

TITLE 7 HEALTH
CHAPTER 1 HEALTH GENERAL PROVISIONS
PART 2 ADJUDICATORY HEARINGS FOR LICENSED FACILITIES

7.1.2.1 ISSUING AGENCY: This rule is promulgated and issued by the New Mexico Department of Health.
[7.1.2.1 - Rp, 7 NMAC 1.2.1, 12/15/09]

7.1.2.2 SCOPE: Except as otherwise specifically provided by statute or rule, the scope of the sections in this part apply to adjudicatory proceedings conducted by the department of health.
[7.1.2.2 NMAC - Rp, 7 NMAC 1.2.2, 12/15/09]

7.1.2.3 STATUTORY AUTHORITY: This rule is promulgated by the secretary of the New Mexico department of health, pursuant to the general authority granted under NMSA 1978, Section 9-7-6(E) of the Department of Health Act; the authority granted under NMSA 1978, Sections 24- 1-3 and 24-1-5 of the Public Health Act; the authority granted pursuant to 42 U.S.C. Section 1396a(i); the authority granted under 42 C.F.R. Sections 431.151 through 431.154; 442.118, and Section 8.353.2.9 NMAC, based on sanctions imposed by the department on licensed facilities in which medicaid recipients receive services. This rule does not provide adjudicatory procedures for appeals from actions related to the home and community based waiver.
[7.1.2.3 NMAC - Rp, 7 NMAC 1.2.3, 12/15/09]

7.1.2.4 DURATION: Permanent.
[7.1.2.4 NMAC - Rp, 7 NMAC 1.2.4, 12/15/09]

7.1.2.5 EFFECTIVE DATE: This rule becomes effective on 12/15/09, unless a later date is cited at the end of a section.
[7.1.2.5 NMAC - Rp, 7 NMAC 1.2.5, 12/15/09]

7.1.2.6 OBJECTIVE: This rule provides adjudicatory procedures for licensed health facilities: administrative appeals of the initial denial of an annual license; of an emergency prehearing suspension of license and of emergency intermediate sanctions; of department action denying renewal, suspending, or revoking a license, or of the department's imposition of an intermediate sanction or civil monetary penalty; and of a cease and desist order.
[7.1.2.6 NMAC - Rp, 7 NMAC 1.2.6, 12/15/09]

7.1.2.7 DEFINITIONS: For purposes of this rule, the following shall apply.

- A. "Adjudicate" means to decide, settle or determine a disputed action. The term applies to a determination of facts and the application of law and reason to the facts by an impartial decision maker.
- B. "Administrator" means the person or manager in charge of the day-to-day operation of the facility or medicaid provider. The administrator may be the licensee or an authorized representative of the licensee.
- C. "Annual license" is the legally required department-issued license authorizing a facility to operate for the one year period of time noted on the face of the document and issued on an initial and renewal basis.
- D. "Appellant" means the party seeking review in a court of competent jurisdiction of a final decision of the licensing authority.
- E. "Applicant" means the individual responsible for the day-to-day operations of the facility, and who signs the license application. The applicant must be the individual. The applicant may be the same individual as the prospective licensee or may be an authorized representative of the prospective licensee.
- F. "Application" means the forms, attachments and other writings and drawings required by the licensing authority, to be completed and submitted by the applicant for the licensing authority's review for granting or denying a license.
- G. "Burden of proof" refers to the requirement of a party to produce an amount of evidence tending to prove a proposition.
- H. "Cease and desist order" means a formal, enforceable order of the licensing authority issued to a facility, usually in instances where the facility is operating without a license.
- I. "Certification" means the determination made by the licensing authority as to whether a health facility or agency complies with applicable federal regulations and the conditions of participation in the medicare

and/or medicaid program. Certification of noncompliance may be the basis for denial or termination of provider participation in the medicare and/or medicaid programs, or the basis for the imposition of other sanctions including license revocation.

J. "Denial of an application" and "denial of an annual license" mean action by the licensing authority declining to grant an annual license on the basis of noncompliance with applicable laws and regulations.

