHILD CARE FACILITIES:

A. The licensing authority will conduct a survey at least twice a year in each child care facility using these regulations as criteria. The licensing authority will conduct additional surveys or visit the child care facility additional times to provide technical assistance, to check progress on correction of deficiencies found on previous surveys, or to investigate complaints.

B. Upon the completion of a survey, the licensing authority will discuss the findings with the licensee or their representative and will provide the child care facility with an official written report of the findings and a request for a plan or plans of correction, if appropriate.

C. The licensee, director, or operator, will submit within 10 working days after the date of the survey, a corrective action plan to the licensing authority for deficiencies found during the survey. The corrective action plan will be specific on how and when the child care facility will correct the deficiency or deficiencies.

D. The licensing authority may accept the corrective action plan as written or require modifications of the plan.

E. By applying for

either a new license or a license renewal, the licensee grants the licensing authority representative the right to enter the premises and survey the child care facility, including inspection and copying of child care facility records, both while the application is being processed and, if licensed, at any time during the licensure period.

F. The licensing authority may or may not announce a survey. At all times, a person who is knowledgeable in the daily operations, has access to all records and locked areas, and can represent the licensee or director for survey purposes will be present in the child care facility.

[8.16.2.17 NMAC - Rp, 8.16.2.17 NMAC, 10/1/16]

8.16.2.18 COMPLAINTS:

A. The licensing authority will process any complaint regarding any child care facility licensed or required to be licensed under these regulations. The investigatory authority of the licensing authority is limited to matters pertaining to these regulations.

B. A licensing authority representative receiving complaints will ask complainants to identify themselves and provide all information necessary to document the complaint.

C. The licensing authority will investigate any complaint in which the health, safety, or welfare of a child could be in danger. The complaint will be reviewed and prioritized immediately according to the nature and severity of the complaint. The licensing authority follows established protocols and procedures for prioritizing, tracking, initiating and reporting of complaints and complaint investigations. Complaints will be investigated in a timely manner as follows.

(1) Priority 1 complaints: investigation will be initiated within 24 hours.

(2) Priority 2 complaints: investigation will be

initiated within three working days.

(3) Priority 3 complaints: investigation will be initiated within five working days.

(4) Initiation timeframes for investigations may be shortened based on the severity and nature of the complaint, but timeframes may not be extended.

D. The licensee shall cooperate in good faith with any investigation by the licensing authority. Obstruction of an investigation may subject the licensee to sanctions, up to revocation.

E. Action by the licensing authority:

(1) The licensing authority will provide a written letter on the results of the investigation to both the licensee of the child care facility that is the subject of the complaint and the complainant.

(2) If the licensing authority finds the complaint is unsubstantiated, it will be so designated and the licensing authority will take no further action.

(3) If the licensing authority finds that a complaint is substantiated, it will make the complaint part of the licensing authority's file on the child care facility. The following additional actions will, at the discretion of the licensing authority, be taken:

(a) the licensing authority will require the child care facility to submit and comply with a written corrective action plan; or

(b) the licensing authority will sanction the child care facility administratively including, without limitation, suspension, revocation, or restriction of a license; or

(c) the licensing authority will file criminal charges or pursue civil remedies.

F. The licensing authority will report all cases of suspected child abuse and neglect to both children's protective services and the local law enforcement agency.

[8.16.2.18 NMAC - Rp, 8.16.2.18 NMAC, 10/1/16]

8.16.2.19 BACKGROUND CHECKS: Background checks will be conducted in accordance with the most current regulations related to background checks and employment history verification provisions as promulgated by the children, youth and families department pursuant to 8.8.3 NMAC. All licensed child care facilities must adhere to these provisions to maintain their licensing status. A request for a background check must be submitted prior to a staff member's employment. A background check must be conducted in accordance with 8.8.3 NMAC on all required individuals at least once every five years from the original date of eligibility regardless of the date of hire or transfer of eligibility. A direct provider of care may request a transfer of background check eligibility if:

A. the staff member was found eligible as a direct provider of care in a child care center, licensed child care, home licensed group home, or registered home within the past five years and has not been separated from employment for more than 180 days; and

B. submits an application for transfer and is found eligible pursuant to 8.8.3.11 NMAC. [8.16.2.19 NMAC - Rp 8.16.2.19 NMAC, 10/1/16]

8.16.2.20 CHILD CARE CENTER REGULATIONS:

A. **APPLICABILITY TO CHILD CARE CENTERS:** A center required to be licensed under regulations in 8.16.2.21 NMAC through 8.16.2.29 NMAC is one that provides care, education, services and supervision to children for less than 24 hours a day to children in a non-residential setting, and is not exempted from regulation under any of the exceptions listed in 8.16.2.9 NMAC.

B. **NEW OR INNOVATIVE PROGRAMS FOR PROVIDING CHILD CARE TO CHILDREN:** A new or innovative service for child care that is typically not governed by these regulations will be licensed if there is a substantiated

need for the service and if it meets all requirements outlined in Paragraphs (1), (2) and (3) of Subsection C. New or innovative programs shall adhere to all basic licensing standards regulations except that the licensing authority may grant waiver(s) to the extent necessary to accommodate new and innovative services which may conflict with any regulations pertaining to curriculum and environment.

C. **SPECIAL REQUIREMENTS FOR NEW OR INNOVATIVE CHILD CARE CENTERS:** Applicants for new or innovative child-care services that do not fit under these regulations will submit a proposal to the licensing authority for review and approval. Applications shall be presented to the department for review. The proposal will include:

- (1) an explanation of any special needs or modifications for the children who will be receiving these services;
- (2) identification of those portions of the proposed program that would conflict with these regulations; and
- (3) statement of how the proposed center will modify or provide alternative measures, policies and procedures that meet the intent of these regulations.

D. **SPECIAL REQUIREMENTS FOR CENTERS LOCATED ON OR NEAR THE PREMISES OF CORRECTIONAL FACILITIES:** Applicants for centers located on or near correctional facilities will submit a proposal to the licensing authority for review and approval. The proposal will include:

- (1) an explanation of security modifications that are deemed necessary to ensure the safety of the staff, parents, and children using the child care center; and
- (2) statement of how the proposed center will modify or provide alternative measures, policies and procedures that meet the intent of these regulations if the proposed program is in conflict with these regulations.

[8.16.2.20 NMAC - Rp, 8.16.2.20 NMAC, 10/1/16]

8.16.2.21 LICENSURE REQUIREMENTS FOR CENTERS:

A. **LICENSING REQUIREMENTS:**
(1)

APPLICATION FORM: An applicant will complete an application form provided by the licensing authority and include payment for the non-refundable application fee. Applications will be rejected unless all supporting documents are received within six months of the date indicated on the application. A 45 day extension will be granted if the licensee provides documentation to the licensing authority that documents were submitted to the appropriate agencies in a timely manner but, through no fault of their own, they have not received responses from these agencies.

(2)
BACKGROUND CHECK: The licensing authority will provide a copy of the most current version of the department's background check and employment history verification provisions, fingerprint instructions, and forms for recording an employment history. The licensee will be responsible for obtaining background checks on all staff members, educators, volunteers, and prospective staff members, educators, volunteers or any person who may have unsupervised physical access to children as per the requirements outlined in the department's most current version of the background check and employment history verification provisions. All requirements of the current background check and employment history verification provisions pursuant to 8.8.3 NMAC must be met prior to the issuance of an initial license. A request for a background check must be submitted prior to a staff member's employment. A background check must be conducted in accordance with 8.8.3 NMAC at least once every five years on all required individuals.

(3)
ZONING, BUILDING AND OTHER APPROVALS: An applicant will have: current written finalized zoning approval from the appropriate city, county or state authority; current written building approval, such as a certificate of occupancy, from the appropriate city, county or state authority; current written approval of the state fire marshal office or other appropriate city, county or state fire-prevention authority; current written approval from the New Mexico environment department or other environmental health authority for:

(a) a kitchen, if meals are prepared on site and served in the center;

(b) private water supply, if applicable;

(c) private waste or sewage disposal, if applicable; and

(d) a swimming pool, if applicable.

(4)
ACCESS REQUIREMENTS FOR INDIVIDUALS WITH DISABILITIES IN NEW CENTERS:

(a)
 Accessibility to individuals with disabilities is provided in all new centers and will include the following:

(i) main entry into the center is level or has a ramp to allow for wheelchair access;

(ii) building layout allows for access to the main activity area;

(iii) access to at least one bathroom is required to have a door clearance of 32 inches; the toilet unit also provides a 60-inch diameter turning radius;

(iv) if ramps are provided to the building, the slope of each ramp is at least a 12-inch horizontal run for each inch of vertical rise; and

(v) ramps exceeding a six-inch rise are provided with handrails.

(b)
 Requirements contained herein are minimum and additional disability

requirements may apply depending on the size and complexity of the center.

(5)
SCHEDULE: All applications for a new license will include a description of the center’s proposed activities and schedule.

(6) **INITIAL SURVEY:** The licensing authority will schedule a survey for a center when it receives a complete application with all supporting documents.

B. CAPACITY OF CENTERS:

(1) The number of children in a center, either in total or by age, will not exceed the capacity stated on the license.

(2) The licensing authority will count all children in the care of the licensed facility, including school-age children and the children of staff members and volunteers, in the capacity of the facility, even if the children are on a field trip or other outing outside the licensed premises. The licensed capacity must not be exceeded by the presence of school-age children.

(3) A center must meet the following space requirements.

(a) 35 square feet of indoor activity space measured wall to wall on the inside for each child in a center, excluding single-use areas, such as restrooms, kitchens, halls and storage areas, and excluding offsets and built-in fixtures.

(b) 75 square feet of outdoor activity space for each child using the area at one time. The center will post on the doors to the playground the maximum capacity of the playground.

(c) Centers must post classroom capacities, ratios, and group sizes in an area of the room that is easily visible to parents, staff and visitors.

C. INCIDENT REPORTING REQUIREMENTS:

(1) The licensee will report to the appropriate authorities the following incidents. After making a report to the appropriate authorities, the licensee shall notify the licensing authority of

the incident giving rise to its report as soon as possible but no later than 24 hours after the incident occurred. A report should first be made by telephone and followed with written notification. The licensee shall report any incident that has threatened or could threaten the health and safety of children and staff members, such as, but not limited to:

(a) a lost or missing child;

(b) a serious injury;

(c) the abuse or neglect of a child;

(d) fire, flood, or other natural disaster that creates structural damages to a center or poses a health hazard;

(e) any of the illnesses on the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health;

(f) any legal action against a center or staff members;

(g) any incident that could affect the background check eligibility of any cleared person related to this license;

(h) any declaration of intention or determination to inflict punishment, loss, injury or pain on child or staff member by the commission of an unlawful act, such as, but not limited to, a bomb threat;

(i) the use of physical or mechanical restraints, unless due to documented emergencies or medically documented necessity; or

(j) any known change in an educator’s health condition or use of medication that impairs his or her ability to provide for the health, safety or welfare of children in care.

(2) A center will notify parents or guardians in writing of any incident, including notifiable illnesses, that have threatened the health or safety of children in the center. Incidents include, but are not limited to those

listed in Paragraph (1) of Subsection C of 8.16.2.21 NMAC.
 (3) Incident reports involving suspected child abuse and neglect must be reported immediately to children’s protective services and local law enforcement. The licensing authority follows written protocols/procedures for the prioritization, tracking, investigation and reporting of incidents, as outlined in the complaint investigation protocol and procedures.
 [8.16.2.21 NMAC - Rp, 8.16.2.21 NMAC, 10/1/16]

8.16.2.22 ADMINISTRATIVE REQUIREMENTS FOR CENTERS:

A. ADMINISTRATION RECORDS: A licensee will display in a prominent place that is readily visible to parents, staff and visitors:

- (1) all licenses, certificates, and most recent inspection reports of all state and local government agencies with jurisdiction over the center;
- (2) the current child care regulations;
- (3) dated weekly menus for meals and snacks;
- (4) the guidance policy; and
- (5) the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health.

B. MISSION, PHILOSOPHY AND CURRICULUM STATEMENT: All licensed facilities must have a:

- (1) mission statement;
- (2) philosophy statement; and
- (3) curriculum statement.

C. POLICY AND PROCEDURES: All facilities using these regulations must have written policies and procedures covering the following areas:

- (1) actions to be taken in case of accidents or emergencies involving a child, parents

or staff members;

- (2) policies and procedures for admission and discharge of children;

(3) policies and procedures for expulsion of children. Policies and procedures shall include how the center will maintain a positive environment and will focus on preventing the expulsion of children age birth to five. The center must develop policies that include clear, appropriate, consistent expectations, and consequences to address disruptive student behaviors; and ensure fairness, equity, and continuous improvement;

- (4) policies and procedures for the handling of medications;

(5) policies and procedures for the handling of complaints received from parents or any other person;

- (6) policies and procedures for actions to be taken in case a child is found missing from the center;

(7) policies and procedures for the handling of children who are ill; and

(8) an up to date emergency evacuation and disaster preparedness plan, which shall include steps for evacuation, relocation, shelter in place, lock-down, communication, reunification with parents, individual plans for children with special needs and children with chronic medical conditions, accommodations of infants and toddlers, and continuity of operations (see waivers, Subsection D of 8.16.2.14 NMAC). The plan shall be approved annually by the licensing authority and the department will provide guidance on developing these plans.

D. FAMILY HANDBOOK: All facilities using these regulations must have a parent handbook which includes the following:

- (1) GENERAL INFORMATION:
 - (a) mission statement;
 - (b)

philosophy statement;

- (c) program information (location, license information, days and hours of operation, services offered);

(d) name of director and how he/she may be reached;

- (e) meals, snacks and types of food served (or alternatively, guidelines for children bringing their own food);

(f) daily schedule;

(g) a statement supportive of family involvement that includes an open door policy to the classroom;

- (h) appropriate dress for children, including request for extra change of clothes;

(i) celebrating holidays, birthdays and parties; and

- (j) disclosure to parents that the licensee does not have liability or accident insurance coverage.

(2) POLICIES AND PROCEDURES:

- (a) enrollment procedures;
- (b) disenrollment procedures;
- (c) expulsion procedures;
- (d) fee payment procedures, including penalties for tardiness;
- (e) notification of absence;
- (f) fee credits, if any (e.g. for vacations, absences, etc.);
- (g) field trip policies;
- (h) health policies (program’s policies on admitting sick children, when children can return after an illness, administering medication, and information on common illnesses);
- (i) emergency procedures, safety policies, and disaster preparedness plan;
- (j)

snow days and school closure;
(k)
confidentiality policy;

(l)
child abuse/neglect reporting
procedure; and
(m)

guidance policy

E. CHILDREN'S

RECORDS: A center will maintain a complete record for each child, including drop-ins, completed before the child is admitted. Records will be kept at the center for 12 months after the child's last day of attendance.

Records will contain at least:

(1)

PERSONAL INFORMATION:

(a)

name of the child; date of birth, gender, home address, mailing address and telephone number;

(b)

names of parents or guardians, parents or guardians current places of employment, addresses, pager, cellular and work telephone numbers;

(c)

a list of people authorized to pick up the child and an authorization form signed by parent or guardian; identification of person authorized by the parent or guardian to pick up the child shall be verified at pick up;

(d)

date the child first attended the center and the date of the child's last day at the center;

(e)

a copy of the child's up-to-date immunization record or a public health division approved exemption from the requirement, a grace period of a maximum of 30 days will be granted for children in foster care or homeless children and youth;

(f)

a record of any accidents, injuries or illnesses which require first aid or medical attention which must be reported to the parent or guardian;

(g)

a record of observations of recent bruises, bites or signs of potential abuse or neglect, which must be reported to CYFD;

(h)

written authorization from the child's

parent or guardian to remove a child from the premises to participate in off-site activities; authorization must contain fieldtrip destination, date and time of fieldtrip and expected return time from fieldtrip;

(i)

written authorization from the child's parent or guardian for the educator to apply sunscreen, insect repellent and, if applicable, diaper cream to the child.

(j)

a record of the time the child arrived and left the center and dates of attendance initialed by a parent, guardian, or person authorized to pick up the child;

(k)

an enrollment agreement form which must be signed by a parent or guardian with an outline of the services and the costs being provided by the facility; and

(l)

a signed acknowledgment that the parent or guardian has read and understands the parent handbook.

(2)

EMERGENCY INFORMATION:

(a)

information on any allergies or medical conditions suffered by the child.

(b)

the name and telephone number of two people in the local area to contact in an emergency when a parent or guardian cannot be reached. Emergency contact numbers must be kept up to date at all times.

(c)

the name and telephone number of a physician or emergency medical center authorized by a parent or guardian to contact in case of illness or emergency.

(d) a

document giving a center permission to transport the child in a medical emergency and an authorization for medical treatment signed by a parent or guardian.

(e)

if applicable, legal documentation regarding the child, including but not limited to: restraining orders, guardianship, powers of attorney,

court orders, and custody by children's protective services.

F. PERSONNEL

RECORDS:

(1) A licensee

will keep a complete file for each staff member, including substitutes and volunteers working more than six hours of any week and having direct contact with the children. A center will keep the file for one year after the staff member's last day of employment. Records will contain at least the following:

(a)

name, address and telephone number;

(b)

position;

(c)

current and past duties and responsibilities;

(d)

dates of hire and termination;

(e)

documentation of a background check and employment history verification; if background check is in process then documentation showing that it is in process, such as a submission receipt, shall be placed in file. A background check must be conducted at least once every five years on all required individuals;

(f)

an annual signed statement that the staff member would or would not be disqualified as a direct provider of care under the most current version of the background checks and employment history verification provisions pursuant to 8.8.3 NMAC;

(g)

documentation of current first-aid and cardiopulmonary resuscitation training;

(h)

documentation of all appropriate training by date, time, hours and area of competency;

(i)

emergency contact number;

(j)

universal precaution acknowledgment form;

(k)

confidentiality form;

(l)

results of performance evaluations;

(m) administrative actions or reprimands;

(n) written plan for ongoing professional development for each educator, including the director, that is based on the seven areas of competency, consistent with the career lattice, and based on the individual's goals; and

(o) signed acknowledgment that the staff have read and understand the personnel handbook;

(p) signed acknowledgement that all staff have reviewed and are aware of the center's disaster preparedness plan and evacuation plan; and

(q) form I-9, employment eligibility verification.

(2) A center will maintain dated weekly work schedules for the director, all staff, all educators and volunteers and keep the records on file for at least 12 months. The record will include the time the workers arrived at and left work and include breaks and lunch.

G. PERSONNEL HANDBOOK: The center will give each employee a personnel handbook that covers all matters relating to employment and includes the following critical contents:

- (1) organizational chart;
- (2) job descriptions of all employees by title;
- (3) benefits, including vacation days, sick leave, professional development days, health insurance, break times, etc.;
- (4) code of conduct;
- (5) training requirements, career lattice, professional development opportunities;
- (6) procedures and criteria for performance evaluations;
- (7) policies on absence from work;
- (8) grievance procedures;
- (9) procedures for resignation or termination;

- (10) copy of licensing regulations;
 - (11) policy on parent involvement;
 - (12) health policies related to both children and staff;
 - (13) policy on sexual harassment;
 - (14) child guidance policy;
 - (15) confidentially statement; and
 - (16) a plan for retention of qualified staff.
- [8.16.2.22 NMAC - Rp, 8.16.2.22 NMAC, 10/1/16]

8.16.2.23 PERSONNEL AND STAFFING REQUIREMENTS FOR CENTERS:

A. PERSONNEL AND STAFFING REQUIREMENTS:

- (1) An employer will not allow any employee involved in an incident which would disqualify that employee under the department's most current version of the background check and employment history verification provisions pursuant to 8.8.3 NMAC to continue to work directly or unsupervised with children.
- (2) All educators will demonstrate the ability to perform essential job functions that reasonably ensure the health, safety and welfare of children in care.
- (3) Educators who work directly with children and who are counted in the staff/child ratios must be 18 years of age or older.
- (4) Clerical, cooking and maintenance personnel who also care for children and are included in the staff/child ratio will have a designated schedule showing their normal hours in each role. Educators counted in the staff/child ratios will not have as their primary responsibility cooking, clerical or cleaning duties while caring for children.
- (5) Volunteers shall not be counted in the staff/child ratios or left alone with children

- unless they meet all requirements for an educator.
- (6) Substitutes and part-time educators counted in the staff/child ratios will meet the same requirement as regular educators except for training requirements, professional development plan and evaluations. Substitutes, volunteers, and educators routinely employed in a center but working 20 hours or fewer a week, will complete half the required training hours. Such employees working more than 20 hours a week will meet full training requirements and have professional development plans and evaluations. See Paragraph (2) of Subsection B of 8.16.2.23 NMAC for additional training requirements.
- (7) A director is responsible for one center only. Directors who are responsible for more than one center on the date these regulations are promulgated shall continue in that capacity. The director or co-director must be on the site of the center for a minimum of fifty percent of the center's core hours of operation. See Paragraph (2) of Subsection F of 8.16.2.22 NMAC.
- (8) During any absence, the director will assign a person to be in charge and will post a notice stating the assignment.
- (9) A program will maintain staff/child ratios and group sizes at all times. Children must never be left unattended whether inside or outside the facility. Staff will be onsite, available and responsive to children during all hours of operation.
- (10) A center will have a minimum of two staff members present at all times, with one being an educator. If the center has fewer than seven children, the second staff member may conduct other activities such as cooking, cleaning, or bookkeeping.
- (11) A center will keep a list of at least two people who can substitute for any staff member. The list will include the people's names, telephone numbers, background check, health certificates and record of orientation.
- (12) Each room

of the center and its premises shall be inspected at closing time on a daily basis to assure the center is secure, free of hazards, and that no child has been left unattended.

B. STAFF
QUALIFICATIONS AND
TRAINING:

(1)
DIRECTOR QUALIFICATIONS:

(a)
Unless exempted under Subparagraph (b) below, a child care center will have a director who is at least 21 years old and meets the requirements outlined in the table below.

**Continued On The Following
Page**

Professional Preparation		Experience
<p>Program Administration</p> <p>The first of three AA-level Early Childhood Program Administration courses in the Early Childhood Program Administration career pathway: <i>Program Management I</i></p> <p>Or</p> <p>The National Administrator Credential (NAC)*</p> <p>The Provisional AA-Level NM Early Childhood Program Administration Certificate (All three AA-level Early Childhood Program Administration Courses and Practicum: <i>Program Management I, Effective Program Development for Diverse Learners and Their Families & Practicum, Professional Relationships & Practicum</i>)</p> <p>The New Mexico Child Development Certificate (CDC) (Includes the following four courses as well as additional non-coursework requirements: <i>Child Growth, Development and Learning; Health, Safety and Nutrition; Family and Community Collaboration; and Assessment of Children and Evaluation of Programs</i>)</p> <p>The Child Development Associate (CDA) certificate</p> <p>The Child Care Professional (CCP) certificate</p> <p>The New Mexico Early Childhood Program Administration Certificate</p> <p>Montessori Teacher Certification</p> <p>The New Mexico One-Year Vocational Certificate</p> <p>Associate of Arts (AA) or Applied Sciences (AA or AAS) in child development or early childhood education</p>	<p>Child Development/ Early Childhood Education</p> <p>and</p> <p><i>Child Growth, Development and Learning</i> (one of the AA-level “common core courses”)**</p> <p>and</p>	<p>Two-years experience in an early childhood growth and development setting</p>

Or

<p>A bachelor’s degree or higher in early childhood education or a related field. Related fields include: early childhood special education, family studies, family and consumer sciences, elementary education with early childhood endorsement or other degree with successful completion of courses in early childhood.</p>	<p>and</p>	<p>One year of experience in an early childhood growth and development setting</p>
--	------------	--

*The NAC and two years of experience in an early childhood growth and development setting will be accepted as sufficient qualification for a director under the following conditions: a) The NAC was received prior to November 30, 2012 and b) the NAC has been maintained and has not expired subsequent to November 30, 2012.

**Directors shall be given until the end of the first full academic semester following their start date to successfully complete this course.

(b) Current directors in a licensed center not qualified under these regulations will continue to qualify as directors as long as they continuously work as a director. Current directors having a break in employment of more than one year must meet the requirements as specified in Subparagraph (a) above.

(2) TRAINING:

(a) The director will develop and document an orientation and training plan for new staff members and volunteers and will provide information on training opportunities. The director will have on file a signed acknowledgment of completion of orientation by employees, volunteers and substitutes as well as the director. New staff members will participate in an orientation before working with children. Initial orientation will include training on the following:

- (i) scope of services, activities, and the program offered by the center;
- (ii) emergency first aid procedures, recognition of childhood illness and indicators of child abuse;
- (iii) fire prevention measures, emergency evacuation plans and disaster preparedness plans;
- (iv) review of licensing regulations;
- (v) policies regarding guidance, child abuse and neglect reporting, and handling of complaints;

<p>review of written policies and procedures as defined in Subsection C of 8.16.2.22 NMAC;</p>	(vi)	<p>planning for emergencies resulting from natural or man-caused disasters;</p>	(g)	<p>On-line training courses shall count for no more than 16 hours each year. If the 45-hour entry level course or its equivalent is taken online, it is exempt from the online training limitation.</p>
<p>center/parental agreement;</p>	(vii)	<p>handling and storage of hazardous materials and the appropriate disposal of bio contaminants;</p>	(viii)	(h)
<p>sanitation procedure;</p>	(viii)	<p>precautions in transporting children (if applicable);</p>	(ix)	(i)
<p>written goals of the program;</p>	(ix)	<p>first aid and cardiopulmonary resuscitation (CPR) certification; and</p>	(x)	(j)
<p>personnel handbook;</p>	(x)	<p>recognition and reporting of child abuse and neglect</p>	(xi)	(k)
<p>parent handbook;</p>	(xi)	<p>New staff members working directly with children regardless of the number of hours per week will complete the 45-hour entry level course or approved three-credit early care and education course or an equivalent approved by the department prior to or within six months of employment. Substitutes are exempt from this requirement.</p>	(c)	(l)
<p>names and ages of children;</p>	(xii)	<p>Each staff person working directly with children and more than 20 hours per week, including the director, is required to obtain at least 24 hours of training each year. For this purpose, a year begins and ends at the anniversary date of employment. Training must address all seven competency areas within two years. The competency areas are 1) child growth, development, and learning; 2) health, safety, nutrition, and infection control; 3) family and community collaboration; 4) developmentally appropriate content; 5) learning environment and curriculum implementation; 6) assessment of children and programs; and 7) professionalism. The 24 hours of annual training will be waived for educators if employed by a program currently under FOCUS consultation.</p>	(d)	(m)
<p>names of parents;</p>	(xiii)	<p>Training must be provided by individuals who are registered on the New Mexico trainer registry.</p>	(e)	(n)
<p>tour of the facility; and</p>	(xiv)	<p>Training provided by center employees and directors shall count for no more than half of the required 24 hours of training each year.</p>	(f)	(o)
<p>introduction to other staff and parents.</p>	(xv)			(p)
<p>(b) All new educators regardless of the number of hours per week will complete the following training within three months of their date of hire. All current educators will have three months to comply with the following training from the date these regulations are promulgated:</p>				(q)
<p>prevention and control of infectious diseases (including immunization);</p>	(i)			(r)
<p>prevention of sudden infant death syndrome and use of safe sleeping practices;</p>	(ii)			(s)
<p>administration of medication, consistent with standards for parental consent;</p>	(iii)			(t)
<p>prevention of and response to emergencies due to food or other allergic reactions;</p>	(iv)			(u)
<p>building and physical premises safety, including identification of and protection from hazards that can cause bodily injury such as electrical hazards, bodies of water, and vehicular traffic;</p>	(v)			(v)
<p>prevention of shaken baby syndrome and abusive head trauma;</p>	(vi)			(vi)
<p>emergency preparedness and response</p>	(vii)			(vii)

Continued On The Following Page

Centers where children are grouped by age		
Age Group	Adult to child ratio	Maximum group size
infants	1:6 or fraction of group thereof	12*
toddlers	1:6 or fraction of group thereof	12*
two years	1:10 or fraction of group thereof	20
three years	1:12 or fraction of group thereof	24
four years	1:12 or fraction of group thereof	24
five years	1:15 or fraction of group thereof	30
six years and older	1:15 or fraction of group thereof	30

Centers Where Age Groups Are Combined		
Age Group	Adult to child ratio	Maximum group size
six weeks through 24 months	1:6 or fraction of group thereof	12*
two through four years	1:12 or fraction of group thereof	24
three through five years	1:14 or fraction of group thereof	28
six years and older	1:15 or fraction of group thereof	30
18 to 24 months with children ages 24 through 35 months	1:6 or fraction of group thereof	12*

*Providers whose group size exceeds the maximum group size for infants and toddlers indicated above prior to the date these regulations are promulgated shall continue with their current group size as long as ratios are maintained at all times. Providers whose group size meets the maximum group size for infants and toddlers indicated above prior to the date these regulations are promulgated must continue to meet the maximum group size. All new licensed providers and those requesting an infant or toddler capacity change after the date these regulations are promulgated must meet the maximum group size as indicated above.

(2) The number of children who may be in a group and the number of caregivers is specified in Paragraph (1) of Subsection C of 8.16.2.23 NMAC. More than one group of children may occupy a room, provided the following conditions are met:

- (a) the room is divided so that different activity/interest areas are well-defined (i.e. creative art, dramatic play, books, manipulatives, blocks, science, and math);
- (b) each activity/interest area will have a posted capacity, which may vary according to the activity and size of the space, and will not exceed the group size requirement as specified in Paragraph (1) of Subsection C of 8.16.2.23 NMAC;
- (c) placement of cabinets, tables, carpeting, room-dividers, or shelving clearly define the different activity/interest areas;
- (d) individual children may freely move from one activity/interest area at their own pace as long as the capacity of any individual interest area is not exceeded;
- (e) a single educator is responsible for supervising up to the number of children allowed in the adult to child ratio age grouping specified in Paragraph (1) of Subsection C of 8.16.2.23 NMAC in one or more interest area as long as every child is in direct eyesight of the educator; and
- (f) the total number of children in a larger room must not exceed the room capacity based on activity space. For example, if a three to five year old classroom has a capacity of 40, and the maximum group size is 28, the room must be divided by at least two well-defined spaces that include various activity/interest areas and be supervised by at least three educators, who are spread out so that every child is "attended."

(3) Child care facilities not meeting the requirements as specified in Paragraphs (1) of Subsection C of 8.16.2.23 NMAC, must be able to clearly demonstrate the intent of group sizing through written procedures that must be approved by CYFD. The written procedures will address the following:

- (a) maintenance of adult to child ratio within the group size in Paragraph (1) of Subsection C of 8.16.2.23 NMAC. to facilitate adult to child interaction and constructive activity among children;
- (b) assignment of a group of children to an educator or team of educators; and

(c) demonstrate how the educators will meet the needs of all children in the assigned classroom and account for all children at all times.

(4) A center will schedule staff to minimize the number of primary educators a child has during the day and the week. A child will have no more than three primary, consecutive educators in any day including educators in the early morning and late afternoon. Each child must have an educator who is aware of details of the child's habits, interests, and any special concerns.

(5) The same educator who cares for the children under age two years will supervise those children when they play with children over two years.
[8.16.2.23 NMAC - Rp, 8.16.2.23 NMAC, 10/1/16]

8.16.2.24 SERVICES AND CARE OF CHILDREN IN CENTERS:

A. GUIDANCE:

(1) A center will have written policies and procedures clearly outlining guidance practices. Centers will give this information to all parents and staff who will sign a form to acknowledge that they have read and understand these policies and procedures.

(2) Guidance will be consistent and age appropriate.
(3) Guidance shall be positive and include redirection and clear limits that encourage the child's ability to become self-disciplined. The use of physical or mechanical restraints is prohibited unless due to documented emergencies or medically documented necessity.

(4) A center will not use the following disciplinary practices:

(a) physical punishment of any type, including shaking, biting, hitting, pinching or putting anything on or in a child's mouth;

(b) withdrawal of food, rest, bathroom access, or outdoor activities;

(c) abusive or profane language, including yelling;

(d) any form of public or private humiliation, including threats of physical punishment; or

(e) unsupervised separation.

B. NAPS OR REST PERIOD: A center will provide physical care appropriate to each child's developmental needs that will include a supervised rest period.

(1) Children under the age of six years in the centers for more than five hours will have a rest period.

(2) A center will allow children who do not sleep to get up and participate in quiet activities that do not disturb the other children.

(3) Cribs, cots or mats shall be spaced at least 30 inches apart to permit easy access by adults to each child. If the room used for sleeping cannot accommodate 30 inches of spacing between children, educators shall space children as far as possible from one another. There must be enough room to permit easy access to all children without moving cribs, cots or mats.

(4) Each child will have an individual bed, cot, or mat clearly labeled to ensure each child uses the same items between washing.

(5) Cots or mats will have a nonabsorbent, cleanable surface. Mats will be at least three-fourths of an inch thick. Mats and cots shall be cleaned and linens will be laundered before being used by another child.

(6) Educators shall ensure that nothing covers the face or head of a child aged 12 months or younger when the child is laid down to sleep and while the child is sleeping. Educators shall not place anything over the head or face of a child over 12 months of age when the child is laid down to sleep and while the child is sleeping.

(7) Children with disabilities or medical

conditions that require unusual sleeping arrangements will have written authorization from a parent or physician justifying the sleeping arrangement.

(8) Staff must be physically available to sleeping children at all times. Children must not be isolated for sleeping or napping in an un-illuminated room unless attended by an educator.

(9) Illumination equivalent to that cast by a soft night light shall be operational in areas that are occupied by children who are napping or sleeping.

(10) Staff/child ratios and group sizes shall be maintained at naptime.

C. ADDITIONAL REQUIREMENTS FOR INFANTS AND TODDLERS

(1) The center will provide a crib for each infant and, when appropriate, for a toddler.

(2) Cribs will meet federal standards and be kept in good repair. The center will not use plastic bags or lightweight plastic sheeting to cover a mattress and will not use pillows in cribs. Stacking cribs is prohibited.

(3) No child will be allowed to sleep in a playpen, car seat, stroller or swings.

(4) Children under the age of 12 months shall be placed on their backs when sleeping unless otherwise authorized in writing by a physician.

(5) Toys that are mouthed by infants and toddlers will be cleaned after mouthing by one child before other children do the same.

(6) A center will not admit any child under the age of six weeks except with the written approval of a licensed physician.

(7) A center will care for children under age two years in rooms separate from those used by older children. Children age six weeks to 12 months may be in the same room with children age 13 to 24 months, when they are physically separated from the older children. A center may group toddlers ages 18

to 24 months with children ages 24 through 35 months.

(8)

Throughout the day, an educator will give each infant and toddler physical contact and attention. A caregiver will hold, talk to, sing to and take inside and outside walks with the child. A caregiver will respond immediately to all cries of infants and to the cries of all children within two minutes.

(9) An

educator will use routine activities such as nap time, feeding, diapering and toileting as opportunities for language development and other learning.

(10) Infants

shall not be allowed to be confined to one area for prolonged periods of time unless the infant is content and responsive.

(11) Each infant

shall be allowed to form and observe his/her own pattern of feeding, sleeping and waking periods.

(12) A center

will arrange the sleeping and play areas so that children in the play area do not disturb sleeping children.

(13) Infants

shall either be held or fed sitting up for bottle-feeding. Infants unable to sit shall always be held for bottle-feeding. Infants and toddlers shall not be placed in a laying position while drinking bottles or sippy cups. The carrying of bottles and sippy cups by young children throughout the day or night shall not be permitted.

(14) Foods

served will meet the nutritional needs of the infant or toddler. Foods will be developmentally appropriate for each infant served.

(15) A center

shall provide an evacuation crib.

D. DIAPERING AND TOILETING:

(1) An

educator will plan toilet training with a parent so the toilet routine is consistent. A center will not attempt to toilet train a child who is not developmentally ready.

(2) A center

will change wet and soiled diapers

and clothing promptly. Staff members will wear non-porous, single-use gloves when changing a diaper and wash their hands after changing a diaper. Food service gloves are not permissible for diaper changing.

(3) A center

will have a change of clothes on hand, including dry, clean clothing and diapers sufficient to meet the needs of each child. A center will label diapers and diapering supplies for each child and store them properly. Diaper bags will be inaccessible to children. Soiled diapers will be stored in a secure container with a tight-fitting lid to assure proper hygiene and control of odors.

(4) An

educator will change a child's diaper on a clean, safe, waterproof surface and discard any disposable cover and disinfect the surface after each diaper change.

E. ADDITIONAL REQUIREMENTS FOR CHILDREN WITH SPECIAL NEEDS:

(1) Child

care facilities are responsible for staff awareness of community resources for families of children with disabilities, including children under the age of five years as well as those of school age. If center staff believe that a child may have a delay or disability, possible resources for referral and assistance are provided to parents when appropriate. No referral for special needs services to an outside agency will be made without a parent's consent. Family Education Right and Privacy Act (FERPA) will be respected at all times.

(2) Child care

facilities are responsible for staff awareness of the Americans with Disabilities Act (ADA) as it relates to enrolling and caring for children with disabilities.

F. ADDITIONAL REQUIREMENTS FOR NIGHT CARE:

(1) A center

that provides night care will have 50 square feet of activity area per child for night care.

(2) Staff will

be awake and immediately available

to children who need attention during the night.

(3) The beds

and cots provided for children shall be completely furnished with mattress, waterproof mattress protectors, sheets under and over the child, blanket, pillow and pillowcase.

(4) Linens

shall be changed immediately in case of soiling.

(5) The same

menu shall not be used for lunch and supper.

G. PHYSICAL ENVIRONMENT:

(1)

Environment shall be organized into age appropriate functional identifiable learning areas. If any of the selected learning areas are not represented at a given time, the areas shall be rotated to provide children with the opportunity to gain skills supported by a variety of learning experiences. The areas may include:

(a)

dramatic play;

(b)

creative art;

(c)

books;

(d)

blocks and accessories;

(e)

manipulatives;

(f)

music;

(g)

science;

(h)

math/number; and

(i)

sensory.

(2) Each

center is clearly defined, using shelves and furniture.

(3) Adults can

visually supervise all centers at all times.

(4) The

capacity of each room will be posted in an area of the room that is readily visible to parents, staff members and visitors.

(5) Learning

areas have adequate space and noisy and quiet areas are arranged so that

children’s activities can be sustained without interruption.

(6) Materials are well cared for and organized by type. Where appropriate, materials are labeled with words or pictures. Adaptations to materials are made when needed to accommodate various abilities of all children. Unused materials are stored in inaccessible storage.

(7) Examples of children’s individually expressed artwork are displayed in the environment at the children’s eye level.

(8) Floor surface is suitable for activities that will occur in each learning area.

(9) File and storage space is available for educators’ materials.

H. SOCIAL-EMOTIONAL RESPONSIVE ENVIRONMENT:

(1) Educators remain calm in stressful situations.

(2) Educators are actively engaged with children. Educators talk, actively listen and respond to children appropriately by responding to children’s questions and acknowledging their comments, concerns, emotions and feelings.

(3) Educators help children communicate their feelings by providing them with language to express themselves.

(4) Educators model appropriate social behaviors, interactions and empathy. Educators respond to children that are angry, hurt, or sad in a caring and sensitive manner. Educators make appropriate physical contact to comfort children who are distressed.

I. EQUIPMENT AND PROGRAM:

(1) Toys and equipment must be safe, durable, and easy to clean, non-toxic and sanitized daily.

(2) A center will not use accordion-style baby gates.

(3) A child care center will provide activities that encourage children to be actively

involved in the learning process and to experience a variety of developmentally appropriate activities and materials.

(4) A center will provide sufficient equipment, materials, and furnishings for both indoor and outdoor activities so that at any one time, each child can be individually involved.

(5) Each child at a center will have a designated space for storage of clothing and personal belongings.

(6) A center will store equipment and materials for children’s use within easy reach of the children, including those with disabilities. A center will store the equipment and materials in an orderly manner so children can select and replace the materials by themselves or with minimal assistance.

(7) A center will provide children with toys and other materials that are safe and encourage the child’s creativity, social interaction, and a balance of individual and group play.

(8) A center will post a daily activity schedule. A center will follow a consistent pattern for routine activities such as meals, snacks and rest.

(9) Media viewing will not be permitted for children under two years of age. Media viewing for children two years and older will be limited to six hours per month, but not to exceed one full length film in one day. Programs, movies, music and music programs shall be age appropriate and shall not contain adult content.

(10) Children and family members shall be acknowledged upon arrival and departure.

(11) Full-time children shall have a minimum of 60 minutes of physical activity daily, preferably outside. Part-time children shall have a minimum of 30 minutes of physical activity daily, preferably outside.

(12) Equipment and program requirements apply during all hours of operation of the

licensed facility.

J. OUTDOOR PLAY AREAS:

(1) Outdoor play equipment used in child care centers shall be:

(a) intended for public (non-residential) use and installed and maintained according to the manufacturer’s instructions; or

(b) if intended for residential use, shall be safe and securely anchored.

(2) A center will enclose the outdoor play area with a fence at least four feet high and with at least one latched gate available for an emergency exit.

(3) A center will place sufficient energy absorbing surfaces beneath climbing structures, swings, and slides (as determined by Subsection P of 8.16.2.8 NMAC).

Continued On The Following Page

Critical Heights of Playground Equipment for Various Types and Depths of Resilient Surfaces Based on Information from the U.S. CONSUMER PRODUCT SAFETY COMMISSION (CPSC Publication No. 325), Handbook for Public Playground Safety.

When no requirement is provided for a specific height of equipment, we have used the requirement for the next higher height, so requirements are conservative, erring on the side of safety.

Equipment Height	Wood Chips	Double Shredded Bark	Uniform Wood Chips	Fine Sand	Coarse Sand	Fine Gravel
	Uncompressed Depths of Materials In Fall Zone					
Five feet or less	8 inches	6 inches	6 inches	6 inches	6 inches	6 inches
Six feet	6 inches	6 inches	6 inches	12 inches	12 inches	6 inches
Seven feet	6 inches	9 inches	9 inches	12 inches	12 inches	9 inches
Eight feet	9 inches	9 inches	12 inches	12 inches	12 inches	12 inches
Nine Feet	9 inches	9 inches	12 inches	12 inches	N/A	12 inches
Ten Feet	9 inches	9 inches	12 inches	N/A	N/A	12 inches

For poured or installed foam or rubber surfaces, the materials must meet the ASTM F1292 requirements with written verification from the manufacturer.

(4) Playground equipment shall be inspected and inspections documented weekly.

(5) An outdoor play area for children under age two years will have an area protected from the general traffic where the children can crawl in safety.

(6) The use of a trampoline is prohibited at any time during the hours of operation or by any children receiving care at the facility.

(7) Children shall be protected from the sun during outdoor play, as instructed by the child's parent or guardian.

K. SWIMMING, WADING AND WATER:

(1) Each child will have written permission from a parent or guardian before the child enters the pool.

(2) If a center has a portable wading pool:

(a) a center will drain and fill the wading pool with fresh water daily and disinfect pool before and after each use;

(b) a center will empty a wading pool when it is not in use and remove it from areas accessible to children; and

(c) a center will not use a portable wading pool placed on concrete or asphalt.

(3) If a center has a built in or above ground swimming pool, ditch, fishpond or other water hazard:

(a) the fixture will be constructed, maintained and used in accordance with applicable state and local regulations;

(b) the fixture will be constructed and protected so that, when not in use, it is inaccessible to children; and

(c) when in use, children will be constantly supervised and the number of adults present will be proportional to the ages and abilities of the children and type of water hazard in use.

(4) The following ratios shall be observed for swimming pools more than two feet deep:

Ratio for swimming pools more than two feet deep		
Age of the youngest child	Number of educators, lifeguards or volunteers	Number of children
0-23 months	1	1
2 years	1	2
3 years	1	6
4 years	1	8
5 years	1	10
6 years and older	1	12

L. FIELD TRIPS:
 (1) A center will ensure the children's safety on field trips and excursions. See Subparagraph (h) of Paragraph (1) of Subsection E of 8.16.2.22 NMAC for requirements for permission slips.

(2) Children will not go to a private residence unless accompanied by two adults. [8.16.2.24 NMAC - Rp, 8.16.2.24 NMAC, 10/1/16]

8.16.2.25 FOOD SERVICE REQUIREMENTS FOR CENTERS:

A. MEAL PATTERN REQUIREMENTS: All foods prepared by the center will conform to the guidelines from United States department of agriculture's (USDA's) child and adult care food program (CACFP) for foods, meal patterns and serving sizes.

B. MEALS AND SNACKS:

(1) A center will provide a child a meal or snack at least every three hours except when the child is sleeping at night.

(2) A center will serve, if necessary, a child a therapeutic or special diet with written prescription/diet orders from a physician or a recognized medical authority. Diet orders must be complete and descriptive, and not subject to interpretation by the center staff.

(3) A center shall make water freely available to children.

(4) A center that provides daily meals and snacks shall plan these to meet the minimum standards in the CACFP and to be consistent with the USDA's current dietary guidelines for Americans, to include the following. Parents of children who have special dietary needs may provide written permission to the child care program to exempt their child from the following requirements if necessary due to such special dietary needs.

(a) Only one hundred percent fruit or vegetable juice shall be served. The

use of fruit drinks containing less than one hundred percent juice or artificially flavored drinks for meals or snacks is prohibited. One hundred percent or vegetable juice may be diluted with water.

(b) Only whole, pasteurized fluid milk shall be served to children between 12 and 24 months of age; reduced fat, low fat, or skim milk may be served to children who are two years and older.

(c) A wide variety of fruits and vegetables shall be served, with a preference for fresh or frozen fruits and vegetables over canned.

(5) A center shall vary snacks each day and shall include a selection of two different food group components from the four food group components.

C. MENUS:

(1) Menus shall include a variety of foods. The same menu will not be served twice in one week.

(2) Posted menus shall be followed. Substitutions shall be of equivalent nutritional value and shall be recorded on the posted menu.

(3) Dated weekly menus shall be posted at least one week in advance, in a conspicuous place, for review by parents, educators and children.

D. KITCHENS: Centers shall comply with current New Mexico environment department requirements regarding food service.

(1) A center will not allow children in the kitchen except under careful supervision.

(2) A food preparer will thoroughly wash all raw fruits and vegetables before cooking or serving.

(3) A center will serve food promptly and refrigerate immediately after use.

(4) A center will protect food and drink by properly storing items in an airtight container or by tightly wrapping them. A center will label and date all leftover food.

(5) If food is brought from the child's home, a center will label it with the child's name and refrigerate if necessary. A center will label and refrigerate bottles of infant formula or breast milk.

(6) A center's refrigerators and separate freezers will have working internal thermometers and keep food requiring refrigeration, including formula, at 41 degrees Fahrenheit or below, and frozen food at 0 degrees Fahrenheit or below.

(7) A center will protect all food from insects, rodents and other vermin.

(8) A center will discard any leftover milk or formula, rinse bottles after use and sanitize bottles before reuse.

(9) A center will sanitize eating utensils, dishes and cups before re-use by washing them in a dishwasher or by completing the following steps: 1) wash with soapy water; 2) rinse with clean warm water; and 3) sanitize. Disposable plates and cups and plastic utensils of food-grade, medium weight may be used for single service, but Styrofoam cups may not be used.

(10) A center will use cleaning materials for the kitchen and food preparation areas only in the kitchen and will store the materials separately from food.

(11) A center shall thoroughly sanitize food preparation surfaces before and after each use.

E. MEAL TIMES:

(1) A center will equip dining areas with tables, chairs, eating utensils and dishes appropriate to the age of the children served and sanitize the areas before and after use.

(2) Staff/child ratios and group size must be maintained at meal times.

(3) Adults must sit with the children at meal and snack times to assist children with eating, drinking, and self-feeding and to encourage family-style dining and socialization.

(4) Time

allowed for meals shall enable the children to eat at reasonable rate.

(5) A center will provide sanitary cups or glasses or a drinking fountain for drinking water. Infants and toddlers shall be offered water from a cup. Toddlers shall be encouraged to hold and drink from a cup, use a spoon, and to use their fingers for self-feeding. A center will not allow children to share drinking or eating utensils.
[8.16.2.25 NMAC - Rp, 8.16.2.25 NMAC, 10/1/16]

8.16.2.26 HEALTH AND SAFETY REQUIREMENTS FOR CENTERS:

A. HYGIENE:

(1) Children and staff members will wash their hands with soap and warm running water as needed. Water basins shall not be used as an alternative to running water. Staff and children will wash their hands whenever hands are contaminated with body fluids and always:

- (a) after using a toilet, assisting a child with toilet use, or changing a diaper;
- (b) before and after caring for a sick child;
- (c) before any food service activity, including setting the table;
- (d) before and after eating;
- (e) before and after feeding a child; and
- (f) after handling pets or animals or items used by animals such as water and food bowls.

(2) A center will label with the child's name and store separately any item used for an individual child's personal hygiene.

(3) If a center promotes tooth brushing activities, the center will store toothbrushes so that they do not drip on other toothbrushes and so that they are separate from one another, with bristles exposed to the air to dry, labeled and not in contact with any other surface.

B. FIRST AID

REQUIREMENTS:

(1) All educators must be certified in first aid and cardiopulmonary resuscitation (CPR).

(2) A center will keep a first-aid kit and a first-aid manual together in the center in a location inaccessible to children and easily accessible to adults. The first aid kit will contain, at a minimum, band aids, gauze pads, adhesive tape, scissors, soap, nonporous gloves, and a thermometer.

(3) A center will treat blood spills cautiously and promptly disinfect the area. Staff members will wear non-porous, single-use gloves when handling a blood spill, bloody diarrhea, bloody nose, or any other blood. A center will clean contaminated surfaces first with hot soapy water then with a disinfecting solution effective against HIV and hepatitis B.