K. "Department" means the New Mexico department of health.

L. "Director" means the director of the division of health improvement of the New Mexico department of health.

M. "Emergency suspension of license" means the licensing authority's prohibition of operation of a facility for a stated period of time by temporary withdrawal of the license, prior to a hearing on the matter, when immediate action is required to protect human health and safety. The emergency suspension is carried out by personal service of an emergency suspension order and notice of a hearing. A hearing must be held within five (5) working days of the effective date of suspension ("five-day hearing"), as noticed in the emergency suspension order and notice of hearing, unless the right to a hearing is waived by the licensee or the right to a five-day hearing is waived and a hearing is requested at a later date by the licensee.

N. "Facility" means any health facility or health agency required to be licensed by the licensing authority pursuant to the authority of the Public Health Act, Sections 24-1-1 to 24-1-21 NMSA 1978, as amended, or required to be certified by the licensing authority in order to be eligible to receive and medicaid reimbursement for services provided to eligible recipients. This does not refer to community providers.

O. "Final decision" means the dispositive written document entered following a request for hearing under this rule, stating the final determination of the secretary made after review of the hearing officer's report and recommendation.

P. "Five-day hearing" means the hearing noticed in the emergency suspension order and notice of hearing. See the definition of "emergency suspension of license" in Subsection E of this section.

Q. "Hearing" means a proceeding in which legal rights, duties or privileges of a party are at issue and which shall include an opportunity for the parties to present such testimony and evidence as the hearing officer deems relevant and material to the issues to be adjudicated.

R. "Hearing officer" means an individual designated to conduct prehearing conferences and hearings and to make reports and recommendations, based on the evidence taken, to the secretary.

S. "Initial applicant" means the individual who signs the initial license application.

T. "License" means the document issued by the licensing authority which authorizes the lawful operation of a facility. The term "license" includes an annual license and a temporary license.

U. "Licensee" means the person in whose name a license for a facility has been issued and who is legally responsible for the facility's compliance with applicable laws and regulations.

V. "Licensing authority" means the division of health improvement of the New Mexico department of health. The licensing authority is also the state survey agency authorized to perform survey and certification functions for the medicaid and medicare programs.

W. "Official notice" means administrative notice, the act by which the hearing officer, in conducting the hearing or framing his decision, recognizes the existence and truth of certain facts without the production of evidence by the parties.

X. "Party" and "parties" means the original persons, entities, or agencies to a hearing under this rule and such intervenors permitted to intervene by written order of the hearing officer.

Y. "Person" means an individual, partnership, proprietorship, agency, corporation, company, association, tribal government or tribal organization, state or local government entity, or similar legal entity and the legal successor thereof.

Z. "Prospective licensee" means the person in whose name a license for operation of a facility is to be issued.

AA. "Recipient" means the individual who receives service of notice and, specifically includes the person who receives a cease and desist order issued by the licensing authority.

BB. "Renewal applicant" means the individual who signs the renewal license application.

CC. "Revocation of license" means the licensing authority's cancellation and withdrawal of a license on a permanent basis.

DD. "Secretary" means the secretary of the New Mexico department of health and includes his authorized representative.

EE. "Subpoena" means a written command issued by the hearing officer, at the request of a party, directing the appearance by a person, at a designated time and place, to give testimony upon a certain matter. The

subpoena may include a command to produce books, papers, documents and other things, in which case it is issued as a subpoena duces tecum.

FF. "Suspension of license" means the licensing authority's temporary cancellation and withdrawal of a license for a stated period of time.

GG. "Taking of appearances" means recording for the record the names of persons appearing at the hearing and their representatives, if any.

HH. "Temporary license" means, with respect to a health facility, an operating license issued for a stated period of time not to exceed one-hundred twenty (120) days. Not more than two (2) consecutive temporary licenses may be granted by the licensing authority.

II. "Working days" means, when determining compliance with various deadlines in this rule, Monday through Friday of each calendar week, excluding state observed holidays.

[7.1.2.7 NMAC - Rp, 7 NMAC 1.2.7, 12/15/09]

7.1.2.8 STANDARD OF COMPLIANCE: The degree of compliance required by this rule is designated by the use of the words "shall" or "must" and "may". "Shall" and "must" designate mandatory requirements; "may" is permissive.

[7.1.2.8 NMAC - Rp, 7 NMAC 1.2.107, 12/15/09]

7.1.2.9 USAGE: The masculine pronoun includes the feminine and neuter; and the singular number includes the plural, and the plural includes the singular.

[7.1.2.9 NMAC - Rp, 7 NMAC 1.2.108, 12/15/09]

7.1.2.10 SEVERABILITY: If any portion of this rule or the application of this rule, is held to be invalid, the validity of the remainder of the regulations, or the application of the regulations to different situations or persons, shall not be affected.

[7.1.2.10 NMAC - Rp, 7 NMAC 1.2.109, 12/15/09]

7.1.2.11 HEARING PROCESS AND PROCEDURES: GROUNDS FOR REQUESTING

HEARING: The actions or proposed actions of the department which may be contested are:

- A. denial of an application for initial annual license;
- B. denial of an application for renewal of an annual license;
- C. a cease and desist order;
- D. emergency suspension of license (pre-hearing);
- E. suspension of license (non-emergency, post-hearing);
- F. revocation of license;
- G. intermediate sanctions or civil monetary penalties.

[7.1.2.11 NMAC - Rp, 7 NMAC 1.2.200, 12/15/09]

7.1.2.12 INITIATION OF HEARING PROCESS: The hearing process is begun upon receipt by the licensing authority of a timely request for hearing, or, in the case of a pre-hearing emergency suspension of license, by service upon the licensee of an emergency suspension order and notice of hearing.

[7.1.2.12 NMAC - Rp, 7 NMAC 1.2.201, 12/15/09]

7.1.2.13 REQUEST FOR HEARING:

A. Written and signed: the request for hearing shall be made in writing and shall be signed by the person or an authorized representative of the person against whom the action of the department is taken.

B. Delivery: the request for hearing shall be addressed to the director of the division of health improvement or to any other department employee indicated in the department's notice, and it shall be hand delivered or mailed, return receipt requested, to such person.

[7.1.2.13 NMAC - Rp, 7 NMAC 1.2.202, 12/15/09]

7.1.2.14 TIME FOR REQUESTING HEARING: The request for hearing must be received by the department:

A. within ten (10) working days after receipt by the initial applicant, renewal applicant or prospective licensee of notice of the decision denying the application for license;

B. within five (5) working days after receipt of a cease and desist order;

- C. within ten (10) working days after receipt by the licensee of a notice of suspension or notice of revocation;
- D. within four (4) working days after receipt by the licensee of an emergency suspension order or emergency intermediate sanction and notice of hearing (pre-hearing emergency suspension of license).
[7.1.2.14 NMAC - Rp, 7 NMAC 1.2.203, 12/15/09]

7.1.2.15 EFFECT OF REQUEST FOR HEARING; STAY:

- A. Denial of an initial annual license: receipt by the licensing authority of a timely request for hearing upon the denial of an initial annual license does not allow the facility to begin operation. If the facility begins operation without a license, it is operating illegally and is subject to appropriate administrative and judicial sanctions and criminal charges.
- B. Denial of renewal of annual license: receipt by the licensing authority of a timely request for hearing upon the denial of renewal of an annual license stays the expiration of the current license until a final decision.
- C. Cease and desist order: receipt by the licensing authority of a timely request for hearing following issuance of a cease and desist order does not allow a facility to operate.
- D. Emergency suspension of license: if the licensee intends to appear for the five-day hearing noticed in the emergency suspension order and notice of hearing, a request for hearing need not be made. If the licensee timely waives the five-day hearing and requests a hearing to be held at a later date, the effect of such waiver is to allow time for additional prehearing discovery. Such waiver and request for later hearing does not stay the emergency suspension. The facility operates without legal authority if it continues operation after the effective date of the emergency suspension and becomes subject to appropriate administrative and judicial sanctions and criminal charges.
- E. Suspension, revocation, intermediate sanctions and civil monetary penalties: receipt by the licensing authority of a timely request for hearing following notice of the suspension or revocation of a current license stays suspension or revocation of the license until a final decision is reached following the hearing.
[7.1.2.15 NMAC - Rp, 7 NMAC 1.2.204, 12/15/09]