C. MEDICATION:

(1) All staff and children's medications must be labeled. A center will keep all medications in a locked and identified container inaccessible to children and will refrigerate medications when necessary. If the refrigerator is inaccessible to children, medications do not need to be in a locked container in the refrigerator.

(2) Facilities will give medication only with written permission from a parent or guardian, to be administered according to written directions from the prescribing physician. In the case of non-prescription medication, written instructions must be provided by the parent or guardian. For the purpose of this requirement (Paragraph (2) of Subsection C of 8.16.2.26 NMAC) only, non-prescription medications include sunscreen, insect repellent and diaper creams or other over the counter medications. With written authorization from the child's parent or guardian, sunscreen and insect repellent may be shared. Diaper cream shall not be shared.

(3) A designated staff member will be responsible for giving medication

to children. The designated staff member will ensure non-prescription and prescription medications have a label with the child's name and the date the medication was brought to the center. A center will keep non-prescription and prescription medication in the original container with written instructions, including the name of medication, the dosage, and the hours and dates the child should receive the medicine.

(4) The designated staff member will keep and sign a written record of the dosage, date and time a child is given medication with the signature of the staff who administered the medication. This information will be provided to the parent or guardian who will initial/date acknowledgment of information received on the day the medication is given.

(5) When the medication is no longer needed, it shall be returned to the parents or guardians or destroyed. The center shall not administer expired medication.
[8.16.2.26 NMAC - Rp, 8.16.2.26 NMAC, 10/1/16]

8.16.2.27 ILLNESS REQUIREMENTS FOR CENTERS:

A. Children or staff members absent due to any notifiable disease will not return to the center without a signed statement from a physician.

B. A center will separate and constantly observe a child who becomes sick at the center and promptly notify a parent or guardian of the child's illness.

C. A center will send a child home when:

(1) the child's oral temperature is 101 degrees Fahrenheit or greater or armpit temperature is 100.4 degrees Fahrenheit or greater and the child shows signs of illness or behavior changes; or

(2) an educator observes signs of contagious disease or severe illness.

D. The center will have

a cot or mat available for sick children and it will be disinfected thoroughly after each use.

[8.16.2.27 NMAC - Rp, 8.16.2.27 NMAC, 10/1/16]

8.16.2.28 TRANSPORTATION REQUIREMENTS FOR CENTERS:

A. When a center provides transportation to children, it is responsible for the care of children from the time of pick up to delivery to a responsible adult. All vehicles used for transportation of children will have an operable fire extinguisher, first-aid kit, first-aid manual, water and blanket.

B. A center will license all vehicles used for transporting children and will meet all applicable state vehicle laws. A child shall be transported only if the child is properly secured in a child passenger restraint device or by a safety belt as follows. School buses that are not equipped with passenger restraint devices are exempt from this requirement.

(1) Children less than one year of age shall be properly secured in a rear-facing child passenger restraint device that meets federal standards, in the rear seat of a vehicle that is equipped with a rear seat. If the vehicle is not equipped with a rear seat, the child may ride in the front seat of the vehicle if the passenger-side air bag is deactivated or if the vehicle is not equipped with a deactivation switch for the passenger-side air bag.

(2) Children one year of age through four years of age, regardless of weight, or children who weigh forty pounds, regardless of age, shall be properly secured in a child passenger restraint device that meets federal standards.

(3) Children five years of age through six years of age, regardless of weight, or children who weigh less than 60 pounds, regardless of age, shall be properly secured in either a child booster seat or an appropriate child passenger restraint device that meets federal standards.

(4) Children seven years of age through 12 years of age shall be secured in a child passenger restraint device or by a seat belt.

C. Vehicles used for transporting children will be enclosed and properly maintained. Vehicles shall be cleaned and inspected inside and out.

D. Vehicles operated by the center to transport children shall be air-conditioned whenever the outside air temperature exceeds 82 degrees Fahrenheit. If the outside air temperature falls below 50 degrees Fahrenheit the center will ensure the vehicle is heated.

E. A center will load and unload children at the curbside of the vehicle or in a protected parking area or driveway. The center will ensure children do not cross a street unsupervised after leaving the vehicle.

F. No one will smoke in a vehicle used for transporting children.

G. A second adult will accompany the driver of the vehicle when a center transports five or more children under age five years.

H. Children may be transported only in vehicles that have current registration and insurance coverage. All drivers must have current driver's license and comply with motor vehicle and traffic laws. Persons who have been convicted in the last seven years of a misdemeanor or felony DWI/DUI cannot transport children under the auspices of a licensed facility/program.

I. At least one adult transporting children, shall be currently certified in cardiopulmonary resuscitation (CPR).

[8.16.2.28 NMAC - Rp, 8.16.2.28 NMAC, 10/1/16]

8.16.2.29 BUILDING, GROUNDS AND SAFETY REQUIREMENTS FOR CENTERS:

A. HOUSEKEEPING:
(1) A center will keep the premises, including furniture, fixtures, floors, drinking fountains, toys and equipment clean,

safe, and in good repair. The center and premises will be free of debris and potential hazards.

(2) Materials dangerous to children must be secured in a manner making them inaccessible to children and away from food storage or preparation areas.

(3) All garbage and refuse receptacles in kitchens and in outdoor areas will be durable, constructed of materials that will not absorb liquids and have tight fitting lids.

B. PEST CONTROL:
(1) All licensed child care centers must use a New Mexico licensed applicator whenever applying pesticides on the center's buildings or grounds.

(2) The licensed applicator may not apply pesticides when children are on the premises.

(3) Parents, guardians, and staff must be notified at least two days prior to spraying or applying pesticides.

(4) All food storage, preparation, and serving areas must be covered and protected from spraying or application of pesticides.

C. MECHANICAL SYSTEMS:

(1) A center will maintain comfortable temperatures (68 degrees through 82 degrees Fahrenheit) in all rooms used by children. A center may use portable fans if the fans are secured and inaccessible to children and do not present any tripping, safety or fire hazards. In the event air temperature in a center exceeds the 82 degrees Fahrenheit in the summer months because of evaporative cooler temperature limitations, it will be verified that cooling equipment is functioning, is being maintained, and that supplemental aides have been employed, such as, but not limited to: ceiling fans, portable fans, or portable evaporative coolers.

(2) A center must maintain all heating and cooling equipment so that it is in good working order.

(3) A center

will not use un-vented heaters, open flame heaters or portable heaters. A center will install barriers or take other steps to ensure heating units are inaccessible to children. Heating units include hot water pipes, hot water baseboard heaters hotter than 110 degrees Fahrenheit, fireplaces, fireplace inserts and wood stoves.

(4) A center will provide fresh air and control odors by either mechanical or natural ventilation. If a center uses a window for ventilation, it will have a screen. If a door is used for fresh air ventilation, it must have a screen door.

(5) Water coming from a faucet will be below 110 degrees Fahrenheit. A center will install a tempering valve ahead of all domestic water-heater piping.

D. WATER AND WASTE: All food preparation areas, sinks, washrooms, laundries, bathrooms and any self-contained area for infants and toddlers in diapers will have hot and cold running water pressure.

E. LIGHTING, LIGHTING FIXTURES AND ELECTRICAL:

(1) All areas will have sufficient glare-free lighting with shatterproof or shielded bulbs.

(2) A center will have emergency lighting that turns on automatically when electrical service is disrupted.

(3) Use of electrical cords and outlets:

(a) A center will use U/L approved equipment only and will properly maintain this equipment.

(b) All electrical outlets within reach of children will be safety outlets or will have protective covers.

(c) The use of multi-prong or gang plugs is prohibited. Surge protectors are not gang plugs under these regulations.

F. EXITS AND WINDOWS:

(1) When an activity area does not have a door directly to the outside, at least one

window in each activity area must be able to be opened for emergency egress with a minimum net clear opening of 5.7 square feet. The minimum net clear opening for height dimension must be 24 inches. The minimum net clear opening width dimension must be 20 inches, and the finished sill height must not be more than 44 inches above the floor.

(2) There must be at least two exits remote from each other in each activity area of the center.

(a) All exits must be marked, including fire exits, by signs having letters at least six inches high whose principal strokes are at least three-fourths of an inch wide.

(b) When illuminated exit signs are installed they must be maintained in operable condition.

(3) Exit ways must be kept free from obstructions at all times.

(4) Activity areas for children must have windows or skylight area of at least one-twentieth of the floor area.

G. TOILET AND BATHING FACILITIES:

(1) A center shall have one sink in any room for infants, toddlers, and combination thereof. Centers licensed after November 30, 2012 shall have one sink and one toilet in any room that has children ages 24 - 35 months, which shall be used exclusively by the children in this room. All sinks referred to in this paragraph shall have permanent plumbing, hot and cold running water, and shall not be used for food preparation.

(2) All toilet rooms will have toilet paper, soap and disposable towels at a height accessible to children. A center will not use a common towel or wash cloth.

(3) All closets and bathroom locks must have an outside release. A center will enclose all bathrooms. Bathrooms must be accessible and functional.

(4) Toilets

and lavatories must be provided in the following ratios. These ratios also apply to programs that share lavatories with unlicensed facilities.

(a) one toilet and one lavatory for one to 12 children;

(b) two toilets and two lavatories for 13 through 25 children;

(c) one toilet and one lavatory for each additional 15 children or fraction thereof; or

(d) when a center's capacity exceeds 30 children a separate toilet room must be provided for staff.

H. SAFETY COMPLIANCE:

(1) A center will conduct emergency preparedness practice drills at least quarterly beginning January of each calendar year.

(2) A center will conduct at least one fire drill each month.

(3) A center will:

(a) hold the drills at different times of the day;

(b) use the fire alarm or detector system;

(c) emphasize an orderly rather than a speedy evacuation;

(d) a center will keep a record of the fire drills and emergency preparedness practice drills with the date, time, number of adults and children participating, and any problems encountered during the fire drill on file for at least 12 months;

(e) a center shall request an annual fire inspection from the fire authority having jurisdiction over the center; if the policy of the fire authority having jurisdiction does not provide for an annual inspection of the center, the center must document the date the request was made and to whom; a copy of the latest inspection must be posted in the center;

(f) a

center will post an evacuation plan in each room used by children;

(g) a center will keep a telephone in an easily accessible place for calling for help in an emergency and will post emergency phone numbers for fire, police, ambulance and the poison control center next to the phone; a center will not use a pay phone to fulfill this requirement; if cordless phones are used, emergency numbers shall be posted on the phone itself; facilities shall post the center's telephone number and address in a conspicuous location next to the emergency phone numbers; a center shall have at least one corded phone or cell phone for use in the case of a power outage;

(h) a center must be equipped with an approved, manually operated alarm system or other continuously sounding alarm approved in writing by the fire authority having jurisdiction;

(i) a center must be equipped with smoke detectors approved in writing by the fire authority having jurisdiction as to number, type, and placement;

(j) a center must have a minimum of two 210ABC fire extinguishers, one located in the kitchen or food preparation area, and one centrally located in the center; and

(k) fire extinguishers, alarm systems, automatic detection equipment, and other firefighting must be properly maintained and inspected on a least yearly basis; fire extinguishers must be tagged noting the date of inspection; see Paragraph (2) of Subsection E of 8.16.2.29 NMAC for emergency lighting requirements.

I. SMOKING, FIREARMS, ALCOHOLIC BEVERAGES, ILLEGAL DRUGS AND CONTROLLED SUBSTANCES: A center will prohibit smoking in all areas, including vehicles, and will not allow any alcoholic beverages, firearms, or non-prescription controlled substances (drugs) on the premises or in vehicles.

Possessing or knowingly permitting illegal drugs or non-prescription controlled substances to be possessed or sold on the premises at any time regardless of whether children are present is prohibited.

J. PETS:
(1) A center will inform parents or guardians in writing before pets are allowed in the center.

(2) A center will not allow pets in the kitchen, food serving, food storage areas, bathrooms, or infant room.

(3) A center will inoculate any pets as prescribed by a veterinarian and keep a record of proof of inoculation prior to the pet's presence in the center.

(4) A center will not allow on the premises pets or other animals that are undomesticated, dangerous, contagious or vicious in nature.

(5) Areas of confinement, such as cages and pens, and outdoor areas are cleaned of excrement daily. Animals shall be properly housed, fed and maintained in a safe, clean sanitary and humane condition at all times.

(6) A staff member must be physically present during the handling of all pets or other animals.

[8.16.2.29 NMAC - Rp, 8.16.2.29 NMAC, 10/1/16]

8.16.2.30 FAMILY CHILD CARE HOME AND GROUP CHILD CARE HOME REGULATIONS:

APPLICABILITY: A private dwelling required to be licensed under regulations in 8.16.2.31 NMAC through 8.16.2.38 NMAC which meets one of the following criteria.

A. Family child care home - A private dwelling required to be licensed pursuant to these regulations which provides care, services, and supervision to at least five but no more than six children for a period of less than 24 hours of any day. The licensee will reside in the home and be the primary educator. A family day care home intending to

provide care for more than two but not to exceed four children under the age of two must be specifically licensed for this purpose.

B. Group child care home - A private dwelling or other building on the premises required to be licensed pursuant to these regulations which provides care, services, and supervision for at least seven but not more than 12 children for a period of less than 24 hours of any day. The licensee will reside in the home and be the primary educator. A group day care home intending to provide care for more than two but not to exceed four children under the age of two must be specifically licensed for this purpose. [8.16.2.30 NMAC - Rp, 8.16.2.30 NMAC, 10/1/16]

8.16.2.31 LICENSURE REQUIREMENTS FOR HOMES:

A. LICENSING REQUIREMENTS:

(1) APPLICATION FORM: An applicant will complete an application form provided by the licensing authority and include payment for the non-refundable application fee. Applications will be rejected unless all supporting documents are received within six months of the date indicated on the application. A 45 day extension will be granted if the licensee provides documentation to the licensing authority that documents were submitted to the appropriate agencies in a timely manner but, through no fault of their own, they have not received responses from these agencies.

(2) A home will submit a new application to the licensing authority before changing anything required to be stated on the license such as dates, capacity, operator, or address.

(3) BACKGROUND CHECK: In addition to the basic requirements at 8.16.2.19 NMAC of the general provisions an applicant will apply for a national criminal records check. The licensing authority will provide a copy of the most

current version of the department's background check and employment history verification provisions (8.8.3 NMAC), regulations, fingerprint instructions, and forms for recording an employment history. The licensee will be responsible for obtaining background checks on all staff members, educators, volunteers, and prospective staff members, educators, volunteers, any person who may have unsupervised physical access to children, and all adults residing in the home as per the requirements outlined in the department's most current version of the background check and employment history verification provisions. All requirements of the current background check and employment history verification provisions pursuant to 8.8.3 NMAC must be met prior to the issuance of an initial license. A request for a background check must be submitted prior to a staff member's employment. A background check must be conducted in accordance with 8.8.3 NMAC at least once every five years on all required individuals.

(4) ZONING AND OTHER APPROVALS: An applicant will have:

(a) current written zoning approval from the appropriate city, county or state authority;

(b) current written approval of the state fire marshal office or other appropriate city, county or state fire-prevention authority if applicable;

(c) current written approval from the New Mexico environment department or other environmental health authority for: 1) Private water supply, if applicable; 2) Private waste or sewage disposal, if applicable; and 3) A swimming pool, if applicable.

(5) SCHEDULE: All applications for a new license will include a description of the home's proposed activities and schedule.

(6) INITIAL SURVEY: The licensing authority will schedule a survey for a home when it receives a complete application with

all supporting documents.

B. CAPACITY OF A HOME:

(1) The number of children in a home, either in total or by age, will not exceed the capacity stated on the license.

(2) The licensing authority will count all children in the care of the licensed home, including the educator's own children under the age of six, in the capacity of a home, even if the children are on a field trip or other outing outside the home. The licensed capacity must not be exceeded by the presence of school age children.

(3) A home may be licensed for up to 12 children.

(4) A home licensed as a family day care home under these regulations providing care for a maximum capacity of six children may care for up to four children under the age of two providing a second educator is present in the home and the home is licensed to provide such care. A home licensed as a group day care home under these regulations providing care for a maximum of 12 children may care for up to four children under age two providing a second educator is present in the home and the home is licensed to provide such care.

(5) A home must have 35 square feet of activity and sleeping space per child, excluding bathrooms, kitchens, halls and other built-in fixtures and offsets, with total capacity limited to no more than 12 children. A home must have at least one bathroom with a toilet and sink. For a home licensed for no more than six children, one activity room will be measured. For a home licensed for 12 children, no more than two rooms will be measured.

(6) The home will have an outdoor play area, which must be fenced in.

C. INCIDENT REPORTING REQUIREMENTS:

(1) The licensee will report to the appropriate authorities the following incidents. After making a report to the

appropriate authorities, the licensee shall notify the licensing authority of the incident giving rise to its report as soon as possible but no later than 24 hours after the incident occurred. A report should first be made by telephone and followed with written notification. The licensee shall report any incident that has threatened or could threaten the health and safety of children and staff members, such as, but not limited to:

(a) a lost or missing child;

(b) a serious injury;

(c) the abuse or neglect of a child;

(d)

fire, flood, or other natural disaster that creates structural damages to a home or poses a health hazard;

(e) any of the illnesses on the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health;

(f)

any legal action against a home, household member, or staff members;

(g)

any incident that could affect the background check eligibility of any cleared person related to this license;

(h)

the use of physical or mechanical restraints, unless due to documented emergencies or medically documented necessity; or

(i)

any known change in an educator's health condition or use of medication that impairs his or her ability to provide for the health, safety or welfare of children in care.

(2) A home will notify parents or guardians in writing of any incident, including notifiable illnesses, that has threatened the health or safety of children in the home. Incidents include, but are not limited to, those listed in Paragraph (1) of Subsection C of 8.16.2.31 NMAC.

(3) Incident reports involving suspected child abuse and neglect must be reported

immediately to children’s protective services and local law enforcement. The licensing authority follows written protocols/procedures for the prioritization, tracking, investigation and reporting of incidents, as outlined in the complaint investigation protocol and procedures. [8.16.2.31 NMAC - Rp, 8.16.2.31 NMAC, 10/1/16]

8.16.2.32 ADMINISTRATIVE REQUIREMENTS FOR HOMES:

A. ADMINISTRATIVE RECORDS: A licensee will post the child care home license in an area readily visible to parents and visitors. The licensee will also keep on file:

- (1) all licenses, certificates, and most recent inspection reports of all state and local government agencies with jurisdiction over the home;
- (2) the current child care regulations;
- (3) the guidance policy;
- (4) the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health; and
- (5) an up to date emergency evacuation and disaster preparedness plan, which shall include steps for evacuation, relocation, shelter-in-place, lock-down, communication, reunification with parents, individual plans for children with special needs and children with chronic medical conditions, accommodations of infants and toddlers, and continuity of operations. The plan shall be approved annually by the licensing authority and the department will provide guidance on developing these plans.

B. MISSION, PHILOSOPHY AND CURRICULUM STATEMENT: All licensed facilities must have a:

- (1) mission statement;
- (2) philosophy statement; and
- (3) curriculum

statement.
C. PARENT HANDBOOK: All facilities using these regulations must have a parent handbook which includes the following:

- (1) GENERAL INFORMATION:
 - (a) mission statement;
 - (b) philosophy statement;
 - (c) program information (location, license information, days and hours of operation, services offered);
 - (d) name of licensee and how he/she may be reached;
 - (e) meals, snacks and types of food served (or alternatively, guidelines for children bringing their own food);
 - (f) daily schedule;
 - (g) a statement supportive of family involvement that includes an open door policy to the family or group child care home;
 - (h) appropriate dress for children, including request for extra change of clothes;
 - (i) celebrating holidays, birthdays and parties; and
 - (j) disclosure to parents that the licensee does not have liability or accident insurance coverage.

(2) POLICIES AND PROCEDURES:

- (a) enrollment procedures;
- (b) disenrollment procedures;
- (c) policies and procedures for expulsion of children. Policies and procedures shall include how the home will maintain a positive environment and will focus on preventing the expulsion of children age birth to five. The home must develop policies that include clear, appropriate, consistent expectations, and consequences to address disruptive student behaviors;

- and ensure fairness, equity, and continuous improvement;
- (d) fee payment procedures, including penalties for tardiness;
- (e) notification of absence;
- (f) fee credits, if any (e.g. for vacations, absences, etc.);
- (g) field trip policies;
- (h) health policies (program’s policies on admitting sick children, when children can return after an illness, administering medication, and information on common illnesses);
- (i) emergency procedures, safety policies, and disaster preparedness plan;
- (j) snow days and school closure;
- (k) confidentiality policy;
- (l) child abuse/neglect reporting procedure; and
- (m) guidance policy.

D. CHILDREN’S RECORDS: A home will maintain a complete record for each child, including drop-ins, completed before the child is admitted and kept at the home for 12 months after the child’s last day of attendance. Records will contain at least:

- (1) PERSONAL INFORMATION:
 - (a) name of the child, date of birth, gender, home address, mailing address and telephone number;
 - (b) names of the parents or guardians, the parents or guardians current places of employment, addresses, pager, cellular and work telephone numbers;
 - (c) a list of people authorized to pick up the child and an authorization form signed by parent or guardian; identification of person authorized by the parent or guardian to pick up the child shall be verified at pick up;
 - (d)

date the child first attended the home and the date of the child's last day at the home;

(e) a copy of the child's up-to-date immunization record or a public health division-approved exemption from the requirement. A grace period of a maximum of 30 days will be granted for children in foster care or homeless children and youth;

(f) a record of any accidents, injuries or illnesses that require first aid or medical attention and any observations of recent bruises, bites or potential signs of abuse or neglect, both of which must be reported to a parent or guardian;

(g) written authorization from the child's parent or guardian to remove a child from the premises to participate in off-site activities; authorization must contain fieldtrip destination, date and time of fieldtrip and expected return time from fieldtrip;

(h) written authorization from the child's parent or guardian for the educator to apply sunscreen, insect repellent and, if applicable, diaper cream to the child;

(i) a record of the time the child arrived and left the home and dates of attendance initialed by a parent, guardian, or person authorized to pick up the child;

(j) an enrollment agreement must be signed by a parent or guardian with an outline of the services and the costs being provided by the home; and

(k) a signed acknowledgement that the parent or guardian has read and understands the parent handbook.

(2) EMERGENCY INFORMATION:

(a) information on any allergies or medical conditions suffered by the child;

(b) the name and telephone number of two people to contact in the local area in an emergency when a parent

or guardian cannot be reached; emergency contact numbers must be kept up to date at all times.

(c) the name and telephone number of a physician or emergency medical center authorized by a parent or guardian to contact in case of illness or emergency;

(d) a document giving a home permission to transport the child in a medical emergency and an authorization for medical treatment signed by a parent or guardian; and

(e) if applicable, legal documentation regarding the child, including but not limited to: restraining orders, guardianship, powers of attorney, court orders, and custody by children's protective services.

E. PERSONNEL RECORDS: A home will keep the following records on file and make them available to the licensing authority.

(1) Documentation of a background check and employment history verification for all staff members and all adults living in the home. A background check must be conducted at least once every five years on all required individuals.

(2) An annual signed statement that the staff member would or would not be disqualified as a direct provider of care under the most current version of the background checks and employment history verification provisions pursuant to 8.8.3 NMAC.

(3) A record of the time the second educators arrived at and left work, to include breaks and lunch.

(4) A written plan for ongoing professional development for each educator that is based on the seven areas of competency, consistent with the career lattice, and based on the individual's goals. Family child care homes who do not have employees are exempted from this requirement.

F. PERSONNEL HANDBOOK: The educator will

give each non-resident employee a personnel handbook that covers all matters relating to employment and includes the following critical contents:

- (1) job description of second educator;
- (2) benefits, if provided, including vacation days, sick leave, professional development days, health insurance, break times, etc.;
- (3) code of conduct;
- (4) training requirements, professional development opportunities;
- (5) procedures and criteria for performance evaluations;
- (6) policies on absence from work;
- (7) procedures for resignation or termination;
- (8) copy of licensing regulations;
- (9) policy on parent involvement;
- (10) health policies related to both children and staff;
- (11) policy on sexual harassment;
- (12) child guidance policy;
- (13) confidentially statement; and
- (14) plan for retention of qualified staff.

[8.16.2.32 NMAC - Rp, 8.16.2.32 NMAC, 10/1/16]

8.16.2.33 PERSONNEL AND STAFFING

REQUIREMENTS FOR HOMES:

A. PERSONNEL AND STAFFING REQUIREMENTS:

(1) A licensee will not allow any staff member, including the licensee, or any other adult living in the home involved in an incident which would disqualify that staff member or other adult under the department's most current version of the background check and employment history verification provisions pursuant to 8.8.3 NMAC to continue to work directly or

unsupervised with children or to reside in the home.

(2) All staff members will demonstrate the ability to perform essential job functions that reasonably ensure the health, safety and welfare of children in care.

(3) Educators who work directly with children and who are counted in the staff/child ratios must be 18 years of age or older.

(4) The licensee shall be in the licensed child care home during at least seventy-five percent of the home's core hours of operation.

(5) Substitutes, volunteers and part time second educators counted in the staff/child ratios shall meet the same requirements as regular staff members, except for training requirements. Substitutes and part time second educators routinely employed in the home but working 20 hours or less a week shall complete half the required training hours. Such employees working more than 20 hours per week shall complete all required training hours. The primary educator in a licensed home shall complete all required training hours, regardless of the number of hours worked.

(6) A home licensed to provide care for six or fewer children will have at least one educator in the home at all times. A home licensed to provide care for more than two children under the age of two will have at least two educators in the home at all times.

(7) A home licensed for seven to 12 children will have at least two educators at the home when more than six children are present or when more than two children under the age of two are present.

(8) Children will never be left unattended. An educator will be with the children at all times whether activities are inside or outside of the home. Educators will be onsite, available and responsive to children during all hours of operation.

B. STAFF QUALIFICATIONS AND TRAINING:

(1) All new educators regardless of the number of hours per week will complete the following training within three months of their date of hire. All current educators will have three months to comply with the following training from the date these regulations are promulgated:

(a) prevention and control of infectious diseases (including immunization);

(b) prevention of sudden infant death syndrome and use of safe sleeping practices;

(c) administration of medication, consistent with standards for parental consent;

(d) prevention of and response to emergencies due to food or other allergic reactions;

(e) building and physical premises safety, including identification of and protection from hazards that can cause bodily injury such as electrical hazards, bodies of water, and vehicular traffic;

(f) prevention of shaken baby syndrome and abusive head trauma;

(g) emergency preparedness and response planning for emergencies resulting from a natural disaster, or a man-caused;

(h) handling and storage of hazardous materials and the appropriate disposal of bio contaminants;

(i) precautions in transporting children (if applicable);

(j) first aid and cardiopulmonary resuscitation (CPR) certification; and

(k) recognition and reporting of child abuse and neglect.

(2) A home will keep a training log on file including the date of the training,

name of educator, hours earned, subject/competency area, source of training, and training certificates.

(3) Educators working for a home will receive at least 12 documented hours of training during each year, including six hours in child growth and development and three hours in health, safety, nutrition, and infection control. The three remaining training hours must be within the seven competency areas. The competency areas are: 1) child growth, development and learning; 2) health, safety, nutrition and infection control; 3) family and community collaboration; 4) developmentally appropriate content; 5) learning environment and curriculum implementation; 6) assessment of children and programs; and 7) professionalism. An educator cannot count more than three hours in first aid or CPR training toward the total hours required. Online first aid and CPR training will not be approved. For this purpose, a year begins and ends at the anniversary date of employment. Training must be provided by individuals who are registered on the New Mexico trainer registry. On-line training courses shall count for no more than eight hours each year. If the 45-hour entry level course or its equivalent is taken online, it is exempt from the online training limitation. Identical trainings shall not be repeated for the purpose of obtaining credit. The 12 hours of annual training will be waived for educators if employed by a program currently under FOCUS consultation.

(4) Infant and toddler educators must have at least two hours of training in infant and toddler care within six months of starting work. The two hours will count toward the 12-hour requirement in Paragraph (2).

(5) The primary educator will complete the 45-hour entry level course or approved three-credit early care and education course or an equivalent approved by the department prior to or within six months of employment.

(6) A home must have all educators certified

in first aid and cardio-pulmonary resuscitation (CPR).
[8.16.2.33 NMAC - Rp, 8.16.2.33 NMAC, 10/1/16]

8.16.2.34 SERVICES AND CARE OF CHILDREN IN HOMES:

A. GUIDANCE:

(1) A home will have written policies and procedures clearly outlining guidance practices. Care-givers will give this information to all parents and staff who will sign a form to acknowledge that they have read and understand these policies and procedures.

(2) Guidance will be consistent and age appropriate.

(3) Guidance shall be positive and include redirection and clear limits that encourage the child's ability to become self-disciplined. The use of physical or mechanical restraints is prohibited unless due to documented emergencies or medically documented necessity.

(4) A home will not use the following disciplinary practices:

(a) physical punishment of any type, including shaking, biting, hitting, pinching or putting anything on or in a child's mouth;

(b) withdrawal of food, rest, bathroom access, or outdoor activities;

(c) abusive or profane language, including yelling;

(d) any form of public or private humiliation, including threats of physical punishment; or

(e) unsupervised separation.

B. NAPS OR REST PERIOD:

(1) A home will provide physical care appropriate to each child's developmental needs that will include a supervised rest period.

(2) A home shall allow children who do not sleep to get up and participate in quiet

activities that do not disturb the other children.

(3) Each child will have an individual bed, cot, or mat.

(4) Cribs, cots or mats shall be spaced at least 30 inches apart to permit easy access by adults to each child. If the room used for sleeping cannot accommodate 30 inches of spacing between children, educators shall space children as far as possible from one another. There must be enough room to permit easy access to all children without moving cribs, cots or mats. Cots or mats will have a nonabsorbent, cleanable surface. Mats will be at least three-fourths of an inch thick. Mats and cots shall be cleaned and linens must be laundered before being used by another child.

(5) Educators shall ensure that nothing covers the face or head of a child aged 12 months or younger when the child is laid down to sleep and while the child is sleeping. Educators shall not place anything over the head or face of a child over 12 months of age when the child is laid down to sleep and while the child is sleeping.

(6) Children with disabilities or medical conditions that require unusual sleeping arrangements will have written authorization from a parent or physician justifying the sleeping arrangement.

(7) Illumination equivalent to that cast by a soft night light shall be operational in areas that are occupied by children who are napping or sleeping.

(8) Children shall be directly supervised during naptime.

(9) All children shall sleep in the licensed area of the home. No children shall be allowed to sleep behind closed doors.

C. ADDITIONAL REQUIREMENTS FOR INFANTS AND TODDLERS:

(1) The home will provide a crib for each infant and, when appropriate, for a toddler.

(2) Cribs will

meet federal standards and be kept in good repair. A home will not use plastic bags or lightweight plastic sheeting to cover a mattress and will not use pillows in cribs.

(3) No child will be allowed to sleep in a playpen, car seat, stroller or swing.

(4) Children under the age of 12 months shall be placed on their backs when sleeping unless otherwise authorized in writing by a physician.

(5) A home will not admit any child under the age of six weeks except with the written approval of a licensed physician.

(6) Throughout the day, an educator will give each infant and toddler physical contact and attention. An educator will hold, talk to, sing to and take inside and outside walks with the child. An educator will respond immediately to all cries of infants and to the cries of all children within two minutes.

(7) An educator will use routine activities such as nap time, feeding, diapering and toileting as opportunities for language development and other learning.

(8) Infants shall not be allowed to be confined to one area for prolonged periods of time unless the infant is content and responsive.

(9) A home will arrange the sleeping and play areas so that children in the play area do not disturb sleeping children.

(10) Infants shall either be held or be fed sitting up for bottle-feeding. Infants unable to sit shall always be held for bottle-feeding. Infants and toddlers shall not be placed in a laying position while drinking bottles or sippy cups. The carrying of bottles and sippy cups by young children throughout the day or night shall not be permitted.

(11) Each infant shall be allowed to form and observe his or her own pattern of feeding, sleeping, and waking periods.

(12) Food served shall meet the nutritional needs

of the infant or toddler. Foods shall be developmentally appropriate for each infant served.

D. DIAPERING AND TOILETING:

(1) An educator will plan toilet training with a parent so the toilet routine is consistent. A home will not attempt to toilet train a child who is not developmentally ready.

(2) A home will change wet and soiled diapers and clothing promptly. Staff members will wear non-porous, single use gloves when changing a diaper and wash their hands after changing a diaper. Food service gloves are not permissible for diaper changing.

(3) A home will have a supply of dry, clean clothing and diapers sufficient to meet the needs of the child. A home will label diapers and diapering supplies for each child and store them separately. Diaper bags will be inaccessible to children.

(4) An educator will change a child's diaper on a clean, safe, waterproof surface and discard any disposable cover and disinfect the surface after each diaper change. Soiled diapers shall be stored in a secure container with a tight-fitting lid to assure proper hygiene and control of odors.

E. ADDITIONAL REQUIREMENTS FOR CHILDREN WITH SPECIAL NEEDS:

(1) Child care facilities are responsible for staff awareness of community resources for families of children with disabilities, including children under the age of five years as well as those of school age. If family or group home educators believe that a child may have a delay or disability, possible resources for referral and assistance are provided to parents when appropriate. No referral for special needs services to an outside agency will be made without a parent's consent. Family Education Right and Privacy Act (FERPA) will be respected at all times.

(2) Child care facilities are responsible for staff

awareness of the Americans with Disabilities Act (ADA) as it relates to enrolling and caring for children with disabilities.

F. NIGHT CARE: In addition to all other requirements, a home providing night care will have an educator onsite, physically available and responsive to children who need attention during the night.

G. PHYSICAL ENVIRONMENT:

(1) Environment shall be organized into functional identifiable learning areas. Family child care homes that have dedicated space shall have at least four of the following learning areas. Family child care homes that do not have dedicated space shall have at least three of the following learning areas:

- (a) a place for messy play;
- (b) a place for loud, active play;
- (c) a place for playing quietly;
- (d) a place to pretend; and
- (e) a place to read.

(2) Each learning area is clearly defined, using shelves and furniture.

(3) Adults can visually supervise all centers at all times.

(4) Learning areas have adequate space and noisy and quiet areas are arranged so that children's activities can be sustained without interruption.

(5) Materials are well cared for and organized by type. Where appropriate, materials are labeled with words or pictures. Adaptations to materials are made when needed to accommodate various abilities of all children. Unused materials are stored in inaccessible storage.

(6) Examples of children's individually expressed artwork are displayed in the environment at the children's eye level.

(7) Floor

surface is suitable for activities that will occur in each learning area.

(8) File

and storage space is available for educators' materials.

H. SOCIAL-EMOTIONAL RESPONSIVE ENVIRONMENT:

(1) Educators remain calm in stressful situations.

(2) Educators are actively engaged with children. Educators talk, actively listen and respond to children appropriately by responding to children's questions and acknowledging their comments, concerns, emotions and feelings.

(3) Educators help children communicate their feelings by providing them with language to express themselves.

(4) Educators model appropriate social behaviors, interactions and empathy. Educators respond to children that are angry, hurt, or sad in a caring and sensitive manner. Educators make appropriate physical contact to comfort children who are distressed.

I. EQUIPMENT AND PROGRAM:

(1) Toys and equipment must be safe, durable, and easy to clean, non-toxic and sanitized daily.

(2) A home will not use accordion-style baby gates.

(3) A home will provide sufficient equipment, materials, and furnishings for both indoor and outdoor activities so that at any one time, each child can be individually involved.

(4) A home will store equipment and materials for children's use within easy reach of the children, including those with disabilities. A home will store the equipment and materials in an orderly manner so children can select and replace the materials by themselves or with minimal assistance.

(5) A home will provide children with toys and other materials that are safe, developmentally appropriate, and encourage the child's creativity, social

interaction, and a balance of individual and group play.

(6) A home will post a daily activity schedule. A home will follow a consistent pattern for routine activities such as meals, snacks and rest.

(7) Media viewing will not be permitted for children less than two years of age. Media viewing for children two years and older will be limited to six hours per month, but not to exceed one full length film in one day. Programs, movies, music and music programs shall be age appropriate and shall not contain adult content.

(8) Children and family members shall be acknowledged upon arrival and departure.

(9) Full-time children shall have a minimum of 60 minutes of physical activity daily, preferably outside. Part time children shall have a minimum of 30 minutes of physical activity daily, preferably outside.

(10) Equipment and program requirements apply during all hours of operation of the licensed facility.

J. OUTDOOR PLAY:

(1) Outdoor play equipment used in child care homes shall be:

(a) intended for public (non-residential) use and installed and maintained according to the manufacturer's instructions; or

(b) if intended for residential use, shall be safe and securely anchored.

(2) A home will enclose the outdoor play area with a fence at least four feet high and with at least one latched gate available for an emergency exit.

(3) A home will place sufficient energy absorbing surfaces beneath climbing structures, swings and slides (as determined by Subsection P of 8.16.2.8 NMAC).

Critical Heights of Playground Equipment for Various Types and Depths of Resilient Surfaces Based on Information from the U.S. CONSUMER PRODUCT SAFETY COMMISSION (CPSC Publication No. 325), Handbook for Public Playground Safety. When no requirement is provided for a specific height of equipment, we have used the requirement for the next higher height, so requirements are conservative, erring on the side of safety.						
Equipment Height	Wood Chips	Double Shredded Bark	Uniform Wood Chips	Fine Sand	Coarse Sand	Fine Gravel
Uncompressed Depths of Materials In Fall Zone						
Five feet or less	6 inches	6 inches	6 inches	6 inches	6 inches	6 inches
Six feet	6 inches	6 inches	6 inches	12 inches	12 inches	6 inches
Seven feet	6 inches	9 inches	9 inches	12 inches	12 inches	9 inches
Eight feet	9 inches	9 inches	12 inches	12 inches	12 inches	12 inches
Nine Feet	9 inches	9 inches	12 inches	12 inches	N/A	12 inches
Ten Feet	9 inches	9 inches	12 inches	N/A	N/A	12 inches
For poured or installed foam or rubber surfaces, the materials must meet the ASTM F1292 requirements with written verification from the manufacturer.						

(4) The use of a trampoline is prohibited at any time during the hours of operation or by any children receiving care at the facility.

(5) Children shall be protected from the sun during outdoor play, as instructed by the child's parent or guardian.

K. SWIMMING, WADING AND WATER:

(1) Each child will have written permission from a parent or guardian before the child enters a pool.

(2) If a home has a portable wading pool:

(a) a home will drain and fill the wading pool with fresh water daily and disinfect the pool regularly;

(b) a home will empty a wading pool when it is not in use and remove it from areas accessible to children; and

(c) a home will not use a portable wading pool placed on concrete or asphalt.

(3) If a home has a built in or above ground swimming pool, ditch, fishpond or other water hazard:

(a) the fixture will be constructed, maintained and used in accordance with applicable state and local regulations;

(b) the fixture will be constructed and protected so that, when not in use, it is

inaccessible to children; and

(c) when in use, children will be constantly supervised and the number of adults present will be increased to ensure adequate safety for the ages, abilities and type of water hazard in use.

(4) The following ratios shall be observed for swimming pools more than two feet deep:

Ratio for swimming pools more than two feet deep		
Age of the youngest child	Number of educators, lifeguards or volunteers	Number of children
0-23 months	1	1
2 years	1	2
3 years	1	6
4 years	1	8
5 years	1	10
6 years and older	1	12

L. FIELD TRIPS:

(1) A home will ensure the children’s safety on field trips and excursions. See Subparagraph (g) of Paragraph (1) of Subsection D of 8.16.2.32 NMAC for information on permission slips.

(2) Children will not go to a private residence other than the licensed home unless accompanied by two adults.

[8.16.2.34 NMAC - Rp, 8.16.2.34 NMAC, 10/1/16]

8.16.2.35 FOOD SERVICE REQUIREMENTS FOR HOMES:

A. MEAL PATTERN REQUIREMENTS: All foods prepared by the home will conform to the guidelines from United States department of agriculture’s (USDA’s) child and adult care food program (CACFP) for foods, meal patterns and serving sizes.

B. MEALS AND SNACKS:

(1) A home will provide a child a meal or snack at least every three hours except when the child is sleeping at night.

(2) A home will serve if necessary a child a therapeutic or special diet with a written prescription/ diet order from a physician or a registered or licensed dietician. Diet orders must be complete and descriptive, and not subject to interpretation by the educators.

(3) A home shall make water freely available to children.

(4) A home that provides daily meals and snacks shall plan these to meet the minimum standards in the CACFP and to be consistent with the USDA’s current dietary guidelines for Americans, to include the following. Parents of children who have special dietary needs may provide written permission to the child care program to exempt their child from the following requirements if necessary due to such special dietary needs.

(a) Only one hundred percent fruit or vegetable juice shall be served. The use of fruit drinks containing less than one hundred percent or artificially flavored drinks for meals or snacks is prohibited. one hundred percent fruit or vegetable juice may be diluted with water.

(b) Only whole, pasteurized fluid milk shall be served to children between 12 and 24 months of age; reduced fat, low fat, or skim milk may be served to children who are two years and older.

(c) A wide variety of fruits and vegetables shall be served, with a preference for fresh or frozen fruits and vegetables over canned.

(5) A home will vary snacks each day and will include a selection of two different food group components from the four food group components.

C. MENUS:

(1) Weekly menus must be dated and posted in an area easily visible to parents.

(2) Menus shall be posted at least one week in advance, in a conspicuous place, for review by parents, educators and children.

D. KITCHENS:

(1) A home will not allow children in the kitchen except under careful supervision.

(2) A food preparer will thoroughly wash all raw fruits and vegetables before cooking or serving.

(3) A home will serve food promptly and refrigerate immediately after use. Foods served will meet the nutritional needs of the infant or toddler. Foods will have the proper texture and consistency for each infant served.

(4) A home will protect food and drink by properly storing items in an airtight container or by tightly wrapping them. A home will label and date all leftover food.

(5) If food is brought from the child's home, a home will label it with the child's name and refrigerate if necessary. A home will label and refrigerate bottles of infant formula or breast milk. Labeling is not necessary if only one child is using bottles.

(6) A home will keep food requiring refrigeration, including formula, at 41 degrees Fahrenheit or below, and frozen food at 0 degrees Fahrenheit or below.

(7) Refrigerators and separate freezers will have working internal thermometers.

(8) A home will protect all food from insects, rodents and other vermin.

(9) A home will discard any leftover milk or formula, rinse bottles after use and sanitize bottles before reuse.

(10) A home will sanitize eating utensils, dishes and cups before re-use by washing them in a dishwasher or by completing the following steps: 1) wash with soapy water; 2) rinse with clean warm water; and 3) sanitize.

(11) A home will use cleaning materials for the kitchen and food preparation areas only in the kitchen and will store the materials separately from food.

(12) A home shall thoroughly sanitize food preparation surfaces before and after each use.

E. MEAL TIMES:

(1) A home will equip dining areas with tables, chairs, eating utensils and dishes appropriate to the age of the children served. Areas will be sanitized before and after each use.

(2) A home will provide sanitary cups or glasses or a drinking fountain for drinking water. Infants and toddlers shall be offered water from a cup. Toddlers

shall be encouraged to hold and drink from a cup, use a spoon, and to use their fingers for self-feeding. A home will not allow children to share drinking or eating utensils.

(3) Time allowed for meals shall enable children to eat at a reasonable rate. [8.16.2.35 NMAC - Rp, 8.16.2.35 NMAC, 10/1/16]

8.16.2.36 HEALTH AND SAFETY REQUIREMENTS FOR HOMES:

A. HYGIENE:

(1) Children and staff members will wash their hands with soap and warm running water as needed. Water basins shall not be used as an alternative to running water. Staff and children will wash their hands whenever hands are contaminated with body fluids and always:

(a) after using a toilet, assisting a child with toilet use, or changing a diaper;

(b) before and after caring for a sick child;

(c) before any food service activity, including setting the table;

(d) before and after eating or feeding a child; and

(e) after handling pets or animals or items used by animals such as water and food bowls.

(2) A home will label with the child's name and store separately any item used for an individual child's personal hygiene.

B. FIRST AID REQUIREMENTS:

(1) A home will keep a first-aid kit and a first-aid manual together in the home in a location inaccessible to children and easily accessible to adults. The first aid kit will contain, at a minimum: band aids, gauze pads, adhesive tape, scissors, soap, non-porous gloves, and a thermometer.

(2) A home will treat blood spills cautiously and promptly disinfect the area. Staff

members will wear non-porous, single-use gloves when handling a blood spill, bloody diarrhea, bloody nose, or any other blood. A home will clean contaminated surfaces first with hot soapy water then with a disinfecting solution, which is effective against HIV and hepatitis B.

C. MEDICATION:

(1) A home will keep all medications in a locked and identified container inaccessible to children and will refrigerate medications when necessary. If the refrigerator is inaccessible to children, medications do not need to be in a locked container in the refrigerator.

(2) Homes will give medication only with written permission from parents or guardian, to be administered according to written directions from the prescribing physician. In the case of non-prescription medication, written instructions must be provided by the parent or guardian. For the purpose of this requirement (Paragraph (2) of Subsection C of 8.16.2.36) only, non-prescription medications include sunscreen, insect repellent and diaper creams or other over the counter medications. With written authorization from the child's parent or guardian, sunscreen and insect repellent may be shared. Diaper cream shall not be shared.

(3) The licensee will be responsible for giving medication to children. The designated staff member will ensure non-prescription and prescription medications have a label with the child's name and the date the medication was brought to the home. A home will keep non-prescription and prescription medication in the original container with written instructions, including the name of medication, the dosage, and the hours and dates the child should receive the medicine.

(4) The licensee will keep and sign a written record of the dosage, date and time a child is given medication. This information will be provided to the parent or guardian who will initial/ date acknowledgment of information

received on the day the medication is given.

(5) When the medication is no longer needed, it shall be returned to the parents or guardians or destroyed. The home shall not administer expired medication.

D. ILLNESS AND NOTIFIABLE DISEASES:

(1) Children or staff members absent due to any notifiable disease will not return to the home without a signed statement from a physician.

(2) A home will separate and constantly observe a child who becomes sick at the home and promptly notify a parent or guardian of the child's illness.

(3) A home will send a child home when:

(a) the child's oral temperature is 101 degrees Fahrenheit or greater or armpit temperature is 100.4 degrees Fahrenheit or greater and the child shows signs of illness or behavior changes; or

(b) the educator observes signs of contagious disease or severe illness. [8.16.2.36 NMAC - Rp, 8.16.2.36 NMAC, 10/1/16]

8.16.2.37 TRANSPORTATION REQUIREMENTS FOR HOMES:

A. When a home provides transportation to children, it is responsible for the care of children from the time of pick up to delivery to a responsible adult. All vehicles used for transportation of children will have an operable fire extinguisher, first-aid kit, first-aid manual, water and blanket.

B. A home will license all vehicles used for transporting children and will meet all applicable state vehicle laws. A child shall be transported only if the child is properly secured in a child passenger restraint device or by a safety belt as follows.

(1) Children less than one year of age shall be properly secured in a rear-facing child passenger restraint device that meets

federal standards, in the rear seat of a vehicle that is equipped with a rear seat. If the vehicle is not equipped with a rear seat, the child may ride in the front seat of the vehicle if the passenger-side air bag is deactivated or if the vehicle is not equipped with a deactivation switch for the passenger-side air bag.

(2) Children one year of age through four years of age, regardless of weight, or children who weigh forty pounds, regardless of age, shall be properly secured in a child passenger restraint device that meets federal standards.

(3) Children five years of age through six years of age, regardless of weight, or children who weigh less than 60 pounds, regardless of age, shall be properly secured in either a child booster seat or an appropriate child passenger restraint device that meets federal standards.

(4) Children seven years of age through 12 years of age shall be secured in a child passenger restraint device or by a seat belt.

C. Vehicles used for transporting children will be enclosed and properly maintained. Vehicles shall be cleaned and inspected inside and out.

D. A home will load and unload children at the curbside of the vehicle or in a protected parking area or driveway. The home will ensure children do not cross a street unsupervised after leaving the vehicle.

E. No one will smoke in a vehicle used for transporting children.

F. Children may be transported only in vehicles that have current registration and insurance coverage. All drivers must have current driver's license and comply with motor vehicle and traffic laws. Persons who have been convicted in the last seven years of a misdemeanor or felony DWI/DUI cannot transport children under the auspices of a licensed facility.

G. At least one adult transporting children shall be currently certified in cardiopulmonary

resuscitation.

[8.16.2.37 NMAC - Rp, 8.16.2.37 NMAC, 10/1/16]

8.16.2.38 BUILDING, GROUND AND SAFETY REQUIREMENTS FOR HOMES:

A. HOUSEKEEPING:
(1) An educator will keep the premises, including furniture, fixtures, toys and equipment clean, safe, and free of debris and potential hazards.

(2) Materials dangerous to children must be secured in a manner making them inaccessible to children and away from food storage or preparation areas.

(3) All garbage and refuse receptacles in kitchens and in outdoor areas will have a tight fitting lid, be durable and constructed of materials that will not absorb liquids.

B. PEST CONTROL:
(1) All licensed child care homes must use a New Mexico licensed pest applicator whenever applying pesticides on the home's buildings and grounds.

(2) The pest control company may not apply pesticides when children are on the premises.

(3) Parents, guardians, and staff must be notified at least two days prior to spraying or applying pesticides and insecticides.

(4) All food storage, preparation, and serving areas must be covered and protected from spraying or application of pesticides.

C. MECHANICAL SYSTEMS:

(1) A home will maintain comfortable temperatures (68 degrees through 82 degrees Fahrenheit) in all rooms used by children. A home may use portable fans if the fans are secured and inaccessible to children and do not present any tripping, safety or fire hazards. In the event air temperature in a home exceeds the 82 degrees Fahrenheit in the summer months because of evaporative cooler temperature limitations, it will be verified that cooling equipment is

functioning, is being maintained, and that supplemental aides have been employed, such as, but not limited to: ceiling fans, portable fans, or portable evaporative coolers.

(2) A home will not use unvented heaters, open flame heaters or portable heaters. A home will install barriers or take other steps to ensure heating units, are inaccessible to children. Heating units include hot water pipes, hot water baseboard heaters hotter than 110 degrees Fahrenheit, fireplaces, fireplace inserts and wood stoves.

(3) A home must maintain all heating and cooling equipment so that it is in good working order.

(4) A home will provide fresh air and control odors by either mechanical or natural ventilation. If a home uses a window for ventilation, it will have a screen. If a door is used for fresh air ventilation, it must have a screen door.

(5) Water coming from a faucet will be below 110 degrees Fahrenheit. A home will install a tempering valve ahead of all domestic water-heater piping.

(6) All food preparation areas, sinks, washrooms, laundries and bathrooms will have hot and cold running water under pressure.

D. LIGHTING, LIGHTING FIXTURES AND ELECTRICAL:

(1) A home will use U/L approved equipment only and will properly maintain this equipment.

(2) All electrical outlets within reach of children will be safety outlets or will have protective covers.

(3) The use of multi-prong or gang plugs is not allowed. Surge protectors are not gang plugs under these regulations.

E. EXITS: When an activity area does not have a door directly to the outside, at least one window in each activity area must be useable for an emergency exit.

F. TOILET AND

BATHING FACILITIES:

(1) All toilet rooms will have toilet paper, soap and disposable towels at a height accessible to children. A home will not use a common towel or wash cloth.

(2) All closets and bathroom locks must have an outside release. A home will enclose all bathrooms.

G. SAFETY

COMPLIANCE:

(1) A home will have an operating smoke detector in each child-activity room and in each room in which a child sleeps.

(2) A home will have a 210ABC extinguisher mounted in the kitchen in a visible and easily accessible place. A professional will inspect each fire extinguisher once a year and fire extinguishers will have official tags noting the date of inspection.

(3) A home will conduct at least one fire drill each month and an emergency preparedness practice drill at least quarterly beginning January of each calendar year. A home will hold the drills at different times of the day and will keep a record of the drills with the date, time, number of adults and children participating, and any problems.

(4) A home will keep a telephone in an easily accessible place for calling for help in an emergency and will post emergency phone numbers for fire, police, ambulance and the poison control center next to the phone.

H. SMOKING, FIREARMS, ALCOHOLIC BEVERAGES, ILLEGAL DRUGS AND CONTROLLED SUBSTANCES: A home will prohibit smoking and the drinking of alcoholic beverages in all areas, including vehicles, when children are present. A home will unload all guns, such as pellet or BB guns, rifles and handguns, and keep them in a locked area inaccessible to children. Possessing or knowingly permitting illegal drugs or non-prescription controlled substances to be possessed

or sold on the premises at any time regardless of whether children are present is prohibited.

I. PETS:

(1) A home will inform parents or guardians in writing before pets are in the home.

(2) A home will inoculate any pets as prescribed by a veterinarian and keep a record of proof of inoculation prior to the pet's presence in the home.

(3) A home will not allow on the premises pets or other animals that are undomesticated, dangerous, contagious or vicious in nature.

(4) Areas of confinement, such as cages and pens, and outdoor areas are cleaned of excrement daily. Animals shall be properly housed, fed and maintained in a safe, clean sanitary and humane condition at all times.

(5) An educator must be physically present during the handling of all pets or other animals.

[8.16.2.38 NMAC - Rp, 8.16.2.38 NMAC, 10/1/16]

8.16.2.39 REGULATIONS FOR PROGRAMS OFFERING ONLY OUT OF SCHOOL TIME CARE: APPLICABILITY:

A child care program required to be licensed under 8.16.2.40 NMAC through 8.16.2.47 NMAC of this regulation provides a variety of developmentally appropriate activities that are both educational and recreational at a specific site, usually a school, on a regular basis before or after school or when school is not in regular session to children age five to 18 years, and not exempted from regulation under any of the exceptions listed in 8.16.2.9 NMAC.

[8.16.2.39 NMAC - Rp 8.16.2.39 NMAC, 10/1/16]

8.16.2.40 LICENSURE REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. LICENSING REQUIREMENTS:

(1) APPLICATION FORM: An

applicant will complete an application form provided by the licensing authority and include payment for the non-refundable application fee. Applications will be rejected unless all supporting documents are received within six months of the date indicated on the application. A 45 day extension will be granted if the licensee provides documentation to the licensing authority that documents were submitted to the appropriate agencies in a timely manner but, through no fault of their own, they have not received responses from these agencies.

(2) A program will submit a new application to the licensing authority before changing anything that is stated on the license such as dates, capacity, director, address, etc.

(3) **BACKGROUND CHECK:** The licensing authority will provide a copy of the most current version of the department's background check and employment history verification provisions (8.8.3 NMAC), regulations, fingerprint instructions, and forms for recording an employment history. The licensee will be responsible for obtaining background checks on all staff members, educators, volunteers, and prospective staff members, educators, volunteers, any person who may have unsupervised physical access to children, and all adults residing in the home as per the requirements of the most current version of the department's background check and employment history verification provisions. All requirements of the current background check and employment history verification provisions pursuant to 8.8.3 NMAC must be met prior to the issuance of an initial license. A request for a background check must be submitted prior to a staff member's employment. A background check must be conducted in accordance with 8.8.3 NMAC at least once every five years on all required individuals.

(4) **ZONING, BUILDING AND OTHER APPROVALS:** An applicant will use

the approvals provided to the schools and community centers as long as the approvals are current according to the applicable department's requirements. Acceptable documents will be provided to the licensing authority before licensure. Otherwise, an applicant will have:

(a) current written zoning approval from the appropriate city, county or state authority;

(b) current written building approval, such as a certificate of occupancy, from the appropriate city, county or state authority;

(c) current written approval of the state fire marshal office or other appropriate city, county or state fire-prevention authority; and

(d) current written approval from the New Mexico environment department or other environmental health authority for:

(i) a kitchen, if meals are prepared and served on site in the program;

(ii) private water supply, if applicable;

(iii) private waste or sewage disposal, if applicable; and,

(iv) a swimming pool, if applicable.

(5) **ACCESS REQUIREMENTS FOR INDIVIDUALS WITH DISABILITIES IN NEW FACILITIES:** Accessibility for individuals with disabilities is provided in all new facilities and will include the following.

(a) Main entry into the facility is level or has a ramp to allow for wheelchair access.

(b) Building layout allows for access to the main activity area.

(c) Access to at least one bathroom is required to have a door clearance of 32 inches. The toilet unit also provides a 60-inch diameter turning radius.

(d) If ramps are provided to the building, the slope of each ramp is at least a 12-inch horizontal run for each inch of vertical rise.

(e) Ramps exceeding a six-inch rise are provided with handrails.

(f) Requirements contained herein are minimum and additional disability requirements may apply depending on the size and complexity of the facility.

(6) **SCHEDULE:** All applications for a new license will include a description of the programs proposed activities and schedule.

(7) **INITIAL SURVEY:** The licensing authority will schedule a survey for a program when it receives a complete application with all supporting documents.

B. CAPACITY OF A PROGRAM:

(1) The number of children in a program, either in total or by age, will not exceed the capacity stated on the license.

(2) The licensing authority will count all children in the care of the program even if the children are on a field trip or other outing outside the program site.

(3) A program must meet the following space requirements:

(a) 35 square feet of indoor activity space measured wall to wall on the inside for each child in a program, excluding single-use areas, such as restrooms, kitchens, and storage areas, and excluding offsets and built-in fixtures.

(b) A program must have an outdoor activity space.

(4) The capacity of each room will be posted in an area of the room that is readily visible to parents, staff members and visitors.

C. INCIDENT REPORTING REQUIREMENTS:

(1) The licensee will report to the appropriate

authorities the following incidents. After making a report to the appropriate authorities, the licensee shall notify the licensing authority of the incident giving rise to its report as soon as possible but no later than 24 hours after the incident occurred. A report should first be made by telephone and followed with written notification. The licensee shall report any incident that has threatened or could threaten the health and safety of children and staff members, such as, but not limited to:

- (a) a lost or missing child;
 - (b) a serious injury;
 - (c) the abuse or neglect of a child;
 - (d) fire, flood, or other natural disaster that creates structural damages to a program or poses a health hazard;
 - (e) any of the illnesses on the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health;
 - (f) any legal action against a program or staff members;
 - (g) any incident that could affect the background check eligibility of any cleared person related to this license;
 - (h) the use of physical or mechanical restraints, unless due to documented emergencies or medically documented necessity; or
 - (i) any known change in an educator's health condition or use of medication that impairs his or her ability to provide for the health, safety or welfare of children in care.
- (2) A program will notify parents and guardians in writing of any incident, including notifiable illnesses, that has threatened the health or safety of children in the program. Incidents include, but are not limited to, those listed in Paragraph (1) of Subsection C of 8.16.2.40 NMAC.
- (3) Incident

reports involving suspected child abuse and neglect must be reported immediately to children's protective services and local law enforcement. The licensing authority follows written protocols/procedures for the prioritization, tracking, investigation and reporting of incidents, as outlined in the complaint investigation protocol and procedures. [8.16.2.40 NMAC - Rp, 8.16.2.40 NMAC, 10/1/16]

8.16.2.41 ADMINISTRATIVE REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. ADMINISTRATION RECORDS: A licensee shall display in a prominent place that is readily visible to parents, staff and visitors:

- (1) all licenses, certificates, and most recent inspection reports of all state and local government agencies with jurisdiction over the program;
- (2) the current child care regulations;
- (3) dated weekly menus for meals and snacks;
- (4) the guidance policy; and
- (5) the current list of notifiable diseases and communicable diseases published by the office of epidemiology of the New Mexico department of health.

B. MISSION, PHILOSOPHY AND CURRICULUM STATEMENT: All licensed facilities must have a:

- (1) mission statement;
- (2) philosophy statement; and
- (3) curriculum statement.

C. PARENT HANDBOOK: All facilities using these regulations must have a parent handbook which includes the following.

- (1) GENERAL INFORMATION:
 - (a) mission statement;
 - (b) philosophy statement;

- (c) program information (location, license information, days and hours of operation, services offered);
 - (d) name of director and how he/she may be reached;
 - (e) meals, snacks and types of food served (or alternatively, guidelines for children bringing their own food);
 - (f) daily schedule;
 - (g) a statement supportive of family involvement that includes an open door policy to the classroom;
 - (h) appropriate dress for children, including request for extra change of clothes;
 - (i) celebrating holidays, birthdays and parties; and
 - (j) disclosure to parents that the licensee does not have liability or accident insurance coverage.
- (2) POLICIES AND PROCEDURES:
- (a) enrollment procedures;
 - (b) disenrollment procedures;
 - (c) expulsion procedures;
 - (d) fee payment procedures, including penalties for tardiness;
 - (e) notification of absence;
 - (f) fee credits, if any (e.g. for vacations, absences, etc.);
 - (g) field trip policies;
 - (h) health policies (program's policies on admitting sick children, when children can return after an illness, administering medication, and information on common illnesses);
 - (i) emergency procedures and safety policies;
 - (j) snow days and school closure;
 - (k)

confidentiality policy;
 (l)
 child abuse/neglect reporting
 procedure;
 (m)
 guidance policy; and
 (n)
 emergency procedures, safety
 policies, and disaster preparedness
 plan.

D. CHILDREN'S
 RECORDS: A program will maintain
 a complete record for each child,
 including drop-ins, to be completed
 before the child is admitted. Records
 will be kept at the program, unless
 otherwise indicated in the list below,
 for 12 months after the child's last day
 of attendance. Records will contain at
 least:

- (1)
 PERSONAL INFORMATION:
 (a)
 name of the child; date of birth,
 gender, home address, mailing
 address and telephone number;
 (b)
 names of the parents or guardians, the
 parents or guardian's current places
 of employment, addresses, and pager,
 cellular and work telephone numbers;
 (c) a
 list of people authorized to pick up the
 child and an authorized form signed
 by parent or guardian; identification
 of person authorized by the parent or
 guardian to pick up the child shall be
 verified at pick up;
 (d)
 date the child first attended the
 program and the date of the child's
 last day at the program;
 (e)
 a record of any accidents, injuries
 or illnesses that require first aid
 or medical attention and any
 observations of recent bruises, bites
 or signs of abuse or neglect, both of
 which must be reported to a parent or
 guardian; these records may be kept at
 a central location;
 (f)
 written authorization from the child's
 parent or guardian to remove a child
 from the premises to participate in
 off-site activities; authorization must
 contain fieldtrip destination, date and
 time of fieldtrip and expected return

time from fieldtrip;
 (g)
 a record of the time the child arrived
 and left the program and dates of
 attendance initialed by a parent,
 guardian, or person authorized to pick
 up the child; and
 (h)
 an enrollment agreement; this form
 will be signed by a parent or guardian
 with an outline of the services and the
 costs; these forms may be kept at a
 central location.

(2)
 EMERGENCY INFORMATION:
 (a)
 information on any allergies or
 medical conditions suffered by the
 child; the name and telephone number
 of two people in the local area to
 contact in an emergency when a
 parent or guardian cannot be reached;
 emergency contact numbers must be
 kept up to date at all times;
 (b)
 the name and telephone number of
 a physician or emergency medical
 facility authorized by a parent or
 guardian to contact in case of illness
 or emergency;
 (c)
 a document giving a program
 permission to transport the child
 in a medical emergency and an
 authorization for medical treatment
 signed by a parent or guardian;
 (d)
 if applicable, legal documentation
 regarding the child, including but
 not limited to: restraining orders,
 guardianship, powers of attorney,
 court orders, and custody by
 children's protective services.

E. PERSONNEL
 RECORDS:
 (1) A licensee
 will keep a complete file for each staff
 member, including substitutes and
 volunteers having direct contact with
 the children. A program will keep
 the file for one year after the staff
 member's last day of employment.
 Unless otherwise indicated, a licensee
 may keep the items listed below in a
 central location. Records will contain
 at least the following:
 (a)
 name, address and telephone number;

(b)
 position;
 (c)
 current and past duties and
 responsibilities;
 (d)
 dates of hire and termination;
 (e)
 documentation of a background check
 and employment history verification.
 A background check must be
 conducted at least once every five
 years on all required individuals;
 (f)
 an annual signed statement that the
 staff member would or would not
 be disqualified as a direct provider
 of care under the most current
 version of the background checks
 and employment history verification
 provisions pursuant to 8.8.3 NMAC;
 (g)
 documentation of first-aid and
 cardiopulmonary resuscitation
 training;
 (h)
 documentation of all appropriate
 training by date, time, hours and area
 of competency;
 (i)
 emergency contact number;
 (j)
 universal precaution
 acknowledgement; and
 (k) a
 written plan for ongoing professional
 development for each staff member,
 including the director, that is based
 on the seven areas of competency,
 consistent with the career lattice, and
 based on the individual's goals.
 (2) A program
 will maintain current work schedules
 and daily sign in sheets for the
 director, all staff, all educators, and
 volunteers and keep the records on
 file for at least 12 months. The record
 will include the time the employee
 arrived at and left work and include
 breaks and lunch.
 F. PERSONNEL
 HANDBOOK: The educator will
 give each employee a personnel
 handbook that covers all matters
 relating to employment and includes
 the following critical contents:
 (1)
 organizational chart;

(2) job descriptions of all employees by title;

(3) benefits, including vacation days, sick leave, professional development days, health insurance, break times, etc.;

(4) code of conduct;

(5) training requirements

(6) procedures and criteria for performance evaluations;

(7) policies on absence from work;

(8) grievance procedures;

(9) procedures for resignation or termination;

(10) copy of licensing regulations;

(11) policy on parent involvement;

(12) health policies related to both children and staff;

(13) policy on sexual harassment;

(14) plan for retention of qualified staff; and

(15) an up-to-date emergency evacuation and disaster preparedness plan, which shall include steps for evacuation, relocation, shelter in place, lock-down, communication, reunification with parents, individual plans for children with special needs and children with chronic medical conditions, and continuity of operations (see waivers, Subsection D of 8.16.2.14 NMAC). The plan shall be approved annually by the licensing authority and the department will provide guidance on developing these plans; and

(16) policies and procedures for expulsion of children. Policies and procedures shall include how the program will maintain a positive environment and will focus on preventing the expulsion of children age five. The program must develop policies that include clear, appropriate, consistent expectations, and consequences to address disruptive student behaviors; and ensure fairness, equity, and

continuous improvement.
[8.16.2.41 NMAC - Rp, 8.16.2.41 NMAC, 10/1/16]

8.16.2.42 PERSONNEL AND STAFFING REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. PERSONNEL AND STAFFING REQUIREMENTS:

- (1) An employer will not allow any employee involved in an incident which would disqualify that employee under the department's most current version of the background check and employment history verification provisions pursuant to 8.8.3 NMAC to continue to work directly or unsupervised with children;
- (2) All educators will demonstrate the ability to perform essential job functions that reasonably ensure the health, safety and welfare of children in care.
- (3) Educators (staff members) who work directly with children and who are counted in the staff/child ratios must be 18 years of age or older.
- (4) Clerical, cooking and maintenance personnel included in the staff/child ratio will have a designated schedule showing their normal hours in each role. Educators counted in the staff/child ratios will not be responsible for cooking, clerical or cleaning duties while caring for children.
- (5) Substitutes, volunteers and part-time educators counted in the staff/child ratios will meet the same requirement as regular staff members except for training requirements. Substitutes and educators routinely employed in a facility but working 20 hours or fewer a week, will complete half the required training hours. Such employees working more than 20 hours a week will meet full training requirements. See Paragraph (4) of Subsection C of 8.16.2.42 NMAC for additional training requirements.
- (6) Each site will have a site director. The site director or a designated co-director who meets the same qualifications

as the site director will be on site 50 percent of the program's core hours of operation.

(7) A program will maintain staff/child ratios and group sizes at all times. Children must never be left unattended whether inside or outside the facility.

(8) A program will have a minimum of two staff members present at all times, with one being an educator. If the program has less than seven children, the second staff member may be engaged in other duties.

(9) Each site will have one adult for every 15 children age five or older. Maximum group size of 30.

(10) The number of children who may be in a group and the number of caregivers is specified in Paragraph (9) of Subsection A of 8.16.2.42 NMAC. More than one group of children may occupy a room, provided the following conditions are met:

(a) The room is divided so that different activity/interest areas are well-defined (i.e. art, dramatic play, fine motor, homework, science, math, and quiet homelike area);

(b) Each activity/interest area will have a posted capacity, which may vary according to the activity and size of the space, and will not exceed 30;

(c) Placement of cabinets, tables, carpeting, room-dividers, or shelving clearly define the different activity/interest areas;

(d) Individual children may freely move from one activity/interest area at their own pace as long as the capacity of any individual interest area is not exceeded;

(e) A single educator is responsible for supervising up to 15 children in one or more interest area as long as every child is in direct eyesight; and

(f) The total number of children in the larger room must not exceed the room capacity based on activity

space. For example, if the larger room has a capacity of 90, and the maximum group size is 30, the room must be divided by at least three well-defined activity/interest areas and be supervised by at least six caregivers, who are spread out so that every child is "attended".

B. STAFF QUALIFICATIONS:

(1) Unless exempted under Paragraph (3) below, an out of school time program will have an administrator/director who is at least 21 years old and has proof of a current copy of:

- (a) a child development associate (CDA) certificate, a certified child care professional credential (CCP), a Montessori teacher, a national administrator credential (NAC), or an associate of arts or applied science degree in child development or early childhood education and at least two years of experience in an early childhood growth and development setting; a school-age child care growth and development setting; or
- (b) a bachelor's degree or higher in early childhood education or a related field with at least one year of experience in an early childhood growth and development setting or a school-age child care growth and development setting; early childhood growth and development settings include, but are not limited to, licensed or registered family child care programs, licensed center-based early childhood education and development programs, and family support programs.

(2) Every site of an out of school time program will have a site director who has at least a high school diploma or GED and proof of at least three years of experience working with children.

(3) Program administrators and site directors employed in a licensed program on the date these regulations become effective but who are not qualified will continue to qualify in their positions as long as they continuously work as program administrators or site directors. Current program

administrators and site directors having a break in employment of more than one year must meet the requirements.

C. TRAINING:

(1) The program administrator will develop and document an orientation and training plan for new staff members and will provide information on training opportunities. New staff members will participate in an orientation before working with children. Initial orientation will include training on the following areas:

- (a) scope of services and activities offered by the program;
- (b) emergency first aid procedures;
- (c) indicators of child abuse and neglect;
- (d) fire prevention measures, emergency evacuation plan and disaster preparedness plan;
- (e) review of licensing regulations;
- (f) review of policies regarding guidance;
- (g) child abuse and neglect reporting;
- (h) handling of incidents and complaints; and
- (i) health and safety, including infection and injury prevention and control.

(2) All new educators regardless of the number of hours per week will complete the following training within three months of their date of hire. All current educators will have three months to comply with the following training from the date these regulations are promulgated:

- (a) prevention and control of infectious diseases (including immunization);
- (b) administration of medication, consistent with standards for parental consent;
- (c) prevention of and response to emergencies due to food or other

- allergic reactions;
- (d) building and physical premises safety, including identification of and protection from hazards that can cause bodily injury such as electrical hazards, bodies of water, and vehicular traffic;
- (e) abusive head trauma;
- (f) emergency preparedness and response planning for emergencies resulting from natural or man-caused disasters;
- (g) handling and storage of hazardous materials and the appropriate disposal of bio contaminants;
- (h) precautions in transporting children (if applicable);
- (i) first aid and cardiopulmonary resuscitation (CPR) certification; and
- (j) recognition and reporting of child abuse and neglect.

(3) A program will keep a training log on file with the employee's name, date of hire and position. The log must also include the date, hours of training, subject, training source and training certificate.

(4) All educators are required to obtain at least 24 hours of training each year. For this purpose, a year begins and ends at the anniversary date of employment. Training must address all seven competency areas within two years. Training shall be relevant to school age children. Identical trainings shall not be repeated for the purpose of obtaining credit. The competency areas are:

- (a) child growth, development, and learning;
- (b) health, safety, nutrition, and infection control;
- (c) family and community collaboration;
- (d) developmentally appropriate content;
- (e) learning environment and curriculum

implementation;
 (f) assessment of children and programs;
 and
 (g) professionalism.
 (5) The 24 hours of annual training will be waived for educators if employed by a program currently under FOCUS consultation.
 (6) Training must be provided by individuals who have education or experience in the competency area (or areas) in which they train. Employees or relatives of employees who provide training must have prior approval by the department.
 (7) Program administrators may count hours in personnel and business training toward the training requirement. [8.16.2.42 NMAC - Rp, 8.16.2.42 NMAC, 10/1/16]

8.16.2.43 SERVICES AND CARE OF CHILDREN IN OUT OF SCHOOL TIME CARE:

A. GUIDANCE:
 (1) A program will have written policies and procedures clearly outlining guidance practices. Facilities will give this information to all parents and staff who will sign a form to acknowledge that they have read and understand these policies and procedures.
 (2) Guidance will be consistent and age appropriate.
 (3) Guidance shall be positive and include redirection and clear limits that encourage the child's ability to become self-disciplined. The use of physical or mechanical restraints is prohibited unless due to documented emergencies or medically documented necessity.
 (4) A program will not use the following disciplinary practices:
 (a) physical punishment of any type, including shaking, biting, hitting or putting anything on or over a child's mouth;
 (b)

withdrawal of food, rest, bathroom access, or outdoor activities;
 (c) abusive or profane language, including yelling;
 (d) any form of public or private humiliation, including threats of physical punishment; or
 (e) unsupervised separation.

B. PHYSICAL ENVIRONMENT:

(1) Environment shall be organized into age appropriate functional identifiable learning areas. If any of the selected learning areas are not represented at a given time, the areas shall be rotated to provide children with the opportunity to gain skills supported by a variety of learning experiences. The areas may include:
 (a) dramatic play;
 (b) creative art;
 (c) books;
 (d) blocks and accessories;
 (e) manipulatives;
 (f) music;
 (g) science;
 (h) math/number; and
 (i) sensory.

(2) Each center is clearly defined, using shelves and furniture.
 (3) Adults can visually supervise all centers at all times.
 (4) The capacity of each room will be posted in an area of the room that is readily visible to parents, staff members, and visitors.
 (5) Learning areas have adequate space and quiet areas are arranged so that children's activities can be sustained without interruption.
 (6) Materials

are well cared for and organized by type. Where appropriate, materials are labeled with words or pictures. Adaptations to materials are made when needed to accommodate various abilities of all children. Unused materials are stored in inaccessible storage.

(7) Examples of children's individually expressed artwork are displayed in the environment at the children's eye level.

(8) The floor surface is suitable for activities that will occur in each learning area.

(9) File and storage space is available for educators' materials.

C. SOCIAL-EMOTIONAL RESPONSIVE ENVIRONMENT:

(1) Educators remain calm in stressful situations.
 (2) Educators are actively engaged with children. Educators talk, actively listen and respond to children appropriately by responding to children's questions and acknowledging their comments, concerns, emotions and feelings.
 (3) Educators help children communicate their feelings by providing them with language to express themselves.
 (4) Educators model appropriate social behaviors, interactions and empathy. Educators respond to children that are angry, hurt, or sad in a caring and sensitive manner. Educators make appropriate physical contact to comfort children who are distressed.

D. EQUIPMENT AND PROGRAM:

(1) A program will provide sufficient equipment, materials, and furnishings for both indoor and outdoor activities so that at any one time each child can be individually involved.
 (2) Each child at a program will have a designated space for storage of clothing and personal belongings.
 (3) A program will store equipment and materials for children's use within easy reach

of the children, including those with disabilities. A program will store the equipment and materials in an orderly manner so children can select and replace the materials by themselves or with minimal assistance.

(4) A program will provide children with toys, educational materials, equipment and other materials and activities that are safe, developmentally appropriate, and encourage the child's educational progress, creativity, social interaction, and a balance of individual and group activity. Program staff must be onsite, available and responsive to children during all hours of operation.

(5) A program will post a daily activity schedule. A program will follow a consistent pattern for routine activities such as meals, snacks and rest.

(6) Media viewing will be limited to six hours per month, but not to exceed one full length film in one day. Programs, movies, music and music programs shall be age appropriate and shall not contain adult content.

(7) Children and family members shall be acknowledged upon arrival and departure.

(8) Equipment and program requirements apply during all hours of program operation.

E. ADDITIONAL REQUIREMENTS FOR CHILDREN WITH SPECIAL NEEDS:

(1) Child care facilities are responsible for staff awareness of community resources for families of children with disabilities, including children under the age of five years as well as those of school age. If staff believe that a child may have a delay or disability, possible resources for referral and assistance are provided to parents when appropriate. No referral for special needs services to an outside agency will be made without a parent's consent. Family Education Right and Privacy Act (FERPA) will be respected at all times.

(2) Child care facilities are responsible for staff awareness of the Americans with

Disabilities Act (ADA) as it relates to enrolling and caring for children with disabilities.

F. OUTDOOR PLAY AREAS:

(1) Outdoor play equipment used in out of school time programs shall be:

(a) intended for public (non-residential) use and installed and maintained according to the manufacturer's instructions; or

(b) if intended for residential use, shall be safe and securely anchored.

(2) A program will place sufficient energy absorbing surfaces beneath climbing structures, swings and slides (as determined by Subsection P of 8.16.2.8 NMAC).

Continued On The Following Page

Critical Heights of Playground Equipment for Various Types and Depths of Resilient Surfaces Based on Information from the U.S. CONSUMER PRODUCT SAFETY COMMISSION (CPSC Publication No. 325), Handbook for Public Playground Safety.

When no requirement is provided for a specific height of equipment, we have used the requirement for the next higher height, so requirements are conservative, erring on the side of safety.

Equipment Height	Wood Chips	Double Shredded Bark	Uniform Wood Chips	Fine Sand	Coarse Sand	Fine Gravel
	Uncompressed Depths of Materials In Fall Zone					
Five feet or less	6 inches	6 inches	6 inches	6 inches	6 inches	6 inches
Six feet	6 inches	6 inches	6 inches	12 inches	12 inches	6 inches
Seven feet	6 inches	9 inches	9 inches	12 inches	12 inches	9 inches
Eight feet	9 inches	9 inches	12 inches	12 inches	12 inches	12 inches
Nine Feet	9 inches	9 inches	12 inches	12 inches	N/A	12 inches
Ten Feet	9 inches	9 inches	12 inches	N/A	N/A	12 inches

For poured or installed foam or rubber surfaces, the materials must meet the ASTM F1292 requirements with written verification from the manufacturer.

(3) The use of a trampoline is prohibited at any time during the hours of operation or by any children receiving care at the facility.

G. SWIMMING, WADING AND WATER:

(1) Each child will have written permission from a parent or guardian before the child enters the pool.

(2) If a program has a portable wading pool:

(a) a program will drain and fill the wading pool with fresh water daily and disinfect the pool regularly;

(b) a program will empty a wading pool when it is not in use and remove it from areas accessible to children; and

(c) a program will not use a portable wading pool placed on concrete or asphalt.

(3) If a program has a built in or above ground swimming pool, ditch, fishpond or other water hazard:

(a) the fixture will be constructed, maintained and used in accordance with applicable state and local regulations;

(b) the fixture will be constructed and protected so that, when not in use, it is inaccessible to children; and

(c) when in use, children will be constantly supervised and the number of adults present will be proportional to the ages and abilities of the children and type of water hazard in use.

(4) The following ratios shall be observed for swimming pools more than two feet deep:

Ratio for swimming pools more than two feet deep		
Age of the youngest child	Number of educators, lifeguards or volunteers	Number of children
5 years	1	10
6 years and older	1	12

H. FIELD TRIPS:

(1) A program will ensure the children’s safety on field trips and excursions. See Subparagraph (f) of Paragraph (1) of Subsection D of 8.16.2.41 NMAC for requirements concerning field trip permission slips.

(2) Children will not go to a private residence unless accompanied by two adults.

[8.16.2.43 NMAC - Rp, 8.16.2.43 NMAC, 10/1/16]

8.16.2.44 FOOD SERVICE REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. MEAL PATTERN REQUIREMENTS: All foods prepared by the program will conform to the guidelines from United States department of agriculture’s (USDA’s) child and adult care food program (CACFP) for foods, meal patterns and serving sizes.

B. MEALS AND SNACKS:

(1) A program will provide a child a meal or snack at least every three hours.

(2) A program will serve a child a therapeutic or special diet with a written prescription/diet order from a physician or a recognized medical authority. Diet orders must be complete and descriptive, and not subject to interpretation by the program staff.

(3) A program will serve snacks each day and will include a selection of two different food group components from the four food group components.

(4) A program shall serve only one hundred percent fruit or vegetable juice. The use of fruit drinks that contain less than one hundred percent juice or artificially flavored drinks for meals or snacks is prohibited. One hundred percent fruit or vegetable juice may be diluted with water.

(5) A program shall serve a wide variety of fruits and vegetables, with a preference for fresh or frozen fruits and vegetables over canned.

(6) A program shall make water freely available to children.

(7) Menus shall contain a variety of foods. The same menu must not be served twice in one week.

C. KITCHENS:

(1) A program will not allow children in the kitchen except under careful supervision.

(2) A food preparer will thoroughly wash all raw fruits and vegetables before cooking or serving.

(3) A program will serve food promptly and refrigerate immediately after use.

(4) A program will discard any leftover milk.

(5) A program will keep food requiring refrigeration, at 41 degrees Fahrenheit or below and frozen food at 0 degrees Fahrenheit or below.

(6) Refrigerators and separate freezers

will have working internal thermometers.

(7) A program will protect food and drink by properly storing items in an airtight container or by tightly wrapping them. A program will label and date all leftover food.

(8) A program will protect all food from insects, rodents and other vermin.

(9) A program will sanitize eating utensils, dishes and cups before re-use by washing them in a dishwasher or by completing the following steps:

- (a) wash with soapy water;
- (b) rinse with clean warm water; and
- (c) sanitize

(10) A program will use cleaning materials for the kitchen and food preparation areas only in the kitchen and will store the materials separately from food.

(11) A program will equip dining areas with tables, chairs, eating utensils and dishes appropriate to the age of the children served and sanitize the areas before and after use.

(12) A program will provide sanitary cups or glasses or a drinking fountain for drinking water. A program will not allow children to share drinking or eating utensils.

(13) A program shall thoroughly sanitize food preparation surfaces before and after each use.
[8.16.2.44 NMAC - Rp, 8.16.2.44 NMAC, 10/1/16]

8.16.2.45 HEALTH AND SAFETY REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. HYGIENE:

Children and staff members will wash their hands with soap and warm running water as needed. Water basins shall not be used as an alternative to running water. Staff and children will wash their hands whenever hands are contaminated with body fluids and always:

- (1) after using a toilet;
- (2) before and after caring for a sick child;
- (3) before any food service activity, including setting the table;
- (4) before and after eating; and
- (5) after handling pets or animals or items used by animals such as water and food bowls.

B. FIRST AID

REQUIREMENTS:

(1) A program will have all educators certified in first aid and cardiopulmonary resuscitation (CPR).

(2) A program will keep a first-aid kit and a first-aid manual together in the program in a location inaccessible to children and easily accessible to adults. The first aid kit will contain, as a minimum, band aids, gauze pads, adhesive tape, scissors, soap, non-porous gloves, and a thermometer.

(3) A program will treat blood spills cautiously and promptly decontaminate the area. Staff members will wear non-porous, single-use gloves when handling a blood spill, bloody diarrhea, bloody nose, or any other blood. A program will clean contaminated surfaces first with hot soapy water then with a disinfecting solution which is effective against HIV and hepatitis B.

C. MEDICATION:

(1) A program will keep all medications in a locked and identified container inaccessible to children and will refrigerate medications when necessary. If the refrigerator is inaccessible to children, medications do not need to be in a locked container in the refrigerator.

(2) Programs will give medication only with written permission from parents or guardian, to be administered according to written directions from the prescribing physician. In the case of non-prescription medication, written instructions must be provided by the parent or guardian.

(3) A

designated staff member will be responsible for giving medication to children. The designated staff member will ensure non-prescription and prescription medications have a label with the child's name and the date the medication was brought to the program. A program will keep non-prescription and prescription medication in the original container with written instructions, including the name of medication, the dosage, and the hours and dates the child should receive the medicine.

(4) The designated staff member will keep a written record of the dosage, date, and time a child is given medication with the signature of the staff who administered the medication. This information will be provided to the parent or guardian who will initial/date acknowledgment of the information received on the day the medication is given.

(5) When the medication is no longer needed, it shall be returned to the parents or guardians or destroyed. The program shall not administer expired medication.

D. ILLNESSES:

(1) Children or staff members absent due to any notifiable disease will not return to the program without a signed statement from a physician.

(2) A program will separate and constantly observe a child who becomes sick at the program and promptly notify a parent or guardian of the child's illness.

(3) A program will send a child home when:

(a) the child's oral temperature is 101 degrees Fahrenheit or greater or armpit temperature is 100.4 degrees Fahrenheit or greater and the child shows signs of illness or behavior changes; or

(b) an educator observes signs of contagious disease or severe illness.

(4) The program will have a cot or mat available for sick children and it will be cleaned and disinfected thoroughly

after use.

[8.16.2.45 NMAC - Rp, 8.16.2.45 NMAC, 10/1/16]

8.16.2.46 TRANSPORTATION REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. All vehicles used for transportation of children will have an operable fire extinguisher, first-aid kit, first-aid manual, water and blanket.

B. A program will load and unload children at the curbside of the vehicle or in a protected parking area or driveway. The program will ensure children do not cross a street unsupervised after leaving the vehicle.

C. No one will smoke in a vehicle used for transporting children.

D. A program will license all vehicles used for transporting children and will meet all applicable state vehicle laws. A child shall be transported only if the child is properly secured in a child passenger restraint device or by a safety belt as follows. School buses that are not equipped with passenger restraint devices are exempt from this requirement.

(1) Children five years of age through six years of age, regardless of weight, or children who weigh less than 60 pounds, regardless of age, shall be properly secured in either a child booster seat or an appropriate child passenger restraint device that meets federal standards.

(2) Children seven years of age through 12 years of age shall be secured in a child passenger restraint device or by a seat belt.

E. Vehicles used for transporting children will be enclosed and properly maintained. Vehicles shall be cleaned and inspected inside and out at least weekly.

F. Vehicles operated by the program to transport children shall be air-conditioned whenever the outside air temperature exceeds 82 degrees Fahrenheit. If the outside air temperature falls below 50 degrees Fahrenheit the program will ensure

the vehicle is heated.

G. Children may be transported only in vehicles that have current registration and insurance coverage. All drivers must have current driver's license and comply with motor vehicle and traffic laws. Persons who have been convicted in the last seven years of a misdemeanor or felony DWI/DUI cannot transport children under the auspices of a licensed facility/program.

H. At least one adult transporting children shall be currently certified in cardiopulmonary resuscitation (CPR).

[8.16.2.46 NMAC - Rp, 8.16.2.46 NMAC, 10/1/16]

8.16.2.47 BUILDING, GROUND AND SAFETY REQUIREMENTS FOR OUT OF SCHOOL TIME CARE:

A. HOUSEKEEPING:

(1) A program will keep the premises, including furniture, fixtures, toys and equipment clean, safe, and free of debris and potential hazards.

(2) Materials dangerous to children must be secured in a manner making them inaccessible to children and away from food storage or preparation areas.

(3) All garbage and refuse receptacles in kitchens and in outdoor areas will be durable, and constructed of materials that will not absorb liquids.

B. PEST CONTROL:

(1) All licensed programs must use a New Mexico licensed applicator whenever applying pesticides in or on the program's buildings and grounds.

(2) The applicator may not apply pesticides when children are on the premises.

(3) Parents, guardians, and staff must be notified at least two days prior to spraying or applying pesticides.

(4) All food storage, preparation, and serving areas must be covered and protected from spraying or application of pesticides.

C. MECHANICAL SYSTEMS:

(1) A program will maintain comfortable temperatures (68 degrees Fahrenheit through 82 degrees Fahrenheit) in all rooms used by children. A program may use portable fans if the fans are secured and inaccessible to children and do not present any tripping, safety or fire hazards. In the event air temperature in a program exceeds the 82 degrees Fahrenheit in the summer months because of evaporative cooler temperature limitations, it will be verified that cooling equipment is functioning, is being maintained, and that supplemental aides have been employed, such as, but not limited to: ceiling fans, portable fans, or portable evaporative coolers.

(2) A program must maintain all heating and cooling equipment so that it is in good working order.

(3) A program will not use unvented heaters, open flame heaters or portable heaters. A program will install barriers or take other steps to ensure heating units, are inaccessible to children. Heating units include hot water pipes, hot water baseboard heaters hotter than 110 degrees Fahrenheit, fireplaces, fireplace inserts and wood stoves.

(4) A program will provide fresh air and control odors by either mechanical or natural ventilation. If a program uses a window for ventilation, it will have a screen. If a door is used for ventilation, it must have a screen door.

(5) Water coming from a faucet will be below 110 degrees Fahrenheit. A program will install a tempering valve ahead of all domestic water-heater piping.

(6) All food preparation areas, sinks, washrooms, laundries and bathrooms will have hot and cold running water under pressure.

D. LIGHTING, LIGHTING FIXTURES AND ELECTRICAL:

(1) All areas will have sufficient glare-free lighting with shatterproof or shielded bulbs.

(2) A program

will have emergency lighting that turns on automatically when electrical service is disrupted.

(3) Use of electrical cords and outlets:

(a) A program will use U/L approved equipment only and will properly maintain this equipment.

(b) The use of multi-prong or gang plugs is prohibited. Surge protectors are not gang plugs under these regulations.

E. EXITS AND WINDOWS: When an activity area does not have a door directly to the outside, at least one window in each activity area must be able to be opened for emergency egress with a minimum net clear opening of 5.7 square feet. The minimum net clear opening for height dimension must be 24 inches. The minimum net clear opening width dimension must be 20 inches, and the finished sill height must not be more than 44 inches above the floor.

(1) There must be at least two exits remote from each other in each activity area of the program.

(2) Exit ways must be kept free from obstructions at all times.

F. TOILET AND BATHING FACILITIES:

(1) All toilet rooms will have toilet paper, soap and disposable towels at a height accessible to children. A program will not use a common towel or wash cloth.

(2) All toilets and sinks must be located within 100 feet of the licensed area. The staff member shall maintain a direct line of sight of the child until the child enters the bathroom and from the time the child leaves the bathroom until the child returns.

G. SAFETY COMPLIANCE:

(1) A program will conduct emergency preparedness practice drills at least quarterly beginning of each school calendar year.

(2) A program

will conduct at least one fire drill each month. A program will:

(a) hold the drills at different times of the day;

(b) use the fire alarm, detector system or a simulated fire alarm;

(c) emphasize an orderly evacuation rather than speedy; and

(d) a program will keep on file a record of the drills with the date, time, number of adults and children participating, and any problems encountered during the drills. Records will be kept for one year.

(3) A program shall request an annual fire inspection from the fire authority having jurisdiction. If the policy of the fire authority having jurisdiction does not provide for an annual inspection of the program, the program must document the date the request was made and to whom. A copy of the latest inspection must be posted in the program.

(4) A program will post evacuation plans for each room used by children in the appropriate room.

(5) A program will keep a working telephone in an easily accessible place for calling for help in an emergency and will post emergency phone numbers for fire, police, ambulance and the poison control center next to the phone. A pay phone will not fulfill this requirement. If cordless phones are used, emergency numbers shall be posted on the phone itself. Facilities shall post the program's telephone number and address in a conspicuous location next to the emergency phone numbers.

(6) A program must be equipped with smoke detectors approved in writing by the fire authority having jurisdiction as to number, type, and placement.

(7) A program must have a minimum of two 210ABC fire extinguishers, one located in the kitchen or food preparation area, and one centrally

located in the program.

(8) Fire extinguishers, alarm systems, automatic detection equipment, and other firefighting must be properly maintained and inspected on at least a yearly basis; fire extinguishers must be tagged noting the date of inspection; see Paragraph (2) of Subsection D of 8.16.2.47 NMAC for emergency lighting requirements.

H. SMOKING, FIREARMS, ALCOHOLIC BEVERAGES, ILLEGAL DRUGS AND CONTROLLED SUBSTANCES: A program will prohibit smoking in all areas, including vehicles, and will not allow any alcoholic beverages, firearms or non-prescription controlled substances (drugs) on the premises or in vehicles. Possessing or knowingly permitting illegal drugs or non-prescription controlled substances to be possessed or sold on the premises at any time regardless of whether children are present is prohibited.

I. PETS:

(1) A program will inform parents or guardians in writing before pets are at the program site.

(2) A program will not allow pets in the kitchen, food serving, food storage areas, or bathrooms.

(3) A program will inoculate any pets as prescribed by a veterinarian and keep a record of proof of inoculation prior to the pet's presence at the program.

(4) A program will not allow on the premises pets or other animals that are undomesticated, dangerous, contagious or vicious in nature.

(5) Areas of confinement, such as cages and pens, and outdoor areas are cleaned of excrement daily. Animals shall be properly housed, fed and maintained in a safe, clean sanitary and humane condition at all times.

(6) A staff member must be physically present during the handling of all pets or other animals.

[8.16.2.47 NMAC - Rp, 8.16.2.47

NMAC, 10/1/16]

HISTORY OF 8.16.2 NMAC:

Pre-NMAC HISTORY: The material in this part was derived from that previously filed with the Commission of Public Records-State Records Center and Archives:

HSSD 76-8, Child Care Facilities, Licensing Rules, Regulations and Standards, 12-1-76

HED-82-4 (HSD), Regulations Governing Child Care Center Licensing, 8-11-82

HED-81-2 Regulations Governing Family Day Care Licensing, 6-16-81

HED 82-6 (HSD), Regulations Governing Family Day Care Licensing, 8-11-82

HED 87-1 (HSD), New Mexico Regulations Governing Facilities Providing Day/Night Care to Children, 6-16-87

HED 87-3 (HSD), New Mexico Regulations Governing Facilities Providing Day/Night Care to Children, 6-19-87.

HISTORY OF REPEALED MATERIAL:

8 NMAC 16.2, Child Care Centers, Before/After School Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 8-1-99.

8 NMAC 16.2, Child Care Centers, Before/After School Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 8-1-00.

8 NMAC 16.2, Child Care Centers, Before/After School Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 8-1-01.

8.16.2 NMAC, Child Care Centers, Before/After School Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 11-01-02.

8.16.2 NMAC, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 2-14-05.

8.16.2 NMAC, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and other Early

Care and Education Programs - repealed 6-30-10.

8.16.2 NMAC, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 11-30-12.

8.16.2 NMAC, Child Care Centers, Out of School Time Programs, Family Child Care Homes, and other Early Care and Education Programs - repealed 10/1/16.

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

**TITLE 8 SOCIAL SERVICES
CHAPTER 17 NON-LICENSED CHILD CARE
PART 2 REQUIREMENTS GOVERNING REGISTRATION OF NON-LICENSED FAMILY CHILD CARE HOMES**

8.17.2.1 ISSUING

AGENCY: Children, Youth and Families Department.

[8.17.2.1 NMAC - Rp, 8.17.2.1 NMAC, 10/1/16]

8.17.2.2 SCOPE: All non-licensed family child care homes within the state of New Mexico who are intending to participate in the child and adult care food program or the child care services programs.

[8.17.2.2 NMAC - Rp, 8.17.2.2 NMAC, 10/1/16]

8.17.2.3 STATUTORY

AUTHORITY: The requirements (regulations) set forth herein, are established pursuant to the federal regulations at 7 CFR Part 226 CACFP, 45 CFR Part 98 CCDBG, the New Mexico Public Health Act, Sections 24-1-2 and 24-1-5 NMSA 1978, and the New Mexico Children's Codes, Section 32A-15-2-3 NMSA 1978. These regulations are promulgated by authority 9-2A-7 NMSA 1978. Child care homes registered pursuant to these regulations for participation in the child and adult care food program (CACFP) and child care assistance

programs (CCAP) with children, youth and families department (CYFD), are health facilities within the scope of Sections 24-1-2, 24-1-5 NMSA 1978, and Section 32A-15-3 NMSA 1978.
[8.17.2.3 NMAC - Rp, 8.17.2.3 NMAC, 10/1/16]

8.17.2.4 DURATION:
Permanent.
[8.17.2.4 NMAC - Rp, 8.17.2.4 NMAC, 10/1/16]

8.17.2.5 EFFECTIVE DATE: October 1, 2016, unless a later date is cited at the end of a section.
[8.17.2.5 NMAC - Rp, 8.17.2.5 NMAC, 10/1/16]

8.17.2.6 OBJECTIVE:
The objective of 8.17.2 NMAC is to establish standards and procedures to permit independent caregivers who are not required to be licensed as family child care homes under state regulation 8.16.2 NMAC to participate in the federal child and adult care food program and the state and federal child care assistance programs through the registration process.
[8.17.2.6 NMAC - Rp, 8.17.2.6 NMAC, 10/1/15]

8.17.2.7 DEFINITIONS:

A. "Abuse" means any act or failure to act, performed intentionally, knowingly or recklessly, which causes or is likely to cause harm to a child, including:

- (1) physical contact that harms or is likely to harm a child;
- (2) inappropriate use of a physical restraint, isolation, medication or other means that harms or is likely to harm a child;
- (3) punishment that is hazardous to the physical, emotional or mental state of the child; and
- (4) an unlawful act, a threat or menacing conduct directed toward a child that results or might be expected to result in fear or emotional or mental distress

to a child.

B. "Adult" means a person who has a chronological age of 18 years or older.

C. "Child" means any person who is under the chronological age of 18 years.

D. "Child care assistance program (CCAP)" means the state of New Mexico's child care services bureau (CCSB) which administers the federal child care and development fund (CCDF).

E. "Child and adult care food program (CACFP)" means the state of New Mexico's family nutrition bureau which administers the federal child and adult care food program.

F. "Child with a disability or special needs" means a child with an identified disability, health, or mental health conditions requiring early intervention, special education services, or other specialized services and support; or children without identified conditions, but requiring specialized services, supports, or monitoring.

G. "Drop-in" means a child who attends a child care home on an occasional or unscheduled basis.

H. "Emergency caregiver" means someone 18 years of age or older who is authorized by the primary caregiver to provide care on an emergency basis, eight hours or less, on behalf of the primary caregiver.

I. "Exempt caregiver" means a child care home primary caregiver who is exempt from participating in the CACFP because he or she is caring only for resident children or does not provide child care during the hours when a meal (breakfast, lunch or dinner) is served.

J. "Expulsion" means the involuntary termination of the enrollment of a child or family.

K. "Guidance" means fostering a child's ability to become self-disciplined. Guidance shall be consistent and developmentally appropriate.

L. "Homeless children and youth" means individuals who

lack a fixed, regular, and adequate nighttime residence, which includes:

- (1) children and youth who are temporarily sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks (excludes mobile homes), or camping ground due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
- (2) children and youth who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings;
- (3) children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
- (4) migratory children who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in Paragraphs (1) through (3) of this subsection.

M. "Infant" means a child from birth to one-year-old.

N. "Neglect" means the failure to provide the common necessities including but not limited to: food, shelter, a safe environment, education, emotional well-being and healthcare that may result in harm to the child.