7.1.2.16 SCHEDULING HEARING:

- A. Scheduling: promptly upon receipt of a timely request for hearing, the department shall schedule a hearing to be held in Santa Fe, unless the hearing is required to be held elsewhere by applicable regulation.
- B. Change of location: upon timely motion, and with a showing of undue hardship and burden, the hearing officer may order the hearing location changed.
[7.1.2.16 NMAC - Rp, 7 NMAC 1.2.205, 12/15/09]

7.1.2.17 HEARING OFFICER:

- A. Designation of hearing officer: promptly upon receipt of a timely request for hearing, the secretary or authorized representative of the department shall designate a hearing officer.
- B. Qualifications: the hearing officer shall be impartial and shall have no personal bias or interest in the matter to be heard. He may be an officer or employee of the New Mexico department of health as long as he was not involved in making the challenged administrative decision. The hearing officer need not be a licensed attorney, however, he should have relevant experience with evidentiary, adjudicatory proceedings.
- C. Disqualification: a hearing officer designated to preside at the hearing may disqualify himself on his own motion, or upon written request to, and approval of, the secretary of the New Mexico department of health.
- D. Party's request for disqualification: whenever any party deems the hearing officer to be disqualified to preside, such party may file a written request to disqualify with the secretary of the New Mexico department of health. The request shall be supported by affidavits setting forth the grounds for disqualification. The secretary shall promptly determine the validity of the grounds alleged and take appropriate action.
[7.1.2.17 NMAC - Rp, 7 NMAC 1.2.206, 12/15/09]

7.1.2.18 DUTIES OF HEARING OFFICER:

- A. Official file: upon appointment, the hearing officer shall establish an official file which will contain all the filed notices, pleadings, briefs, recommendations, correspondence and decisions. It shall also contain the department's notice of action as well as the request for hearing. Upon conclusion of the proceeding and following issuance of the final decision, the hearing officer shall turn over to the department this official file for future custody.

B. Preside at hearing: the hearing officer shall preside over the hearing, administer oaths, take evidence and decide evidentiary objections and any motions or other matters that arise prior to or during the hearing.

C. Evidence file: the hearing officer shall maintain an evidence file with each document or item admitted into evidence. Proffered items not admitted into evidence, at the request of the offering party, shall be so identified and separately maintained by the hearing officer.

D. Subpoenas: the hearing officer, upon request by a party, may issue subpoenas and subpoenas duces tecum.

[7.1.2.18 NMAC - Rp, 7 NMAC 1.2.207, 12/15/09]

7.1.2.19 PARTIES: The principal and original parties to a hearing conducted under this rule shall be the appropriate agency of the department, and the applicant or prospective licensee, the licensee, licensed medicare provider applicant, or the recipient of a cease and desist order, depending upon the nature of the hearing. Generally, intervenors are not allowed to participate as a party.

[7.1.2.19 NMAC - Rp, 7 NMAC 1.2.208, 12/15/09]

7.1.2.20 LEGAL REPRESENTATION:

A. Natural persons: natural persons may appear on their own behalf or by an attorney licensed to practice in New Mexico.

B. Entities: the department, corporations and other organizations and entities may appear by a bona fide officer, employee or representative or may be represented by an attorney licensed to practice in New Mexico.

C. Filing: any party filing documents in the appeal shall sign the original and hand deliver or mail it to the hearing officer and shall hand deliver or mail copies to all other parties.

[7.1.2.20 NMAC - Rp, 7 NMAC 1.2.209, 12/15/09]

7.1.2.21 DISCOVERY:

A. Minimum discovery; inspection and copying of documents: each party shall have access to the relevant documents in the possession of the other party, except confidential or privileged documents. Access to the department's relevant documents may be had during normal business hours at the department's appropriate business offices. A reasonable copying fee may be charged.

B. Minimum discovery; witnesses: the parties shall each disclose to each other orally or in writing and to the hearing officer, the names of witnesses to be called, together with a brief summary of the testimony of each witness. In situations where statements will be presented to the hearing officer, rather than witnesses examined, the names of the persons making the statements and the summary of the statements, shall be disclosed.