O. "Non-resident child" means any child who does not reside in the primary caregiver's home.

P. "Notifiable diseases" means confirmed or suspected diseases/conditions as identified by the New Mexico department of health which require immediate reporting to the office of epidemiology which include but are not limited to: measles, pertussis, food borne illness, hepatitis and acquired immune deficiency syndrome.

Q. "Primary caregiver" means a registered child care home caregiver 18 years of age or older

who is personally providing care to children, less than 24 hours a day, in his/her own residence and has completed the registration process, paid the required fee and has no other employment during hours of care. The primary caregiver must reside in the home.

R. "Registered authority" means the child care services bureau - registration section of the early childhood services division of the New Mexico children, youth and families department.

S. "Registered family child care home" means the residence of an independent primary caregiver who registers the home under these regulations to participate in the child and adult care food program or in the state and federal child care assistance programs.

T. "Registered family child care food-only home" means the residence of an independent primary caregiver who registers the home under these regulation to participate in the child and adult care food program only and does not participate in the state and federal child care assistance program.

U. "Resident child" means any child who resides in the home, such as the primary caregiver's own children by birth or adoption, foster children, grandchildren, or cohabitant's children who are part of the residential unit.

V. "Serious injury" means the death of a child or accident, illness, or injury that requires treatment by a medical professional or hospitalization.

W. "Substitute caregiver" means someone 18 years of age or older who is authorized by the primary caregiver and the registered authority to provide care in the absence of the primary caregiver and is required to complete all the items required of primary caregivers, including background check clearance in accordance with the most current provisions of 8.8.3 NMAC governing background checks and employment history verification provisions.

X. "Substantiated" means an incident or complaint

determined to be factual, based on an investigation of events.

Y. "Supervision" means the direct observation and guidance of children at all times and requires being physically present with them.

Z. "Survey" means a representative of CYFD's authority to enter a home, observes activity, examine the records and premises, interviews parents and records deficiencies.

AA. "Unattended" means a caregiver is not physically present with a child or children under care.

BB. "Unsubstantiated" means an incident or complaint not determined to be factual based on an investigation of events.

[8.17.2.7 NMAC - Rp, 8.17.2.7 NMAC, 10/1/16]

8.17.2.8 APPLICATION:

An independent caregiver who wants to participate in the federal child and adult care food program and state and federal child care assistance programs must apply as a registered family child care home by submitting an application, receiving an on-site health and safety inspection by CYFD, completing the registration process and paying the processing charge. One primary caregiver per household can be registered or licensed with CCSB. All registered homes receiving child care assistance subsidies must be enrolled and participate in the CACFP, unless they are exempt. Primary caregivers must provide proof of their physical address for the home being registered. [8.17.2.8 NMAC - Rp, 8.17.2.8 NMAC, 10/1/16]

8.17.2.9 REGISTERED AUTHORITY (ADMINISTRATION AND ENFORCEMENT RESPONSIBILITY):

The child care services bureau, registration section, of the early childhood services division of the New Mexico children, youth and families department, hereafter called the registered authority, has been granted

the responsibility by CYFD for the administration and enforcement of these regulations pursuant to the Children, Youth and Families Department Act, Section 9-2A-1 to 9-2A-16 NMSA 1978, as amended. [8.17.2.9 NMAC - Rp, 8.17.2.9 NMAC, 10/1/16]

8.17.2.10 CAREGIVER REQUIREMENTS:

A. All child care primary caregivers who receive child care assistance reimbursements are required to be licensed or registered by the department and meet and maintain compliance with the appropriate licensing and registration regulations in order to receive payment for child care services. All registered homes receiving child care assistance subsidies must be enrolled and participate in a CACFP, unless they are exempt.

B. All caregivers, including primary, substitute and emergency caregivers must be at least 18 years of age, and must demonstrate the ability to perform essential job functions that reasonably ensure the health, safety and welfare of children in care.

C. Primary and substitute caregivers must comply with background check requirements in accordance with the most current provisions of 8.8.3 NMAC governing background checks and employment history verification provisions.

D. Emergency caregivers may provide care on unforeseen, unforeseeable and rare occasions for up to eight hours per month on behalf of the primary caregiver. Anyone who provides care repeatedly or in reasonably foreseeable circumstances is a substitute caregiver and must have the required background checks and training.

E. In the event care is provided by a substitute or emergency caregiver, all parents/guardians must be notified as promptly as possible.

F. All caregivers are responsible for immediately reporting to the appropriate authorities any signs or symptoms of child abuse or

neglect.

G. All new primary and substitute caregivers of registered family child care homes, with the exception of registered family child care food-only homes, must complete the following training within three months of their date of initial registration. All current primary and substitute caregivers in a registered family child care home will have three months to comply with the following training from the date these regulations are promulgated:

- (1) prevention and control of infectious diseases (including immunization);
- (2) prevention of sudden infant death syndrome and use of safe sleeping practices;
- (3) administration of medication, consistent with standards for parental consent;
- (4) prevention of and response to emergencies due to food or other allergic reactions;
- (5) building and physical premises safety, including identification of and protection from hazards that can cause bodily injury such as electrical hazards, bodies of water, and vehicular traffic;
- (6) prevention of shaken baby syndrome and abusive head trauma;
- (7) emergency preparedness and response planning for emergencies resulting from a natural disaster, or a man-caused;
- (8) handling and storage of hazardous materials and the appropriate disposal of bio contaminants;
- (9) precautions in transporting children (if applicable);
- (10) first aid and cardiopulmonary resuscitation (CPR) certification; and
- (11) recognition and reporting of child abuse and neglect.

H. Primary and substitute caregivers are required to attend six hours of training annually. Training documentation must be

maintained for three years and include the caregiver's name, the date of training, instructor's name and signature, topic of training and number of hours completed.

I. Primary and substitute caregivers caring for infants shall receive two hours of infant or toddler specific training within six-months of registration.

J. If a registered home caregiver completes the 18-hour course, it will count toward the six-hour annual training requirement during the year in which the course was completed and the following year, exclusive of training required by CACFP.

K. Primary and substitute caregivers are required to maintain current first aid and CPR certification at all times. On-line first aid and CPR classes are not valid. A caregiver cannot count more than four hours in first aid and CPR trainings toward their total hours of annual training requirements.

L. Training shall be within the seven competency areas. The competency areas are:

- (1) child growth, development and learning;
- (2) health, safety, nutrition and infection control;
- (3) family and community collaboration;
- (4) developmentally appropriate content;
- (5) learning environment and curriculum implementation;
- (6) assessment of children and programs; and
- (7) professionalism.

[8.17.2.10 NMAC - Rp, 8.17.2.10 NMAC, 10/1/16]

8.17.2.11 BACKGROUND CHECKS:

A. All background checks shall be conducted in accordance with the most current provisions of 8.8.3 NMAC governing background checks and employment history verification provisions as promulgated by the children, youth and families department. All

non-licensed child care caregivers must adhere to these provisions to maintain their registration status. A background check must be conducted in accordance with 8.8.3 NMAC on all required individuals at least once every five years from the original date of eligibility regardless of the date of hire or transfer of eligibility. A direct provider of care may request a transfer of background check eligibility if:

- (1) the staff member was found eligible as a direct provider of care in a child care center, licensed child care home, licensed group home, or registered home within the past five years and has not been separated from employment for more than 180 days; and
- (2) submits an application for transfer and is found eligible pursuant to 8.8.3.11 NMAC.

B. The primary caregiver will be responsible for obtaining background checks on all adults residing in the home using the requirements outlined in the department's most current version of the background checks and employment history verification provisions (8.8.3 NMAC). A household member over the age of 18, who is currently approved but does not have an individual background check clearance, shall comply with the background check requirements no later than one year after these regulations are in effect. However, in the case of a registered family child care food-only home, all household members are only required to undergo a criminal history and child abuse and neglect screening.

C. Any adult who is present in the registered primary caregiver's home for significant periods while children are in care, or who commences being present in the registered primary caregiver's home for significant periods, may be required by the department to obtain either a background check or criminal history and child abuse and neglect screen.

D. All requirements of the current background checks and employment history verification

provisions pursuant to 8.8.3 NMAC must be met prior to the issuance of an initial registration.

E. The registered primary caregiver must maintain documentation of all applications, correspondence and clearances relating to the background checks required in this section and make them available to the registered authority upon request.

F. The primary caregiver shall certify upon renewal that they, or any other adult living in the home have not been convicted of a disqualifying offense during the last twelve month.

[8.17.2.11 NMAC - Rp, 8.17.2.11 NMAC, 10/1/16]

8.17.2.12 ANNUAL REGISTRATION: An annual registration is issued for a one-year period to a child care home that has met all requirements of these regulations.

A. Primary caregivers must renew registration annually, and only after receiving an onsite inspection by CYFD, by submitting a registration application and paying the processing charge with cashier's check or a money order.

B. Primary caregiver's who fail to renew registration by the expiration date will not be eligible to receive program benefits from either the child and adult care food program or the child care assistance program.

C. Primary caregivers shall ensure that all adults residing in the home are listed on all documentation required by CYFD and sponsoring agencies.

[8.17.2.12 NMAC - N, 10/1/16]

8.17.2.13 VISITS BY THE SPONSORING AGENCY AND REGISTERED AUTHORITY: Caregivers must consent to visits, to include unannounced visits, by the children, youth and families department and the child and adult care food program sponsoring agency when child care children are present and during the caregiver's stated normal hours of operation.

[8.17.2.13 NMAC - Rp, 8.17.2.14

NMAC, 10/1/16]

8.17.2.14 NON-TRANSFERABILITY OF REGISTRATION:

A. The primary caregiver's registration agreement is personal, and not transferable to any other person or location.

B. A registration will expire automatically at midnight of the expiration date unless earlier suspended or revoked, or:

- (1) if the primary caregiver moves; or
- (2) changes their name.

C. If the primary caregiver moves to a new location or has a change of name, the primary caregiver must register again by submitting a new application and pay the processing charge. The caregiver must report a new location or change of name prior to the occurrence and receive a new on-site health and safety inspection by CYFD.

[8.17.2.14 NMAC - Rp, 8.17.2.15 NMAC, 10/1/16]

8.17.2.15 INCIDENT REPORTS: Registered caregiver shall notify the appropriate authorities immediately by phone of any incident which results in significant harm to a child or which places the child in immediate danger. After making a report to the appropriate authorities, the caregiver shall notify CYFD of the incident giving rise to its report as soon as possible but no later than 24 hours after the incident occurred. A report shall first be made by telephone and followed with written notification. The caregiver shall report to the appropriate authorities the following incidents, including but not limited to:

A. Any incident that has threatened or could threaten the health and safety of children, including but not limited to:

- (1) a lost or missing child;
- (2) a serious injury;
- (3) the suspected abuse or neglect of a child;
- (4) fire, flood,

or other natural disaster that creates structural damages to a home or poses a health hazard;

(5) any of the illnesses on the current list of notifiable diseases and communicable published by the office of epidemiology of the New Mexico department of health;

(6) any legal action against a caregiver or household member;

(7) any incident that could affect the background check eligibility of any cleared person related to this registration;

(8) the use of physical or mechanical restraints, unless due to documented emergencies or medically documented necessity; or

(9) any known change in a caregiver's health condition or use of medication that impairs his or her ability to provide for the health, safety or welfare of children in care.

B. A home will notify parents or guardians in writing of any incident, including notifiable illnesses that have threatened the health or safety of children in the home. Incidents include, but are not limited to, those listed in Subsection A. of 8.17.2.15 NMAC.

C. Incident reports involving suspected child abuse and neglect must be reported immediately to children's protective services and local law enforcement. The registered authority follows written protocols/procedures for the prioritization, tracking, investigation and reporting of incidents, as outlined in the complaint investigation protocol and procedures.

[8.17.2.15 NMAC - Rp, 8.17.2.16 NMAC, 10/1/16]

8.17.2.16 COMPLIANCE: By completing the CYFD registration process and annual renewals, the primary caregiver is agreeing to comply with these regulations to include the following:

A. The primary caregiver agrees to continue to

meet these requirements, to correct deficiencies promptly and to take prompt action to resolve problems cited in complaints filed with state agencies and referred to the caregiver.

B. The caregiver must grant the registered authority the right to enter the premises and survey the caregiver's home and the inspection and copying of records. This includes any investigations which are announced or un-announced. [8.17.2.16 NMAC - Rp, 8.17.2.17 NMAC, 10/1/16]

8.17.2.17 NON-COMPLIANCE:

A. The children, youth and families department may deny, suspend, revoke or decline to renew registration at any time it is reasonably determined that the caregiver is not in compliance with these regulations, or is unable to maintain compliance with registration standards.

B. Violation of any provisions of these regulations, especially when the registered authority has reason to believe that the health, safety or welfare of a child is at risk, or has reason to believe that the caregiver cannot reasonably safeguard the health and safety of children may be grounds to suspend, revoke or decline to renew registration include but are not limited to:

- (1) failure to comply with the group composition requirement;
- (2) any health and safety violations which place the children in immediate danger, including but not limited to:
 - (a) a dwelling infested with vermin, including rodents, with no effort to correct the problem;
 - (b) lack of basic sanitary facilities, such as an open cesspool or open sewer line draining onto the ground surface; and
 - (c) unlocked or unsecured firearms and weapons in the home;
- (3)

background check denial or suspension;

(4) failure to timely obtain required background checks;

(5) misrepresentation or falsification of any information given to CYFD or CACFP;

(6) failure to allow access to the registered home by authorized representatives of the department or sponsor, at any time that children are present in the registered home;

(7) failure to properly protect the health, safety and welfare of children due to impaired health or conduct or hiring or continuing to allow any person whose health or conduct impairs the person's ability to properly protect the health, safety, and welfare of the children;

(8) discovery of repeat violations of these regulations or failure to correct deficiencies of survey findings in current or past contiguous or noncontiguous certification periods;

(9) possessing or knowingly permitting non-prescription controlled substances or illegal drugs to be present on the premises at any time, regardless of whether children are present;

(10) substantiated non-compliance with caregiver requirements to care for children in the registered home as defined in these regulations;

(11) substantiated abuse or neglect of children by the caregiver or household member as determined by CYFD or a law enforcement agency;

(12) allowing any person to be active in the child care home who is or would be disqualified as a primary caregiver under the most current version of the background checks and employment history verification provisions pursuant to 8.8.3 NMAC; this will include all adults and teenaged children living in a family child care home operated in a private residence whether or not they are active in the child care operation;

(13) situations where the children in care are placed in unreasonable or unnecessary danger, including but not limited to: evidence of illegal drug use in the home, evidence of domestic violence in the home, a convicted sex offender maintaining residence in the home, a convicted sex offender in the home when children are present, accusations of sexual child abuse against a caregiver or household member, or pending the outcome of a child protective services referral; and

(14) any serious violation or other circumstance which reasonably leads the department to determine that the caregiver cannot reliably safeguard the health and safety of children.

C. Commencement of a children, youth and families department or law enforcement investigation may be grounds for immediate suspension of registration pending the outcome of the investigation. Upon receipt of the final results of the investigation, the department may take such further action as is supported by the investigation results.

D. A suspension, revocation, or conditions of operations imposed pursuant to part A of this section may take effect immediately if in the discretion of the department that the health, safety or welfare of a child is at risk, or has reason to believe that the caregiver cannot reasonably safeguard the health and safety of children.

E. The children, youth and families department notifies the primary caregiver in writing when registration is denied, suspended or revoked, or if renewal is declined. The notification shall include the reasons for the department's action. The primary caregiver may obtain an administrative appeal of the department's action.

F. The child care services bureau notifies the family nutrition bureau of any revocation or suspension of registration for a primary caregiver participating in the child care assistance programs.

G. Primary caregivers

whose registration has previously been suspended or revoked may re-apply for registration through the regular registration process. The child care services bureau may consider the reasons for the previous action, as well as changed and current circumstances, in determining whether to allow the new application. The children, youth and families department may require the registered caregiver to implement specific actions, or to agree to specific conditions, in order to obtain re-registration.

H. The children, youth and families department may require the registered caregiver to implement specific actions, or to agree to specific conditions, in order to maintain registered status. Such specific actions or conditions may be required if the department has reasonable grounds to determine they are needed to assure the continued safe operation of the primary caregiver's home. Examples:

(1) The department may require caregiver(s) to complete additional training if it appears that the caregiver has used inappropriate discipline, and revocation is not necessary under the circumstances.

(2) The department may require that certain person(s) not be permitted to enter the premises while care is being provided, if it reasonably appears that that person(s) may pose a threat to health or safety, or otherwise create a risk of harm to children.

I. Caregivers who are required to implement actions or to agree to conditions pursuant to Subsections G or H, are notified in writing, and shall have the opportunity for administrative appeal. [8.17.2.17 NMAC - Rp, 8.17.2.18 NMAC, 10/1/16]

8.17.2.18 COMPLAINTS:

A. Complaints received by CYFD shall be investigated promptly.

B. An authorized CYFD representative receiving complaints will ask complainants to

identify themselves and provide all information necessary to document the complaint.

C. The authorized CYFD representative will investigate any complaint in which the health, safety or welfare of a child could be in danger. The complaint will be reviewed and prioritized immediately according to the nature and severity of the complaint. The registered authority will follow established protocols and procedures for prioritizing, tracking, initiating and reporting of complaints and complaint investigations. Complaints will be investigated in a timely manner as follows:

(1) Priority 1 complaints: investigation will be initiated within 24 hours.

(2) Priority 2 complaints: investigation will be initiated within three working days.

(3) Priority 3 complaints: investigation will be initiated within five working days.

(4) Initiation timeframes for investigations may be shortened based on the severity and nature of the complaint, but timeframes may not be extended.

D. The caregiver shall cooperate in good faith with any investigation by the authorized CYFD authority. Obstruction of an investigation may subject the primary caregiver to sanctions, up to and including revocation.

E. Action by the authorized CYFD representative:

(1) The registered authority will provide a written letter on the results of the investigation to the registered home primary caregiver that is the subject of the complaint and the complainant if an action is taken.

(2) If the authorized CYFD representative finds the complaint is unsubstantiated, it will be so designated and the authorized CYFD representative will take no further action.

(3) If the authorized CYFD representative finds that a complaint is substantiated, it will make the complaint part of

the authorized CYFD file on the child care registered home. The following additional actions will, at the discretion of the authorized CYFD representative, be taken:

(a) the CYFD authority will require the registered home caregiver to submit and comply with a written corrective action plan; or

(b) the CYFD authority will sanction the registered home administratively including, without limitation, suspension, revocation, or restriction of a registration; or

(c) the CYFD authority will file criminal charges or pursue civil remedies.

F. The authorized CYFD representative will report all cases of suspected child abuse and neglect to both children's protective services and the local law enforcement agency. [8.17.2.18 NMAC - Rp, 8.17.2.19 NMAC, 10/1/16]

8.17.2.19 ADMINISTRATIVE APPEAL RIGHTS:

A. Any primary caregivers who receives notice that registration is denied, revoked, suspended or that renewal is denied, has a right to an administrative appeal of the decision. Any primary caregiver who is required by the department to implement specific actions, or to agree to specific conditions, in order to maintain registered status, has a right to administrative appeal.

B. Administrative appeals shall be conducted by a hearing officer appointed by the department's secretary pursuant to hearing regulations in 8.8.4 NMAC.

C. If the suspension or revocation is to take effect immediately, or if required conditions of continued operation are to take effect immediately, the department affords the primary caregiver the opportunity for an administrative appeal within five working days. If registration is suspended pending the results of an investigation, the primary

caregiver may elect to postpone the hearing until the investigation has been completed.

D. If after the imposition of an immediate suspension the department takes additional actions including additional suspension, revocation, or conditions of operations, the immediate action will stay in effect until the following action goes into effect or an appeal of the following action is concluded and the action is either upheld or overturned.

E. If the contemplated action does not take immediate effect, and the primary caregiver is given advance notice of the contemplated action, the primary caregiver is allowed 10 working days from date of notice to request an administrative appeal in writing.

F. For any action taken by the department pursuant to section 8.17.2.20 NMAC of this regulation, the applicable hearing procedure shall be that contained in section 8.17.2.20 NMAC.

[8.17.2.19 NMAC - Rp, 8.17.2.20 NMAC, A, 10/1/16]

8.17.2.20 PROBABLE CAUSE OF IMMINENT DANGER:

A. In circumstances in which Public Health Act Section 24-1-5(N) (2005) NMSA 1978 may apply, and in which other provisions of this regulation are not adequate to protect children from imminent danger of abuse or neglect while in the care of a provider, the provisions of section 24-1-5(N) NMSA 1978 shall apply as follows:

(1) The department shall consult with the owner or operator of the child care facility.

(2) Upon a finding of probable cause, the department shall give the owner or operator notice of its intent to suspend operation of the child care facility and provide an opportunity for a hearing to be held within three working days, unless waived by the owner or operator.

(3) Within

seven working days from the day of notice, the secretary shall make a decision, and, if it is determined that any child is in imminent danger of abuse or neglect in the child care facility, the secretary may suspend operation of the child care facility for a period not in excess of fifteen days.

(4) Prior to the date of the hearing, the department shall make a reasonable effort to notify the parents of children in the child care facility of the notice and opportunity for hearing given to the owner or operator.

(5) No later than the conclusion of the fifteen day period, the department shall determine whether other action is warranted under this regulation.

B. Nothing in this section of the regulation shall be construed to require registration that is not otherwise required in this regulation.

[8.17.2.19 NMAC - Rp, 8.17.2.21 NMAC, 10/1/16]

8.17.2.21 GROUP COMPOSITION REQUIREMENTS:

A. A caregiver will care for no more than four non-resident children at any one time.

B. A caregiver will care for no more than two children under two years old at any one time, including the caregiver's own children.

C. A caregiver will care for no more than six children under six years old at any one time, including the caregiver's own children.

D. Drop-in children will be counted in the group composition requirements listed above.

E. Shifts are allowed provided there are never more than four non-resident children present at any one time, including change of shifts.

F. All caregivers will be physically present and actively involved in the care of all children during the designated hours of child care as noted in the child enrollment

forms, except for short absences when another approved caregiver is present, or emergencies. Outside employment is not considered a short absence. [8.17.2.2 NMAC - Rp, 8.17.2.22 NMAC, 10/1/16]

8.17.2.22 HEALTH AND SAFETY REQUIREMENTS:

A. A caregiver will maintain the home, grounds and equipment in safe condition. The home and grounds must be clean and free of debris or other potentially dangerous hazards. All equipment must be in good repair.

B. All electrical outlets within reach of children will have safety outlets or have protective covers.

C. A caregiver will not use multiple plugs or gang plugs unless surge protection devices are used.

D. A caregiver will keep the temperature of inside areas used by children at no less than 68 degrees Fahrenheit and no more than 82 degrees Fahrenheit. A home may use portable fans if the fans are secured and inaccessible to children and do not present any tripping, safety or fire hazard.

E. The home must be adequately ventilated at all times.

F. A home will not use un-vented heaters or open flame heaters. Portable heaters will be used in accordance with manufacture instructions. A home will install barriers or take other steps to ensure heating units are inaccessible to children. Heating units include hot water pipes, hot water baseboard heaters hotter than 110 degrees Fahrenheit, fireplaces, fireplace inserts and wood stoves.

G. All homes will have hot and cold running water. Water coming from a faucet will be below 110 degrees Fahrenheit in all areas accessible to children. A home may install a water tempering control valve ahead of all domestic water-heater piping.

H. A caregiver must provide safe playing areas inside and outside the home. Outside play areas

must be approved by the registered authority.

I. A caregiver's outside play area must be safe, clean and free of any debris. The caregiver will fence the outside play area when it is next to a highway, busy street, ditch or arroyo, hazardous area or when determined to be necessary for safety by the registered authority. The fence will have one latched gate for emergency exits.

J. The use of a trampoline is prohibited at any time during the hours of operation or by any children receiving care at the registered home.

K. A caregiver will keep all poisons, toxic materials, cleaning substances, alcohol, sharp and pointed objects or any other dangerous materials in a storage area inaccessible to children.

L. The primary caregiver must have a working telephone in the home and a valid working phone number on file with CYFD at all times.

M. A caregiver will post emergency numbers for the police, fire department, ambulance, and poison control center in a visible location.

N. A caregiver will install at least one working smoke detector and a carbon monoxide detector in an appropriate area in the home.

O. A caregiver will unload all guns, such as pellet or BB guns, rifles and handguns, and keep them in a locked area inaccessible to children.

P. A caregiver will keep all weapons in a locked area inaccessible to children.

Q. A caregiver will prohibit smoking and the drinking of alcoholic beverages in all areas, including vehicles, when children are present. Possessing or knowingly permitting illegal drugs or non-prescription controlled substances to be possessed or sold on the premises at any time regardless of whether children are present is prohibited.

R. A home will have

a 2A-10B:C fire extinguisher in an easily accessible place. A fire extinguisher must be certified once a year and will have official tags noting the date of inspection.

S. A caregiver will store combustible and flammable materials in a safe area away from water heater rooms, furnace rooms, heaters, fireplaces or laundry rooms.

T. In case of a fire, the caregiver's first responsibility is to evacuate the children to safety. An up to date emergency evacuation and disaster preparedness plan must be available. An up to date emergency evacuation and disaster preparedness plan, which shall include steps for evacuation, relocation, shelter-in-place, lock-down, communication, reunification with parents, individual plans for children with special needs and children with chronic medical conditions, accommodations of infants and toddlers, and continuity of operations. The plan shall be approved annually by the registered authority and the department will provide guidance on developing these plans.

U. A home will have two major exits readily accessible to children with no obstructions in the pathways of these exits.

V. Toys and objects (including high chairs, playpens and cribs) are safe, durable, easy to clean and nontoxic. Cribs will meet federal standards and be kept in good repair. A home will not use plastic bags or lightweight plastic sheeting to cover a mattress and will not use pillows in cribs.

W. Children will not use a common towel or wash cloth. All toilet rooms used by children will have toilet paper, soap and disposable towels.

X. The home will have a first aid kit stored in a convenient place inaccessible to children, but easily accessible by caregiver. The kit will contain at least Band-Aids, gauze pads, adhesive tape, scissors, soap, non-porous latex gloves, and a thermometer.

Y. A caregiver with pets will comply with the following

requirements:

(1) A home will inform parents or guardians in writing before pets are allowed at the residence.

(2) A home will inoculate any pets as prescribed by a veterinarian and keep a record of proof of inoculation prior to the pet's presence at the residence.

(3) A home will not allow on the premises pets or other animals that are undomesticated, dangerous, contagious or vicious in nature.

(4) Areas of confinement, such as cages and pens, and outdoor areas are cleaned of excrement daily.

(5) A caregiver must be physically present during the handling of all pets or other animals.

Z. A caregiver will change wet and soiled diapers and clothing promptly. A caregiver will not change a diaper in a food preparation area. Caregivers will wash their hands and the child's hands after every diaper change. A caregiver will change a child's diaper on a clean, safe, waterproof surface and discard any disposable covers and disinfect the surface after each diaper change.

AA. Children may be transported only in vehicles that have current registration and insurance coverage. All drivers must have current driver's license and comply with motor vehicle and traffic laws. A child shall only be transported if the child is properly secured in an age appropriate restraining device.

[8.17.2.22 NMAC - Rp, 8.17.2.23 NMAC, A, 10/1/16]

8.17.2.23 MEAL REQUIREMENTS:

A. Children will not use common eating or drinking utensils.

B. A caregiver will provide readily accessible drinking water in sanitary cups or glasses.

C. Meals must meet age-appropriate USDA requirements.

D. A caregiver must keep a daily menu.

E. Caregivers will serve meals family style and allow children to assist in the preparation and serving of food and snacks.

F. Caregivers will feed children a meal or snack every three hours.

G. Caregivers and children will wash their hands regularly and before each meal time.

H. Caregivers will keep food requiring refrigeration, including formula, at 41 degrees Fahrenheit or below.

I. Refrigerators shall have working refrigerator thermometers.
[8.17.2.23 NMAC - Rp, 8.17.2.24 NMAC, 10/1/16]

8.17.2.24 RECORD KEEPING REQUIREMENTS:

Caregivers must keep an information card for each child (including drop-in children) with:

- A. the child’s full name;
- B. the child’s birth date;
- C. any known food or drug allergies or unusual physical condition;
- D. the name, telephone number, and location of a parent or other responsible adult to be contacted in any emergency;
- E. the name and telephone number of the child’s physician;
- F. authorization from a parent or guardian for the caregiver to seek professional medical care in an emergency;
- G. written permission from a parent or guardian for the caregiver to administer medication prescribed by a physician or requested by the parent;
- H. an immunization record showing current, age-appropriate immunizations for each child or a written waiver for immunizations granted by the department of health. A grace period of a maximum of 30 days will be granted for children in foster care or homeless children and youth; and
- I. written permission

from parent to transport children outside of the registered home.
[8.17.2.24 NMAC - Rp, 8.17.2.25 NMAC, 10/1/16]

8.17.2.25 CAREGIVER’S RESPONSIBILITIES:

A. A caregiver will directly supervise and actively care for children at all times during hours of operation including outdoor playtime and naptime. Caregivers will interact with children and provide a safe and positive learning environment.

B. Children will never be left unattended. A caregiver will be with the children at all times whether activities are inside or outside of the home. Caregivers will be onsite, available and responsive to children during all hours of operation.

C. A caregiver will use guidance that is positive, consistent and age-appropriate. The caregiver will not use:

- (1) physical punishment of any type, including shaking, biting, hitting, pinching or putting anything on or in a child’s mouth;
- (2) withdrawal of food, rest, bathroom access, or outdoor activities;
- (3) abusive or profane language, including yelling;
- (4) any form of public or private humiliation, including threats of physical punishment; or
- (5) unsupervised separation.

D. Each home must develop policies and procedures for expulsion of children. Policies and procedures shall include how the home will maintain a positive environment and will focus on preventing the expulsion of children age birth to five. The home must develop policies that include clear, appropriate, consistent expectations, and consequences to address disruptive student behaviors; and ensure fairness, equity, and continuous improvement.

E. Each home must offer children activities and

experiences that are developmentally appropriate, allow children choices, and promote positive social, emotional, physical and intellectual growth and well-being. Caregivers will schedule activities in these areas. A caregiver will schedule routine activities such as meals, snacks, rest periods, and outdoor play to provide structure to the children’s daily routine. Other activities should be flexible based on changes in the children’s interests. A caregiver will also provide a variety of indoor and outdoor equipment to meet the children’s developmental interests and needs. Equipment will encourage large and fine muscle activity, solitary and group play and active and quiet play. Television, videotapes and video games should be limited to two hours a day and should be age-appropriate.

F. Caregivers of infants will allow them to crawl or toddle. Infants shall either be held or be fed sitting up for bottle-feeding. Infants unable to sit shall always be held for bottle-feeding. Infants and toddlers shall not be placed in a laying position while drinking bottles or sippy cups. The carrying of bottles and sippy cups by young children throughout the day or night shall not be permitted. Caregivers will allow infants to eat and sleep on their own schedules.

G. Caregivers will ensure age appropriate naps or rest periods as follows:

- (1) A home shall allow children who do not sleep to get up and participate in quiet activities that do not disturb the other children.
- (2) Caregivers shall ensure that nothing covers the face or head of a child age 12 months or younger when the child is laid down to sleep and while the child is sleeping.
- (3) Caregivers shall not place anything over the head or face of a child over 12 months of age when the child is laid down to sleep and while the child is sleeping.
- (4) No child(ren) shall be allowed to sleep

behind closed doors.

H. Swimming, wading and water:

(1) A caregiver must obtain written permission from a parent or guardian before a child enters a pool;

(2) If a home has a portable wading pool:

(a) a home will drain and fill the wading pool with fresh water daily and disinfect the pool regularly;

(b) a home will empty a wading pool when it is not in use and remove it from areas accessible to children; and

(c) a home will not use a portable wading pool placed on concrete or asphalt.

(3) If a home has a built in or above ground swimming pool, ditch, fish pond or other water hazard:

(a) the fixture will be constructed, maintained and used in accordance with applicable state and local regulations;

(b) the fixture will be constructed and protected so that, when not in use, it is inaccessible to children; and

(c) when in use, children will be constantly supervised and ensure adequate safety for the ages, abilities and type of water hazard in use. [8.17.2.25 NMAC - Rp, 8.17.2.26 NMAC, 10/1/16]

HISTORY OF 8.17.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives: ISD CCAP 400, Provider Registration, 11/4/91 ISD CCAP 500, Provider Selection and Payment, 11/4/91

History of Repealed Material:

8 NMAC 17.2, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 8/1/00. 8.17.2 NMAC, Requirements

Governing Registration of Non-Licensed Family Child Care Homes - repealed 11/30/01.

8.17.2 NMAC, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 11/1/02.

8.17.2 NMAC, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 02/14/05.

8.17.2 NMAC, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 8/31/06.

8.17.2 NMAC, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 7/30/15.

8.17.2 NMAC, Requirements Governing Registration of Non-Licensed Family Child Care Homes - repealed 10/1/16.

DNA IDENTIFICATION SYSTEM OVERSIGHT COMMITTEE

The New Mexico DNA Identification System Oversight Committee approved, at its 8/30/2016 hearing, to repeal its rule 10.14.200 NMAC, DNA Identification System (filed 4/14/2000) and replace it with 10.14.200 NMAC, DNA Identification System, effective 09/30/2016.

DNA IDENTIFICATION SYSTEM OVERSIGHT COMMITTEE

**TITLE 10 PUBLIC SAFETY & LAW ENFORCEMENT
CHAPTER 14 CORRECTIONAL SERVICES
PART 200 DNA IDENTIFICATION SYSTEM**

10.14.200.1 ISSUING AGENCY: DNA Identification System Oversight Committee & Administrative Center, c/o Metropolitan Forensic Science Center 5350 Second Street N.W., Albuquerque, NM 87107 (505) 823-

4200. [10.14.200.1 NMAC - Rp, 10.14.200.1 NMAC, 09/30/2016]

10.14.200.2 SCOPE: Department of public safety, department of corrections, attorney general, state medical investigator, local, county and state New Mexico law enforcement agencies, jails and detention facilities, city of Albuquerque, covered offenders and persons arrested for felony offenses. [10.14.200.2 NMAC - Rp, 10.14.200.2 NMAC, 09/30/2016]

10.14.200.3 STATUTORY AUTHORITY: Subsection C of 29-3-10, Subsection G of 29-11A-5, Paragraph (6) of Subsection B of 29-16-4, Subsection B of 29-16-5 and Subsection E of 29-16-5 NMSA 1978. [10.14.200.3 NMAC - Rp, 10.14.200.3 NMAC, 09/30/2016]

10.14.200.4 DURATION: Permanent. [10.14.200.4 NMAC - Rp, 10.14.200.4 NMAC, 09/30/2016]

10.14.200.5 EFFECTIVE DATE: September 30, 2016, unless a later date is cited at the end of a section or paragraph. [10.14.200.5 NMAC - Rp, 10.14.200.5 NMAC, 09/30/2016]

10.14.200.6 OBJECTIVE: To establish a DNA identification system for covered offenders, persons arrested for felony offenses, unidentified persons and unidentified human remains. To facilitate the use of DNA records by local, state and federal law enforcement agencies in the identification, detection or exclusion of persons in connection with criminal investigations, the registration of sex offenders required to register pursuant to the provisions of the Sex Offender Registration and Notification Act and to facilitate the use of DNA records by local, state and federal law enforcement agencies and the state medical investigator in the identification of unidentified persons or unidentified human remains pursuant to the DNA

Identification Act.

[10.14.200.6 NMAC - Rp,
10.14.200.6 NMAC, 09/30/2016]

10.14.200.7 DEFINITIONS:

A. "Administrative center" means the part of a national DNA index system qualified New Mexico crime laboratory that administers and operates the DNA identification system and is governed by the DNA oversight committee.

B. "Analysis" means DNA profile generation.

C. "Arrestee" for purposes of DNA sample collection means any person as described in Subsection A of 29-3-10 NMSA 1978.

D. "Buccal cell" means cells from the interior linings of the cheek and gum in a liquid or semiliquid form.

E. "CODIS" means the federal bureau of investigation's national DNA index system for storage and exchange of DNA records submitted by designated forensic or database DNA laboratories.

F. "Collection kit" see Subsection N of 10.14.200.7 NMAC.

G. "Core loci" means the minimal chromosomal locations designated as being required for a known DNA profile to be considered complete by the board of the national DNA index system, and consistent with the federal DNA Identification Act of 1994 and subsequent federal laws.

H. "Covered offender" for purposes of fee assessment means any person convicted of a felony offense, committed after July 1, 1997, and as defined by Subsection C of 29-16-3 NMSA 1978 and as described in Paragraphs (1) through (3) of Subsection A of 29-16-6 NMSA 1978.

I. "Covered offender" for purposes of DNA sample collection means any person as defined by Subsection C of 29-16-3 and Subsection A of 29-16-6 NMSA 1978.

J. "DNA" means deoxyribonucleic acid.

K. "DNA Identification Act" means Sections 29-16-1 to 29-16-13 NMSA 1978, and any

subsequent amendments or additions to these sections, the law that authorizes the DNA identification system and the DNA oversight committee.

L. "DNA identification system" means the system established pursuant to the DNA Identification Act.

M. "DNA oversight committee" means the DNA identification system oversight committee.

N. "DNA sample collection kit" means a group of materials assembled or gathered for the collection of DNA samples.

O. "FTA card" means an FTA collection card, a card of blotter paper designed for the collection of liquid or semiliquid biological samples or any other device designed for the collection of liquid or semiliquid biological samples.

P. "Head of the administrative center" means the authorized person who supervises the day-to-day operations of the administrative center.

Q. "Identification system" see Subsection L of 10.14.200.7 NMAC.

R. "In writing" see Subsection Z of 10.14.200.7 NMAC.

S. "Kit" see Subsection N of 10.14.200.7 NMAC.

T. "Records" means the results of DNA collection, analysis, testing, and other related information.

U. "Sample" means a sample of biological material sufficient for DNA testing.

V. "Sample collection kit" see Subsection N of 10.14.200.7 NMAC.

W. "Sample profile hit" means a match of the examined loci as determined by the servicing forensic DNA laboratory that has undergone a defined level of confirmatory processes and reviews sufficient to allow the issuance of a letter of notification to the servicing forensic DNA laboratory and the reporting of statistical information to the federal bureau of investigation.

X. "Sample profile

match" means a match of the examined loci as determined by the servicing forensic laboratory that has not yet undergone the processes described in Subsection W. of 10.14.200.7 NMAC.

Y. "Secured" means limited and controlled access only by authorized personnel including use of protection and safety devices such as restricted space access, physical locks and keys, passwords, encryption, firewalls etc. to safeguard any and all functions of that equipment or facility that may be determined to be necessary.

Z. "Written" means a document that is hand or typewritten on paper and includes the use of facsimile copies, computer or other electronically generated or scanned, traceable documents that can be subsequently printed.

[10.14.200.7 NMAC - Rp,
10.14.200.7 NMAC, 09/30/2016]

10.14.200.8 COLLECTION AND TRANSFER OF SAMPLES AND FEES:

A. Routine collection of samples from a covered offender shall be performed only by employees of the department of corrections adult prisons or probation and parole divisions, jail or detention facility personnel, employees of the county sheriff office, members of the administrative center or persons designated by the administrative center and in coordination with the administrative center, utilizing the collection protocol approved by the oversight committee and provided by the administrative center.

B. Collection and deposit of assessed fees from covered offenders shall be performed by employees of the department of corrections adult prisons and probation and parole divisions pursuant to policies and procedures established by the department of corrections.

C. The department of corrections shall be responsible for establishing policies and procedures for the collection of samples and assessed fees from covered offenders

when custody is maintained by private or out-of-state, probation and parole or corrections facilities.

D. Routine collection of samples from arrestee's shall:

(1) be performed only by jail or detention facility personnel, members of the administrative center or persons designated by the administrative center and in coordination with the administrative center, utilizing the collection protocol approved by the oversight committee and provided by the administrative center; and

(2) include the issuance to each collected arrestee a written statement or notice informing the arrestee that if the arrestee is not convicted of the felony charges in this arrest, or that the felony charges are otherwise dismissed, that the arrestee may request that the collected DNA sample and records be expunged, as well as how the arrestee can obtain information related to expungement procedures. Such written statement or notice shall also include information that if the arrestee posted bond or was released prior to appearing before a judge or magistrate and then failed to appear for a scheduled hearing, that the arrestee's DNA sample will automatically be analyzed.

E. DNA sample collection kits and information on the collection, storage, and transfer of samples shall be provided at no cost by the administrative center.

F. The routine method of sample collection shall be by buccal cell collection using the sample collection kit supplied by the administrative center. In non-routine circumstances, including a refusal by an arrestee or a covered offender the collection shall, pursuant to Section 29-16-9 NMSA 1978:

(1) be referred to the administrative center;

(2) require a written consent or court order;

(3) consist of an appropriate, alternative sample type as designated by the administrative center or the court; and

(4) shall be collected by members of the

administrative center; or

(5) by persons trained in the collection of the designated alternative sample type in coordination with, and as designated by, the administrative center.

G. In the case of an arrestee who refuses to provide a DNA sample to jail or detention facility personnel upon booking as required by Subsection A of 29-3-10 NMSA 1978, the jail or detention facility personnel shall immediately document the refusal and shall immediately report the refusal to the administrative center in order for the administrative center to coordinate, with the office of the district attorney for the county where the arrest took place, the initiation of the required legal proceedings as required by Paragraph (2) of Subsection F of 10.14.200.8 NMAC.

H. The determination of a person's eligibility for DNA sample collection as a qualifying arrestee or as a covered offender shall be the responsibility of the authorized collector designated in Subsection A or D of 10.14.200.8 NMAC. An authorized collector may request, and receive, assistance from the administrative center when making such a determination. The determination of a person's eligibility shall be based upon the statutory requirements for the specific collection.

I. Questions on supplies, collection or packaging should be directed to the administrative center.

[10.14.200.8 NMAC - Rp, 10.14.200.8 NMAC, 09/30/2016]

10.14.200.9 HANDLING AND SECURITY OF SAMPLES:

A. DNA records and samples are confidential and shall not be disclosed except as authorized by the DNA oversight committee and as governed by the DNA Identification Act.

B. All files, computer, and sample storage systems maintained by the administrative center pursuant to the DNA Identification Act shall

be secured. Access shall be limited to employees of the administrative center as authorized by the head of the administrative center pursuant to and directed by the official functions and duties stated in Paragraph (1) of Subsection B of 29-16-4 NMSA 1978, and as provided by Subparagraph (e) of Paragraph (6) of Subsection B of 29-16-4 and Subsection C of 29-16-8 NMSA 1978 and to technical repair personnel as required to maintain the system as authorized by the head of the administrative center.

C. Both state and national database searches shall be performed via secured computer systems.

D. Any person who willfully discloses, seeks to obtain or use information from the DNA identification system for purposes not authorized in these rules and in violation of Section 29-16-12 NMSA 1978 shall be subject to the penalties thereof.

E. All samples received by the administrative center for DNA analysis shall be considered potentially bio-hazardous. Universal safety precaution procedures shall be followed when handling biological samples.

F. Samples shall be handled, examined, and processed one at a time to avoid possible cross-contamination from another sample or from the examiner.

G. All sample collection kits shall be received in a sealed condition. If the kit is not sealed upon receipt the sample shall be rejected and a request for a new sample shall be made by the head of the administrative center.

H. If the documentation or certification sections are not filled out, it shall be documented and the head of the administrative center shall be notified. The decision as to whether to accept the sample or request a new sample shall be made by the head of the administrative center.

I. Each sample shall receive a unique identifying NMDIS database number that does not include any personal identification

information. The database number shall be placed on the sample collection kit and on the FTA card or its proximal container.

J. The FTA card shall be returned to its proximal container and placed into secured storage until processed for analysis.

K. Known, collected and non-analyzed, duplicate arrestee or covered offender samples and DNA collection kits may be destroyed at the discretion of the head of the administrative center, provided that:

(1) the kit duplication is confirmed and documented by fingerprint comparison between the original and duplicate kits;

(2) an image of the duplicate collection kit is retained; and

(3) the original, or other previously collected, DNA collection kit are maintained by the administrative center.

L. Unopened, unanalyzed arrestee samples that are collected but are found to not qualify to have been collected pursuant to Subsection B of 29-3-10 NMSA 1978, and whereby the person collected is not otherwise required to provide a DNA sample pursuant to another DNA collection related New Mexico statute, shall be destroyed by the administrative center.

M. Provided that there has been no qualifying request for expungement pursuant to 29-16-10 NMSA 1978, arrestee samples that are collected, may be retained unopened and unanalyzed as long as may be required to make a final determination of compliance with Subsection B of 29-3-10 NMSA 1978.

N. Unopened, unanalyzed arrestee samples that are collected and after more than one year from the date of collection are found to have no available information with which to make a final determination of compliance with Subsection B of 29-3-10 NMSA 1978, and whereby the person collected is not otherwise required to provide a DNA sample pursuant to another DNA collection related New Mexico statute, shall

be destroyed by the administrative center.

[10.14.200.9 NMAC - Rp,
10.14.200.9 NMAC, 09/30/2016]

10.14.200.10 SAMPLE PROCESSING AND ANALYSIS BY THE ADMINISTRATIVE CENTER:

A. All samples received by the administrative center for DNA analysis should be considered potentially bio-hazardous. Universal safety precaution procedures shall be followed when handling biological samples.

B. The mechanism of sample collection authorization for samples collected pursuant to Subsection C of 29-16-6 NMSA 1978 shall be documented and a copy of that authorization maintained by the administrative center.

C. Samples shall be handled, examined, and processed individually to avoid possible cross-contamination from another sample or from the examiner.

D. Samples tested shall follow DNA testing procedures approved by the administrative center. Remaining samples shall be returned to secured storage.

E. Five percent of all samples tested annually, shall consist of samples:

(1) with a known DNA profile; or

(2) that constitute randomly collected, unknown duplicate samples; and

(3) shall be presented to the analyzing laboratory in a "blind" fashion to ensure proficiency and to act as a quality assurance measure. Results of these analyses are to be evaluated with the corresponding offender or arrestee samples. Should any resultant "blind" sample's DNA profile (other than a sample that is determined to be of insufficient quality or quantity to generate a profile) not match the expected known DNA profile for that sample, or should the known personally identifying information for the collectee not reasonably match (other than from

the purposeful misidentification by the collected individual or for monozygotic siblings), an error rate is to be calculated by the administrative center and be presented to the analyzing laboratory and to the oversight committee.

F. The genetic markers analyzed shall consist of those contained in commercial analysis kits approved by the board of the national DNA index system, having been selected for identification and statistical purposes only.

G. Excess extracted or amplified arrestee and offender DNA shall be destroyed within 30 days after completion of analysis.

H. Excess DNA collected pursuant to Subsection C of 29-16-2 NMSA 1978 shall be retained by the administrative center, the analyzing laboratory or the submitting agency at the discretion of the submitting agency.

I. No written letters of notification shall be released on any specific DNA sample except as authorized by the DNA Identification Act, these rules and the current New Mexico DNA identification system standard operating procedures.

J. Analysis of arrestee DNA samples collected on, or after, July 1, 2011, shall only be analyzed in conformance with the requirements of Subsection B of 29-3-10 NMSA 1978. [10.14.200.10 NMAC - Rp,
10.14.200.10 NMAC, 09/30/2016]

10.14.200.11 ACCESS TO DNA SAMPLE INFORMATION, RECORDS AND SAMPLES:

A. Access to or disclosure of DNA records and samples collected shall be authorized only in the following circumstances:

(1) when used as statistical or research information, and only when all personal identification is removed; or

(2) for identification, comparison, and investigative purposes, to local, state, and federal law enforcement agencies and the state medical investigator in response to official inquiries as authorized by Section 29-16-2 and

Subsection B of 29-16-8 NMSA 1978 and these rules; or

(3) in order to minimize duplicate sample collection and testing to local, state and federal law enforcement agencies, the corrections department, jails and detention facilities as provided by Subparagraph (e) of Paragraph (6) of Subsection B of 29-16-4 and Subsection C of 29-16-8 NMSA 1978; or

(4) pursuant to court order.

B. Access to the DNA identification system shall be consistent with the DNA identification act and only by:

(1) authorized law enforcement agencies and the state medical investigator through their servicing forensic DNA laboratory or by direct written request to the head of the administrative center; or

(2) authorized law enforcement agencies, the corrections department, jail and detention facilities through secure electronic methods established by the administrative center.

C. DNA records and samples.

(1) All requests for information on DNA records or requests for DNA samples, other than those intended to minimize duplicate sample collection and testing or accessed through the secure electronic methods established by the administrative center, shall be submitted in writing to the administrative center.

(2) The head of the administrative center shall verify the validity of all written requests prior to releasing any DNA related information or samples pursuant to the DNA Identification Act.

(3) A copy of the request and resulting action shall be retained in a retrievable written format.

(4) Samples from persons defined in Subsections C and I of 10.14.200.7 NMAC are collected and records of analysis for

such persons are generated. Samples and records submitted shall not be compared to any other sample or record of analysis unless such comparison is performed pursuant to a CODIS or other DNA identification system maintained database search process or unless it is for a quality control or quality assurance purpose.

D. DNA database searches.

(1) All specific, non-routine requests for searches of, or through, the administrative center DNA database computers, other than those intended to minimize duplicate sample collection and testing or accessed through the secure electronic methods established by the administrative center, shall be submitted in writing to the administrative center.

(2) The head of the administrative center shall verify the validity of all written requests pursuant to the DNA Identification Act, prior to initiating any database searches or releasing information from such searches and shall reject inappropriate or invalid requests.