C. Additional discovery: at the hearing officer's discretion, upon a written request by a party which sets out reasons that additional discovery is needed, further discovery in the form of production and review of documents and other tangible things, examinations and premise inspections, interviews or written interrogatories may be ordered. In exercising his authority to determine whether further discovery is necessary or desirable, the hearing officer should consider whether the complexity of fact or law reasonably requires further discovery to ensure a fair opportunity to prepare for the hearing and whether such request will result in unnecessary hardship, cost, or delay in holding the hearing.

D. Costs: cost of document copying, mail or delivery service, interviews or written interrogatories, including mileage and per diem, paid in accordance with the New Mexico Per Diem and Mileage Act (Section 10-8-1, NMSA 1978) shall be paid by the requesting party.

E. Depositions prohibited: oral or written depositions are not permitted.

[7.1.2.21 NMAC - Rp, 7 NMAC 1.2.210, 12/15/09]

7.1.2.22 PREHEARING CONFERENCE:

A. Purpose: at the discretion of the hearing officer, upon request of a party or upon the hearing officer's own motion, a prehearing conference shall be scheduled by the hearing officer at a time and place reasonably convenient to all parties, in order to: limit and define issues; discuss possible prehearing disposition; consider possible stipulations of factual or legal issues, or stipulations concerning the admissibility of evidence; limit the testimony or the number of witnesses, the issues or the evidence; and, discuss such other matters as may aid in the simplification of evidence and disposition of the proceedings.

B. Informal: such a conference shall be informal. No offer of settlement made at the conference shall be admissible in evidence at any later hearing. Stipulations and admissions shall be binding and may be used

as evidence at the hearing. At the hearing officer's discretion, stipulations and admissions may be made in writing and filed with the hearing officer as part of the official record of the proceedings.

C. Notice: the hearing officer will give notice of the time and place of the pre-hearing conference to the parties by telephone, in person or by mail.

D. Costs: each party shall bear its own costs, including transportation costs.

E. Record: a record of the prehearing conference shall not be kept. A prehearing order or other pleadings may be filed as a result of the prehearing conference.

[7.1.2.22 NMAC - Rp, 7 NMAC 1.2.211, 12/15/09]

7.1.2.23 PREHEARING DISPOSITION: The subject matter of any hearing may be disposed of by stipulation, settlement or consent order, unless otherwise precluded by law. Any stipulation, settlement or consent order reached between the parties shall be written, signed by the hearing officer and the parties or their attorneys, and submitted to the secretary of the New Mexico department of health. Such prehearing disposition shall be effective only if approved by the secretary.

[7.1.2.23 NMAC - Rp, 7 NMAC 1.2.212, 12/15/09]

7.1.2.24 POSTPONEMENT OR CONTINUANCE: The hearing officer in his or her discretion, may postpone or continue a hearing upon his or her own motion or upon motion of a party, for good cause shown. Notice of any postponement or continuance shall be given in person, by telephone, or by mail to all parties within a reasonable time in advance of the previously scheduled hearing date.

[7.1.2.24 NMAC - Rp, 7 NMAC 1.2.213, 12/15/09]

7.1.2.25 ADDITIONAL PLEADINGS: Solely at the discretion of the hearing officer, pleadings, motions and briefs allowed in the state district courts of New Mexico may be filed.

[7.1.2.25 NMAC - Rp, 7 NMAC 1.2.214, 12/15/09]

7.1.2.26 CONDUCT OF THE HEARING:

A. Public: all hearings shall be open to the public, unless a closed hearing is asked for by the person requesting the hearing and the hearing officer finds good cause exists for closing the hearing. The department shall not request a closed hearing.

B. Powers of hearing officer: the hearing officer shall have all the powers necessary to conduct a hearing and to take all necessary action to avoid delay, maintain order, and assure development of a clear and complete record, including but not limited to the power to: administer oaths or affirmations on the request of any party; schedule continuances; examine witnesses and direct witnesses to testify; limit repetitious and cumulative testimony; and set reasonable limits on the amount of time a witness may testify; decide objections to the admissibility of evidence or receive the evidence subject to later ruling; receive offers of proof for the record; direct parties to appear and confer for the settlement or simplification of issues, and to otherwise conduct prehearing conferences; dispose of procedural requests or similar matters; and, enter findings of fact, conclusions of law, orders, and reports and recommendations.