(3) A copy of the request and resulting action shall be placed with the original sample records if a database hit should occur. If a database hit should occur pursuant to this request, it shall be administratively handled pursuant to the provisions of Subsection E of 10.14.200.11 NMAC.

(4) A separate file shall be established where copies of all specific, non-routine requests and resulting action shall be kept.

(5) All routine searches will be performed in such a manner as to not target a specific covered offender or arrestee sample. No documentation of routine searches is required to be maintained.

E. Database hits.

(1) If a DNA profile match should occur between the DNA profile from a covered offender or arrestee and an unknown forensic sample, an unidentified person or unidentified human remains, a reanalysis of the stored DNA sample

shall be performed, if possible, to verify the generated profile.

(2) A written letter of notification indicating the hit shall be forwarded to the requesting agency through their servicing laboratory or directly by the head of the administrative center. Release of personal identifying information shall be made only after compliance with Subsection D of 10.14.200.11 NMAC.

(3) Should the reanalysis of a profile match not be confirmed, a written letter of notification to that effect shall be forwarded to the requesting agency through their servicing laboratory or directly by the head of the administrative center and a non-conformance investigation will be executed.

(4) All written letters of notification that possess an original signature shall be kept by the administrative center. Copies of letters of notification that possess an original signature will be distributed as deemed appropriate by the head of the administrative center. As required, a certified copy of a letter of notification that possesses an original signature will be distributed as deemed appropriate by the head of the administrative center.

F. Only DNA records that directly relate to the identification characteristics of individuals shall be collected and stored in the DNA identification system database. The information contained in the DNA identification system database shall not be collected, stored, or released for the purpose of obtaining information about physical characteristics, traits, or predisposition for a disease or mental illness or behavior and shall not serve any purpose other than those specifically allowed by the DNA Identification Act.

G. CODIS.

(1) The administrative center will contribute data obtained from the DNA identification system to CODIS.

(2) The information maintained and accessed by CODIS shall adhere to the

procedures, rules and regulations established by the board of the national DNA index system and the FBI for CODIS access.

(3) Both state and national CODIS searches shall be performed via secured computer systems.

[10.14.200.11 NMAC - Rp,
10.14.200.11 NMAC, 09/30/2016]

10.14.200.12 EXPUNGEMENT OF INFORMATION:

A. A person may request expungement of his arrestee or offender DNA sample and DNA records from the DNA identification system on the following grounds:

(1) that the conviction that led to the inclusion of the offender DNA sample and DNA records in the DNA identification system has been reversed; or

(2) that the arrest that led to the inclusion of the arrestee DNA sample and DNA records in the DNA identification system has resulted in a felony or misdemeanor charge that has been resolved by a dismissal with or without prejudice, nolle prosequi, the successful completion of a pre-prosecution diversion program or a conditional discharge, misdemeanor conviction or acquittal; or

(3) that the arrest that led to the inclusion of the arrestee DNA sample and DNA records did not result in a felony charge being filed within one year of the date of arrest.

B. The head of the administrative center shall expunge a person's arrestee or offender DNA sample and DNA records from the DNA identification system when the person provides the administrative center with the following materials:

(1) a written request for expungement of the sample and DNA records; and

(2) for offender samples and DNA records, a certified copy of a court order or mandate that reverses the *conviction that led to the inclusion of the sample and DNA records in the DNA identification system; or*

(3) for arrestee samples and DNA records, a certified copy of the dismissal with or without prejudice, nolle prosequi, conditional discharge, misdemeanor conviction or acquittal or, documentation certifying the successful completion of a pre-prosecution diversion program or, a sworn affidavit that the arrest that led to the inclusion of the sample has not resulted in a felony charge being filed within one year of the date of arrest.

C. Before expungement of an arrestee or offender DNA sample the administrative center shall, within 30 days of the receipt of the request for expungement, request that an independent review of the submitted materials be conducted by the attorney general's office. The attorney general shall confirm or reject the expungement request, or request a reasonable extension of time for the review of the request from the administrative center, in writing within 45 days from the receipt of the request for review by the attorney general's office. If no action is taken and there is no request for an extension of the review by the attorney general after 45 days from the receipt of the request for review, expungement shall automatically occur.

D. A person may request expungement of his DNA sample and DNA records from the missing persons DNA identification system at any time.

E. The head of the administrative center shall expunge a person's sample and DNA records from the missing persons DNA identification system when the person provides the administrative center with the following materials.

(1) A written request for expungement of his sample and DNA records.

(2) A certified copy of a court order overturning any original search warrant or court order that led to the inclusion of his sample and DNA records in the missing persons DNA identification system, if applicable.

F. Before

expungement of a DNA sample collected for the missing persons DNA identification system, a review of the mechanism of sample collection authorization shall be conducted by the administrative center. The administrative center shall confirm or reject the expungement request in writing within 30 business days from the receipt of the written request by the administrative center.

G. Requests for a review extension and the rejection of requests for expungement shall not be made without cause.

H. Should a request for expungement be rejected, the written notification shall include information as to the reason for rejection and that the rejection may be appealed to the oversight committee.

I. The administrative center shall not expunge a person's sample or DNA records from the DNA identification system if the person has a prior felony conviction or a pending felony charge for which collection of a sample is authorized pursuant to the provisions of the DNA Identification Act.

J. When a person's sample and DNA records are to be expunged from the DNA identification system, the head of the administrative center shall ensure that the person's sample and DNA records are expunged from CODIS within 30 days after the receipt of the confirmation of the expungement request by the attorney general.

K. Written confirmation of the expungement shall be sent to the requesting party and a record of the written confirmation, as well as all expungement related correspondence and checklists, shall be securely kept solely by the head of the administrative center.

L. Expungement related confirmation, correspondence and checklists shall not list any results of DNA testing or the NMDIS database number and if such items do contain these identifiers the identifiers shall be obliterated.

M. All items kept by the head of the administrative center pursuant to Subsection K

of 10.14.200.12 NMAC shall be destroyed not less than six months, nor greater than seven months, from the date of the written confirmation of the expungement being sent to the requesting party.

N. For purposes of this section, expungement means the complete destruction of all samples, records, personal identification and information concerning that person, such that the person could not be re-associated with the expunged materials as described in this section. [10.14.200.12 NMAC - Rp, 10.14.200.12 NMAC, 09/30/2016]

10.14.200.13 OPERATION AND OVERSIGHT OF THE ADMINISTRATIVE CENTER:

A. The written agreement required in Section 29-16-4 NMSA 1978 shall:

(1) provide for the general terms of the operation and administration of the administrative center; and

(2) define the relationship between the DNA oversight committee and the law enforcement agency that administers and operates the DNA identification system; and

(3) be read and interpreted consistent with the provisions of these rules and the DNA Identification Act.

B. Personnel staffing.

(1) Staffing for the administrative center, to include the head of the administrative center, shall be selected by the law enforcement agency or unit that administers and operates the DNA identification system following the agency or unit's standard hiring policies.

(2) In the event of a vacancy of the position held by the head of the administrative center, the law enforcement agency or unit that administers and operates the DNA identification system shall notify the oversight committee chairperson of the vacancy and coordinate the inclusion of two or more oversight committee members, not affiliated with the law enforcement agency that

administers and operates the DNA identification system, for the selection interviews.

(3) The head of the administrative center shall meet or exceed the educational and experience requirements of a technical leader or a CODIS administrator as required by the FBI's quality assurance standards.

(4) All analysts shall meet or exceed the educational and experience requirements of an analyst as required by the FBI's quality assurance standards.

C. Funding of positions.

(1) All positions funded by the DNA identification system shall be for the execution of the duties listed in Subsection B of 29-16-4 NMSA 1978 and for the benefit of the DNA identification system.

(2) The creation of any full-time or permanent, DNA identification system funded staff positions by the law enforcement agency or unit that administers and operates the DNA identification system shall be approved by the oversight committee prior to the hiring process.

(3) The utilization of part-time or temporary, DNA identification system funded staff positions shall be at the discretion of the head of the administrative center, however any such positions shall be limited in duration and maintained only for such time as their specific need exists.

D. Authority of the head of the administrative center.

(1) The head of the administrative center is authorized to make all reasonable administrative decisions as are required to comply with the duties listed in Subsection B of 29-16-4 NMSA 1978, these rules, the operational procedures of the board of the national DNA index system and the FBI's quality assurance standards.

(2) The head of the administrative center shall abide by all decisions of the oversight

committee.

E. General strategic plan.

(1) The head of the administrative center shall present a general strategic plan to the oversight committee within the first four months of each calendar year, for approval by the committee.

(2) Should significant changes to the strategic plan, the operations or processes of the administrative center be necessary during the interim period, those changes shall require the prior approval of the oversight committee.

F. Authority of the administrative center over forensic laboratories with respect to their participation in CODIS.

(1) The administrative center shall have "stop work" authority over forensic laboratories. This authority shall not be exercised without cause.

(2) Forensic laboratories shall utilize and provide any documents as designed by, or otherwise required by, the administrative center.

(3) Forensic laboratories shall abide by all policies and procedures established by the administrative center.

(4) Forensic laboratories shall abide by all federal and New Mexico laws, rules and standards as shall be enacted.

G. For purposes of the required memorandum between the federal bureau of investigation, laboratory division and a New Mexico, national DNA index system participating forensic laboratory the signatory shall be the crime laboratory director that oversees the respective forensic laboratory. For purposes of the required memorandum between the federal bureau of investigation, laboratory division and the administrative center the signatory shall be the chairperson of the DNA oversight committee, after review and advisement of the DNA oversight committee.

[10.14.200.13 NMAC - Rp, 10.14.200.13 NMAC, 09/30/2016]

10.14.200.14 [RESERVED]
 [10.14.200.14 NMAC - Rp,
 10.14.200.14 NMAC, 09/30/2016]

10.14.200.15 [RESERVED]
 [10.14.200.15 NMAC - Rp,
 10.14.200.15 NMAC, 09/30/2016]

10.14.200.16
MISCELLANEOUS PROVISIONS:

A. Savings clause.
 These rules shall be read and interpreted consistent with the provisions of the DNA Identification Act. If a topic is not addressed in these rules, reference shall be made to the DNA Identification Act.

B. Annual review.
 These rules shall be reviewed on, at least, an annual basis by the DNA oversight committee.

C. Purpose and intent.
 The purpose and intent of these rules is to fully implement the provisions of Sections 29-3-10, 29-16-1 et seq. and 29-11A-1 et seq. NMSA 1978. These rules are governed by the Uniform Statute and Rule Construction Act, Section 12-2A-1 et seq. NMSA 1978. These rules rely on the primary text of each statute and the common and technical use of the language in each statute.

D. Chairperson. The DNA oversight committee shall, in such a manner and for such duration as the DNA oversight committee may choose, select from the members of the DNA oversight committee, a chairperson and a vice-chairperson. In the absence of the chairperson, the vice-chairperson shall act in the capacity of the chairperson. In the circumstance that the chairperson is no longer willing, or able, to continue to act as the chairperson, the vice-chairperson shall act in the capacity of the chairperson until such time that the DNA oversight committee selects a new chairperson. The chairperson is eligible to vote on all motions brought before the DNA oversight committee.

E. Spokesperson. The chairperson of the DNA oversight committee, or designee, shall be empowered to act as the official spokesperson on behalf of the DNA oversight committee and the

administrative center.
F. Proxy, abstention and electronic participation and voting. Designation of a proxy by any member of the DNA oversight committee is allowed when the respective member is unable to attend a meeting of the DNA oversight committee. Such proxy shall count towards establishing a quorum and be eligible to cast a vote as may be necessary. Any member of the DNA oversight committee, or their proxy, may abstain from any vote and such abstention shall not count towards, or against, the majority on any motion. Electronic participation and voting may be allowed pursuant to the approval of a majority of the quorum that is physically present at any meeting of the DNA oversight committee. Such approved electronic participation and voting shall be considered to be the same as if the member of the DNA oversight committee were physically present at that meeting.

[10.14.200.16 NMAC - Rp,
 10.14.200.16 NMAC, 09/30/2016]

HISTORY OF 10.14.200 NMAC:
Pre-NMAC History: none.

History of Repealed Material:
 10.14.200 NMAC, DNA Identification System, filed 4/14/2000 - Repealed effective 09/30/2016.

Other History:
 10 NMAC 14.200, DNA Identification System, filed 2/12/1998 was renumbered, reformatted, amended and replaced by 10.14.200 NMAC, DNA Identification System, effective 5/1/2000.

EDUCATIONAL RETIREMENT BOARD

This is an amendment to 2.82.2 NMAC, Sections 3, 9 and 11, effective September 30, 2016.

2.82.2.3 STATUTORY AUTHORITY: The Educational Retirement Act Section 22-11-1 to [22-11-53;] 22-11-55 NMSA 1978.

[6-30-99; 2.82.2.3 NMAC - Rn, 2 NMAC 82.2.3, 11-30-2001; A, 5-31-2012; A, 9-30-2016]

2.82.2.9 REGULAR MEMBERS:

A. In four year colleges, technical and vocational institutes and community or junior colleges, "regular members" shall be all regularly employed teaching staff, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule); all regularly employed administrators, whether full-time or part-time, who hold a bachelor's degree or the professional equivalent thereof and who have managerial and supervisory responsibilities, (except retired members participating in the return to work program and exclusions under Section 11 of this rule); and all regularly employed nurses, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

B. In the public school districts and state operated schools other than those listed in Subsection A above, "regular members" shall be all regularly employed teachers, administrators, and nurses who are holders of appropriate certificates issued by the public education department, regardless of whether employed full-time or part-time, (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

C. Any member except a retired member participating in the return to work program, who is regularly employed in any of the following local administrative units, shall be a "regular member" if [he] the member holds a teacher's, nurse's or administrator's certificate (which is issued by the public education department at the time of commencement of employment in such local administrative units:

(1) northern New Mexico state school;

- (2) New Mexico boys' school;
- (3) New Mexico girls' school;
- (4) Los Lunas medical center;
- (5) public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually impaired;
- (8) New Mexico school for the deaf; and
- (9) New Mexico activities association.

D. Except retired members participating in the return to work program, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under the Educational Retirement Act, commencing with the first day of employment.

E. Except retired members participating in the return to work program, any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if he is employed in an educational program and if he holds a certified school instructor's certificate issued by the public education department. [6-30-99; 2.82.2.9 NMAC - Rn & A, 2 NMAC 82.2.9, 11-30-2001; A, 5-31-2012; A, 9-30-2016]

2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:

A. Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under

no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

B. Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. For purposes of calculating a person's FTE, employment with all local administrative units shall be aggregated. Any person employed on July 1, 1994 who was then covered under the Educational Retirement Act shall continue to be covered for the duration of that employment.

C. Any employee engaged on a day-to-day basis to replace another employee who is temporarily absent shall be considered a "substitute" and shall not be covered under the Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a "substitute" and must be covered under the Educational Retirement Act.

D. Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:

- (1) registration with the New Mexico department of taxation and revenue to pay gross receipts tax;

- (2) the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;

- (3) whether the person receives benefits such

as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;

- (4) whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;

- (a) as necessary, the director shall make available forms for use by local administrative units for use in making this determination;

- (b) the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

E. All students enrolled in any public school, grade 1-12.

F. Employees who have a portion of their salaries paid through the Comprehensive Employment and Training Act (Public Law 95-524) shall not be covered for contributions on that portion except those employees who have vested. [6-30-99; 2.82.2.11 NMAC - Rn, 2 NMAC 82.2.11, 11-30-2001; A, 10-31-2002; A, 9-15-2006; A, 5-31-2012; A, 6-16-2015; A, 9-30-2016]

HUMAN SERVICES DEPARTMENT

INCOME SUPPORT DIVISION

This is an emergency amendment to Section 8 of 8.102.500 NMAC, effective 10/01/2016.

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 [(85%)] 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	[\$834]	\$842
	(b)	
two persons	[\$1,129]	\$1,135
	(c)	
three persons	[\$1,424]	\$1,428
	(d)	
four persons	[\$1,718]	\$1,721
	(e)	
five persons	[\$2,013]	\$2,015
	(f)	
six persons	\$2,308	
	(g)	
seven persons	\$2,602	
	(h)	
eight persons	\$2,897	

(i) add \$295 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 [100%] 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	[\$98+]	\$990
	(2)	two persons	[\$1,328]	\$1,335
	(3)	three persons	[\$1,675]	\$1,680
	(4)	four persons	[\$2,021]	\$2,025
	(5)	five persons	[\$2,368]	\$2,370
	(6)	six persons	\$2,715	
	(7)	seven persons	\$3,061	
	(8)	eight persons	\$3,408	
	(9)	add \$347		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.

(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]

**HUMAN SERVICES
 DEPARTMENT
 INCOME SUPPORT DIVISION**

This is an emergency amendment to Section 8 of 8.106.500 NMAC, effective 10/01/2016.

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 [(85%)] 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 [(85%)] 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	[\$834]	\$842
	(b)	
two persons	[\$1,129]	\$1,135
	(c)	
three persons	[\$1,424]	\$1,428
	(d)	
four persons	[\$1,718]	\$1,721
	(e)	
five persons	[\$2,013]	\$2,015
	(f)	
six persons	\$2,308	
	(g)	
seven persons	\$2,602	
	(h)	
eight persons	\$2,897	
	(i)	
		add \$295 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 [nineteen] 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]

**HUMAN SERVICES
DEPARTMENT**
INCOME SUPPORT DIVISION

**This is an emergency amendment
to Section 8 of 8.139.500 NMAC,
effective 10/01/2016.**

**8.139.500.8 BASIS OF
ISSUANCE:**

A. Income standards:
Determination of need in the food stamp program is based on federal guidelines. Participation in the program is limited to households whose income is determined to be a substantial limiting factor in permitting them to obtain a nutritious diet. The net and gross income eligibility standards are based on the federal income poverty levels established in the Community Services Block Grant Act [42 USC 9902(2)].

B. Gross income standards: The gross income eligibility standards for the 48 contiguous states, District of Columbia, Guam and the Virgin Islands is [~~130 percent (130%)~~] one hundred thirty percent of the federal income poverty levels for the 48 states and the District of Columbia. One hundred thirty percent [~~(130%)~~] of the annual income poverty guidelines is divided by 12 to determine monthly gross income standards, rounding the results upward as necessary. For households larger than eight, the increment in the federal income poverty guidelines is multiplied by [~~130%;~~] one hundred thirty percent divided by 12, and the results rounded upward if necessary.

C. Net income standards: The net income eligibility standards for the 48 contiguous

states, District of Columbia, Guam and the Virgin Islands are the federal income poverty levels for the 48 contiguous states and the District of Columbia. The annual income poverty guidelines are divided by 12 to determine monthly net income eligibility standards, (results rounded upward if necessary). For households larger than eight, the increment in the federal income poverty guidelines is divided by 12, and the results rounded upward if necessary.

D. Yearly adjustment:
Income eligibility limits are revised each October 1st to reflect the annual adjustment to the federal income poverty guidelines for the 48 contiguous states and the District of Columbia.

E. Issuance table:
The issuance table lists applicable income guidelines used to determine SNAP eligibility based on household size. Some amounts are increased to meet the needs of certain categorically eligible households. Some of the net income amounts listed are higher than the income limits for some household sizes. Households not categorically eligible for SNAP benefits must have income below the appropriate gross income limit for household size.

**Continued On The Following
Page**

Household Size	Maximum Gross Monthly Income Categorical Eligibility at 165% of Poverty	Maximum Gross Monthly Income At 130% of Poverty	Maximum Net Monthly Income At 100% of Poverty	Maximum SNAP Monthly Allotment
1	[\$1,619] <u>\$1,634</u>	[\$1,276] <u>\$1,287</u>	[\$981] <u>\$990</u>	\$194
2	[\$2,191] <u>\$2,203</u>	[\$1,726] <u>\$1,736</u>	[\$1,328] <u>\$1,335</u>	\$357
3	[\$2,763] <u>\$2,772</u>	[\$2,177] <u>\$2,184</u>	[\$1,675] <u>\$1,680</u>	\$511
4	[\$3,335] <u>\$3,342</u>	[\$2,628] <u>\$2,633</u>	[\$2,021] <u>\$2,025</u>	\$649
5	[\$3,907] <u>\$3,911</u>	[\$3,078] <u>\$3,081</u>	[\$2,368] <u>\$2,370</u>	\$771
6	[\$4,479] <u>\$4,480</u>	[\$3,529] <u>\$3,530</u>	\$2,715	\$925
7	\$5,051	\$3,980	\$3,061	\$1,022
8	\$5,623	\$4,430	\$3,408	\$1,169
\$ Each Additional Member	+\$572	+\$451	+\$347	+\$146

F. Deductions and standards:

(1) **Determination:** Expense and standard deduction amounts are determined by federal guidelines and may be adjusted each year. Households eligible based on income and resource guidelines, and other relevant eligibility factors, are allowed certain deductions to determine countable income.

(2) **Yearly adjustment:** The expense and standard deductions may change each year. If federal guidelines mandate a change, it is effective each October 1st.

(3) **Expense deductions and standards table:**

Standard Deduction for Household Size of 1 through 3	[\$155] <u>\$157</u>
Standard Deduction for Household of 4	\$168
Standard Deduction for Household Size of 5	\$197
Standard Deduction for Household Size of 6 or more	\$226
Earned Income Deduction (EID)	20%
Dependent Care Deduction	Actual Amount
Heating/Cooling Standard Utility Allowance (HCSUA)	[\$318] <u>\$325</u>
Limited Utility Allowance (LUA)	[\$123] <u>\$125</u>
Telephone Standard (TS)	[\$41] <u>\$40</u>
Excess Shelter Cost Deduction Limit for Non-Elderly/Non-Disabled Households	[\$504] <u>\$517</u>
Homeless Household Shelter Standard	\$143
Minimum Allotment for Eligible One and Two-Person Households	\$16

[02/1/95, 10/01/95, 02/29/96, 10/01/96, 3/15/97, 01/15/98, 11/15/98, 12/15/99, 01/01/01, 03/01/01; 8.139.500.8 NMAC - Rn, 8 NMAC 3.FSP.501, 05/15/2001; A, 10/01/2001; A, 10/01/2002, A, 09/01/2003; A, 10/01/2003; A/E, 10/01/2004; A/E, 10/01/2005; A/E, 10/01/2006; A/E, 10/01/2007; A/E, 10/01/2008; A/E, 04/01/2009; A/E, 10/01/2009; A, 10/30/2009; A, 04/01/2010; A/E, 10/01/2010; A/E, 10/01/2011; A/E, 10/01/2012; A/E, 10/01/2013; A/E, 10/01/2014; A, 04/16/2015; A, 10/01/2015; A, 10/01/2016]

**REGULATION AND LICENSING DEPARTMENT
PUBLIC ACCOUNTANCY BOARD**

This is an amendment to 16.60.1 NMAC, Sections 7 and 10, effective 10-1-2016

16.60.1.7 DEFINITIONS:

A. **“Acceptance letter”** means a document issued by the administering entity indicating the type of report (unmodified, modified, or adverse) when all review documents and, if applicable, all remedial/corrective actions have been completed and accepted by the peer review committee.

B. **“Act”** means the New Mexico 1999 Public Accountancy Act, Sections 61-28B-1 to 61-28B-29 NMSA1978.

C. “Administering entity” means an entity (any form of organization allowed by state law or professional organization or association of CPA’s) that has met, and at all relevant times continues to meet, the standards specified by the board for administering the review. The board shall periodically publish a list of administering entities that have applied for and received approval.

D. “Agreed upon procedures” are those which are to be performed in accordance with applicable attestation standards. They are also those in which a license is engaged to issue a written finding that is based on specific procedures that the specified parties agreed are sufficient for their purpose, is restricted to the specified parties, and does not provide an opinion or negative assurance.

E. “Audit” means the procedures performed in accordance with applicable auditing standards for the purpose of expressing or disclaiming an opinion on the fairness with which the historical financial information is presented in conformity with generally accepted accounting principles, another comprehensive basis of accounting, or a basis of accounting described in the report.

F. “Client” means the person or entity who retains a licensee for the performance of professional services.

G. “Enterprise” means any person or entity who retains a licensee for the performance of professional services.

H. “Financial statements” means statements and footnotes related thereto that purport to show an actual or anticipated financial position or results of operations, cash flow, or changes in financial position based on generally accepted accounting principles or another comprehensive basis of accounting. The term includes specific elements, accounts, or items of such statements, but it does not include incidental financial data included in management advisory service reports which support recommendations made to clients.

In addition, it does not include tax returns and supporting schedules.

I. “He, his, him” means masculine pronouns when used herein also include the feminine and the neuter.

J. “Holding out to the public as a permit holder or registered firm” means the phrase “holding himself out to the public as a permit holder or registered firm” as used in the definition of “practice of public accountancy” in Section 3L of the act, and in these rules it means any representation, other than by an individual holding a certificate or firm registration issued by this board pursuant to the 1999 Public Accountancy Act, Sections 61-28B-7 thru 61-28B-9, 61-28B-1 or 61-28B-13, of the fact that a certificate holder holds a permit, certificate or is a registered firm in connection with the performance of, or an offer to perform, services for the public, except as allowed under the practice privilege pursuant to the 1999 Public Accountancy Act, Sections 61-28B-26. Any such representation is presumed to invite the public to rely upon the professional skills implied by the certificate, registration, or permit in connection with the professional services offered to be performed. For the purpose of this rule, a representation shall be deemed to include any oral or written communication conveying the fact that the person holds a certificate, permit or firm registration, including without limitation the use of titles or legends on letterheads, business cards, office doors, advertisements, internet, email, or other electronic media.

K. “Manager” has, when used in these rules, the same meaning as the term “manager” in a limited liability company.

L. “Member” has, when used in these rules, the same meaning as the term “member” in a limited liability company.

M. “Peer review” means a program to monitor compliance with applicable accounting and auditing standards adopted by generally recognized standard setting bodies.

N. “Peer review committee” means a committee comprised exclusively of CPAs practicing public accountancy and formed by an administering entity for the purpose of accepting peer review reports submitted by firms on peer review engagements.

O. “Practice Privilege” as defined in the 1999 Public Accountancy Act, Section 61-28B-26, a person whose principal place of business or residence in not in New Mexico shall be presumed to have qualifications substantially similar to New Mexico’s requirements, may exercise all the practice privileges of certificate holders of New Mexico without the need to obtain a certificate pursuant to the 1999 Public Accountancy Act, Sections 61-28B-9 NMSA 1978, if the individual meets the requirements of the 1999 Public Accountancy Act, Section 61-28B-26.

P. “Professional engagement” means a written or oral agreement between a client and a licensee relative to the performance of professional services and the services performed under this agreement. Oral agreements may only be used when allowed by professional standards.

Q. “Professional services” means any service performed or offered to be performed by a licensee for a client in the course of the practice of public accountancy.

R. “Public communication” means a communication made in identical form to multiple persons or to the world at large, including but not limited to television, radio, motion pictures, newspaper, pamphlet, mass mailing, letterhead, business card, the internet, email or directory.

S. “Quality review” means an interchangeable term for peer review.

T. “Report” as defined in Section 61-28 3N of the act and in these rules includes forms of language which refers to financial statements, when such forms of language express or deny any assurance as to the reliability of the financial statements to which

they refer. Among the possible sources of such forms of language are pronouncements by authoritative bodies describing the work that should be performed and the responsibilities that should be assumed for specified kinds of professional engagements. In addition, these pronouncements prescribe the form of report that should be issued upon completion of such engagements. A form of report prescribed by such a pronouncement will ordinarily constitute a form of language which is conventionally understood as implying assurance and expertise. For this reason, as provided in Section 3N of the act, the term "report" includes the issuance of reports using the forms of language set out in the American institute of certified public accountants (AICPA) statement on standards for accounting and review services (SSARS) as amended, modified, or superseded from time to time, for reports with respect to both "reviews" of financial statements, and also compilations of financial statements, as well as the forms of language for "special reports" set out in the AICPA's statement on auditing standards (SAS) as amended, modified, or superseded from time to time. These statements on standards are incorporated in the AICPA professional standards: code of professional conduct.

U. "Services involving accounting or auditing skills" means "services involving accounting or auditing skills" as used in the definition of "practice of public accountancy" in Sections 3K and L of the act. It includes the provision of advice or recommendations in connection with the sale or offer for sale of products, when the advice or recommendations require or imply the possession of accounting or auditing skills or expert knowledge in auditing or accounting.

V. "Statement of compliance" means a certified statement from the human services department (HSD) stating that an applicant or licensee is in compliance with a judgment and order for support.

W. "Statement of

non-compliance" means a certified statement from HSD stating that an applicant or licensee is not in compliance with a judgment and order for support. **"Acceptance letter"** means a document issued by the sponsoring organization indicating the peer review report has been accepted and, if applicable, any remedial/ corrective actions to be agreed to and completed by the firm.

B. "Accounting and auditing services" for peer review purposes means providing any one or more of the following:

(1) engagements performed in accordance with the "statements on auditing standards";

(2) engagements, other than preparation services, performed in accordance with the "statements on standards for accounting and review services";

(3) examination, review or agreed upon procedures engagements performed in accordance with the "statements on standards for attestation engagements"; or

(4) engagements performed in accordance with public company accounting oversight board (PCAOB) standards that are not subject to PCAOB permanent inspection.

C. "Act" means the New Mexico 1999 Public Accountancy Act, Sections 61-28B-1 to 61-28B-29 NMSA 1978.

D. "Agreed upon procedures" are those which are to be performed in accordance with applicable attestation standards. They are also those in which a license is engaged to issue a written finding that is based on specific procedures that the specified parties agreed are sufficient for their purpose, is restricted to the specified parties, and does not provide an opinion or negative assurance.

E. "Client" means the person or entity who retains a licensee for the performance of professional services.

F. "Completion letter" means a document issued

by the sponsoring organization after a firm has provided evidence of remedial/ corrective actions taken, which were specified in the acceptance letter, and its peer review committee has determined no further actions are required.

G. "Enterprise" means any person or entity who retains a licensee for the performance of professional services.

H. "Financial statements" means statements and footnotes related thereto that purport to show an actual or anticipated financial position or results of operations, cash flow, or changes in financial position based on generally accepted accounting principles or another comprehensive basis of accounting. The term includes specific elements, accounts, or items of such statements, but it does not include incidental financial data included in management advisory service reports which support recommendations made to clients. In addition, it does not include tax returns and supporting schedules.

I. "He, his, him" means masculine pronouns when used herein also include the feminine and the neuter.

J. "Holding out to the public as a permit holder or registered firm" means the phrase "holding himself out to the public as a permit holder or registered firm" as used in the definition of "practice of public accountancy" in Section 3L of the act, and in these rules it means any representation, other than by an individual holding a certificate or firm registration issued by this board pursuant to the 1999 Public Accountancy Act, Sections 61-28B-7 thru 61-28B-9, 61-28B-1 or 61-28B-13 of the fact that a certificate holder holds a permit, certificate or is a registered firm in connection with the performance of, or an offer to perform, services for the public, except as allowed under the practice privilege pursuant to the 1999 Public Accountancy Act, Sections 61-28B-26. Any such representation is presumed to invite the public to rely upon the professional skills

implied by the certificate, registration, or permit in connection with the professional services offered to be performed. For the purpose of this rule, a representation shall be deemed to include any oral or written communication conveying the fact that the person holds a certificate, permit or firm registration, including without limitation the use of titles or legends on letterheads, business cards, office doors, advertisements, internet, email, or other electronic media.

K. “Manager” has, when used in these rules, the same meaning as the term “manager” in a limited liability company.

L. “Member” has, when used in these rules, the same meaning as the term “member” in a limited liability company.

M. “PCAOB” means the public company accounting oversight board

N. “Peer review program” means the sponsoring organization’s entire peer review process, including but not limited to the standards for administering, performing and reporting on peer reviews, oversight procedures, training, and related guidance and materials.

O. “Peer review committee” means a committee comprised exclusively of CPAs practicing public accountancy and formed by a sponsoring organization for the purpose of overseeing the administration, acceptance, and completion of peer reviews.

P. “Peer review oversight committee” means a board appointed committee to provide oversight of the sponsoring organization in order to provide reasonable assurance that peer reviews are being administered, conducted, and reported on in accordance with the minimum standards for performing and reporting on peer reviews.

Q. “Practice Privilege” as defined in the 1999 Public Accountancy Act, Section 61-28B-26, a person whose principal place of business or residence in not in New Mexico shall be

presumed to have qualifications substantially similar to New Mexico’s requirements, may exercise all the practice privileges of certificate holders of New Mexico without the need to obtain a certificate pursuant the 1999 Public Accountancy Act, Sections 61-28B-9 NMSA 1978, if the individual meets the requirements of the 1999 Public Accountancy Act, Section 61-28B-26.

R. “Professional engagement” means a written or oral agreement between a client and a licensee relative to the performance of professional services and the services performed under this agreement. Oral agreements may only be used when allowed by professional standards.

S. “Professional services” means any service performed or offered to be performed by a licensee for a client in the course of the practice of public accountancy.

T. “Public communication” means a communication made in identical form to multiple persons or to the world at large, including but not limited to television, radio, motion pictures, newspaper, pamphlet, mass mailing, letterhead, business card, the internet, email or directory.

U. “Quality review” means an interchangeable term for peer review.

V. “Report” As provided in Section 61-28B-3 N of the act, the term “report” includes the issuance of reports in conjunction with an accounting and auditing practice using the forms of language set out in the American institute of certified public accountants (AICPA) “statements on auditing standards,” “statements on standards of accounting and review services,” “statements on standards for attestation engagements,” and PCOAB standards.

W. “Services involving accounting or auditing skills” means “services involving accounting or auditing skills” as used in the definition of “practice of public accountancy” in Sections 3K and L of the act. It includes the provision of advice or recommendations in

connection with the sale or offer for sale of products, when the advice or recommendations require or imply the possession of accounting or auditing skills or expert knowledge in auditing or accounting.

X. “Sponsoring Organization” means a board approved professional society, or other organization responsible for the facilitation and administration of peer reviews through use of its peer review program and peer review standards.

Y. “Statement of compliance” means a certified statement from the human services department (HSD) stating that an applicant or licensee is in compliance with a judgment and order for support.

Z. “Statement of non-compliance” means a certified statement from HSD stating that an applicant or licensee is not in compliance with a judgment and order for support.

[16.60.1.7 NMAC - Rp 16 NMAC 60.1.7 and 16 NMAC 60.11.7, 02-14-2002; A, 11-30-2007; A, 4-15-2008; A, 06-30-2008; A, 01-17-2013; A, 09-15-2015; A, 10-1-2016]

16.60.1.10 FEES AND OBLIGATIONS: Fees charged by the board shall be as follows.

A. Fees set by the board for CPA examination applicants shall not unreasonably exceed the amount required for the board to operate CPA examination administration on a break even basis, but in no case shall the fee be less than the state’s cost of procuring and administering the exam.

B. Initial examination qualification review under Section 27F of the act shall be \$75.

C. Delinquency fee for incomplete or delinquent continuing education reports, certificate/license or firm permit renewals under Section 27D of the act shall be [~~\$50.~~] \$100.

D. Certificate application under Section 27B of the act shall be: initial certificate, \$175; certificate renewal, \$130.

E. No annual renewal fee shall be assessed for an individual

who holds an inactive certificate and who has reached the age of 70.

F. Firm permit application or renewal fee under Section 27C of the act shall be \$75 for each firm, regardless of form of entity.

G. Firm permit renewal delinquency fee under Section 27C of the act shall be [~~\$50~~] \$100 and includes all practitioners whose renewal applications are delinquent.

H. Certificate/license/firm permit reinstatement fee under Section 27H of the act shall be \$175. For certificate/individual license reinstatements only, reinstatement fee and an additional fee of the current year's renewal fee. No delinquency fee shall be assessed.

I. Continuing professional education waiver and reentry into active certificate status and to comply with continuing professional education under Sections 27H and 27I of the act shall not exceed \$75 each occurrence.

J. Administrative fees for services under Section 27F shall be:

- (1) list of certificate or permit holders, \$250;
- (2) duplicate or replacement certificate card or permit card, \$10 each;
- (3) duplicate or replacement wall certificate, \$25 each;
- (4) board evaluation of coursework for continuing professional education credit, \$50 per hour of board staff research and study;
- (5) certificate application package for reciprocity, \$20 each;
- (6) grade transfer candidates, \$75 each;
- (7) replacement packages for by-examination candidates, \$75 each;
- (8) copies of combined Accountancy Act and board rules, \$10 each;
- (9) copies of records and documents, \$.25 per page; and
- (10) name change due to marriage, divorce, legal

name change, etc. for replacement license shall be \$130; and

(11) the board may, at its discretion, charge for other administrative costs as it deems appropriate.

K. Fee for the transfer of licensure or examination information to a third party under Section 27E of the act shall be \$75.

L. Fee for criminal history background check under Section 8.1 of the act shall be the amount established by the department of public safety for the processing of criminal history background checks.

M. The board may waive charges as it deems appropriate.

N. All fees are non-refundable.

[16.60.1.10 NMAC - Rp 16 NMAC 60.2.8, 02-14-2002; A, 01-15-2004; A, 04-29-2005; A, 11-30-2007; A, 06-30-2008; A, 05-29-2009; A, 11-13-2009; A, 9-15-2010; A, 01-17-2013, A, 12-01-2014; A, 9-15-2015; A, 10-1-2016]

**REGULATION AND LICENSING DEPARTMENT
PUBLIC ACCOUNTANCY BOARD**

This is an amendment to 16.60.4 NMAC, Sections 10 and 11, effective 10-1-2016.

16.60.4.10 PEER REVIEW REQUIREMENTS:

A. [Participation: A firm seeking to obtain or renew a firm permit to engage in the practice of public accountancy in New Mexico must undergo a peer review at least once every 3 years beginning with initial firm permit application. Peer review program objectives are established pursuant to Section 13L of the act to monitor compliance with applicable accounting and auditing standards adopted by generally recognized standard-setting bodies. Emphasis is on education, including appropriate education programs or remedial procedures that may be recommended or required where reporting does not comply with appropriate professional standards.

(1) Firms contracting to perform audits of state agencies as defined in the Audit Act must also comply with peer review standards applicable to those audits.

(2) Participation is required of each firm registered with the board who performs accounting and auditing engagements, including but not limited to audits, reviews, compilations, attestations, forecasts, or projections. Exceptions to peer review participation: preparation of financial statements (accounting) and tax return preparation service shall be in accordance with AICPA standards.

B. Reporting to the board: Within 90 days from the scheduled due date of the peer review for those administered by state societies and 150 days for all others, the firm must submit a copy of the interim or conditional or final acceptance letter or any combination of the above from the administering entity. This must be accompanied by the letter of comments, the reviewer's report, and other supporting documentation as requested by the board.

(1) If within 90 days from the scheduled due date of the peer review for those administered by state societies and 150 days for all others the firm cannot provide the final acceptance letter, the firm must submit a letter to the board explaining its failure to comply. The board may take disciplinary action for failure to comply.

(2) Each holder of a board-issued firm permit shall schedule a review to commence no later than the end of their first year of operations. Firms applying for their initial permit with a current (within the three years preceding initial application) peer review acceptance letter may submit that year's acceptance letter in support of their initial application and shall then schedule and maintain a subsequent review for each successive 3-year review period thereafter.

(3) Upon completion of the scheduled peer review, each firm shall schedule and

maintain subsequent reviews for each successive 3-year period thereafter. It is the responsibility of the firm to anticipate its needs for review services in sufficient time to enable completion and acceptance of the review within the requirement of each successive 3-year reporting period.

(4) The board, at its sole discretion, may grant any reasonable extensions that it deems necessary.

C. Peer review program standards:

(1) The board adopts the standards for performing and reporting on peer reviews or any successor standards for peer review promulgated by the American institute of certified public accountants (AICPA) as its minimum standards for review of practice firms. This shall not require a membership in any specific administering entity or the AICPA.

(2) Approved administering entities shall be AICPA, the national conference of CPA practitioners (NCCPAP), state CPA societies fully involved in the administration of the AICPA peer review program and such other entities which register with and are approved by the board on their adherence to the peer review minimum standards.

(3) The board may, for cause, revoke approval of an administering entity.

D. Hardship Exceptions: The board may make exceptions to the requirements set out in this section for hardships. All hardship requests must be in writing, setting forth detailed reasons for the request, and must be submitted no later than six months prior to expected completion date of the peer review.

E. Exemptions: A firm which does not perform accounting or auditing engagements, including but not limited to audits, reviews, compilations, attestations, forecasts, or projections is exempt from the peer review program and shall re-certify annually to the board as to this exempt status as part of the firm permit renewal process. A previously

exempt firm which begins providing the above described services must initiate and complete a review within 18 months of the date the services were first provided.

F. Procedures for an administering entity.

(1) To qualify as an administering entity, an organization must submit a peer review administration plan to the board for review and approval. The plan of administration must:

(a) establish a peer review committee (PRC) and subcommittees as needed, and provide professional staff as needed for the operation of the peer review programs;

(b) establish a program to communicate to firms participating in the peer review program the latest developments in peer review standards and the most common findings in the peer reviews conducted by the administering entity;

(c) establish procedures for resolving any disagreement which may arise out of the performance of a peer review;

(d) establish procedures to evaluate and document the performance of each reviewer and conduct hearings which may lead to the disqualification of a reviewer who does not meet the AICPA standards; and

(e) require the maintenance of records of peer reviews conducted under the program in accordance with the records retention rules of the AICPA.

(2) A peer review committee (PRC) is comprised exclusively of CPAs practicing public accountancy and formed by an administering entity for the purpose of accepting peer review reports submitted by firms on peer review engagements.

(3) Each member of a PRC must be active in the practice of public accountancy at a supervisory level in the accounting or auditing function while serving on the committee. The member's firm must be enrolled in an approved practice-monitoring program and have

received a "pass" rating on its most recent peer review. A majority of the committee members must satisfy the qualifications required of on-site peer review team captains as established and reported in the AICPA standards for performing and reporting on peer reviews.

(4) The PRC members' terms shall be staggered to provide for continuity.

(5) A PRC member may not concurrently serve as a member of his state's board of accountancy.

(6) A PRC member may not participate in any discussion or have any vote with respect to a reviewed firm when the committee member lacks independence of or has a conflict of interest with the firm.

(7) A PRC decision to accept a report must be made by a majority of a quorum of members.

(8) Responsibilities of peer review committee. The PRC shall:

(a) establish and administer the administering entities' peer review program in accordance with the AICPA standards for performing and reporting on peer reviews;

(b) when necessary in reviewing reports on peer reviews, prescribe actions designed to assure correction of the deficiencies in the reviewed firm's system of quality control policies and procedures;

(c) monitor the prescribed remedial and corrective actions to determine compliance by the reviewed firm;

(d) resolve instances in which there is a lack of cooperation and disagreement between the committee and review teams or reviewed firms in accordance with the administering entities adjudication process;

(e) promptly act upon requests from firms for changes in the timetable of their review;

(f)

appoint members to subcommittees and task forces as necessary to carry out its functions;

(g)

establish and perform procedures for insuring that reviews are performed and reported on in accordance with the AICPA standards for performing and reporting on peer reviews;

(h)

establish a report acceptance process which facilitates the exchange of viewpoints among committee members; and

(i)

provide to the board administrative statistical reports regarding their peer review program as requested.

G. Disciplinary Action.

(1)

The board shall take disciplinary action against a firm for failure to comply with peer review requirements. Actions shall include, but are not limited to, remedial and corrective procedures, fines, and denial of firm registration.

(2)

In the event a firm is unwilling or unable to comply with established standards, or a firm's professional work is so egregious as to warrant disciplinary action, the board shall take appropriate action to protect the public interest.

(3)

A copy of the peer review acceptance letter from the administering entity must be submitted to the board office no later than 90 days after the scheduled date for the peer review as determined by the administering entity.

(a)

For each day the firm is delinquent in submitting the acceptance letter, the board may assess a fine of \$10 per day not to exceed \$1,000.

(b)

If a peer review acceptance letter is submitted more than 100 days late, a notice of contemplated action may be issued against all licensees listed on the most recent firm permit renewal application as owners of the firm.

(4)

If an extension for completion of a peer review is granted by the administering entity, the board shall also accept this extension, provided that the

firm provides the board office with documentation of the extension from the administering entity.

H. Privileged

information: A report, statement, memorandum, transcript, funding record, or working paper prepared for and an opinion formulated in connection with any positive enforcement or peer review is privileged information held by the administering entity and may not be subject to discovery, subpoena, or other means of legal compulsion for release to any person and is not admissible as evidence in any judicial or administrative proceeding except for a board hearing.

I. Peer review

continuing professional education (CPE) credit: The board will allow a firm up to a total of 24 hours of CPE credits for its CPAs. These hours shall be allocated by the firm to participating firm CPAs and must be used in the calendar year of the acceptance letter.

(1) Firms

having an engagement or report peer review will be allowed up to 12 hours of CPE credits.

(2) Firms

having a system peer review will be allowed up to 24 hours of CPE credits.

(3) Firms

having a system peer review at a location other than the firm's office shall be considered a system peer review and will be allowed up to 12 hours of CPE credits.

(4) The

firm will report to the board the peer review CPE credit allocation listing individual firm CPAs and the number of credits allotted to each CPA. Individual CPAs receiving credit based upon a firm's report to the board may submit firm-reported hours in their annual CPA report forms to the board. If CPE credits will not be used, no firm report will be necessary.] **Participation:** A firm seeking to obtain or renew a firm permit to provide accounting and auditing services in New Mexico must be enrolled in a peer review program and undergo a peer review

pursuant to Section 6.60.4.10 B of the 1999 Public Accountancy Act [61-28B-1 NMSA 1978], Peer review program objectives are established pursuant to Section 13L of the act to monitor compliance with applicable accounting and auditing standards adopted by generally recognized standard-setting bodies. Emphasis is on education, including appropriate education programs or remedial procedures that may be recommended or required where reporting does not comply with appropriate professional standards.

(1) Firms

contracting to perform audits of state agencies as defined in the audit act must also comply with peer review standards applicable to those audits.

(2)

Participation is required of each firm registered with the board who provides accounting or auditing services pursuant to Subsection 13L of the act.

B. Timing of peer

reviews:

(1) Each

holder of a board-issued firm permit shall enroll in a board approved peer review program and arrange, schedule, complete and allow time for the sponsoring organization to consider their peer reviews for acceptance prior to the June 30 renewal period.

(a)

Firms need to ensure that their peer review year ends and corresponding due dates allow for compliance with Subsection 13E of the act.

(b)

Firms may need to consider changing their current peer review year ends and the timing of when their peer reviews are performed in order to comply.

(2) When a

firm performs its first engagement requiring its initial peer review, the firm shall be enrolled in a board approved peer review program by the report date of the first engagement, and the due date ordinarily will be 18 months from the report date of that engagement.

(a)

The initial peer review must report on the firm's practice for a full year.

(b)

The requirements of Subsection 13L of the act regarding permit renewal are initially applicable to the firm the first June 30 renewal period after the 18 month due date.

(c)

The peer review year end means the year end as determined by the firm and its reviewer and may be different than the firm's tax reporting year end.

(3) A firm's

subsequent peer review ordinarily has a due date of three years and six months from the year-end of the previous peer review.

(4) The

board may grant extensions up to 180 days from the original due date in order for the firm to comply with the peer review requirements in Subsection 13E and 13L of the act. All requests for extensions shall be submitted to the board in writing by the firm no later than 30 days prior to renewal date and should include any extensions approved by the sponsoring organization. The board may recognize extensions granted by the sponsoring organization. The board has the authority at its sole discretion to grant any reasonable extensions that it deems necessary and extensions are ordinarily granted for the following reasons:

(a)

health;

(b)

military service; or

(c)

other good cause clearly outside the control of the firm.

C. Hardship

Exceptions: The board may make exceptions to the requirements set out in this section for hardships. All hardship requests must be in writing, setting forth detailed reasons for the request, and must be submitted no later than six months prior to expected completion date of the peer review.

D. Exemptions: A firm

which does not perform accounting or auditing engagements, including but not limited to audits, reviews, compilations, attestations, forecasts,

or projections is exempt from the peer review program and shall recertify annually to the board as to this exempt status as part of the firm permit renewal process. A previously exempt firm which begins providing the above described services must initiate and complete a review within 18 months of the date the services were first provided.

E. Reporting to the board: Firms are required to submit a copy of the following documents related to its most recently accepted peer review to the board:

(1)

peer review report which has been accepted by the sponsoring organization;

(2) the

firm's letter of response (accepted by the sponsoring organization), if applicable;

(3) the

acceptance letter from the sponsoring organization;

(4) letter(s)

signed by the firm acknowledging that the firm agrees to take any actions required by the sponsoring organization, if applicable;

(5) the

completion letter signed by the sponsoring organization notifying the firm that required actions have been appropriately completed, if applicable.

(6)

Upon request of the board, any correspondence from the sponsoring organization regarding the scheduling or completion of a peer review.

F. Submission of documents: the above documents shall be submitted by the firm to the board via mail, or electronically or digitally as follows:

(1) The

documents in Paragraph (1) through (3) of Subsection E of 16.60.4.10 NMAC shall be submitted within 30 days of the sponsoring organization's acceptance.

(2) The

documents in Paragraph (4) of Subsection E of 16.60.4.10 NMAC within 30 days from the date the letter is signed by the firm, or

with submission of firm renewal application, whichever occurs first.

(3) The

documents in Paragraph (5) of Subsection E of 16.60.4.10 NMAC shall be submitted to the board within 30 days of the date of the letter.

(4) The

documents in Paragraph (6) of Subsection E of 16.60.4.10 NMAC shall be submitted to the board within 30 days of receiving the documents by the firm or upon request by the board.

(5) If the

firm cannot submit the documents in Paragraphs (1) through (5) of Subsection E of 16.60.4.10 NMAC within the stated timeframe or, at the maximum, 180 days after the scheduled due date of the peer review, the firm must submit a letter to the board via mail, electronically or digitally explaining its failure to comply. The board may take disciplinary action for failure to comply.

(6) Firms may

also satisfy this document submission requirement by having the sponsoring organization make the documents described in Paragraphs (1) through (5) of Subsection E of 16.60.4.10 NMAC available to the board within the stated time frames via the AICPA facilitated state board access (FSBA) secure website process.

G. Additional

information to be provided by firms or the sponsoring organization, upon request by the board, shall provide written permission for the sponsoring organization to provide information to the board. Permission may be granted annually on the firm renewal form. Such information may include the following (or similar) types of objective information about a firm's review, if known:

(1) the date

the review is or was scheduled to take place;

(2) the name

of the reviewing firm, team captain or review captain;

(3) if the

field work on the peer review has commenced;

(4) the date the exit conference was expected to or did occur;

(5) a copy of any extension approval letters;

(6) whether the peer review working papers have been received by the sponsoring organization;

(7) whether a must select engagement was included in the scope of engagements reviewed;

(8) if a technical review is in progress;

(9) whether the review has been presented to a report acceptance body (RAB);

(10) the date the review is expected to be presented to the report acceptance body;

(11) if the firm is going through fair procedures to determine whether it is cooperating with the peer review.

H. Approved peer review sponsoring organizations, programs and peer review standards:

(1) The board shall approve sponsoring organizations, peer review program(s) and standards.

(2) The board adopts the American institute of certified public accountants (AICPA) as an approved sponsoring organization and its peer review program and the New Mexico society of CPAs (NMSCPA) or its successor and other peer review programs administered by entities fully involved in the administration of the AICPA peer review program. These organizations are not required to submit a plan of administration to the board for approval. The board may approve other sponsoring organizations and peer review programs.

(3) Any board approved peer review program and any peer reviewer performing a peer review under this section shall utilize standards for performing and reporting on peer reviews by a recognized national accountancy organization whose standards are generally accepted by other regulatory

authorities in the United States, including but not limited to the AICPA standards for performing and reporting on peer review.

(4) The board may terminate its approval of a sponsoring organization for cause following notice and opportunity for hearing. For purposes of this paragraph, "cause" includes but is not limited to failure to maintain an ongoing compliance with the requirements.

(5) For an organization, not specifically identified in these rules as board-approved, to receive board approval for its peer review program and standards, the organization must submit evidence to the satisfaction of the board. At a minimum, the evidence shall include the standards, procedures, guidelines, oversight process, training materials and related documents used to administer, perform, and accept peer reviews. The board has the authority to request any other documents/ information from an organization about its peer review program in determining whether to grant approval.

(6) For firms required to be registered with an inspected by the public company accounting oversight board (PCAOB), the board approves the PCAOB's inspection process for reviewing practices subject to its authority (which are not included in the scope of peer review programs). Firms receiving inspections under the PAOB are also required to meet the peer review requirements under a board-approved peer review program that covers the portion of the firm's practice not subject to the PCAOB inspection process, should the firm have such a practice.

I. Authority and function of peer review oversight committee:

(1) The board may appoint up to five individuals licensed in this or another state to a peer review oversight committee to monitor programs administered by the sponsoring organization and report periodically to the board. Peer review

oversight committee members shall not be current members of the board or perform any enforcement related work for regulator or governmental bodies, professional organizations (including but not limited to an AICPA ethics committee, AICPA joint trial board or state professional ethics committee) or similar groups or subgroups, including consultants and other similar arrangements for the board; and may be removed or replaced by the board at its discretion.

(2) Each committee member shall annually sign a confidentiality statement indicating they will not divulge any information to the board or any other person or entity that would identify any firm, licensee, or peer reviewer/ reviewing firm.

(3) The peer review oversight committee may conduct oversight of approved sponsoring organization to provide reasonable assurance that the program it is administering is complying with the minimum standards for performing and reporting on peer reviews. The committee shall report to the board any modifications to the sponsoring organization and shall make the recommendations regarding their continued approval.

(a) Oversight procedures to be performed by the peer review oversight committee may consist of, but are not limited to, the following activities:

(i) visit the sponsoring organization for the approved peer review program;

(ii) review the sponsoring organization's procedures for administering the program;

(iii) meet with the sponsoring organization's RAB during consideration of peer review documents;

(iv) review the sponsoring organization's compliance with their programs.

(b) The peer review oversight committee shall verify that firms comply with peer review requirements as follows:

(i) verification may include review of the peer review report, the firm’s response to the matters discussed in the peer review report, and the acceptance letter outlining any additional corrective or monitoring procedures, and the letter(s) signed by the sponsoring organization notifying the firm that required actions have been appropriately completed;

(ii) any other actions deemed necessary by the peer review oversight committee to assure compliance with peer review standards.

J. Disciplinary action:
(1) The board shall take disciplinary action against a firm for failure to comply with peer review requirements. Actions may include, but are not limited to, remedial and corrective procedures, fines, and denial of firm registration.

(2) In the event a firm is unwilling or unable to comply with established standards, or a firm’s professional work is so egregious as to warrant disciplinary action, the board shall take appropriate action to protect the public interest.

(3) Peer review documents must be submitted to the board office in accordance with Subsection F of 16.60.4.10 NMAC.

(a) For each day the firm is delinquent in submitting the documents, the board may assess a fine of \$10 per day not to exceed \$1,000.

(b) If peer review documents are submitted more than 100 days late, a notice of contemplated action may be issued against all licensees listed on the most recent firm permit renewal application as owners of the firm.

(4) Requests for extensions must be submitted no later than 30 days prior to renewal date as required by Paragraph (4) of Subsection B of 16.60.4.10 NMAC.

K. Privileged information: A report, statement, memorandum, transcript, funding record, or working paper prepared for and an opinion formulated

in connection with any positive enforcement or peer review is privileged information held by the sponsoring organization and may not be subject to discovery, subpoena, or other means of legal compulsion for release to any person and is not admissible as evidence in any judicial or administrative proceeding except for a board hearing.

L. In the event a firm is merged, otherwise combined, dissolved, or separated, the sponsoring organization shall determine which firm is considered to be the succeeding firm, if any. The succeeding firm shall retain its peer review status and the review due date.
[16.60.4.10 NMAC - Rp 16 NMAC 60.11.8 & 16 NMAC 60.11.9, 02-14-2002; A, 06-15-2004; A, 12-30-2005; A, 06-30-2008; A, 09-15-2015; A, 10-1-2016]

16.60.4.11 ~~[FIRM-MERGERS, COMBINATIONS, DISSOLUTIONS, SEPARATIONS, OR PERMIT EXPIRATION/REQUEST FOR REINSTATEMENT:~~ In the event of a firm merger, combination, dissolution or separation, the firms must notify the board of changes in quality review cycles:

A. In the event that two or more firms are merged or sold and combined, the surviving firm shall retain the peer review year of the largest (based on accounting and auditing hours) firm.

B. In the event that a firm is divided, the firm(s) shall retain the review year of the former practice unit. In the event that such review is due in less than 12 months, a review year shall be assigned so that the review occurs within 18 months of the commencement of the new firm(s).

C. In the event that a firm’s permit expires/lapses due to non-renewal, the firm shall retain the year of the previously established firm peer review reporting completion dates. Peer review completion with a supporting acceptance letter shall be required to support any reinstatement application request.

D. The firm must

notify the board within 20 days of an extension, approved by the administering entity, as a result of a merger, combination, dissolution, or separation. Extension may not exceed 180 days.] [RESERVED]
[16.60.4.11 NMAC - Rp 16 NMAC 60.4.10 through 60.4.16, 02-14-2002; A, 01-15-2004; A, 09-15-2015; Repealed, 10-01-2016]

**WORKERS’
COMPENSATION
ADMINISTRATION**

A public meeting was held on August 11, 2016 to accept public comment on amendments to WCA rules. The Workers’ Compensation Administration is repealing its rule 11.4.2 NMAC, Workers’ Compensation – Data Reporting and Safety Requirements effective September 30, 2016. The rule is replaced with 11.4.2 NMAC, Workers’ Compensation – Data Reporting and Safety Requirements effective September 30, 2016.

A public meeting was held on August 11, 2016 to accept public comment on amendments to WCA rules. The Workers’ Compensation Administration is repealing its rule 11 NMAC 4.11, Workers’ Compensation – Proof of Coverage effective September 30, 2016. The rule is replaced with 11.4.11 NMAC, Workers’ Compensation – Proof of Coverage effective September 30, 2016.

**WORKERS’
COMPENSATION
ADMINISTRATION**

**TITLE 11 LABOR AND
WORKERS’ COMPENSATION
CHAPTER 4 WORKERS’
COMPENSATION
PART 2 DATA
REPORTING AND SAFETY
REQUIREMENTS**

11.4.2.1 ISSUING
AGENCY: Workers' Compensation Administration.
 [11.4.2.1 NMAC - Rp, 11.4.2.1 NMAC, 9/30/16]

11.4.2.2 SCOPE: These provisions govern all employers subject to the act.
 [11.4.2.2 NMAC - Rp, 11.4.2.2 NMAC, 9/30/16]

11.4.2.3 STATUTORY AUTHORITY: The director is authorized by Section 52-5-4, NMSA 1978, to promulgate regulations to implement the act. The regulations implementing the safety program requirements are adopted pursuant to Section 52-1-6.2, NMSA 1978. The rules on gathering and reporting of statistical data are adopted pursuant to Section 52-5-3, NMSA 1978.
 [11.4.2.3 NMAC - Rp, 11.4.2.3 NMAC, 9/30/16]

11.4.2.4 DURATION:
 Permanent.
 [11.4.2.4 NMAC - Rp, 11.4.2.4 NMAC, 9/30/16]

11.4.2.5 EFFECTIVE DATE: September 30, 2016, unless a later date is cited at the end of a section.
 [11.4.2.5 NMAC - Rp, 11.4.2.5 NMAC, 9/30/16]

11.4.2.6 OBJECTIVE:
 The objective of 11.4.2 NMAC is to establish reporting and safety requirements for employers. This rule creates a standardized method for reporting data on work accidents, notifying workers about legal requirements for making a claim, and complying with mandatory safety provisions of the act.
 [11.4.2.6 NMAC - Rp, 11.4.2.6 NMAC, 9/30/16]

11.4.2.7 DEFINITIONS:
 A. "American standard code for information interchange (ASCII)" means a code that follows the proposed standard for defining codes for information exchange between equipment produced by

different manufacturers.
 B. "Claims administrator" means the insurance carrier, third party administrator, self-insured association, self-insured employer, or any claims coordinator, if any, designated by the employer or another claims payer to provide claims processing services on workers' compensation claims. These services include receiving and sending workers' compensation claims information to the WCA, employer, insurance carrier, and injured worker.
 C. "EDI" means electronic data interchange.
 D. "Loss run" means a computer generated report, listing or file that provides uniquely identifying and financial data of each individual claim for a group of claims occurring during a particular period for an insured or employer.
 E. "Industry" means a business, or all businesses, as the context requires, that have identical two digit NAICS codes as determined by the WCA.
 F. "NAICS code" means a designator of the principal business of an employer assigned by the WCA pursuant to the current version of the North American industry classification system, a publication of the executive office of the president, office of management and budget, United States.
 G. "Experience modifier" is a calculation that compares the losses of an individual risk (employer) to average losses for all other risks in that industry classification and state. The experience modifier is used to adjust the insurance premiums of an individual risk according to the risk's loss experience.
 H. "FROI" means first report of injury data (IAIABC 148 format). FROI also refers to WCA form E-1 and WCA form E-1.2.
 I. "SROI" means subsequent report of injury data required to complete the notice of benefit payment (IAIABC A49 format). SROI also refers to WCA form E-6.
 J. "TA" means

transmission accepted.
 K. "TE" means transmission accepted with errors.
 L. "TR" means transmission rejected.
 [11.4.2.3 NMAC - Rp, 11.4.2.3 NMAC, 9/30/16]

11.4.2.8 DATA COLLECTION:
 A. General provisions:
 (1) Paper copies of FROI and SROI will not be accepted by the WCA as of January 1, 2017. Beginning January 1, 2017, FROI and SROI data shall only be submitted through EDI or the WCA website.
 (2) It is the claims administrator's or an uninsured employer's responsibility to timely submit all data required under the data collection rules.
 (3) Time frames for submission of reports are not waived when the WCA acknowledges and returns an erroneous submission that needs correction.
 (4) It is the responsibility of the claims administrator to report to the WCA required financial, legal and medical claims activity for the insured including reporting of the first dollar of indemnity benefits paid by, or on behalf of, an employer who has a deductible policy.
 (5) It is the responsibility of the claims administrator to provide a loss run to the WCA upon request for reconciliation of a noted discrepancy.
 (6) Claims administrators that file any required report at the time of the mediation conference, either with the mediator or at the clerk of the courts office, have not met their filing obligation with the WCA and must electronically file all required FROI and SROI data. The date of actual filing is the date of acceptance by the WCA, which will be used to determine compliance with filing requirements.
 (7) Electronic filing
 (a)

A claims administrator shall file electronically with the WCA.

(b)

EDI trading partner profile must be on record with the WCA before electronic filings can be accepted. A sample EDI trading partner profile is available on the WCA website.

(c)

The transmission format is the international association of industrial accident boards and commissions (IAIABC) 148 and A49 record scheme. Transmission header and trailer records are also required under this format. The transmission record formats are also available on the WCA website.

(d)

Electronic transmissions must be in the ASCII format. The file may be transmitted by electronic transmission via the internet.

(e)

Electronic mailboxes must be registered with the management information systems (MIS) bureau of the WCA.

(f)

Receipts for all TA, TE, and TR transmissions will be returned electronically.

(g)

TR codes must be corrected within 30 days.

B. FROI:

(1) FROI

data must be submitted, within 10 days of notification, for all injuries or occupational diseases that result in more than seven cumulative days of lost time.

(2) FROI data

must be timely submitted even if the claim is disputed.

(3) The claims

administrator must furnish a copy of the FROI data to the worker and the employer at the time of electronic submission to the WCA. If the employer is uninsured, the employer must furnish a copy of the FROI data to the worker.

(4) When an

employer has notice of an accident and receives a complaint, FROI data must be submitted immediately after receiving an initial pleading involving

an injury or illness that is not otherwise already supported by FROI data.

C. SROI must be submitted:

(1) within 10 days of the date of initial payment of the indemnity portion of any claim;

(2) within 50 days of the filing of an order of the WCA, or of the date upon which a recommended resolution became a compensation order for payment made to or on behalf of an injured worker, unless an order staying enforcement of a compensation order is filed with the clerk; and

(3) within 30 days of the date of the closing payment of the indemnity portion of the claim; and

(4) within 30 days of any change in benefits; and

(5) within 90 days of the date of the initial payment of a medical-only claim with cumulative payments over \$300, provided, however, that a E-6 closing report shall be submitted with respect to all claims for which expenses have been previously reported;

(6) for medical-only claims with cumulative payments over \$300, the initial and closing E-6 may be submitted on one form.

D. Annual expenditure report: Claims administrators shall file an annual expenditure report with the economic research and policy bureau of the WCA. The annual expenditure report must:

(1) be submitted electronically using the WCA website;

(2) identify the carrier(s), groups, pools or self-insured employer(s), by the name and the federal employers identification number (FEIN);

(3) be submitted for all expenditures reported in a calendar year (January 1-December 31); and

(4) be received by the WCA no later than February 15th of the year following the reporting period.

E. Failure to file. Any failure to timely file a statistical report as required by 11.4.2 NMAC shall be considered a violation of these rules and may be penalized pursuant to Section 52-1-61 NMSA 1978.

F. Waiver: Any provision of 11.4.2.8 NMAC may be waived, either permanently or temporarily, by written order of the director upon good cause shown. [11.4.2.8 NMAC - Rp, 11.4.2.8 NMAC, 9/30/16]

11.4.2.9 SAFETY:

A. Annual inspections:

(1) All

employers, as identified in Section 52-1-6.2 NMSA 1978, are required to have an annual safety inspection. All other employers are encouraged to do so.

(2) Any

employer who purchases or renews a policy of workers' compensation insurance with a premium liability of \$15,000 or more shall, within 60 days of the policy issuance or renewal, submit proof of an annual safety inspection to the WCA. Self-insured employers shall submit proof of an annual safety inspection to the WCA within 60 days of completing an inspection.

(3) Standards

for annual inspections: The minimum standards for the annual safety inspection are contained in the WCA publication, annual safety inspections. This publication may be obtained from the WCA's website.

(4) Who may

conduct the inspection:

(a)

A safety consultant from the WCA.

(b)

A senior manager or dedicated safety professional employed by the business. The WCA may be contacted to provide training on how to conduct a proper safety inspection.

(c)

A third party safety organization or safety professional.

(d)

A safety professional from the insurance company.

(5) Employers

shall submit an affidavit listing the address of all facilities that were included in the inspection to the WCA safety program on a form approved by the director. Though the responsibility for reporting is with the employer, the insurance carrier may report completed inspections, provided the insurance carrier or a safety organization or safety professional retained by the carrier conducted the inspection.

(6) Failure to comply with the annual safety inspection requirement may subject an employer to penalties under Section 52-1-6.2 NMSA 1978.

B. Risk reduction program:

(1) The extra-hazardous employer program is hereinafter referred to as the risk reduction program ("RRP").

(2) An employer may be classified for the RRP if its experience modifier (e-mod) is higher than the state average for that industry or if a safety audit reveals a need for assistance based on the employer's accident frequency or severity of injury caused by the accident(s).

(3) The WCA shall notify the employer and its insurance carrier if that the employer meets the criteria, under the above guidelines, to be enrolled in the RRP and is selected for enrollment in the RRP.

(a) Notice shall be given to the employer, and the insurer or self-insurance entity, if any, by personal service upon any person of suitable age and discretion at the business location or by certified mail addressed to the owner, proprietor, managing partner, president, majority stockholder, chief operational officer or manager of the business.

(b) Employers who have received a notice of classification shall have five days to file a written request for reconsideration with the director. The director may hold hearings upon a request for reconsideration and make a determination as appropriate.

Appeal of a ruling by the director shall be by writ of certiorari to the district court, pursuant to S.C.R.A. Rule 1-075.

(4) Within 30 days of service of a notice of classification or within 30 days of the director's decision if a request for reconsideration is filed, an employer who is classified and enrolled in the RRP shall obtain a safety consultation. The consultation must be performed by a WCA safety consultant, the employer's insurer or a professional independent safety consultant approved by the director. A WCA safety consultant may assist employers in interpreting the requirement for a safety consultation and in conducting the consultation.

(5) The safety consultant performing the safety consultation shall submit within 10 days a written report to WCA and the employer detailing any identified hazardous conditions or practices identified through the safety consultation. The written report must be in a form acceptable to the director.

(6) Within 30 days of the submission of the written report concerning the safety consultation, the employer participating in the RRP shall submit a specific accident prevention plan to resolve the hazards and practices identified in the written report.

(7) The WCA may investigate accidents occurring at the work site(s) of an employer for whom a plan has been formulated under Paragraph (6) of Subsection B of this section and the WCA may otherwise monitor the implementation of the accident prevention plan as it finds necessary.

(8) Six months after the formulation of an accident prevention plan prescribed by Paragraph (6) of Subsection B of this section, the WCA shall conduct a follow-up inspection of the employer's premises. The WCA may require the participation of the safety consultant who performed the initial consultation and formulated the safety plan.

(a)

If the WCA determines that the employer has complied with the terms of the accident prevention plan or has implemented other acceptable corrective measures, the WCA shall so certify.

(b) If, at the time of the inspection required under Paragraph (8) of Subsection B of this section, the employer continues to exceed the injury frequencies that may reasonably be expected in that employer's business or industry, the WCA shall continue to monitor the safety conditions at the work site(s) and may formulate additional safety plans reasonably calculated to abate hazards. The employer shall comply with the plans and may be subject to additional penalties for failure to implement the plan or plans.

(9) For good cause shown, the director may extend any time limit required by this part for up to 30 additional days.

(a) All applications for extension shall be submitted in writing and shall state with specificity the reasons for requested additional time.

(b) The director may hold hearings to determine the appropriateness of extensions of time for submission of specific accident prevention plans.

(c) The director's determination on a request for an extension is final.

(d) In the case of an RRP employer whose employees are assigned to furnish services to other employers, the responsibility for the development and submission of an accident prevention plan as required by these rules shall be with the employer who controls and provides direct on-site supervision of the workers who are exposed to the hazards and practices identified in the written report of the safety consultant.

(10) Any employer who fails to develop, submit, cause to be submitted, implement or comply with a specific accident prevention plan as provided for in these rules shall be subject

to imposition of a penalty of up to \$5,000. Each incident of failure to formulate, submit, cause to be submitted, implement or comply with a specific accident prevention plan persisting for a period of 15 days shall constitute a separate violation and subject the employer to additional penalties. The enforcement procedures established in 11.4.5 NMAC shall be utilized in all proceedings under this subsection.

(11)

An employer shall no longer be designated to participate in the RRP when the provisions of Paragraphs (4) through (8) of Subsection B of 11.4.2.9 NMAC, inclusive, have been satisfied.

C. The employer, its insurer and all agents of the employer or insurer have the duty of compliance with reasonable requests for information from workers' compensation administration personnel. WCA personnel shall collect data regarding all work-place fatalities in New Mexico.

[11.4.2.9 NMAC - Rp, 11.4.2.9 NMAC, 9/30/16]

11.4.2.10 ACCIDENT NOTICE POSTERS AND ACCIDENT NOTICES:

A. Every employer shall post and keep posted in conspicuous places on its business premises, in areas where notices to employees and applications for employment are customarily posted, an accident notice poster stating the requirement that workers notify employers of accidents. The accident notice poster is available at the WCA at no charge to the employer on a form approved by the director.

B. Every employer must keep attached to the accident notice poster an adequate supply of notice of accident forms approved by the director.

C. Any employer may submit to the director a proposal for approval of a notice of accident form or accident notice poster. No form shall be approved except in writing, signed by the director.

[11.4.2.10 NMAC - Rp, 11.4.2.10

NMAC, 9/30/16]

HISTORY OF 11.4.2 NMAC:

Pre-NMAC History:

The material in this part was derived from that previously filed with the State Records Center:

WCA 86-5, Final Notice of Final Payment of Compensation, filed 5/26/87.

WCD 89-5, Final Reports, filed 6/20/89.

WCA 86-6, Completed Supplement Report to Accident, filed 5/26/87.

WCD 89-6, Annual Reports, filed 6/20/89.

History of Repealed Material:

11.4.2 NMAC - Repealed effective 9/30/16.

WORKERS' COMPENSATION ADMINISTRATION

**TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 4 WORKERS' COMPENSATION
PART 11 PROOF OF COVERAGE**

11.4.11.1 ISSUING

AGENCY: Workers' Compensation Administration

[11.4.11.1 NMAC - Rp, 11 NMAC 4.11.1, 9/30/16]

11.4.11.2 SCOPE: This rule

applies to all insurers issuing workers' compensation coverage in the state of New Mexico, all self-insured groups issuing workers' compensation coverage in the state of New Mexico and all vendors submitting proof of coverage information either on behalf of themselves or for others who are required to report such coverage.

[11.4.11.2 NMAC - Rp, 11 NMAC 4.11.2, 9/30/16]

11.4.11.3 STATUTORY

AUTHORITY: Sections 52-1-4.1 and 52-5-4 NMSA 1978 (Repl. Pamp. 1991) and department of insurance regulation 17, rule 2.

[11.4.11.3 NMAC - Rp, 11 NMAC

4.11.3, 9/30/16]

11.4.11.4 DURATION:

Permanent

[11.4.11.4 NMAC - Rp, 11 NMAC 4.11.4, 9/30/16]

11.4.11.5 EFFECTIVE

DATE: September 30, 2016 unless a later date is cited at the end of a section.

[11.4.11.5 NMAC - Rp, 11 NMAC 4.11.5, 9/30/16]

11.4.11.6 OBJECTIVE: The

purpose of this rule is to establish requirements governing workers' compensation insurance proof of coverage.

[11.4.11.6 NMAC - Rp, 11 NMAC 4.11.6, 9/30/16]

11.4.11.7 DEFINITIONS:

A. "Certified vendor" (also referred to as a "vendor") means a company or business which electronically transmits proof of coverage insurance information to the workers' compensation administration either for itself or for others and is certified by the WCA as being qualified to submit POC data using the IAIABC format. The terms "certified vendor" and "vendor" are used interchangeably within this rule and carry the same meaning. A vendor's identity is not considered a record of the workers' compensation administration and is therefore not protected by the confidentiality provision.

B. "Filed" means that the policy information required under these rules has successfully passed all edits and has been accepted, date and time stamped and uploaded into the workers' compensation administration's database.

C. "IAIABC" means the international association of industrial accident boards and commissions.

D. "Insurer" means any insurance carrier or self-insured group or other entity that issues a workers' compensation insurance policy or provides workers' compensation coverage for itself or subsidiaries by

any other means.

E. "POC" means proof of coverage.

F. "POC flat file" or "POC flat file format" means the IAIABC defined standard in which proof of coverage data is electronically submitted to the WCA.

G. "WCA certified" or "WCA certification" means a vendor has received approval from the WCA to submit POC data electronically. WCA certification is required prior to submitting POC data.

[11.4.11.7 NMAC - Rp, 11 NMAC 4.11.7, 9/30/16]

11.4.11.8 PROOF OF COVERAGE:

A. Filing requirements:

(1) Every insurer shall file proof of coverage with the workers' compensation administration within 30 days of the effective date of any workers' compensation policy or within 30 days of the date of extension, renewal, reinstatement or amendment to such policy.

(2) Every insurer shall, in the event of a policy cancellation, file a notice of cancellation with the workers' compensation administration within 10 days of such cancellation.

(3) Vendor certification

(a) In order to be certified as a vendor for submission of POC data with the workers' compensation administration, an entity must receive certification from the workers' compensation administration.

(b) In order to maintain certified vendor status, the vendor must maintain certification with the workers' compensation administration, which includes continuous compliance with the workers' compensation administration POC business plan.

B. POC submission procedures and requirements

(1) POC data must be submitted in the IAIABC POC flat file format.

(2) A vendor

must provide optional ways for insurers to submit POC data to the vendor such as hard copy, mag tape, web page form or IAIABC flat file.

(3) Once certified, vendors must notify the workers' compensation administration of any changes they make in hardware or software and complete re-certification with the workers' compensation administration prior to using such changed or new hardware or software to submit POC data. Vendors must also comply with IAIABC requirements pertaining to hardware and software changes.

(4) A current information form and sender/vendor information form must be on file with the workers' compensation administration before electronic filings will be accepted.

(5) All POC data is the property of the New Mexico workers' compensation administration and such data cannot be used for any purpose other than that designated by the workers' compensation administration.

(6) Failure to file POC data in accordance with the act and these rules will subject the insurer to penalties and fines permitted by the act and the rules.

(7) After notice and opportunity to be heard, the director may decertify a vendor for good cause shown.

C. Exempt entities:
(1) The legislatively mandated pools governed by 11.4.10 NMAC are required to provide membership information to the workers' compensation administration through the self-insurance bureau and may exempt themselves from the electronic filing requirements at their option.

(2) Self-insurance groups, authorized to provide workers' compensation insurance to their members based upon a valid and active certificate of self-insurance issued by the director of the workers' compensation administration and whose membership roster does not exceed 75 members are required to provide

membership information to the workers' compensation administration through the self-insurance bureau and may exempt themselves from the electronic filing requirements at their option.

(3) Individual self-insurers in possession of a valid and active certificate of self-insurance issued by the director of the workers' compensation administration and those subsidiaries listed on such certificate are exempt from the filing requirements.

D. Affirmative election forms: Affirmative election forms for executive employees shall be deemed filed with the director pursuant to Section 52-1-7 NMSA 1978 by filing the form with the insurance carrier that is issuing or will be issuing the workers' compensation insurance policy to the employer. Election forms for executive employees need not be submitted to the WCA.

E. Referral to enforcement bureau: If proof of coverage is not provided within the deadlines given by the WCA to obtain coverage, the potential violation may be referred for investigation and prosecution in accordance with 11.4.5 NMAC.

[11.4.11.8 NMAC - Rp, 11 NMAC 4.11.8, 9/30/16]

HISTORY OF 11.4.11 NMAC:

History of Repealed Material:
11 NMAC 4.11 - Repealed effective 9/30/16.

WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.4 NMAC, Sections 6, 9, 10, 11, 12, 13, 14, 16 and the addition of a new Section 17, effective September 30, 2016.

11.4.4.6 OBJECTIVE:
These claims resolution rules are a compilation of rules associated with WCA dispute resolution methods. Section eight [(8)] establishes rules

for the ombudsman program. Section nine [(9)] contains general rules for all resolution processes and filing rules for the clerk. Section [ten-(10)] 10 outlines practices and procedures for informal resolution of claims. Section 11 establishes procedures for matters falling under the director's jurisdiction. Section [eleven-(11)] 12 defines procedures for HCP dispute hearings and [section twelve-(12)-establishes] Sections 13, 14, and 15 establish the rules for adjudication by a judge. Sections 16 and 17 address the release of medical records and sealing of court records. [11.4.4.6 NMAC - Rp, 11.4.4.6 NMAC, 10/1/2014; A, 9/30/16]

11.4.4.9 FORMS, FILING AND HEARING PROCEDURES:

A. Requirements

for filing with the clerk of the administrative court:

(1) All documents to be filed shall be legible, on 8 1/2 x 11 inch white paper, signed in black ink, and shall include a caption with the name of each party and a descriptive title.

(2) For all matters where the filing party requests a hearing, the filing party shall submit self-addressed stamped envelopes for all parties entitled to notice, in addition to request for setting and notice of hearing forms.

(3) A copy of all documents filed with the clerk shall be served on all parties of record by the filing party, except as otherwise provided in this rule. If the filing party requests the clerk to serve endorsed copies of a filed pleading, the filing party shall submit sufficient self-addressed stamped envelopes.

B. Computation of time: Any period of time prescribed or allowed by these rules shall be computed pursuant to the method set forth in the rules of civil procedure for the district courts, NMRA Rule 1-006.

C. Name of the insurer:

(1) The workers' compensation complaint, petition for lump sum payment or application to workers' compensation

judge must indicate the name of the employer's insurance carrier or claims administrator, if self-insured. If the insurance carrier or claims administrator is not named, the cause shall not be referred for mediation or hearing.

(2) A party or representative may obtain the name of the insurance carrier by mailing or faxing a request to the employer compliance bureau of the WCA. The request must provide the name of the party making the request, date of the accident, and names of the worker and employer. The person requesting information may be required to provide proof of identification.

D. Time for filing of pleadings with the clerk:

(1) Pleadings will be accepted for filing only between 8:00 a.m. and 5:00 p.m., on business days. Pleadings received by fax or other methods of delivery after 5:00 p.m. shall be filed the next regular business day. Complaints submitted by mail shall be deemed filed, for purposes of the act, on the date postmarked.

(2) Faxed pleadings will be filed as the original by the clerk. The clerk may require confirmation of the fax transmission of a pleading. A faxed pleading must comply with requirements established in these rules. Faxed pleadings shall not be more than 10 pages.

E. Mandatory forms:

(1) Forms designated as mandatory by these rules shall be used when filing a pleading and must be fully and legibly completed by the filing party. Items on the mandatory forms may not be deleted, but additional information may be provided at the end of the text or by additional pages with clear reference to the paragraph being supplemented. The mandatory form may be reproduced or reprinted.

(2) The forms listed below have been adopted as mandatory forms. The parties shall use the version of the form available on the WCA website:

(a) workers' compensation complaint;

(b) summons for workers' compensation complaint;

(c) worker's authorization for use and disclosure of health records;

(d) response;

(e) notice of acceptance or rejection of recommended resolution;

(f) notice of disqualification;

(g) application to workers' compensation judge;

(h) summons for application to workers' compensation judge;

(i) subpoena or subpoena duces tecum;

(j) request for setting;

(k) notice of hearing;

(l) HCP disagreement form;

(m) petition for lump sum payment;

(n) summons for petition for lump sum payment;

(o) application to director; and

(p) summons for application to director.

F. Complete filing is required: ~~[The complaint shall be filed with a summons, and an executed authorization to release medical information if filed by the worker. The application to workers' compensation judge, application to director, or petition for lump sum payment shall also be filed with a summons, when no service of process has previously occurred in the cause. The clerk may accept an incomplete filing but shall not process the incomplete complaint, application or petition until all required information or documents are submitted. A party must complete the filing within fifteen (15) days of being given notice from the clerk that the filing is incomplete or the clerk's office will issue a notice of administrative closure. The filing party must provide the clerk a copy~~

of a complete filing for each named party at the time of filing.]

(1) The complaint shall be filed with a summons, and an executed authorization to release medical information if filed by the worker.

(2) The application to workers' compensation judge, application to director, or petition for lump sum payment shall also be filed with a summons, when no service of process has previously occurred in the cause.

(3) The clerk may accept an incomplete filing but shall not process the incomplete complaint, application or petition until all required information or documents are submitted. A party must complete the filing within 15 days of being given notice from the clerk that the filing is incomplete or the clerk's office will issue a notice of administrative closure.

(4) The filing party must provide the clerk a copy of a complete filing for each named party at the time of filing.

G. Service of process of initial pleadings:

(1) "Initial pleading" means a complaint, application, or petition for lump sum payment that opens or reopens a case before the administration.

(2) The clerk shall serve the [complaint] initial pleading to each named party by certified mail, domestic return receipt requested. Service may be accomplished by electronic mail for parties who have registered with the WCA.

(3) In the event service of process by certified mail is unsuccessful, the clerk may attempt service by any means allowable under the rules of civil procedure for the district courts. If the clerk is unable to accomplish service of the initial pleadings, notice shall be given to the filing party, who shall then be responsible to accomplish service of process.

H. Application to workers' compensation judge:

(1) Unless

otherwise provided, all disputes under the act shall be pleaded on a complaint form, which shall be scheduled for mediation under 11.4.4.10 NMAC. A party may file an application to judge only for the following limited forms of relief:

(a) physical examination pursuant to Section 52-1-51 NMSA 1978 (Repl. Pamp. 1991);

(b) independent medical examination pursuant to Section 52-1-51 NMSA 1978 (Repl. Pamp. 1991);

(c) determination of bad faith, unfair claims processing, fraud or retaliation;

(d) supplemental compensation order;

(e) award of attorney fees;

(f) stipulated reimbursement agreement pursuant to Section 52-5-17 NMSA 1978;

(g) consolidation of payments into quarterly payments (not a lump sum under Section 52-5-12 NMSA 1978); or

(h) approval of limited discovery where no complaint is pending before the agency, including, but not limited to, approval of a communication to a treating health care provider when the parties cannot otherwise agree on the form or content.

(2) If any claim not enumerated in (1) (a) - (h) above is raised on an application to judge, the application shall be deemed a complaint and processed by the clerk under 11.4.4.9 NMAC and 11.4.4.10 NMAC.

(3) Except for an application seeking relief under Subparagraphs (e), (f) or (g) of Paragraph (1) of Subsection H of 11.4.4.9 NMAC above, an application to judge may not be filed if a complaint has previously been filed in the same cause, and the time period for acceptance or rejection of the recommended resolution has not yet expired. Any other claim for relief arising under Subsection H of 11.4.4.9

NMAC above during that time period shall be raised in the mediation process in accordance with 11.4.4.10 NMAC.

(4) Following the rejection of a recommended resolution, and during the pendency of a complaint, the forms of relief enumerated in Paragraph (1) of Subsection H of 11.4.4.9 above shall be sought through motion.

(5) Written responses to the application, if any, shall be filed within [~~fifteen (15)~~] 15 days of service of an application. A response to application to judge may not raise new claims or issues unless enumerated in Subparagraphs (a) through (h) of Paragraph (1) of Subsection H of 11.4.4.9 NMAC above.

(6) All applications to a judge shall be accompanied by a summons, if applicable, and by a proposed order or a request for setting and notice of hearing. Such hearings as necessary may be scheduled by the assigned judge.

I. Petition for lump sum payment:

(1) All requests for approval of a lump sum shall be pleaded on the WCA mandatory petition form, which shall be signed and verified by the worker or his dependents pursuant to NMRA 1-011(B) or signed by the worker or his dependents before a notary public.

(2) Petitions under Subsection D of Section 52-5-12 shall also be signed by the employer/insurer or their representative or, where applicable, the UEF.

(3) Hearing. For lump sum petitions filed pursuant to Subsection D of Section 52-5-12 NMSA 1978, a lump sum approval hearing shall be held for the purpose of determining that the agreement is voluntary, that the worker understands the terms, conditions and consequences of the settlement agreement or any release, and that the settlement is fair, equitable and provides substantial justice to the parties. For all other joint lump sum

petitions, a hearing may be held at the discretion of an assigned workers' compensation judge pursuant to Sections 52-5-12 and 13 NMSA 1978.

(4) Any lump sum petition filed pursuant to this rule shall comply with Section 52-1-54 NMSA 1978 and counsel for the parties may concurrently seek approval or award of attorney fees, if appropriate, to be heard in the context of the lump sum hearing.

(5) Written responses to the petition, if any, shall be filed within ~~[ten]~~ 10 days of service of ~~[an]~~ a petition.

(6) All petitions shall be accompanied by a summons, if one has not previously been issued in the cause, and by a proposed order or a request for setting and notice of hearing. Such hearings will be promptly scheduled by the assigned judge.

J. Subpoenas: Unless otherwise stated herein, the issuance of subpoenas is governed by Supreme Court Rules Annotated 1986, 1-045. The clerk of the WCA may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party before the WCA, as an officer of the court, may also issue and sign a subpoena on behalf of the WCA.

K. Copies made by clerk: The clerk may provide copies of pleadings or documents in WCA files to parties of record. Copies may be requested by completing a copy request form or by calling the clerk's office. The clerk shall charge a reasonable fee for each copy requested. If the requested copies are mailed, adequate postage for mailing must be paid to the clerk.

L. Notice of lien for child support: The clerk shall accept a notice of lien filed by the child support enforcement bureau of the New Mexico department of human services. The notice of lien shall state the worker's name and social security number, and the total dollar amount of the lien. The notice of lien shall include a copy of the district court

order requiring the payment of child support by the worker.

M. Communications with WCA employees: WCA employees shall be addressed at all times in a courteous and respectful manner.

N. Appointment of interpreter:

(1) It is the responsibility of the parties to determine if interpretive services are necessary. The employer or the uninsured employers' fund when named and when an employer fails to do so shall be responsible for arranging for a qualified interpreter for the hearing or mediation conference and shall be responsible for the cost of the interpreter.

(2) An interpreter may be appointed by the judge, director, or mediator. The interpreter shall be a court-certified interpreter, except a non-certified interpreter may serve at mediation conferences.

O. Telephonic conference calls: The employer shall make all necessary arrangements and pay all costs incurred for telephonic conference calls. The director, judge, or mediator may appear telephonically for the conference call.

P. Withdrawal and substitution of counsel:

(1) The entry of appearance of an attorney or a firm for a party in a pending cause shall not be withdrawn without permission of the judge. If no judge has been assigned to the cause, the withdrawal must be approved by the director. A motion to workers' compensation judge or application to director requesting withdrawal shall be filed with the clerk and shall indicate whether the client concurs with the ~~[motion]~~ withdrawal.

(2) ~~[When a party changes counsel, a notice of substitution of counsel shall be filed with the clerk. A copy of the notice shall be mailed to each party. The notice shall contain the new attorney's mailing address, phone and fax numbers.]~~ A motion to workers' compensation judge or application

to director seeking withdrawal of counsel shall clearly state whether the withdrawing attorney is asserting a request for attorneys' fees for services rendered. If no statement is made, and if the motion or application to withdraw is granted, the withdrawing attorney is barred from thereafter seeking attorneys' fees for services rendered on the claim. A statement asserting a request for attorneys' fees shall serve as notice to the parties and new legal counsel, if any.

(3) When a party changes counsel, a notice of substitution of counsel shall be filed with the clerk. A copy of the notice shall be mailed to each party. The notice shall contain the new attorney's mailing address, phone and fax numbers.

~~[(3)]~~ (4) The attorney of record shall be subject to notice of hearings or other proceedings for one year after the entry of the final order or accepted recommended resolution. After the expiration of one year from the administrative closing date, the named party shall receive notice of any further proceedings in the cause. The filing party may serve a courtesy copy on the prior attorney of record.

Q. Return of records: A party who noticed a deposition may request the return of the original deposition after final disposition of the claim. The clerk may return a deposition or any exhibits tendered to the submitting party or its attorney. If no request for the deposition or exhibits is received, the deposition or exhibits will be destroyed. Notice of intent to destroy exhibits is published in the New Mexico bar bulletin.

R. Discovery: Upon the filing of a complaint and by written stipulation of the parties, good cause is presumed and, authorization granted, for the following limited discovery:

(1) the deposition of worker;

(2) the deposition of an employer representative;

(3) the deposition of any authorized health

care provider;

(4) the deposition of any provider of an independent medical examination.

S. Consolidated Cases:

(1) By order of a workers' compensation judge, cases may be consolidated when the issues or facts in dispute in the cases are common or when consolidation will expedite resolution of the issues or facts in dispute.

(2) A motion requesting consolidation shall be filed in each case sought to be consolidated. The filing party is responsible for providing a copy of the motion to all the parties and their counsel for each case sought to be consolidated. The motion shall be heard by the judge assigned to the lowest case number.

(3) The order of consolidation shall be filed in each consolidated case.

(4) Consolidated cases will be adjudicated before the final judge assigned to the case with the lowest case number.

(5) After consolidation, the case number of each consolidated case shall appear in the caption of all pleadings filed and all pleadings shall only be filed in the case with the lowest case number.

(6) All parties of record and their counsel shall have access to view the filed pleadings for each case.

(7) In the event of an appeal, the notice of appeal shall include the case number for each consolidated case and shall be filed in the case with the lowest case number. The record proper on appeal shall include all pleadings in each of the consolidated cases.

11.4.4.9 NMAC - Rp, 11.4.4.9 NMAC, 10/1/2014; A, 10/1/2015; A, 9/30/16]

11.4.4.10 MEDIATION RULES:

A. Evaluation of complaints:

(1) The director's designee, a mediator, shall

evaluate all initial complaints for workers' compensation filed with the administration. Where a new or subsequent complaint is later filed and the matter was previously assigned to a workers' compensation judge, the judge shall determine whether the complaint shall proceed again to mediation or directly to adjudication before the judge.

(2) The director's designee, a mediator, shall evaluate the merits of [every] the complaint for workers' compensation, including, but not limited to, jurisdiction, proper parties, compensability, extent of any benefits due the worker, and the strength or availability of any defenses. The mediator may also evaluate the compliance of the parties with the mediation rules.

B. Mandatory

production:

(1) No later than five [~~(5)~~] days before the mediation the parties shall exchange any and all of the following within the parties' possession:

- (a) medical records, including unpaid bills;
- (b) payroll records;
- (c) witness statements; and
- (d) any other documents related to a claim or defense.

(2) The documents outlined above do not need to be produced if they are unrelated to a claim or defense, have previously been produced or there is a good faith objection or privilege.

(3) The purpose of mandatory production is to ensure the parties and the mediator have access to all pertinent information regarding the issues disputed in the complaint.

(4) The mandatory production shall be provided to the mediator by delivering it to the clerk of the court. Documents attached to a complaint or response to a complaint which are listed in the mandatory production

subsection shall be treated as mandatory production. Mandatory production delivered to the clerk of the court shall not be part of the case record, although parties may file a notice indicating compliance with the rule, and shall be destroyed by the WCA following issuance of the recommended resolution.

C. Mediation

conferences:

(1) Notice of the mediation conference shall be mailed by certified mail, domestic return receipt requested, to the parties, accompanied by a copy of the complaint, summons and authorization to release medical information, at least [~~ten (10)~~] 10 days before the mediation conference. Service may also be accomplished by electronic mail for parties who have registered with the WCA. Mediation conferences reset through the WCA electronic portal will result in notification via electronic mail to registered users.

(2) Responses:

- (a) The respondent shall file a timely response not less than five [~~(5)~~] days prior to the mediation conference.
- (b) The response shall include a short summary of reasons for denials of any benefits claimed, statements of facts and affirmative defenses.
- (c) An answer, as set forth in Subsection B of 11.4.4.13 NMAC, may be filed in lieu of this response.

(3) Rescheduling and continuances: By agreement, the parties may reschedule a mediation to occur within 90 days of filing the complaint. Mediation conferences reset through the WCA electronic portal will result in notification via electronic mail to registered users.

(4) Mediation conference: The mediation conference shall be held at the workers' compensation administration building in Albuquerque, unless otherwise requested by the parties and agreed to by the assigned mediator. Parties to the conference

who live outside of the Albuquerque area may appear via video conference equipment at one of the administration's regional offices. Mediation conferences may also be conducted telephonically with prior approval from the mediator.

(5)

Amendments of caption/joinder of parties: The mediator may recommend an amendment to the caption of the complaint to correct an improperly named party or to reflect the joining of appropriate parties who otherwise have notice or attended the mediation conference.

(6) The

purposes of mediation conferences and duties of mediator are:

(a)

to bring the parties together and, with the use of mediation and other dispute resolution techniques, attempt to settle disputed issues by discussing the facts and applicable law pertaining to the complaint and by suggesting compromises or settlements;

(b)

to define, evaluate, and make recommendations on all issues remaining in dispute;

(c) to

state an opinion of the strength of any argument or position, and the possible results if the complaint is tried by a judge;

(d)

to issue a recommended resolution within ~~[sixty-(60)]~~ 60 days of the filing of the complaint;

(e)

to identify all potential parties;

(f)

to make a recommendation regarding attorney's fees; and

(g)

to refer any violation of these rules or the act for administrative investigation, if appropriate.

(7) Conduct of

mediation conferences:

(a)

The conduct of the mediation conference shall be in the control of the mediator.

(b)

The mediator shall be addressed in a courteous and respectful manner by

all parties.

(c)

Mediation conferences are informal meetings with no transcript of the proceedings. No motions practice shall be allowed. Conferences shall be conducted in a civil, orderly manner, with all presentation geared towards discussion and negotiation of disputed issues. Attorneys and other representatives of the parties shall be attired in an appropriate manner, suitable to a court proceeding.

(d)

Employer and attorney, or a representative, if no attorney has entered an appearance, and worker and attorney, if any, shall appear in person at the mediation conference. The mediator may enter recommendations against any party failing, without excuse as determined by the mediator, to attend the conference.

(e)

Appearances by a legal assistant, paralegal, or other agent or employee of the attorney, in lieu of a personal appearance by an attorney, are prohibited.

(f)

This rule does not prohibit the appearance of an employer through an adjuster or third-party administrator, nor prohibit a worker from attending a mediation conference with an unpaid lay assistant.

(g)

The attendance of any other person at the mediation conference is subject to the discretion of the mediator.

(h)

All issues may be considered at the discretion of the mediator when consistent with the goals of economy and fairness, and when an opportunity can be granted for additional response.

(i)

The parties are encouraged to prepare written narratives and summaries to assist the mediator.

D. Recommended

resolutions:

(1) The

mediator shall issue the recommended resolution within ~~[sixty-(60)]~~ 60 days of the filing of the complaint unless

the parties have stipulated to a waiver of the ~~[sixty-(60)]~~ 60-day requirement and the mediator approves. The mediator may allow additional time to supplement the file prior to issuance of the recommended resolution.

(2) The

mediator shall serve a copy of the recommended resolution on the parties by certified mail, domestic return receipt requested, unless the parties have registered with the agency to receive notice by electronic service.

(3) Receipt by

the WCA of a certified mail domestic return receipt with a signature and date of receipt shall create a presumption of receipt by the party of the recommended resolution on the indicated date. Service by electronic mail will create a presumption of receipt upon transmission.

(4) Receipt by

the WCA of a certified mail domestic return receipt with a signature, but without a date of receipt, shall create a rebuttable presumption of receipt of the recommended resolution on the fourth day following transmission of the recommended resolution by the WCA.

(5) Mailed

responses must be received by the clerk of the court on or before the ~~[thirtieth-(30th)]~~ 30th day after receipt of the recommended resolution. No additional time is allowed for mailing. Receipt by the clerk of a facsimile of notice of acceptance or rejection of recommended resolution shall constitute actual receipt.

(6) Effect of

recommended resolution:

(a)

A rejection in whole or in part of a recommended resolution shall result in assignment to a judge for a new determination of all issues in a formal hearing.

(b)

A rejection shall contain a statement of the party's reasons for rejecting the recommended resolution.

(c)

The judge shall have access to the recommended resolution.

(d)

Once a party has filed an acceptance or a rejection of a recommended resolution, the party is bound to the acceptance or rejection, unless permitted to withdraw it by written order of the director. The party requesting leave to withdraw a previously filed acceptance or rejection shall submit a written application and proposed order to the director, reciting good cause, within [thirty (30)] 30 days following receipt by that party of the recommended resolution. The clerk may cancel any judge assignment when a rejection is withdrawn.

(e)

If a rejection appears to be untimely, the clerk shall notify the parties of the untimeliness. A party requesting that a rejection be considered timely shall submit a written application to the director within [sixty (60)] 60 days of receipt of the recommended resolution. The application shall state the grounds to support a finding of excusable neglect.

E. Penalties:

(1) Willful

failure or refusal to participate in the mediation process shall not preclude the issuance of a recommended resolution, and may constitute bad faith or unfair claims processing.

(2) The

assigned mediator, or any party, may refer any such violation for administrative investigation by the enforcement bureau.