[7.1.2.26 NMAC - Rp, 7 NMAC 1.2.215, 12/15/09]

7.1.2.27 ORDER OF PRESENTATION; GENERAL RULE: Except as specifically provided in the following section, the order of presentation for hearings in all cases, including but not limited to those arising from suspension, revocation, denial of renewal of license, intermediate sanctions, civil monetary penalties, emergency suspension, emergency intermediate sanctions shall be:

A. appearances: opening of proceeding and taking of appearances by the hearing officer;

B. pending matters: disposition by the hearing officer of preliminary and pending matters;

C. opening statements: the opening statement of the department; and then the opening statement of the licensee or the party challenging the department's action;

D. cases: the department's case-in-chief; and then the case-in-chief of the licensee or the party challenging the department's action;

E. rebuttal: the department's case-in-rebuttal;

F. closing argument: the department's closing statement, which may include legal argument; and then the closing statement, which may include legal argument of the licensee or the party challenging the department's action; and

G. close: closing of proceedings by the hearing officer.

[7.1.2.27 NMAC - Rp, 7 NMAC 1.2.216, 12/15/09]

7.1.2.28 ORDER OF PRESENTATION; SPECIAL CASES RULE: The order of presentation in denial of an initial annual license and cease and desist order cases is:

- A. appearances: opening of proceeding and taking of appearances by the hearing officer;
- B. pending matters: disposition by the hearing officer of preliminary and pending matters;
- C. opening statements: applicant's or recipients's opening statement; and then the opening statement of the licensing authority;
- D. cases: the applicant's or recipient's case-in-chief; and then the licensing authority's case-in-chief;
- E. rebuttal: the applicant's/prospective licensee's or recipient's case-in-rebuttal;
- F. closing argument: the applicant's/prospective licensee's or recipient's closing statement, which may include legal argument; and then the licensing authority's closing statement, which may include legal argument; and
- G. close: closing of proceedings by the hearing officer.

[7.1.2.28 NMAC - Rp, 7 NMAC 1.2.217, 12/15/09]

7.1.2.29 BURDEN OF PROOF:

A. General rule: except as specifically provided for in the following paragraph, in all cases, including but not limited to those arising from suspension, revocation, denial of renewal of license, Intermediate sanctions, civil monetary penalties, emergency suspension, emergency intermediate sanctions, or medicaid provider appeals, the department shall present evidence supporting its decision. The party challenging the department's decision shall then present evidence to show that the department's decision is incorrect. The burden of proving by a preponderance of the evidence the basis for the decision at issue rests with the department.

B. Special cases: in cases arising from the denial of initial license and cease and desist orders, the applicant for initial license or the recipient of the cease and desist order shall present evidence supporting the license application, or evidence supporting the legality of operating without a license. The licensing authority shall then present evidence supporting the denial of the application, or evidence of the propriety and of cease and desist order. The burden of proving by a preponderance of the evidence:

- (1) that the application was improperly denied by the licensing authority and should be approved, or
- (2) that operation is proper and in accordance with law, rests with the license applicant or recipient of the cease and desist order.

[7.1.2.29 NMAC - Rp, 7 NMAC 1.2.218, 12/15/09]

7.1.2.30 EVIDENCE:

A. Technical rules not applicable: in general, the technical rules of evidence, such as the New Mexico rules of evidence, shall not apply but may be used as a guide to the principles of evidence and may be considered in determining the weight to be given any item of evidence. Nonprivileged, material and relevant evidence of the type which is relied upon by reasonably prudent persons in the conduct of serious affairs is admissible. The hearing officer may exclude, either with or without formal objection, unreliable, immaterial, irrelevant and unduly repetitious testimony and evidence.

B. Objections: a party may timely object to evidentiary offers by stating the objection together with a succinct statement of the grounds. The hearing officer may rule on the admissibility of evidence at the time an objection is made or may receive the evidence subject to later ruling.