(3) Failure

to comply with the mediation rules, including those requiring mandatory production of evidence prior to the mediation conference, or to cooperate with an inquiry of the enforcement bureau may subject a party to penalties pursuant to Sections 52-1-28.1, 52-1-54 and 52-1-61, NMSA 1978 (Repl. Pamp. 1991), and in accordance with 11.4.5 NMAC.

F. Amendment of

recommended resolution: The recommended resolution may be amended by a mediator or by the agreement of the parties within the time allowed for acceptance or rejection of a recommended resolution, which shall not be

expanded or modified in any way by the issuance of an amended recommended resolution.

G. Confidentiality:

Notes of the mediator taken in conducting a mediation conference are not subject to discovery and shall not be admissible as evidence in any legal proceeding.

[11.4.4.10 NMAC - Rp, 11.4.4.10 NMAC, 10/1/2014; A, 10/1/2015; A, 9/30/16]

11.4.4.11 DIRECTOR'S MATTERS:

A. The following matters shall be pleaded on the application to director form:

(1) judge

assignment disputes;

(2) requests

for relief from an untimely rejection of a recommended resolution;

(3) requests

to withdraw an acceptance of a recommended resolution;

(4)

appointment of a recipient of benefits for a minor child or an incompetent worker;

(5) approval of

an out of state health care provider, if necessary;

(6) attorney

withdrawal when no judge is assigned;

(7) objection

to [assignment of nurse] case management or utilization review by the WCA; and

(8) any

other matter within the director's jurisdiction.

B. A party responding to an application to the director may submit a written response.

C. Recipient of benefits for minors and incompetent workers:

(1) General

provisions.

(a)

"Recipient" means the individual or entity approved to receive benefit payments on behalf of a minor child or incompetent worker pursuant to Section 52-5-11 NMSA 1978.

(b)

The director may designate a workers' compensation judge to resolve applications brought pursuant to Section 52-5-11 NMSA 1978 when other matters are pending before the workers' compensation judge.

(2)

Designation of recipient.

(a)

An application to the director, request for setting, and notice of hearing shall be filed with the clerk of the court with self-addressed stamped envelopes for all parties entitled to notice. The application shall also be accompanied by a summons, if one has not previously been issued in this cause.

(b)

The application shall have attached any applicable marriage certificate, birth certificates for all known minor children, or a record reflecting worker's incompetency.

(c)

The proposed recipient shall provide a copy of a driver's license or other state issued identification at the hearing.

(d)

When it is in the best interests of a minor child or incompetent worker, the director may designate a recipient who does not have care, custody, and control of a minor or incompetent worker.

(e)

When it is in the best interests of a minor child or incompetent worker, the director may designate a professional or corporate recipient for a minor or incompetent worker. The employer shall pay reasonable administrative fees requested by the alternative recipient and approved by the director.

(f)

As a condition of appointment, the recipient must agree to manage and protect benefit payments for the benefit of the minor child or incompetent worker.

(g) A

minor child who has reached the age of [sixteen (16)] 16 may apply to the director to receive benefit payments directly.

(3)

Accounting of benefits.

(a) The director may require an accounting of how benefits were used on behalf of a minor child or incompetent worker.

(b) Unless otherwise ordered by the director, accountings shall be submitted on the approved form and shall be submitted quarterly for the first year and annually thereafter.

(c) The director may suspend, in whole or in part, benefit payments for failure to provide the ordered accounting of benefits or failure to comply with any other condition placed on the recipient.

[11.4.4.11 NMAC - Rp, 11.4.4.11 NMAC, 10/1/2014; 11.4.4.10 NMAC - N, 10/1/2015; A, 9/30/16]

11.4.4.12 HCP RULES:

A. HCP general provisions:

(1) These rules apply to claims governed by the 1990 amendments to the act.

(2) The assigned judge shall decide HCP choice disputes. If no judge has been assigned, a judge shall be appointed by the clerk solely to resolve the HCP dispute.

(3) The HCP judge appointed by the clerk is not assigned pursuant to Subsection C of Section 52-5-5 NMSA 1978 (Repl. Pamp. 1991). The peremptory right to disqualify a judge allowed by Subsection D of Section 52-5-5 NMSA 1978 (Repl. Pamp. 1991), does not apply to the appointment of the HCP judge.

B. HCP choice:

(1) Emergency care: The provision of emergency medical care shall not be considered a choice of a treating HCP by the employer or worker.

(2) Selection of HCP:

(a) The employer shall decide either to select the initial HCP or to permit the worker to select the initial HCP. The decision made by the employer shall

be made in writing to the worker.

Employer may communicate the decision to select the initial HCP or to permit the worker the selection by any method reasonably calculated to notify workers. The employer may use a wallet card, a poster stating the decision posted with the WCA poster, a flyer inserted semi-annually with pay checks, or any other method employer reasonably believes will be successful in alerting the worker.

(b) If the decision of the employer is not communicated in writing to the worker, then the medical care received by the worker prior to written notification shall not be considered a choice of treating HCP by either party.

(c) Medical treatment provided to the worker prior to the employer's written communicated decision to either select the HCP, or to permit the worker to select the HCP, shall be considered authorized health care, the cost of which shall be borne by the employer.

(d) If a provider not licensed in New Mexico treats a worker, the employer must, upon receipt of the initial billing from that provider, either request approval of the out-of-state HCP pursuant to the act, or immediately notify the worker in writing that the provider is not acceptable pursuant to Section 52-4-1 NMSA 1978 (Repl. Pamp. 1991).

C. Referrals by an authorized HCP:

(1) A referral by an authorized HCP to another HCP shall be deemed a continuation of the selection of the referring HCP.

(2) The ~~sixty~~ ~~(60)~~ 60 day effective period allowed in Subsection B of Section 52-1-49 NMSA 1978 (Repl. Pamp. 1991), is not enlarged by the HCP's referral.

D. Notice of change of HCP:

(1) The ~~sixty~~ ~~(60)~~ 60 day period of initial HCP choice shall run from the date of first treatment or examination by, or consultation with, the initial HCP.

(2) The notice of change of HCP shall provide:

(a) name, address and telephone number of worker, employer and insurance carrier, if any;

(b) date and county of accident;

(c) nature of injury;

(d) the names, addresses and telephone numbers of the current and proposed HCPs;

(e) the signature of the party requesting the change of HCP; and

(f) the following text: "your rights may be affected by your failure to respond to this notice; if you need assistance and are not represented by an attorney, contact an ombudsman of the WCA."

(3) After ~~fifty~~ ~~(50)~~ 50 days of the initial ~~[sixty~~ ~~(60)]~~ 60 day period, the party denied the initial selection may give notice of change of HCP.

E. Issuance of notice of change: The party seeking the change of HCP shall issue a notice of change of HCP. A copy of the notice shall be provided to the other party ~~[ten~~ ~~(10)]~~ 10 days prior to provision of any medical treatment by the proposed HCP.

F. Effective date of notice of change:

(1) The notice of change shall be effective, unless an objection is filed with the clerk within three ~~[(3)]~~ days from receipt of the notice of change. A copy of the notice of change shall be attached to any objection filed with the clerk.

If no objection is filed, the HCP declared on the notice of change form shall be designated as the authorized treating HCP and may begin treating the worker ~~[eleven~~ ~~(11)]~~ 11 days after issuance of the notice of change.

(2) An objection can be filed after the three ~~[(3)]~~ day period, but any bills incurred for medical treatment rendered after the effective date of the notice of change and prior to a ruling by the

judge on the objection shall be paid by the employer. A party required to pay for medical treatment pursuant to this rule shall not be deemed to have waived any objections to the reasonableness or necessity of the treatment provided.

G. Responsibility for payment of HCP services:

(1) The employer shall be responsible for all reasonable and necessary medical services provided by an authorized HCP from the date the notice of change is effective.

(2) The worker shall be responsible for any medical services rendered by an unauthorized HCP.

(3) The designation of an authorized HCP shall remain in effect until modified by agreement of the parties or by order of the judge.

(4) Effective July 1, 2013, all medical services rendered pursuant to recommended treatment contained in the most recent edition of the official disability guidelines™ (ODG) is presumed reasonable and necessary; there is no presumption regarding any other treatment.

H. Reasonable and necessary disputes: Disputes concerning the reasonableness and necessity of prescribed treatment may be brought before the administration pursuant to Section 11 of 11.4.7 NMAC.

I. Hearing on objection to notice of change: If an objection to notice of change of HCP is filed with the clerk, the objection shall be heard by the judge within seven [(7)] days from the filing of the objection. The judge may issue a minute order at the conclusion of the hearing on the objection.

J. Request for change of HCP: If a disagreement arises over the selection of a HCP, and the parties cannot otherwise agree, a request for change of HCP must be submitted to the clerk. The request for change of HCP may be submitted at any time, including the initial [sixty-(60)] 60 day period.

K. Request for change of HCP form:

(1) The request for change of HCP must state the specific reasons for the requested change.

(2) The request for change of HCP may suggest an alternative HCP's name.

L. Burden of proof: The applicant requesting a change of HCP must prove the authorized HCP is not providing the worker reasonable and necessary medical care. If the applicant fails to establish the provision of medical care is not reasonable, the request for change shall be denied.

M. Hearing on request for change of HCP: The request for change of HCP disagreement shall be heard by the judge within seven [(7)] days from the filing of the request for change of HCP. The judge may issue a minute order at the conclusion of the hearing on the request for change. [11.4.4.12 NMAC - Rn & A, 11.4.4.11 NMAC, 10/1/2015; A, 9/30/16]

11.4.4.13 THE FORMAL HEARING PROCESS:

A. Assignment of judge:

(1) Upon receipt of a timely rejection of a recommended resolution an application to judge, or petition for lump sum payment, the clerk shall assign a judge to the cause and shall notify all parties of the judge assignment by certified mail, domestic return receipt requested. This notice shall be considered the initial notice of judge assignment.

(2) Each party shall have the right to disqualify a judge. To exercise the peremptory right to disqualify a judge, a party must file a notice of disqualification of judge no later than [ten-(10)] 10 days from the date of filing of the notice of assignment of judge. The clerk shall assign a new judge to the cause and notify all parties by certified mail, domestic return receipt requested. A party who has not exercised the right of disqualification may do so no later than [ten-(10)] 10 days from the filing

of the notice of reassignment of judge.

(3) No action may be taken by any judge on a cause until the expiration of the time for all parties to exercise the peremptory right to disqualify a judge. To expedite the adjudication process, the parties may file a joint waiver of the right to disqualify a judge. Such waiver shall forever bar the parties' right to disqualify a judge in that cause.

(4) Disputes related to the assignment, re-assignment, or disqualification of a judge shall be raised by written application to the director, which shall be filed with the clerk.

(5) The director may designate an on-call judge for the limited purpose of reviewing and approving lump sum payment petitions on a voluntary walk-in basis. The director shall provide notice to the public about the schedule for any on-call judge availability. Such designation shall not be considered a judge assignment or reassignment under this section if further adjudication action is needed.

B. Commencement of adjudication process and answer to complaint: The adjudication process for complaints shall commence upon the clerk's receipt of a timely rejection of a recommended resolution. An answer to complaint shall be filed within [twenty-(20)] 20 days of date of filing of the initial notice of assignment of judge unless already filed in lieu of the response required under Paragraph (2) of Subsection C of 11.4.4.10 NMAC. The answer shall admit or deny each claim asserted in the complaint. Any affirmative defenses to the complaint shall be stated in the answer. The answer shall comply with the general rules of pleading set forth in the rules of civil procedure for the district courts of New Mexico.

C. The assigned judge may hold pre-trial conferences as necessary, establish appropriate deadlines, mandate evidentiary disclosures between the parties, approve formal discovery, and otherwise control all other aspects of

the adjudication process in order to enable the prompt adjudication of the claim.

D. [Medical evidence:
(1) Live
medical testimony shall not be
permitted, except by an order of the
judge.
(2) A form
letter to HCP, completed by an
authorized HCP, may be admitted
into evidence. The employer shall pay
the costs for completion of the form
letter.] Unless otherwise stated or
necessarily implied in these rules, the
rules of civil procedure for the district
courts of New Mexico shall apply to
and govern proceedings within the
adjudication process.

~~[D:]~~ **E.** Except as set forth
in this section, the rules of evidence
for the courts of New Mexico shall
apply to and govern proceedings
within the adjudication process:

(1) Live
medical testimony shall not be
permitted, except by an order of the
judge.
(2) A workers'
compensation judge may admit the
following documentary evidence,
including hearsay evidence, provided
that the evidence is relevant, has
sufficient indicia of reliability and
authenticity, and will assist the judge
in determining a fact or issue in
dispute:

(a)
Personnel records, payroll records, or
other employment files for worker;

(b)
Pre-injury medical records of
treatment received for a period of
10 years prior to the date of injury
through the time of hearing on the
merits;

(c)
Form letters approved by the
administration;

(d)
Records of authorized health care
providers and their referrals, including
functional capacity evaluations;

(e)
Reports of IMEs performed pursuant
to the Act or as otherwise agreed to by
the parties;

(f)

Toxicology or drug and alcohol test
reports;

(g)
Records of the office of medical
examiner, including autopsy and
toxicology reports; or

(h)
Records of the New Mexico board
of pharmacy prescription monitoring
program.

~~[E:]~~ **E.** Depositions:
(1) The parties
should make a good faith effort to
obtain a completed and signed form
letter to HCP prior to setting the
deposition of the HCP.

(2)
Depositions shall be taken pursuant
to Supreme Court Rules Annotated
1986, 1-030. Reasonable notice shall
be deemed to be not less than five
[5] days prior to the date set for the
deposition.

(3) The
original deposition shall be kept by
the party who noticed the deposition.

(4) Deposition
testimony of authorized HCPs shall be
admissible, in lieu of live testimony.

(5)
Depositions of other witnesses
identified by the parties may also be
admissible, if noticed for use at trial,
provided that nothing prohibits either
party from issuing a subpoena to the
deposed witness to testify at trial.

(6) The use
of depositions shall otherwise be
governed by Supreme Court Rules
Annotated 1986, 1-032. A party
intending to use a deposition shall
notify the other party of the intended
use at least [ten (10)] 10 days prior to
trial. Any objection to the use of the
deposition shall be determined at the
adjudication hearing.

~~[F:]~~ **G.** Written discovery
procedures: If authorized,
interrogatories, request for production
or inspection, and requests for
admissions shall be governed by
Supreme Court Rules Annotated
1986, 1-033, 1-034 and 1-036.

~~[G:]~~ **H.** Motions: All
motions, except in open court, shall
be written and comply with Supreme
Court Rules Annotated 1986, 1-007.1.
Motions for summary judgment shall

comply with Supreme Court Rules Annotated 1986, 1-056.

~~[H:]~~ **I.** Settlement/pre-trial
conferences: The judge shall have
discretion to schedule settlement
conferences or pre-trial conferences
to expedite adjudication. A settlement
conference with the assigned judge
shall require the consent of all parties
either on the record or in writing.

~~[H:]~~ **J.** Continuance of
hearing:
(1) The
continuance of an adjudication
hearing shall be at the discretion of
the judge for good cause shown.

(2) All
discovery, disclosure and exchange
deadlines shall be extended by the
granting of a continuance unless
otherwise ordered.

~~[H:]~~ **K.** Hearings:
(1) Failure to
appear at a hearing after proper notice
and without good cause may result in
the imposition of sanctions.

(2) The
parties shall appear personally at
the adjudication hearing, without
the necessity of a subpoena. Unless
excused by a judge, the parties shall
appear personally or through their
legal representatives at all other
hearings properly noticed.

(3) All
hearings shall be recorded by audio
tape recording or by any other method
approved by the director.

(4) Prior to
commencement of the adjudication
hearing, the parties shall confer with
the court monitor to ensure that all
exhibits are properly marked. Any
exhibit to be jointly tendered shall be
marked and offered as a joint exhibit.
All other exhibits shall be marked by
party and exhibit number or letter.
Depositions shall be marked as
exhibits.

(5) Under
exceptional circumstances and in the
interest of justice, within [ten (10)] 10
days of the close of the adjudication
hearing, the judge has discretion to
direct or allow supplementation of
evidence.

~~[K:]~~ Additional rules:
Unless otherwise stated or necessarily

implied in the preceding rules, the rules of evidence and the rules of civil procedure for the district courts of New Mexico shall apply to and govern proceedings within the adjudication process.]

[11.4.4.13 NMAC - Rn & A, 11.4.4.12 NMAC, 10/1/2015; A, 9/30/16]

11.4.4.14 [APPROVAL OF ATTORNEY'S FEES:] APPROVAL OF ATTORNEY FEES AND LIENS:

A. The award of [attorney's] attorney fees may be requested on an application to a judge. The application must contain sufficient information to determine if the fee requested is appropriate. The contested application should indicate the date and terms of any offers of settlement made; the present value of the benefits awarded the worker, including, but not limited to, medical expenses and past and future weekly benefits; the total number of hours reasonably expended by counsel to secure benefits for the worker; the hourly billing rate of counsel; and any other relevant information for the determination of fees.

B. No attorney fees shall be paid until the claim has been settled or adjudged. For purposes of the Workers' Compensation Act, settled or adjudged includes:

- (1) the entry of a compensation order; or
- (2) the acceptance by both parties of a recommended resolution; or
- (3) an order granting or denying any petition or application when no other claims are pending before the administration; or
- (4) the WCA has administratively closed the file; or
- (5) when there is a good faith belief that all pending issues or questions have been resolved, whether or not the jurisdiction of the administration has been invoked.

C. An attorney withdrawing from representation during the pendency of a claim and before the claim has been settled

or adjudged shall assert a request for attorney fees, if any, within the motion to workers' compensation judge or application to director seeking to withdraw as mandated by Subsection P of 11.4.4.9 NMAC. The request for attorney fees shall not be decided until the claim is settled or adjudged.

D. When a subsequent attorney requests attorney fees, the attorney shall give notice to the withdrawn attorney by serving on the withdrawn attorney a copy of all relevant pleadings at the time of filing.

E. No attorney fee lien shall be filed in a cause until a workers' compensation judge has awarded fees pursuant to Section 52-1-54.

[11.4.4.14 NMAC – Rn, 11.4.4.13 NMAC, 10/1/2015; A, 9/30/16]

11.4.4.16 COURT AUTHORIZED RELEASE OF MEDICAL RECORDS:

Any party or any authorized health care provider (HCP) may file a petition for court authorization to release medical records. Such petitions shall be allowed notwithstanding the provisions of any other rule, and shall be disposed of separate and apart from all rule provisions and procedures pertaining to resolution of other disputes arising from a claim for benefits.

A. The assigned workers' compensation judge (judge) shall decide medical record disputes. If no judge has been assigned, a judge shall be appointed by the clerk upon the filing of a petition for court authorization to release medical records for the resolution of that matter only.

B. The judge appointed by the clerk is not assigned pursuant to Subsection C of Section 52-5-5 NMSA 1978 (1990). The peremptory right to disqualify a judge allowed by Subsection D of Section 52-5-5 NMSA 1978 (1993) does not apply. No party or authorized HCP may disqualify a judge appointed to hear a petition for court authorization to release medical records.

C. The judge will determine whether the protected health information in controversy is material to the resolution of any matter presently at issue or likely to be at issue in the administration of the claim, and shall order the release of protected health information upon a finding of materiality by a preponderance of evidence.

D. If a petition for court authorization to release medical records is filed with the clerk, the judge shall hear the petition within seven [(7)] days from the filing of the petition. The judge may issue a minute order at the conclusion of the hearing on the petition. If the judge does not issue a minute order, the judge shall issue an order not later than three [(3)] days after the conclusion of the hearing. A minute or formal order resolving the petition shall have the force of law with respect to the parties and to the authorized HCP.

E. If, after a judge has ordered the release of records pursuant to this rule, an HCP fails to provide records to a payer, the party which is to receive the records shall give the HCP (1) written notice of the obligation to produce the records and (2) an endorsed copy of the judge's order or minute order. If the records are not produced within five [(5)] days of the actual delivery of the notice, the payer's obligation to timely pay shall be tolled until the actual production of the records.

F. If any judge involved in the adjudication of the claim finds that the withholding of records of health information after an order to produce has obstructed the efficient administration or adjudication of a claim, then:

(1) Notice shall be given to the authorized HCP who has withheld records that have been ordered disclosed and a hearing shall be scheduled to determine if the withholding of records was unreasonable.

(2) If the judge finds after notice to the HCP and an opportunity to be heard that the continued withholding of records by

the HCP is unreasonable, the director may find the HCP in violation of this rule and penalize pursuant to Section 52-1-61 NMSA 1978 (1990).
[11.4.4.16 NMAC - Rn, 11.4.4.15 NMAC, 10/1/2015; A, 9/30/16]

11.4.4.17 SEALING OF PUBLIC COURT RECORDS

A. Public court records filed with the clerk of court or offered as evidence in an administrative or adjudicative hearing shall not be sealed based solely on the agreement or stipulation of the parties.

B. The party requesting to seal court records subject to public inspection shall establish the same requirements for sealing court records as set forth in the rules of civil procedure for the district courts of New Mexico.

C. The order sealing the court records may seal the records from public inspection but shall not prohibit WCA staff from accessing the court record as necessary to enforce the provisions of the Act.
[11.4.4.17 NMAC - N, 9/30/16]

WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.7 NMAC, Sections 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, and 15, effective September 30, 2016.

11.4.7.2 SCOPE: This rule applies to workers, employers, and insurers and to all workers' compensation health care services providers, caregivers, pharmacies, and suppliers and all payers for such services and supplies.
[11.4.7.2 NMAC - Rp, 11.4.7.2 NMAC, 12-31-13; A, 09-30-16]

11.4.7.3 STATUTORY AUTHORITY: ~~[NMSA 1978, Sections 52-1-1, 52-3-1, 52-4-1, 52-4-2, 52-4-3, 52-4-5, 52-5-4, and 52-10-1.] Sections 52-1-1, 52-3-1, 52-4-1, 52-4-2, 52-4-3, 52-4-5, 52-5-4, and 52-10-1 NMSA 1978.~~
[11.4.7.3 NMAC - Rp, 11.4.7.3

NMAC, 12-31-13; A, 9-30-16]

11.4.7.6 OBJECTIVE: The purpose of these rules is to establish and enforce a system of maximum allowable fees and reimbursements for health care services and related non-clinical services provided by all practitioners, to establish billing dispute procedures and to establish the procedures for cost containment, including case management and utilization review services.

[11.4.7.6 NMAC - Rp, 11.4.7.6 NMAC, 12-31-13; A, 09-30-16]

11.4.7.7 DEFINITIONS: The definitions in 11.4.1.7 NMAC shall apply to this rule. In addition, the following definitions apply to the provision of all services.

A. "Business day" means any day on which the WCA is open for business.

B. "Cannabis Program" means the State of New Mexico Department of Health Medical Cannabis Program.

C. "Caregiver" means any provider of health care services not defined and specified in ~~[NMSA 1978, Section 52-4-1]~~ Section 52-4-1 NMSA 1978.

D. "Case management" means the on-going coordination of health care services provided to an injured or disabled worker including, but not limited to:

(1) developing a treatment plan to provide appropriate health care service to an injured or disabled worker;

(2) systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker;

(3) assessing whether alternate health care services are appropriate and delivered in a cost-effective manner based upon acceptable medical standards;

(4) ensuring that the injured or disabled worker is following the prescribed health care plan; and,

(5) formulating a plan for the return to

work.

E. "Contractor" means any organization that has a legal services agreement currently in effect with the workers' compensation administration (WCA) for the provision of utilization review or case management or peer review services.

F. "Current procedural terminology ("CPT")" means a systematic listing and coding of procedures and services performed by HCPs of the American medical association, adopted in the director's annual order. Each procedure or service is identified with a numeric or alphanumeric code (CPT code). This was developed and copyrighted by the American medical association. The five character codes included in the rules governing the health care provider fee schedule are obtained from current procedural terminology (CPT®), copyright [2012] 2015 by the American medical association (AMA). CPT is developed by the AMA as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of the rules governing the health care provider fee schedule is with WCA and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in rules governing the health care provider fee schedule. Fee schedules, relative value units, conversion factors or related components are not assigned by the AMA, are not part of CPT, and AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT outside of rules governing the health care provider fee schedule should refer to the most recent edition of the current procedural terminology which contains the complete and most current listing of CPT codes and descriptive terms. Applicable FARS/

DRARS apply. CPT is a registered trademark of the American medical association.

G. “Diagnostic and statistical manual of mental disorders (DSM)” means the current edition of the manual, which lists and describes the scientifically diagnosed mental disorders and is commonly referred to as “DSM”.

H. “Department of health (DOH)” means the state of New Mexico department of health.

I. “Director” means director of the workers’ compensation administration (WCA) or designee.

J. “Durable medical equipment (DME)” means supplies and equipment that are rented, leased, or permanently supplied to a patient and which have been prescribed to aid the recovery or improve the function of an injured or disabled worker.

K. “Employer” means, collectively: an employer subject to the act; a self-insured entity, group or pool; a workers’ compensation insurance carrier or its representative; or any authorized agent of an employer or insurance carrier, including any individual owner, chief executive officer or proprietor of any entity employing workers.

L. “Freestanding ambulatory surgical center (FASC)” means a separate facility that is licensed by the New Mexico department of health as an ambulatory surgical center.

M. “Health care provider (HCP) or provider” means any person, entity, or facility authorized to furnish health care to an injured or disabled worker pursuant to ~~[NMSA 1978, Section 52-4-1]~~ Section 52-4-1 NMSA 1978, including any provider designated pursuant to ~~[NMSA 1978, Section 52-1-49]~~ Section 52-1-49 NMSA 1978, and may include a provider licensed in another state if approved by the director, as required by the act. The director has determined that certified registered nurse anesthetists (CRNAs) and certified nurse specialists (CNSs) who are licensed in the state of New Mexico are automatically approved as health care providers pursuant

to ~~[NMSA 1978, Section 52-4-1(P)]~~ Paragraph (P) of Section 52-4-1 NMSA 1978.

N. “Hospital” means any place currently licensed as a hospital by the department of health pursuant to ~~[NMSA 1978, Section 52-4-1(A);]~~ Paragraph (A) of Section 52-4-1 NMSA 1978, where services are rendered within a permanent structure erected upon the same contiguous geographic location as are all other facilities billed under the same name.

O. “Implants, instrumentation and hardware” means:

(1) surgical implants are defined as any single-use item that is surgically inserted, deemed to be medically necessary and approved by the payer which the physician does not specify to be removed in less than six weeks, such as bone, cartilage, tendon or other anatomical material obtained from a source other than the patient; plates, screws, pins, cages; internal fixators; joint replacements; anchors; permanent neurostimulators; and pain pumps;

(2) disposable instrumentation includes ports, single-use temporary pain pumps, external fixators and temporary neurostimulators and other single-use items intended to be removed from the body in less than six (6) weeks.

P. “Independent medical examination (IME)” means a specifically requested evaluation of an injured or disabled worker’s medical condition performed by an HCP, other than the treating provider, as provided by ~~[NMSA 1978, Section 52-1-51]~~ Section 52-1-51 NMSA 1978.

Q. “Licensed producer” means an individual or entity located in New Mexico licensed and certified by the department of health to produce, manufacture, or dispense medical cannabis.

R. “Medical cannabis” means medical cannabis in the form of flower, bud, cannabis derived products, edibles, oils, tinctures, or any other form regulated by the department of health.

S. “Medical records” means:

(1) all records, reports, letters, and bills produced or prepared by an HCP or caregiver relating to the care and treatment rendered to the worker;

(2) all other documents generally kept by the HCP or caregiver in the normal course of business relating to the worker, including, but not limited to, clinical, nurses’ and intake notes, notes evidencing the patient’s history of injury, subjective and objective complaints, diagnosis, prognosis or restrictions, reports of diagnostic testing, hospital records, logs and bills, physical therapy records, and bills for services rendered, but does not include any documents that would otherwise be inadmissible pursuant to ~~[NMSA 1978, Section 52-1-51(C)]~~ Paragraph (C) of Section 52-1-51 NMSA 1978.

T. “New Mexico gross receipts tax (NMGR T)” means the gross receipts tax or compensating tax as defined in Chapter 7, Article 9 of the New Mexico Statutes Annotated 1978 (the “Gross Receipts and Compensating Tax Act”). This tax is collected by the New Mexico taxation and revenue department.

U. “Peer review” means an individual case by case review of services for medical necessity and appropriateness conducted by an HCP licensed in the same profession as the HCP whose services are being reviewed.

V. “Physical impairment ratings (PIR)” means an evaluation performed by an MD, DO, or DC to determine the degree of anatomical or functional abnormality existing after an injured or disabled worker has reached maximum medical improvement. The impairment is assumed to be permanent and is expressed as a percent figure of either the body part or whole body, as appropriate, in accordance with the provisions of the Workers’ Compensation Act and the most current edition of the American medical association’s guides to the evaluation of permanent impairment (AMA guide).

W. “Prescription drug” means any drug, generic or

brand name, which requires a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP.

X. "Referral" means the sending of a patient by the authorized HCP to another practitioner for evaluation or treatment of the patient and it is a continuation of the care provided by the authorized HCP.

Y. "Services" means health care services, the scheduling of the date and time of the provision of those services, procedures, drugs, products or items provided to a worker by an HCP, pharmacy, supplier, caregiver, or freestanding ambulatory surgical center which are reasonable and necessary for the evaluation and treatment of a worker with an injury or occupational disease covered under the New Mexico Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

Z. "Unlisted service or procedure" means a service performed by an HCP or caregiver which is not listed in the edition of the American medical association's current procedural terminology referenced in the director's annual order or has not otherwise been designated by these rules.

AA. "Usual and customary fee" means the monetary fee that a practitioner normally charges for any given health care service. It shall be presumed that the charge billed by the practitioner is that practitioner's usual and customary charge for that service unless it exceeds the practitioner's charges to self-paying patients or non-governmental third party payers for the same services and procedures.

BB. "Utilization review" means the evaluation of the necessity, appropriateness, efficiency, and quality of health care services provided to an injured or disabled worker and may include peer group utilization review of selected provider services as set forth in Section 52-4-2 NMSA 1978.

CC. "Worker" means an injured or disabled employee. [11.4.7.7 NMAC - Rp, 11.4.7.7 NMAC, 12-31-13; A, 10-1-15; A, 09-

30-16] [CPT only copyright 2015 American Medical Association. All rights reserved.]

11.4.7.8 GROUND RULES FOR BILLING AND PAYMENT:

A. Basic ground rules.
(1) These rules apply to all charges and payments for medical, other health care treatment, and related non-clinical services covered by the New Mexico Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law.

(2) These rules shall be interpreted to the greatest extent possible in a manner consistent with all other rules promulgated by the [~~workers' compensation administration (WCA)~~] WCA. In the event of an irreconcilable conflict between these rules and any other rules, the more specific set of rules shall control.

(3) Nothing in these rules shall preclude the separate negotiation of fees between a provider and a payer within the health care provider fee schedule for any health care service as set forth in these rules.

(4) These rules and the director's annual order adopting the health care provider fee schedule utilize the edition of the current procedural terminology referenced in the director's annual order, issued pursuant to Subsection A of 11.4.7.9 NMAC. All references to specific CPT code provisions in these rules shall be modified to the extent required for consistency with the director's annual order.

(5) Employers are required to inform a worker of the identity and source of their coverage for the injury or disablement.

B. Authorization for treatment and services.

(1) A provider or inpatient facility may seek pre-authorization from payer for all services or treatment plans. If authorization is sought, all requests for authorization of referrals and all other procedures shall be approved or denied by the payer within five

[(5)] business days of receipt of all supporting documentation and no later than five [(5)] business days before the procedure.

(2) Once a worker has been admitted to an inpatient facility, all requests for authorization of referrals and procedures during the inpatient stay shall be approved or denied by the payer by the close of the next business day after receipt of all supporting documentation.

(3) If an authorization or denial is not received by the provider by the deadlines set forth in this rule, the requested service or treatment will be deemed authorized. The provider shall document all attempts to obtain authorization from the date of the initial request.

(4) A payer shall not be required to respond to a provider's request for authorization within the deadlines set forth in this rule if the payer has previously denied a claim in writing.

(5) Pre-authorization is required prior to scheduling or performing any of the following services:

- (a) independent medical examinations;
- (b) physical impairment ratings;
- (c) functional capacities evaluations;
- (d) physical therapy;
- (e) caregiver services; and
- (f) durable medical equipment (DME).

C. Billing provision ground rules.

(1) Billing shall be made in accordance with billing instructions issued by the director in conjunction with the annual fee order.

(2) Submitting a bill to any party for the difference between the usual and customary charges and the maximum amount of reimbursement allowed for compensable health care services or items, also known as balance billing,

is prohibited.

(3) Coding and billing separately for procedures that do not warrant separate identification because they are an integral part of a service for which a corresponding CPT code exists, also known as unbundling, is prohibited.

(4) The appropriate CPT code must be used for billing by providers.

(5) Initial billing of outpatient services by providers, hospitals and FASC's, shall be submitted no later than ~~[thirty (30) calendar]~~ 30 days from the end of the month in which services were rendered. Initial billing of inpatient services shall be issued no later than ~~[sixty (60) calendar]~~ 60 days from the date of discharge.

(6) Failure of the provider to submit the initial billing within the time limits provided by these rules shall constitute a violation of these rules but does not absolve the employer of financial responsibility for the bill.

(7) Unlisted services or procedures are billable and payable on a by-report (BR) basis as follows:

(a) The fee for the performance of any BR service shall be negotiated between the provider and the payer prior to delivery of the service. Payers should ensure that a CPT code with an established fee schedule amount is not available.

(b) Performance of any BR service requires that the provider submit a written report, for which no separate charge is allowed, with the billing to the payer. The report shall substantiate the rationale for not using an established CPT code and shall include pertinent information regarding the nature, extent, and special circumstances requiring the performance of that service and an explanation of the time, effort, personnel, and equipment necessary to provide the service.

(c) Information provided in the medical record(s) may be submitted in lieu of

a separate report if that information satisfies the requirements of Paragraph (10) of Subsection C of 11.4.7.8 NMAC.

(d) In the event a dispute arises regarding the reasonableness of the fee for a BR service, the provider shall make a prima facie showing that the fee is reasonable. In that event, the burden of proof shall shift to the payer to show why the proposed fee is not reasonable.

(8) If payer and provider agree to enter into a global fee agreement at any time, a global fee can be used. All services not covered by the global fee agreement shall be coded and paid separately, to the extent substantiated by medical records. Agreement to use a global fee creates a presumption that the HCP will be allowed to continue care throughout the global fee period.

(9) If a service that is ordinarily a component of a larger service is performed alone for a specific purpose it may be considered a separate procedure for coding, billing, and payment purposes.

Documentation in the medical records must justify the reasonableness and necessity for providing such services alone.

(10) Initial bills for every visit shall be accompanied by appropriate office notes (medical records) which clearly substantiate the service(s) being billed and are legible.

(11) Records provided by hospitals and FASCs shall have a copy of the admission history and physical examination report and discharge summary, hospital emergency department medical records, imaging, ambulatory surgical center medical records or outpatient surgery records.

(12) No charge shall be made to any party to the claim for the initial copy of required information.

(13) The worker shall not be billed for health care services provided by an authorized HCP as treatment for a valid workers' compensation claim unless payer denies compensability

of a claim or payer does not respond to a bill within the time limit set forth in Paragraph (2) of Subsection D of 11.4.7.8 NMAC.

(14) Diagnostic coding shall be consistent with the most current version of the international classification of diseases, clinical modification or diagnostic and statistical manual of mental disorders guidelines required by CMS as appropriate.

(15) For any reimbursement under the fee schedule or these rules that is based upon provider's cost, the provider shall submit a copy of the invoice showing that cost either at the time of billing or upon the payer's request.

(16) The health care facility is required to submit all requested data to the payer. Failure to do so could result in fines and penalties imposed by the WCA. All payers are required to notify the economic research bureau of unreported data fields within ~~[ten (10)]~~ 10 days of payment of any inpatient bill.

D. Payment provision ground rules.

(1) The provision of services gives rise to an obligation of the employer to pay for those services. Accordingly, all services are controlled by the rules in effect on the date the services were provided.

(2) For all reasonable and necessary services provided to a worker with a valid workers' compensation claim, payer is responsible for timely good faith payment within ~~[thirty (30)]~~ 30 days of receipt of a bill for services unless payment is pending in accordance with the criteria for contesting bills and an appropriate explanation of benefits has been issued by the payer. Payment for non-contested portions of any bill shall be timely.

(3) Effective July 1, 2013, all medical services rendered pursuant to recommended treatment contained in the most recent edition of the official disability guidelines™ (ODG) is presumed reasonable and necessary pursuant to

[NMSA 1978, Section 52-1-49(A)] Paragraph (A) of Section 52-1-49 NMSA 1978; there is no presumption regarding any other treatment.

(4) If a service has been pre-authorized or is provided pursuant to a treatment plan that has been pre-authorized by an agent of the payer, it shall be presumed that the service provided was reasonable and necessary. The presumption may be overcome by competent evidence that the payer, in the exercise of due diligence, did not know that the compensability of the claim was in doubt at the time that the authorization was given.

(5) An employer who subcontracts bill review services remains fully responsible for compliance with these rules.

(6) Fees and payments for all physician professional services, regardless of where those services are provided, are reimbursed within the health care provider fee schedule.

(7) Bills may be paid individually or batched for a combined payment; however, each service, date of service and the amount of payment applicable to each procedure must be appropriately identified.

(8) All bills shall be paid in full unless one or more of the following criteria are met. These criteria are the only permissible reasons for contesting workers' compensation bills submitted by authorized providers:

- (a) compensability is denied;
- (b) services are deemed not to be reasonable and necessary;
- (c) incomplete billing information or support documentation;
- (d) inaccurate billing or billing errors; or
- (e) reduction specifically authorized by this rule.

(9) Whenever a payer contests a bill or the payment for services is denied, delayed,

reduced or otherwise differs from the amount billed, the payer shall issue to the provider a written EOB which shall clearly relate to each payment disposition by procedure and date of service. Only the EOBs listed in WCA billing instructions may be used.

(10) Failure of the payer to indicate the appropriate EOB(s) constitutes an independent violation of these rules.

(11) The prorating of the provider's fees for time spent providing a service, as documented in the provider's treatment notes, is not prohibited by these rules provided an appropriate EOB is sent to the provider. Evaluation and management CPT codes shall not be prorated. The provider's fees should not be prorated to exclude time spent in pre- and post-treatment activity, such as equipment setup, cleaning, disassembly, etc., if it is directly incidental to the treatment provided and is adequately documented.

(12) A request for reconsideration, if any, shall be submitted to the payer within 30 days of receipt of the payer's disposition. Failure to comply with the deadline for a request for reconsideration or for seeking a director's determination as provided below shall result in acceptance of the payer's position.

(13) Payment or disposition of a request for reconsideration shall be issued within 30 days of payer's receipt of the request for reconsideration. Failure to comply with the established deadline shall result in the payer accepting the provider's position asserted in the request for reconsideration.

[11.4.7.8 NMAC - Rp, 11.4.7.8 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

[CPT only copyright 2015 American Medical Association. All rights reserved.]

11.4.7.9 FEES FOR HEALTH CARE SERVICES

A. Health care provider fee schedule

(1) The director shall issue an order pursuant

to [NMSA 1978, Section 52-4-5] Section 52-4-5 NMSA 1978 not less than once per annum setting the health care provider fee schedule which shall list the maximum amount of reimbursement for, or the method for determining the maximum amount of reimbursement for medical services, treatments, devices, apparatus, and medicine.

(2) In addition to the fee schedule, the order shall contain a brief description of the technique used for derivation of the fee schedule and a reasonable identification of the data upon which the fee schedule was based.

(3) The health care provider fee schedule is procedure-specific and provider-neutral. Any code listed in the edition of the current procedural terminology adopted in the director's annual order may be used to designate the services rendered by any qualified provider within the parameters set by that provider's licensing regulatory agencies combined with applicable state laws, rules, and regulations.

(4) The fee schedule shall be released to the public not less than ~~thirty (30)~~ 30 days prior to the date upon which it is adopted and public comments will be accepted during the ~~thirty (30)~~ 30 immediately following release.

(5) After consideration of the public comments the director shall issue a final order adopting a fee schedule, which shall state the date upon which it is effective. The final fee schedule order shall be available at the WCA clerk's office not less than ~~twenty (20)~~ 20 days prior to its effective date.

B. Hospital ratio

(1) All hospitals shall be reimbursed at the hospital ratio set forth in the health care provider fee schedule. A new hospital shall be assigned a ratio of ~~[67%]~~ sixty-seven percent.

(2) The assigned ratio is applied toward all charges for compensable services provided during a hospital inpatient stay and emergency department visit.

(3) The ratio

does not apply to procedures that are performed in support of surgery, even if performed on the same day and at the same surgical site as the surgery.

(4) By February 1 of each calendar year, all hospitals shall provide to the WCA the most recent full year filing of their HCFA/CMS 2552 G-2 worksheet prepared on behalf of the organization. A hospital may specifically designate this worksheet as proprietary and confidential. Any worksheet specifically designated as proprietary and confidential in good faith shall be deemed confidential pursuant to [Section 52-5-21 NMSA-1978] Section 52-5-21 NMSA 1978 and the rules promulgated pursuant to that provision. Failure to comply may result in fines and penalties.

(5) Appeal of assigned ratio by hospitals. A written appeal may be filed with the director within [thirty (30)] 30 days of the assignment of the ratio. The director will review the appeal and respond with a written determination. The director may require the hospital to provide additional information prior to a determination and in his discretion may conduct a hearing. The director's written determination shall be issued within [thirty (30)] 30 days of the final submission of all information regarding the appeal to the director. The director's written determination shall be final.

C. Prescription medicine

(1) The maximum payment that a pharmacy or authorized HCP is allowed to receive for any prescription medicine shall be determined by the method set forth in health care provider fee schedule.

(2) Pharmacies shall not dispense more than a [thirty (30)] 30 day supply of medication unless authorized by the payer.

(3) Only generic equivalent medications shall be dispensed unless a generic does not exist and unless specifically ordered by the HCP.

(4) Compounded medication shall be paid in accordance with the fee schedule.

(5) Any medications dispensed and administered in excess of a [twenty-four (24)] 24 hour supply to a registered emergency room patient shall be paid according to the hospital ratio.

(6) Health care provider dispensed medications shall not exceed a [ten (10)] 10 day supply for new prescriptions only. The payment for health care provider dispensed medications shall not exceed the cost of a generic equivalent.

D. Medical cannabis reimbursement

(1) General Provisions
(a) The maximum payment that a worker may be reimbursed for medical cannabis shall be determined by the method and amount set forth in health care provider fee schedule.

(b) Medical cannabis may be a reasonable and necessary medical treatment only where an authorized health care provider certifies that other treatment methods have failed.

(c) At least one physician certifying worker for participation in the cannabis program shall be an authorized health care provider.

(d) The worker must be an enrolled in the cannabis program and provide proof of enrollment and qualifying condition prior to the date of purchase of medical cannabis to be eligible for reimbursement.

(2) Worker shall be reimbursed upon the following conditions:

(a) Only the worker shall be reimbursed for the out of pocket cost of medical cannabis;

(b) Worker shall submit an itemized receipt issued by a licensed producer that includes the name and address of the licensed producer and the worker, the date of purchase, the quantity in grams of dry weight, the form of medical cannabis purchased, and the

purchase price;

(c) Worker shall be reimbursed no more than the maximum amount set forth in the fee schedule;

(d) Reimbursement shall be limited to the quantity set forth in the fee schedule;

(e) Reimbursement for paraphernalia, as defined in the Controlled Substances Act, shall not be made; and

(f) Reimbursement is not allowed for expenses related to personal production or cannabis acquired from sources other than a licensed producer.

E. Referrals

(1) If a referral is made within the initial [sixty (60)] 60 day care period as identified by [NMSA 1978, Section 52-1-49(B)] Paragraph (B) of Section 52-1-49 NMSA 1978, the period is not enlarged by the referral.

(2) When referring the care of a patient to another provider, the referring provider shall submit pertinent medical records for that patient, including imaging, upon request of the referral provider, at no charge to the patient, referral provider or payer.

(3) When transferring the care of a patient to another provider, the transferring provider shall submit complete medical records, including imaging, for that patient to the subsequent provider at no charge to the patient, subsequent provider or payer.

F. Independent medical examinations

(1) All IMEs and their fees must be authorized by the claims payer prior to the IME scheduling and service, regardless of which party initiates the request for an IME.

(2) In the event that an IME is authorized and the HCP and claims payer are unable to agree on a fee for the IME, the judge may set the fee or take other action to resolve the fee dispute.

G. Physical impairment ratings

(1) All PIRs and their fees shall be authorized by the claims payer prior to their scheduling and performance regardless of which party initiated the request for a PIR. The PIR is inclusive of any evaluation and management code.

(2) Impairment ratings performed for primary and secondary mental impairments shall be billed [~~using CPT code 90899~~] pursuant to the annual fee schedule and shall conform to the guidelines, whenever possible, presented in the most current edition of the AMA guides to the evaluation of permanent impairment.

(3) A PIR is frequently performed as an inherent component of an IME. Whenever this occurs, the PIR may not be unbundled from the IME. The HCP may only bill for the IME at the appropriate level.

(4) In the event that a PIR with a specific HCP is ordered by a judge and the HCP and claims payer are unable to agree on a fee for the PIR, the judge may set the fee or take other action to resolve the fee dispute.

[11.4.7.9 NMAC - Rp, 11.4.7.9 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

[CPT only copyright 2015 American Medical Association. All rights reserved.]

11.4.7.10 QUALIFICATION OF OUT OF STATE HEALTH CARE PROVIDERS

A. An HCP that is not licensed in the state of New Mexico must be approved by the director to qualify as an HCP under the act.

B. No party shall have recourse to the billing and payment dispute resolution provisions of these rules with respect to the services of an HCP who is not licensed in New Mexico or approved by the director.

C. The director's approval may be obtained by submitting an application to the director and proposed order, supported by an original affidavit of the HCP seeking approval. Nothing in this

rule shall prevent the director from entering into agreements with any party or HCP to provide for simplified and expeditious qualification of HCPs in individual cases, provided, however, that all such agreements shall be considered public records.

D. The director's approval of a health care provider in a particular case, pursuant to the provisions of [~~NMSA 1978, Section 52-4-1~~] Section 52-4-1 NMSA 1978 will be deemed given when an out of state health care provider provides services to that injured worker and the employer/insurer pays for those services. Unless otherwise provided, the approval obtained by this method will not apply to the provision of health care by that provider to any other worker, except by obtaining separate approval as provided in these rules.

[11.4.7.10 NMAC - Rp, 11.4.7.9 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

11.4.7.11 BILLING AND PAYMENT DISPUTE RESOLUTION

A. In the event of a billing or payment dispute any party may submit to the medical cost containment bureau a request for director's determination on the approved form located on the WCA website.

B. The request shall be made in writing within [~~thirty (30) calendar~~] 30 days of the documented receipt date of the payer's disposition, nonpayment of the bill, or denial of a request for reconsideration. A request for director's determination shall consist of a brief explanation of the disputed billing and payment issue(s) and shall be accompanied by a copy of the bill(s) in question, a copy of the payer's explanation, and all supporting documentation necessary to substantiate the performance of the service(s) and the accuracy of the associated charges.

C. Upon receipt of a request, the administration will initially attempt to resolve the dispute informally. If this is unsuccessful,

a notice of receipt of request for director's determination shall be issued to both parties along with a copy of the request for director's determination.

D. Both parties shall have [~~fifteen (15)~~] 15 days from the date of the notice of receipt of request for director's determination to present to the director and opposing party any pertinent additional documentation.

E. The director [~~or his designee~~] in his discretion may conduct such hearings and receive such evidence as is necessary to make a determination concerning the reasonableness and necessity of the services provided. A final determination shall issue within [~~forty-five (45)~~] 45 days of the issuance of the notice of receipt of request for director's determination or the close of the hearing, whichever is later.

F. The director's determination of the billing and payment dispute is final. Any further attempt, directly or indirectly, to charge any party for any disallowed services or to fail to pay within [~~thirty (30)~~] 30 days of documented receipt of the director's determination for such services as may have been found to be due and owing shall be considered a violation of this rule.

G. The director's determination shall not be considered with regard to the compensability of the claim and shall have no legal force or effect beyond the resolution of the billing and payment disputes.

H. Any time frame set forth in 11.4.7.11 NMAC may be waived by the director, in writing, for good cause shown.

I. Nothing in this rule shall prohibit the parties from resolving their billing dispute prior to or following referral to the administration.

[11.4.7.11 NMAC - Rp, 11.4.7.13 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

11.4.7.12 [~~INPATIENT-ADMISSIONS/CASE-MANAGEMENT/PEER-REVIEW;~~] **INPATIENT ADMISSIONS, CASE**

MANAGEMENT AND UTILIZATION REVIEW:

A. Basic provisions
 (1) All workers and their legal representatives are required to cooperate with the WCA or its contractor, if any, with respect to all reasonable requests for information necessary for any provision of service.

(2) ~~[AH] For the purpose of facilitating the provision of services, all employers, insurers, and third party administrators are required to communicate, [and provide information to the contractor for the purpose of facilitating the provision of services. The employer, insurer or third party administrator shall be required to] cooperate and provide information, without charge, to the WCA or its contractor, if any.~~

(3) The WCA or its contractor, if any, shall report any refusal to cooperate to the director. Failure to provide requested information shall be presumed to be a refusal to cooperate. Any dispute concerning the reasonableness of any request for information may be submitted, in writing, to the director. The determinations of the director concerning the reasonableness of such requests are final.

(4) In any hearing before the WCA, the worker's refusal to cooperate in any services may be considered by a workers' compensation judge on the issues of reasonableness and necessity of medical charges or reasonableness, necessity, or appropriateness of medical treatment.

~~[(5) The WCA or its contractor, if any, shall provide worker's employer, legal representative, insurer, or third party administrator a copy of written reports upon written request.]~~

(5) The contractor shall avoid conflicts of interest or the appearance of impropriety when performing case management services and utilization review.

(6) Nothing in these rules prohibits an employer from establishing their own system

of case management or utilization review at the employer's expense as provided in Section 52-4-3 NMSA 1978.

B. Inpatient admission review

(1) For every inpatient admission the following information shall be provided to the WCA or its contractor at least ~~[forty eight (48)] 48~~ hours prior to the admission or before the close of the next business day after any emergency admission:

- (a) worker's/patient's name;
- (b) worker's/patient's social security number;
- (c) worker's/patient's employer;
- (d) employer's insurance carrier or third party administrator and a statement of whether they have authorized the admission;
- (e) date of injury/onset of symptoms;
- (f) admitting diagnosis, including primary, secondary, and tertiary, if any;
- (g) planned treatment(s) and procedures;
- (h) planned date of admission; and
- (i) proposed length of stay.

(2) For planned or elective hospital admissions any practitioner ordering the admission of a worker for evaluation or treatment of their injury or occupational disease disablement shall report the admission to the WCA.

(3) For emergency hospital admissions, the hospital shall report the admission to the WCA.

(4) Any practitioner or hospital discharge planner ordering or arranging a transfer of a worker to another facility shall report to the WCA at least ~~[twenty four (24)] 24~~ hours prior to any transfer all of the information ~~[in] as is~~ required by Paragraph (1) of

Subsection B of 11.4.7.12 NMAC.

(5) Throughout the period of time in which inpatient services are being provided, the WCA shall monitor the worker's treatment regime, including treatments, procedures, and length of stay.

(6) If a hospital or practitioner reports that an employer's insurance carrier or third party administrator has not authorized the admission, the WCA shall issue a recommendation concerning the medical necessity and appropriateness of the admission service and the assigned length of stay before the close of the next business day after the report is submitted to the WCA.

C. Case management and ~~[peer review]~~ utilization review:

~~(1) [Any party may refer a case to the WCA for case management or peer review. The WCA in its sole discretion will assign cases to its contractor for case management or peer review, as provided by the contract in effect.~~

~~(2) Upon assignment of a case by the WCA for case management, the contractor shall notify the worker, his/her legal representative, employer, insurer, or third party administrator of the selection.~~

~~(3) The contractor shall have the right to contact the worker, insurer, third party administrator, legal representative, and all practitioners involved in the case.~~

~~(4) The contractor shall give reasonable notice and an opportunity to the worker or his or her representative to be present during contacts by a case manager with the insurer, third party administrator, legal representative(s), and practitioners.~~

~~(5) Any party who objects to the WCA referring a case for case management shall notify the WCA of its objection by filing an application to the director not later than thirty (30) days of receiving notice of the assignment from the contractor or the medical cost containment bureau.] Referral~~

process:

(a) Any party may refer a claim to the WCA for case management or utilization review by the WCA or its contractor, if any, by submitting the appropriate form to the WCA medical cost containment bureau. The form is located on the agency website.

(b) A WCA judge may refer a claim for case management or utilization review by submitting a written referral to the medical cost containment bureau and with a copy placed in the court file.

(c) Within 20 days of receiving a referral and all supporting documentation, the medical cost containment bureau shall notify the parties and the judge, if any, of its decision either accepting or denying the referral. The medical cost containment bureau may assign approved cases to the WCA's contractor.

(d) Any party who objects to the decision of the medical cost containment bureau shall notify the WCA of its objection by filing an application to the director not later than 15 days from service of the decision.

(2) Case Management

(a) The WCA will consider the following factors when determining eligibility of a case referred for case management:

(i) severe or complex injury including total loss of limb/amputation, severe injury to multiple body parts or limbs, severe burns over a large part of body, traumatic brain injury, spinal cord injury, reflex sympathetic dystrophy/ complex region pain syndrome;

(ii) language barrier, including hearing impairment;

(iii) a record or pattern of non-compliance with prescribed treatment, care plan or medical appointments;

(iv) multiple health care providers, including providers of different disciplines, requiring coordination between them;

(v) inpatient admission lasting longer than five days or multiple admissions or emergency room visits;

(vi) failure to reach maximum medical improvement after one year from the date of injury;

(vii) psychological issues that complicate provision of services; and

(viii) any other reasonable criteria as approved by the director.

(b) The WCA will monitor case management services to ensure progress pursuant to Section 52-4-3 NMSA 1978. The WCA may terminate or reassign services as it deems appropriate with notice to the parties.

(c) The contractor shall have the right to contact the worker, insurer, third party administrator, legal representatives, and all HCPs involved in the case. The contractor shall give reasonable notice and an opportunity to the worker or his or her representative to be present during, or to participate in, any and all contacts by the case manager.

(d) The contractor providing case management services may help coordinate services by bringing treatment options or return to work opportunities to the attention of the health care provider.

(e) The contractor shall provide status reports to the WCA as directed, with copies to the parties identified in the initial assignment.

(3) Utilization review

(a) Utilization review shall consider only the medical reasonableness, clinical necessity, efficiency and quality of the treatment under review.

(b) Utilization review shall not include issues of compensability, including:

(i) the causal relationship between the treatment under review and the

worker's work-related injury;

(ii) whether the worker is disabled; and

(iii) whether the worker is at maximum medical improvement.

(c) If the medical cost containment bureau or its contractor requests additional information, the parties shall provide the requested information within 15 days. The WCA shall issue its utilization review decision within 60 days of receiving all necessary documentation.

(d) The WCA in its sole discretion may assign a claim to its contractor for peer review. Peer review shall only be conducted by a licensed healthcare provider who is in a similar field or equivalent discipline as the provider whose service is being reviewed. Peer review shall be independent and the physician or health care provider should not have prior involvement in the worker's care or treatment.

(e) The medical cost containment bureau shall communicate the utilization review findings in writing with a copy to all parties. The WCA may adopt the findings of its contractor after utilization review.

(f) Any party who objects to the utilization review findings shall file an application to director within 15 days from service of the utilization review findings. If an application is not filed within 15 days, the utilization review findings shall become binding on the parties.

(g) The director may set a utilization review matter for hearing. An order issued by the director after hearing or receipt of an application to director is final and binding on the parties. [11.4.7.12 NMAC - Rp, 11.4.7.14 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

11.4.7.13 NON-CLINICAL SERVICES

A. A practitioner may charge up to one dollar (\$1.00) per page for the first ~~ten~~ 10 pages

and up to twenty cents (\$0.20) for each page thereafter for copying medical records and reports, except as provided in Paragraphs (10), (11), (12) and (13) of Subsection C of 11.4.7.8 NMAC. This fee is inclusive of any and all fees, including, but not limited to, administrative, processing, and handling fee of any kind.

B. A practitioner may charge for the completion of the form letter to health care provider the amount set forth in the fee schedule.

C. Depositions
 (1) An HCP may not charge more than four hundred dollars (\$400) for the first hour or any portion thereof; and not more than three hundred sixty dollars per hour (\$360/hour) for the second and subsequent hours, prorated in five [(5)] minute increments. An HCP may not charge more than two hundred dollars (\$200) for the first hour of deposition preparation time actually spent, and not more than one hundred and twenty dollars (\$120) per hour for the second or third hours, prorated in five [(5)] minute increments, up to a maximum of three [(3)] hours.

(2) No compensation shall be paid for travel time to or from the deposition, waiting time prior to the scheduled beginning of the deposition, or time spent reading or correcting depositions. For good cause shown, a judge may enter a written order providing recompense to an HCP for reading and correcting a deposition.

(3) An HCP may require that they be paid for the first hour of the deposition testimony either before or at the time of the deposition.

(4) A non-refundable fee of up to four hundred dollars (\$400) may be charged by an HCP for deposition appointments at which the attorney making the appointment is a no-show or fails to cancel at least [forty-eight (48)] 48 hours in advance.

(5) Any notice of deposition to a practitioner shall contain the following language: "The rules of the WCA provide a schedule

of maximum permissible fees for deposition testimony. No more than \$400 for the first hour and \$360 for each subsequent hour is permitted. Fees for the second and subsequent hours shall be prorated in five [(5)] minute increments. An HCP may not charge more than \$200 for the first hour of deposition preparation time actually spent, and not more than \$120 for the second or third hours, prorated in five [(5)] minute increments, up to a maximum of three [(3)] hours."

D. Live testimony by a health care provider: Such testimony is allowed only pursuant to an order by a judge. Fees for live testimony, travel, lodging, and preparation time shall be set by the judge.

E. Disputes concerning the non-clinical fee schedule shall be raised with the assigned judge, if any, or pursuant to the medical billing dispute process set forth in 11.4.7.11 NMAC.

[11.4.7.13 NMAC - Rp, 11.4.7.15 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

11.4.7.15 DATA ACQUISITION:

A. The insurer must report an inpatient hospital bill to the WCA within [ten (10) to ninety (90)] 10 to 90 days of payment of the bill. Reports may be submitted by mail, fax, or electronic media in batches daily, weekly, or monthly from the insurer or insurer's representative.

B. The paid inpatient services data shall be submitted in a format acceptable to the WCA. The economic research bureau shall distribute a specific set of instructions for the submission of required data. If the required paid inpatient services data is not received from payer as stated under Subsection A of this section, the economic research bureau may petition for a hearing before the WCA director [or his designee] and seek penalties pursuant to [NMSA-1978, Section 52-1-61] Section 52-1-61 NMSA 1978.

[11.4.7.15 NMAC - Rp, 11.4.7.17 NMAC, 12-31-13; A, 10-1-15; A, 9-30-16]

WORKERS' COMPENSATION ADMINISTRATION

This is an amendment to 11.4.8 NMAC, Sections 8 and 9, effective September 30, 2016.

11.4.8.8: INDIVIDUAL SELF-INSURANCE:

A. An employer seeking to be certified as a self-insurer under the Act shall make application on a form prescribed by the director.

B. The director shall notify the chairman of the guarantee board of the identity of any applicant for self-insurance within [fifteen (15)] 15 days of the receipt of the application. The guarantee board shall respond in writing to the director within [thirty (30)] 30 days of receipt of the notification or be deemed to have expressed no objection to the applicant's membership in the commission. The administration's self-insurance audit staff shall take any written objections into account when making its final recommendation to the director.

C. The director may decline to approve an application for self-insurance if not satisfied that the employer will be able to meet all its obligations under the Act and these rules.

D. Eligibility: Applicants for self-insurance must demonstrate the following base eligibility criteria, each of which must be continuously maintained during the period of self-insurance to maintain eligibility:

(1) a current tangible net worth of at least two million, five hundred thousand dollars (\$2,500,000);

(2) the employer has been in business for a period of not less than three [(3)] years. This requirement may be waived by the director under circumstances where the form of business organization has changed within the three [(3)] year period but the management and function of

the business entity has substantially stayed the same;

(3) a strong trend of financial health and financial solvency;

(4) an acceptable risk management program;

(5) workers' compensation specific excess insurance from an approved excess insurer with retention of two hundred fifty thousand dollars (\$250,000) or less per occurrence and statutory upper limits; an acceptable policy of excess insurance shall provide coverage for all provisions of the Act, contain no exclusion of such coverage, and include a current New Mexico amendatory endorsement;

(6) an approved security issued in favor of the New Mexico self-insurers' guarantee fund;

(7) a bona fide employment relationship exists between the employer and the employees which it proposes to self-insure; employees who receive wages from or are under the control of any other entity with respect to the day to day supervision and assignment of the work may not come under an individual self-insurance program; employee leasing companies are prohibited from receiving a certificate of self-insurance;

(8) if the employer is a subsidiary, a parental guarantee from the subsidiary's uppermost parent in a form acceptable to the director; a parent company may self-insure its subsidiaries under one certificate in the name of the parent provided the parent meets all eligibility criteria and provides parental guarantees for the subsidiaries and guarantees by each subsidiary for the other(s); and

(9) any other reasonable criteria deemed necessary by the director to guarantee payment of workers' compensation claims to injured workers.

E. Application:
The employer's application for certificate of self-insurance shall be accompanied by documentation sufficient to demonstrate eligibility,

including the following:

- (1) a one hundred fifty dollar (\$150) non-refundable filing fee made out to the workers' compensation administration;
- (2) proof of valid workers' compensation insurance in force for the three years preceding the date of application and continuing in force up to the approved date of self-insurance;
- (3) employer's audited financial statements for the most recent fiscal year, presented in accordance with generally accepted accounting principles (GAAP), and financial statements for the preceding two years;
- (4) if the employer is a corporation, proof of a resolution adopted by employer's board of directors authorizing and directing the corporation to undertake to self-insure its risks and to comply with the provisions of the Act and the rules of the director; a similar official ratification is required from the governing body of any governmental entity;
- (5) a detailed accounting of the employer's workers' compensation loss history for the last three [~~3~~] years, and experience modifiers for the same period, which shall include all claims covered under a claims "buy-back" program and deductible programs;
- (6) an explanation of the safety program, a copy of the safety manual, and resumes of all personnel responsible for the New Mexico safety program;
- (7) proof of a proposed policy for workers' compensation excess insurance that complies with the eligibility requirements set forth in this rule, including the declaration page of such policy and all endorsements providing or limiting coverage in New Mexico.
- (8) a letter of intent from an approved surety to issue an approved security in an amount and form to be specified by the director, but not less than two hundred thousand dollars (\$200,000); and

(9) proof of compliance with Section 52-1-6.2 NMSA 1978 for the most recent year.

F. Certification.

(1) The director shall act upon a completed application for a certificate of self-insurance within [~~ninety (90)~~] 90 days.

(2) Upon approval, the director shall issue a certificate acknowledging the employer's status as a self-insured under the act; the certificate shall be effective continuously until terminated at the request of the self-insured or revoked by the director.

(3) Upon a merger or other combination by two self-insured employers, the employers may continue to be self-insured under one certificate provided that the administration is given adequate disclosure, and guarantees and subject to the approval of the director.

(4) The director may issue a provisional certificate, good for not more than one [~~+~~] year, to a self-insurer if the director is convinced that any defects are minor in nature and can be corrected within the one [~~+~~] year period.

G. Continuing eligibility requirements: Following certification by the director, a self-insured employer shall:

(1) notify the director prior to liquidation, sale, or transfer of ownership and prior to any material change in the employer's financial condition or in New Mexico operations;

(2) obtain the director's approval prior to making any material change in any excess insurance policy or approved security;

(3) notify the director prior to any change in the provider or scope of risk management program;

(4) have at least one [~~+~~] claims representative licensed and located within New Mexico to pay workers' compensation claims of claimants residing or located in New Mexico, and to ensure that all adjusters and third party

administrators are licensed in New Mexico, regardless of their physical location, and to promptly pay all claims from accounts in financial institutions located within New Mexico;

(5) be subject to sanctions for any act or omission by its agents;

(6) provide proof of coverage for excess insurance policies within 30 days of effective date or renewal and to provide the complete policy within [sixty (60)] 60 days of effective date or renewal; unauthorized changes appearing in any policy will require immediate remediation by way of reinstatement of approved terms or other measures deemed appropriate by the director; and

(7) comply with all conditions required as stated in the employer's self-insurance certificate.

H. Financial responsibility and payment of claims:

(1) The employer shall pay claims for which it becomes obligated in accordance with the act and these rules.

(2) The payment of claims shall continue without regard to the self-insurance status of the employer and without regard to any amount of security posted, whether or not the security is called. An approved security shall be maintained until all claims have expired, subject to determination of the director.

(3) The employer shall maintain a level of reserves at the full undiscounted value of each claim, including indemnity and medical only claims, sufficient to pay all claims and associated expenses.

(4) The employer shall promptly pay guarantee fund assessments, provide documentation supporting assessment calculations, and maintain in good standing membership in the guarantee fund.

(5) The employer shall report loss runs, regardless of type or cost, to

the administration in the format prescribed by the director on a semi-annual basis not later than January 31 and July 31 of each year.

(6) Failure to maintain minimum financial criteria and an approved risk management program may result in increased security requirements, termination of self-insurance status, or any other measure deemed necessary by the director for the protection of benefits of injured workers and the guarantee fund.

(7) Upon voluntary or involuntary termination of employer's self-insurance status, the employer shall:

(a) provide any information requested by the director for the purpose of establishing claims liability and financial condition;

(b) comply with any requirement by the director to increase security;

(c) make claims files available to the director for the performance of any audit, examination or review, or for administration of claims in the event of a default;

(d) notify the administration of any changes in address/location, pertinent personnel, claims administration services, location of claims files and related claims personnel, and financial condition; and

(e) promptly notify the director of the employer's current ownership, organizational structure and the employer's ability to pay workers' compensation obligations;

(8) All government entities must have a pre-funded system. All past, present, and future liabilities existing at any time shall be fully accounted for by liquid assets or other assets agreeable to the director. No government entity shall be required to post security.

(9) A self-insurer shall maintain compliance with the requirements of Workers' Compensation Act, WCA rules and the conditions set forth in its

certificate of self-insurance.

I. Audits and examinations:

(1) An applicant or self-insured employer is subject to initial or periodic examination or audit by the administration to determine initial or continued eligibility for self-insurance. The applicant or self-insured agrees to bear the costs of any reviews or evaluations and to provide a reasonably private space to conduct the audit and all records required for such audits and examinations.

(2) Audits or examinations under these rules may include, but are not limited to:

(a) audits or reviews of the applicant's or self-insured's records regarding any representation made on its financial statement or application for self-insurance;

(b) audits or reviews of the applicant's or self-insured's records pertaining to its loss history, claims administration, reserves and claimant files;

(c) audits or reviews of safety programs;

(d) interviewing or taking the testimony of the applicant or self-insured, or any of its agents or employees, regarding any matter pertaining to the obligations of the applicant or self-insured under the act or the director's rules; and

(e) audits or examinations the director deems necessary to ensure a self-insured's continued compliance with these rules.

(3) An applicant or self-insured employer shall cooperate fully with administration representatives in any examination or audit and to attempt in good faith to resolve any issues raised in those examinations or audits.

(4) A self-insured employer shall provide its annual audited financial statements to the administration within 90 days of the end of each fiscal year.

J. Denials, revocation and probationary certificates:

(1) The denial, revocation, or probation of a certificate of self-insurance shall be made by an order signed by the director. Every such order shall state its effective date and shall concisely state what is ordered, the grounds on which the order is based, and the provisions of the act or rules pursuant to which the action is taken.

(2) The director shall deny an application for self-insurance if the employer has failed to demonstrate to the director's satisfaction that the employer meets all requirements of the Act and these rules or has failed to demonstrate its ability to meet all its obligations under the act.

(3) A certificate of self-insurance may be revoked or placed on probationary status if the director, with good cause, ceases to be satisfied that the employer is able to meet all its obligations under the act and these rules. The occurrence of any of the following events shall constitute good cause to revoke or place on probationary status a certificate of self-insurance:

(a) failure of the employer to comply with any provisions or requirements of the act, these rules, or any lawful order or communication of the director;

(b) failure of the approved surety to remain financially solvent, or any other impairment of any aspect of the employer's financial responsibility requirements;

(c) failure to comply with any other statutes, laws, rules, or regulations of the state of New Mexico;

(d) failure to cooperate with the administration to mitigate adverse consequences for injured workers caused by the employer filing for protection under the federal bankruptcy laws; or

(e) failure to maintain membership in the New Mexico self-insurers' guarantee fund commission in good standing.

(4) An employer that has been decertified or placed on probation must still comply with the financial responsibilities set forth in these rules and the following additional requirements:

(a) The security amount set after decertification shall account for both known claims and associated expenses, as well as claims incurred but not reported (IBNR) and associated expenses.

(b) If the employer is subject to Section 52-1-6 NMSA 1978, proof of coverage must be provided.

(c) No adjustments to the security will be allowed for three years from the date of the decertification. If after three years, the director has determined that adequate time has passed to reasonably determine the expected long-term liabilities and that there is no risk to benefits of injured workers or the guarantee fund, reduction in security may be approved. At that time, the director may, in his discretion, reduce or return some or all of the security.

(5) Probationary certifications:

(a) A probationary certificate means the temporary revocation of the self-insured's existing self-insurance certificate.

(b) Failure to comply with the Act or these rules may result in the issuance of a probationary certificate of individual self-insurance.

(c) During a probationary period, the employer must comply with all terms specified as conditions of probation within the probationary certificate or in any other lawful order of the director.

(d) The duration of the probationary period shall be within the director's discretion, but shall not extend for a period greater than one year.

(e) The probationary certificate may be withdrawn and the original

certificate of self-insurance reinstated, if the self-insured comes into full compliance with the Act, these rules, and all probationary conditions. The reinstatement of the original certificate is subject to the sole discretion of the director.

(f) If the self-insured fails to come into compliance with the Act and the rules by the end of the probationary period, the self-insured's status as a self-insured will be revoked.

K. Recertification:

(1) Any employer formerly certified as a self-insurer who ceases to be certified may not apply for recertification until three [~~3~~] years after revocation.

(2) An employer who seeks to reinstate its certificate of self-insurance shall reapply to the director on the form prescribed pursuant to these rules. A non-refundable filing fee of one hundred fifty dollars (\$150) must accompany the application for recertification.

(3) If there is a change of ownership whereby the controlling interest of a self-insured changes, the new ownership shall submit a new application to the director for a certificate of self-insurance. A non-refundable filing fee of one hundred fifty dollars (\$150) must accompany the new application.

L. Hearings: Any person aggrieved by a decision of the director under these rules may request in writing a hearing before the director. The request shall briefly state the respects in which the party is aggrieved, the relief sought, and the grounds relied upon as the basis of relief.

M. Penalty: In addition to any other sanctions provided herein, failure to comply with any of the provisions of the Act or these rules renders the applicant or self-insured employer subject to penalties as provided in Section 52-1-61 NMSA 1978.

N. Waiver: Any requirement contained in these rules may be waived by specific written authorization of the director. Any

interested person may request such a variance or waiver in writing. [11.4.8.8 NMAC - Rp, 11.4.8.8 NMAC, 10/1/15; A, 9/30/16]

11.4.8.9 SELF-INSURERS' GUARANTEE FUND:

A. Commission membership is composed of all self-insurers as defined in Section 52-8-3(J) NMSA 1978, as a condition of their authority to individually self-insure in the state of New Mexico.

B. Withdrawal of membership:

(1) A member shall be automatically withdrawn from the commission upon the termination of its self-insurance certificate and payment of all assessments due to the date of such termination.

(2) Notwithstanding the termination of membership of a self-insured for whatever reason, that self-insured shall remain liable to the commission for any assessments imposed and based upon insolvencies occurring while the terminated self-insured was a member of the commission.

C. Board of directors:

(1) A board of directors shall be appointed pursuant to Section 52-8-5 NMSA 1978. Every member of the board of directors shall currently be a representative of a commission member in good standing. The board may adopt by-laws governing the functioning of the commission including the filling of vacancies on the board, removal of board members and conflicts of interest. The board of directors shall elect a chairperson, who shall also be president of the corporation, and a vice-chairman, who shall also be vice president of the corporation. The director shall be the secretary/ treasurer of the corporation.

(2) The commission shall maintain such financial records as are necessary to properly reflect assessments, receipts and disbursements (including paid claims) of all funds of the commission. Such records shall also reflect the financial condition

of the commission at all times. The commission shall make available its financial records to the administration when so requested.

(3) The commission shall make all necessary records available to an independent auditor to facilitate audits of the commission.

(4) All board members, and such other personnel as may be employed by the board, shall be bonded in an amount determined by the board to be adequate to protect the interests of the commission.

~~(5) [All board members, and such other personnel as may be employed by the board, shall be insured against errors and omissions in an amount determined by the board to be adequate to protect the persons insured and the interests of the commission.~~

~~(6)~~ The board may open one or more insured accounts in any number of state or federally chartered financial institutions located in the state of New Mexico, in order to conduct commission business. Reasonable delegation of deposit and withdrawal authority in such accounts may be made, consistent with prudent fiscal policy, but, except as is expressly provided herein, the withdrawal of commission funds shall require the signatures of any two members of the board.

D. Powers and duties of the commission:

(1) The commission, through its board of directors, shall have the power to:

(a) sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person;

(b) adopt and use a common corporate seal and alter the same; provided, however, that such seal shall always contain the words "not for profit corporation";

(c) elect or appoint such officers and agents as its officers shall require and allow them reasonable compensation;

(d) make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, other obligations and secure any of its obligations by mortgage and pledge of any or all of its property, franchises or income;

(e) purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real and personal property, or any interest therein, wherever situated;

(f) have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized;

(g) purchase reinsurance or excess insurance as is determined by the board of directors to be necessary to effectuate the purposes and intent of Paragraph (A) of Section 52-8-6 NMSA 1978;

(h) review all applicants for membership in the commission and make recommendations to the director concerning the appropriateness of inclusion in, or termination from, membership in the commission with respect to any applicant or member;

(i) provide for imposition of assessments upon members to insure the financial stability of the fund as provided in Paragraph (A) of Section 52-8-6 NMSA 1978; and

(j) request, upon a majority vote of the board, that the administration determine the condition of any member of the commission which the board in good faith believes may no longer be qualified to be a member of the commission; within ~~[thirty (30)]~~ 30 days of receipt of such request or for good cause shown, the administration shall make such determination and shall advise the board of its findings; each request for a determination shall be kept on file by the administration and it shall not be open to public inspection pursuant

to Section 52-5-21 NMSA 1978.

(2) The commission through its board of directors shall have the following duties:

(a) The commission shall incorporate as a not-for-profit corporation under the laws of New Mexico and shall maintain its corporate status in good standing.

(b) The commission shall be deemed to stand in the place of an insolvent employer to the extent of its obligations on covered claims and, to such extent, shall have all rights, duties and obligations of the insolvent employer as if the employer had not become insolvent.

(c) As to any insolvency proceeding, the commission shall periodically file with the receiver or liquidator of the insolvent member statements of the covered claims paid by the commission and estimates of anticipated claims on the commission. Such filing shall preserve the rights of the commission against the assets of the insolvent member.

(d) To maintain an insolvency fund to meet the obligations of insolvent members, pursuant to Section 52-8-7 NMSA 1978.

(e) At the conclusion of any member insolvency in which the commission was obligated to pay covered claims, prepare a report on the history and cause of such insolvency, based on information available to the commission and submit such report to the administration.

(f) Not later than ~~March 30~~ May 31st each year, submit a financial report for the preceding calendar year in a form approved by the director.

E. Procedure for handling claims:

(1) The commission shall accept for processing all claims against insolvent members which are made by the injured party or their representative.

(2) The

commission shall be obligated to pay benefits to injured workers to the same extent as the insolvent member and shall be added as a party in any complaint for benefits or complaints for reduction or termination of benefits filed with respect to the insolvent employer.

(3) The commission may employ persons to process covered claims, giving them reasonable authority to process claims. Any processing of claims in excess of that authority shall be subject to prior approval by the board, or a claims committee established by the board for that purpose.

(4) The commission shall use every reasonable means to expedite the handling of covered claims submitted by the injured worker or representative, and may adopt a protocol for the handling of those claims.

F. Assessments:
Determination and payment of assessment:

(1) Each member shall be given not less than ~~thirty (30)~~ 30 days' notice of the date that an assessment is due and payable.

(2) The assessment notice shall advise the member to remit the assessment payable to the commission. Upon receipt of the assessments, the commission shall deposit said funds in the commission's accounts and shall use them for the purposes stated in the Self-Insurers' Guarantee Fund Act.

(3) The commission shall immediately notify the director if a member fails to pay an assessment when due. The director may penalize the member or revoke its authority to self-insure pursuant to Section 52-1-61 NMSA 1978, and these rules.

(4) The board shall enforce its right to collect any assessment remaining unpaid ~~sixty (60)~~ 60 days after it shall have become due by appropriate action at law or in equity against the non-paying member.

(5) For purposes of calculating assessments, the self-insured may deduct any subrogation recovery in such amounts as are recovered in the same assessment year as they are paid.

(6) If two ~~[(2)]~~ or more self-insureds combine certificates, the fund balance for the combined entity shall be combined.

(7) Assessments paid by a parent on behalf of a subsidiary which has its own certificate shall be allocated to the subsidiary.

[11.4.8.9 NMAC - Rp, 11.4.8.9 NMAC, 10/1/15; A, 9/30/16]

END OF ADOPTED RULES

This Page Intentionally Left Blank

Other Material Related To Administrative Law

WORKERS' COMPENSATION ADMINISTRATION

RESPONSE TO PUBLIC COMMENT ON PROPOSED RULEMAKING

Proposed changes to Parts 2, 4, 7, 8, and 11 of the Workers' Compensation Administration ("WCA") Rules were released for public comment on July 26, 2016. The initial public comment period was from July 26, 2016 through August 25, 2016. In addition to written comments, the WCA accepted oral comment at a public hearing on August 11, 2016.

The undersigned appreciates all of those who took the time to submit comments regarding the proposed amendments.

PART 2

COMMENTS were received in response to changes proposed at 11.4.2.8 NMAC, which governs data collection and electronic filing. Commenters expressed concern that 10 days for claims administrators to correct rejected electronic transmissions (TR) was too short a time frame to allow compliance, especially if "10 days" means ten calendar days.

Commenters also requested clarification of changes proposed at 11.4.2.8(A)(7)(f), (B)(2), (B)(3), and (C). Regarding electronic filings, commenters said the language proposed at (A)(7)(f) was confusing and wondered if the provision would require filers to acknowledge the WCA's acknowledgement of the electronic transmission submitted to the WCA. Regarding first report of injury filings (FROI) at 11.4.2.8(B)(2) and (B)(3), a commenter inquired whether the WCA would no longer require employers to submit FROIs. This commenter also questioned the public policy of requiring the claims administrator to give a copy of the

FROI at the time of electronic filing to the worker and employer when the employer has the initial responsibility to give notice to their insurance carrier.

Regarding notice of benefit payment filings (SROI) at 11.4.2.8(C), several commenters requested clarification on the proposed changes. In particular, commenters questioned whether SROI was required when a claim was "reopened" but no payment was made on the claim. Commenters also requested the WCA clarify whether it would no longer require SROI when a change in benefits occurs, as well as direction on how to file and code SROIs for funeral expenses and attorney fees. Commenters also noted that requiring a closing report on medical only claims would automatically generate a transmission rejected code because a FROI is not required on medical only claims under the current electronic data interchange (EDI) guidelines. One commenter requested the WCA require a report when a worker's return to work status changes so that the worker's entitlement to unemployment insurance benefits can be determined. In addition to clarification, commenters noted insurers and claims administrators would need additional time to reprogram electronic filing systems to comply with the new SROI filing requirements.

Comments were also received in response to changes proposed at 11.4.2.9 NMAC, which governs employers' safety inspections. One commenter suggested the proposed definition of "business day" be clarified throughout Part 2 of WCA regulations. Another commenter expressed concern that 30 days to provide proof of a safety inspection on a new policy may be insufficient to allow compliance. Another commenter requested clarification of what would constitute "proof of inspection" and how the rule would work for self-insured employers. This commenter pointed out that

most self-insured employers, groups, and associations generally renew policies on January 1 of each year and questioned whether the WCA intended to receive all self-insured employers' submissions at one time. The commenter also suggested the rule permit inspections by a "safety organization" or "safety professional".

One commenter opposed the proposed amendments. This commenter viewed the proposed rules as impractical, difficult to enforce, and anti-business. This commenter stated the affidavit approach to safety inspections had been tried in the past and was not successful. This commenter expressed concern that allowing employers to submit affidavits without adequate WCA staffing and a mechanism to enforce the requirement would incentivize employers to submit fraudulent or false affidavits. In lieu of affidavits, this commenter suggested the WCA follow OSHA's approach of requiring employers to submit proof of inspection upon request.

RESPONSE to comments received on 11.4.2.8 and 11.4.2.9:

Section 52-1-58 of the Worker's Compensation Act requires the employer to provide the worker with a copy of the first report of injury filed with the WCA. WCA regulation, 11.4.1.7(I), defines "employer" under the Act as including the employer's agents, such as claims administrator. For insured employers and self-insured employers, FROI is electronically submitted by the employer's claims administrators. Revisions requiring claims administrators to provide a copy of the FROI at the time of electronic submission to the worker and the employer simply reflects that reality.

Based on comments received, rejected transmissions (TR) codes must be corrected within 30 days, rather than 10 days. Rule 11.4.2.8(A)(7)(f) will be revised as follows: "Receipts of all

TA, TE, and TR transmissions will be returned electronically.”

Based on comments, requests for clarification, and additional time needed to implement changes in SROI filing, the WCA withdraws its proposal to amend SROI filing requirements at this time. The WCA will continue exploring alternative language to make data collection rules simple and easier to understand so that compliance, which is currently quite poor, will increase. All stakeholders are strongly encouraged to submit recommendations to the WCA’s Economic Research and Policy Bureau. Through collaboration with insurers, self-insured employers, and other stakeholders, the WCA hopes to achieve transparency, accuracy, and increased compliance with electronic filing requirements and to propose rule amendments as soon as possible.

NMSA 1978, Section 52-1-6.2 requires employers with annual policy premiums of \$15,000 or more to conduct annual safety inspections. In recent years the WCA has renewed efforts to enforce this provision of the Act with the goal of increasing safety at New Mexico’s workplaces. Creating and implementing a safe workplace ultimately falls on employers, who under the proposed regulations will be required to submit proof of annual inspection to the WCA Safety Program. The provision requiring proof of annual inspection should be read in conjunction with paragraph 11.4.2.9(A)(5), which requires employers to submit an affidavit identifying all facilities that were included in the annual inspection.

Based on comments received, 11.4.2.9(A)(2) will be revised to allow employers to submit proof of inspection within 60 days from the issuance date of a new or renewal policy. The rule will also be revised to provide that self-insured employers, groups, and associations submit proof of inspection within 60 days of completing the inspection. The WCA

Safety Program has adequate staff and mechanisms to monitor compliance with these regulations, in addition to mechanisms to enforce violations through the WCA’s Enforcement Bureau. 11.4.2.9(A)(4)(c) and (5) will be revised as suggested to allow inspections by safety professionals or safety organizations. The proposed definition of “business days” at 11.4.2.7(B) will be withdrawn and deadlines will be referred to as “days”. Calculation of “days” under Part 2 will follow the method established at 11.4.4.9(B).

PART 4

COMMENTS were received in response to changes proposed at 11.4.4.9(P) and 11.4.4.14 NMAC, which govern withdrawal of counsel and approval of attorney fees and attorney fee liens. One commenter thought amendments proposed at 11.4.4.9(P)(2), which would bar a withdrawing attorney from later seeking attorney fees when the request for fees is not made in the attorney’s motion to withdrawal, was too harsh a consequence and should be left to the discretion of the workers’ compensation judge. This commenter also wondered how the withdrawing attorney would know the case resolved so that they can request fees.

Comments were also received in response to amendments proposed at 11.4.4.9(E), which governs admissibility of evidence in hearings. A representative of an ad hoc group of attorneys and insurance representatives spoke in support of the proposed amendments. While most commenters supported the changes, some commenters expressed concern about the admissibility of certain records. Opponents of the rule commented that preinjury medical records should not be admissible without additional foundation. One commenter thought the workers’ compensation judge could not determine relevancy of the preinjury records without a medical opinion to support the determination. Another

commenter thought allowing preinjury records into evidence would cause disputes over a party’s constitutional right to confront witnesses, especially where the preinjury medical provider would not agree to the deposition fees established by WCA regulations or would otherwise not appear for deposition. One commenter thought only reports of court ordered IMEs should be admissible, or if admissible upon agreement of the parties, that the agreement to an IME should be in writing. This same commenter suggested adding language to clarify that drug and alcohol testing should comply with requirements set by statute before the reports or results could be admissible.

Other commenters expressed concern and requested clarification on the admissibility of non-doctor depositions, as proposed at 11.4.4.9(F)(4). Commenters thought this rule meant a deposition, if noticed for use at trial, would replace live testimony of the deposed witness. Commenters preferred live testimony stating that observing a witness’s demeanor is valuable to determining credibility. One commenter also noted that putting a party in the position of calling an adverse witness would limit the party’s ability to question the witness. Another commenter thought admissibility of depositions should be limited to witness unavailability.

No comments were received in response to changes proposed at 11.4.4.9(D) (limiting pages for fax filing), 11.4.4.9(S) (establishing a process for consolidating cases), 11.4.4.11(A)(7) (matters required to be pled on Application to Director), and 11.4.4.17 (sealing of court records).

RESPONSE to comments received on Part 4 of 11.4:

With regard to attorney withdrawal, fees, and liens, nothing in the Workers’ Compensation Act or WCA rules authorizes a withdrawing attorney to file a notice of lien for attorney fees. Attorneys practicing

before the WCA have historically filed attorney fee liens with the clerk of court after withdrawing from the case and before the case has been fully resolved. In the last year, the WCA received complaints that this practice unfairly affects injured workers' ability to obtain legal representation. Rules at 11.4.4.9(P) and 11.4.4.14 were proposed to promote the transparent resolution of attorney fees by giving withdrawing attorneys an incentive to protect their own interests at the time of seeking to withdraw, without unfairly preventing their client from seeking new legal representation. The rules also promote efficiency by requiring the attorney fee be claimed at the same time that the request for withdrawal is filed, and further clarifying that by not doing, the withdrawing attorney will be barred from later seeking fees. Based on comments received, 11.4.4.14 will be amended to provide that a subsequent attorney seeking attorney fees shall give notice to the withdrawn attorney by providing a copy of relevant pleadings at the time of filing.

Workers' compensation hearings are administrative proceedings intended to be quick and efficient. Changes proposed at 11.4.4.13(E) originated with an ad hoc group of attorneys and insurance representatives who review and evaluate issues affecting the workers' compensation system in New Mexico. The changes were proposed in response to the Court of Appeals' decision in *Valenzuela v. A.S. Horner, Inc.*, 2016-NMCA-031, which held that IME reports were hearsay and not admissible without foundational testimony. After *Valenzuela*, the WCA received complaints that parties were taking more IME doctor deposition than they had in the past and that discovery was becoming cost prohibitive for all parties. The amendments were intended to eliminate technical or foundational hurdles to the admissibility of exhibits routinely offered and relied upon in workers' compensation hearings. The goal is to eliminate unnecessary evidentiary

disputes and simplify the dispute resolution process, while also providing all sides adequate due process.

Nothing about the amendments prevent a party from raising relevancy or other substantive objections to offered evidence. For example, the parties can still argue that preinjury medical records are not relevant unless a treating physician saw them and relied upon them to form an opinion in the worker's case. Additionally, nothing about the amendments prevents a party from arguing that the IME was not agreed to by the parties, as occurred in the case of *Brashar v. Regents of University of California*, 2014-NMCA-068.

Post-accident drug and alcohol tests, when offered to reduce a worker's benefits are subject to foundational requirements set forth in 11.4.3.12(D), which took effect on June 30, 2016. It is not necessary to state twice that such testing must comply with established regulations before being admissible. Toxicology or drug or alcohol testing unrelated to post-accident testing but conducted as part of the worker's treatment course would be considered a medical record of the authorized health care provider, and thus admissible under the proposed rule.

Changes proposed at 11.4.4.13(F) (4) were not intended to supplant live testimony with deposition testimony. Rather, the rule was proposed to give parties flexibility to admit depositions, if noticed for use at trial, rather than taking the court and parties' time presenting live testimony at hearing. The parties are still free to subpoena witnesses to appear for trial, whether deposed or not. If a party subpoenas an adverse witness, the party can seek permission to treat the witness as hostile enabling the party to cross examine the witness. Based on comments, 11.4.4.13(F) will be revised to add a new paragraph that clarifies deposed witnesses may still be subpoenaed for trial.

Having received no comment in response to changes proposed at Sections 11.4.4.9(D), 11.4.4.9(S), 11.4.4.11(A)(7), and 11.4.4.17, the rules will be amended as proposed.

PART 7

COMMENT was received in response to changes proposed at 11.4.7.8(D) (13)-(14) NMAC, which provide timeframes for a health care provider to request reconsideration of a payer's decision on a bill and for a payer to make a decision following a health care provider's request for reconsideration of the payer's decision. One commenter noted the proposed language was unclear in that it did not state the consequences of failing to act within the established time frames. The commenter suggested the WCA adopt language from the California Division of Workers' Compensation rules.

One commenter submitted numerous suggested changes to 11.4.7.12(C), which will govern case management and utilization review. In particular, the commenter proposed revised language the commenter thought was necessary to clarify the case management and utilization review processes. For example, the commenter suggested time frames be adopted for 11.4.7.12(C)(1)(b) (referral process), 11.4.7.12(C)(2)(b) (WCA termination or reassignment of case management services), and 11.4.7.12(C)(3)(c) (WCA decision on utilization review). With regard to 11.4.7.12(C)(1)(b), the commenter thought the proposed rule was unclear and may allow a 20 year old claim to be referred for case management or utilization review. The commenter also thought a 20 day timeframe should be adopted for parties to notify the WCA of an objection to the WCA's decision to accept a referred claim or to file an objection to the WCA's utilization review findings.

This commenter also requested various sections be clarified and, in some instances, proposed alternative language. Specifically, the

commenter requested 11.4.7.12(C)(1) (b) clarify whether the referring party must exhaust administrative remedies before going before a workers' compensation judge and thought clarification would improve efficiency and mitigate delays. The commenter also requested clarification of whether "psychological issues" considered when determining eligibility for assigning case management referred to pre-injury psychological issues or work related psychological conditions. The commenter also requested clarification on how reports from the WCA's contractor would be issued and the comprehensiveness of such reports.

The commenter expressed concern regarding language proposed at 11.4.7.12(C)(2)(c) and suggested the requirement for the WCA's contractor to give notice and an opportunity to the worker to be present for communications with the health care provider be stricken. The commenter thought the proposed rule would increase litigation, diminish the objectiveness of case management services, and limit quick and efficient delivery of medical services to injured workers. Concern was also expressed about language proposed at 11.4.7.12(C)(3)(d), which proposed to limit peer review to review by New Mexico licensed physicians. The commenter noted that some claims may require review by specialists not readily available in New Mexico and proposed extensive revisions the commenter believed would avoid conflicts and assure the integrity of the process.

This same commenter suggested rule 11.4.7.8(D)(3), which adopted a presumption that treatment falling within the Official Disability Guidelines (ODG) is reasonable and necessary, be repealed. This commenter also suggested that rule 11.4.7.9(D), which adopted regulations governing reimbursement of medical cannabis, be repealed.

RESPONSE to comments received on Part 7 of 11.4:

Based on comments received, 11.4.7.8(D)(13)-(14) will be amended to clarify the consequences to health care providers and payers who fail to act within the established timeframes. Under the proposed rules, a party to a billing dispute can request reconsideration from the other party to the billing dispute, in addition to seeking a director's determination on the billing dispute. The rule clarifies that when a health care provider and payer try to resolve a billing dispute outside of the director's process, each needs to respond to the other within 30 days. Based on comments, the rule will be revised to clarify that a health care provider who fails to request reconsideration of a payer's decision on a bill within 30 days, or fails to seek a director's determination, is deemed to have accepted the payer's decision. Further, the rule will be revised to clarify that a payer who fails to respond to a request for reconsideration within 30 days, or fails to seek a director's determination, will be deemed to have accepted the health care provider's position as stated in the provider's request for reconsideration.

NMSA 1978, Sections 52-4-2 and 52-4-3 require the director to establish systems for utilization review of recommended medical treatment, including peer review, and case management services to coordinate medical care provided to injured workers. WCA case management and utilization review is separate and distinct from systems established by employers. The appropriateness of case management or utilization review on a given claim has many variables. Case management and utilization review rules need to be broad in order to capture the many claims' circumstances that might warrant WCA assistance. In that regard, it is difficult to establish exact parameters or define timeframes for each of the various steps involved in the services. Case management or utilization review can happen at the beginning of, or late in the life of, a claim. For example, case management or utilization review may be appropriate

for an injured worker who has been prescribed opioids for an extended period of time, whether six months or 20 years. Similarly, reporting requirements of the contractor by the WCA also need to be flexible and will often vary depending on the issues involved in the referred claim.

When a party refers a claim for case management or utilization review, the WCA presumes the claim is referred because the medical issue or dispute is current. The parties need not exhaust the director's administrative remedies through case management or utilization review processes prior to bringing a medical dispute before a workers' compensation judge. Case management and utilization are intended to provide binding, alternative means to quickly and efficiently facilitate provision of medical services to an injured worker. The alternative process is intended to resolve, at an administrative level, the reasonableness and necessity of recommended medical treatment, without the need for costly, lengthy litigation before a worker's compensation judge. Parties referring a claim for case management or utilization review should note that such services are not intended to be a second bite at the apple for a party who disagrees with the decision of a workers' compensation judge.

Based on comments received, 11.4.7.12(C)(1)(c) will be revised to allow parties 15 days to file an Application to Director objecting to the WCA's decision to accept or assign a claim for case management or utilization review services. Extending the time frame past 15 days is counterproductive to the goal of rendering quick and efficient decisions on the reasonableness and necessity of medical care through the director's processes. A 15 day time frame is also consistent with the timeframe to object to the WCA's utilization review findings, as well as the deadline to respond to an Application for IME. Comments that the WCA set a time frame in which it should issue a decision on a

claim referred for utilization review were well taken. 11.4.7.12(C)(3) (c) will be revised to provide that the WCA will issue its utilization review decision within 60 days of receiving all necessary documentation.

Based on comments, 11.4.7.12(C)(2)(a) will be amended to clarify that “psychological conditions” considered as a factor in assigning case management include any “psychological issues that complicates provision of services.” Finally, 11.4.7.12(C)(3)(d) will be revised to strike the restriction that only physicians licensed in New Mexico may conduct peer review, which is a subset of utilization review.

Regulations concerning adoption of the Official Disability Guidelines (ODG) and governing reimbursement of medical cannabis were not proposed for amendment. No changes will be made to either rule.

PART 8

No comments were received in response to changes proposed to 11.4.8.9(C)(5) and 11.4.8.9(D)(2) (f) NMAC. The rule will adopted as proposed.

PART 11

COMMENT was received in response to proposed changes to 11.4.11.8 NMAC, which governs proof of coverage filings. The commenter recommended revisions to clarify proposed language because affirmative election forms are neither filed with the National Council on Compensation Insurance (NCCI) nor attached to the policy issued to the employer. The commenter recommended 11.4.11.8(D) be revised as follows: “Affirmative election forms shall be deemed filed with the director pursuant to Section 52-1-7 NMSA 1978 by filing the form with the insurance carrier that is issuing or will be issuing the workers’ compensation insurance policy to the employer.”

RESPONSE to comment received on 11.4.11.8(D): The proposed language was intended to eliminate filing with the WCA of affirmative election forms for executive employees. The filing of such forms is permissible, but not required, under Section 52-1-7. An executive employee’s option to elect to be excluded from the policy issued to the employer is nothing more than a contractual agreement between the employer obtaining the policy and the carrier issuing the policy. The carrier should maintain the election form as part of its file, thus making a separate filing with the WCA unnecessary. Data basing and filing of the election forms is an inefficient use of WCA resources, especially where the WCA is not called upon to produce the form as part of a disputed claims. The suggested amendment will be adopted for clarity. Additionally, the rule adopted will clarify that affirmative election forms only refers to affirmative election forms of the executive employees. Sole proprietors, as defined in Section 52-1-7(F)(2), engaged in activities required to be licensed under the Construction Industries Act should still file affirmative election forms with the WCA Employer Compliance Bureau.

Publication in the New Mexico Register

These rules will be adopted pursuant to NMSA 1978, Section 52-5-4. In addition to the proposed amendments, Part 11 is not currently in the numbered and styled format required by New Mexico State Records’ rules on the New Mexico Administrative Code. In order to comply with directives from State Records Department Archives regarding formatting of the Administrative Code, the final rules for Part 11 will be filed with the New Mexico Register as repealed and replaced. The final rules contain the proposed published amendments opened for public comment and revised following public comment as discussed above.

The public record of this rulemaking

shall incorporate this Response to Public Comment and the formal record of the rulemaking proceedings shall close upon execution of this document.

DARIN A. CHILDERS
WCA DIRECTOR

BY: _____ /s
Rachel A. Bayless
WCA General Counsel
September 15, 2016

**END OF OTHER
MATERIAL RELATED
TO ADMINISTRATIVE
LAW**

2016 New Mexico Register

Submittal Deadlines and Publication Dates

Volume XXVII, Issues 1-24

Volume XXVII	Submittal Deadline	Publication Date
Issue 1	January 4	January 15
Issue 2	January 19	January 29
Issue 3	February 1	February 12
Issue 4	February 15	February 29
Issue 5	March 1	March 15
Issue 6	March 16	March 31
Issue 7	April 1	April 15
Issue 8	April 18	April 30
Issue 9	May 2	May 13
Issue 10	May 16	May 31
Issue 11	June 1	June 15
Issue 12	June 16	June 30
Issue 13	July 1	July 15
Issue 14	July 18	July 29
Issue 15	August 1	August 15
Issue 16	August 16	August 31
Issue 17	September 1	September 15
Issue 18	September 16	September 30
Issue 19	October 3	October 14
Issue 20	October 17	October 31
Issue 21	November 1	November 15
Issue 22	November 16	November 30
Issue 24	December 16	December 30

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.

The New Mexico Register is available free online at <http://www.nmcpr.state.nm.us/nmregister>.
For further information, call 505-476-7942