C. Official notice: official notice may be taken of all facts of which judicial notice may be taken. Any party shall, on timely request, be afforded an opportunity to contest the noticed fact.

[7.1.2.30 NMAC - Rp, 7 NMAC 1.2.219, 12/15/09]

7.1.2.31 EVIDENCE FROM WITNESSES:

A. Statement or examination of witnesses: the hearing officer, at his discretion, may receive evidence in the form of statements where a party is not represented by counsel; otherwise, the normal manner of witness testimony shall be by direct examination, cross examination and redirect examination, and through questioning by the hearing officer.

B. Written form: any part of the evidence may be received by the hearing officer in writing when a hearing will be expedited and the interests of the parties will not be substantially prejudiced.

[7.1.2.31 NMAC - Rp, 7 NMAC 1.2.220, 12/15/09]

7.1.2.32 RECORD:

A. Content: the record of a proceeding under this rule shall include all documents contained in the official files maintained by hearing officer, including findings of fact and conclusions of law, the recommendations of the hearing officer; and the final decision of the secretary.

B. Recording the hearing: proceedings at which evidence is presented orally shall be recorded by means of a mechanical or electronic sound recording device provided by the department. Such recording need not be transcribed, unless requested by a party who shall arrange and pay for the transcription. Any party who seeks judicial review, in conformity with applicable appellate rules, must request leave to file the audio tapes of the administrative proceeding as the transcript of the proceedings together with the necessary copies made and certified as true and correct by an authorized employee of the department.

[7.1.2.32 NMAC - Rp, 7 NMAC 1.2.221, 12/15/09]

7.1.2.33 REPORT AND RECOMMENDATION OF HEARING OFFICER:

A. Hearing officer's report shall contain: a statement of the issues raised at the hearing; findings of fact and conclusions of law, applying law and regulations to the facts. Findings of fact shall be based on the evidence presented at the hearing or known to all parties, including matters officially noticed; and recommended determination.

B. Submission for final decision: the hearing officer's report together with the full hearing record shall be submitted to the secretary of the New Mexico department of health for a final determination. The report and recommendation shall be submitted within thirty (30) working days after expiration of the time set for submittal of the last post hearing submission of requested findings and conclusions, arguments or briefs.

C. Optional announcement of decision: at the close of the hearing, the hearing officer may announce his decision and request that the parties prepare appropriate post hearing submissions, including a decision for approval by the hearing officer. The hearing officer's oral and written decision is a recommendation to the secretary of the New Mexico department of health and is not a final order.

[7.1.2.33 NMAC - Rp, 7 NMAC 1.2.222, 12/15/09]

7.1.2.34 FINAL DECISION: The secretary of the department shall render a final administrative determination within ten working (10) days of the submission of the hearing officer's report. Parties may be notified personally, by telephone or by mail of the final order. A copy of the final decision shall be mailed to each party or attorney of record.

[7.1.2.34 NMAC - Rp, 7 NMAC 1.2.223, 12/15/09]

7.1.2.35 FAILURE TO APPEAR:

A. Default: failure of the party requesting the hearing to appear on the date and at the time set for hearing, without good cause shown, shall constitute a default and the hearing officer shall so notify all parties in writing.

B. Entry of decision: the hearing officer shall enter such findings, conclusions, decisions, recommendations, rulings and orders as are appropriate.

[7.1.2.35 NMAC - Rp, 7 NMAC 1.2.224, 12/15/09]

7.1.2.36 PERSONAL SERVICE: Whenever this rule requires or allow delivery of notice of administration action or proposed action by way of personal service, such service shall be made by a licensing authority employee or other department representative, or by any individual over the age of eighteen (18).

[7.1.2.36 NMAC - Rp, 7 NMAC 1.2.225, 12/15/09]

7.1.2.37 MANNER OF SERVICE:

A. Service on the person or at the place where found: personal delivery of any notice shall be given when the applicant licensee or recipient of a cease and desist order is present, by personal delivery to the individual, applicant, licensee or recipient at the facility or where the person is found; if delivery is refused, service is effected by leaving the notice at the place where such person was found. If the person to be served refuses to accept the notice or to permit the notice to be left, valid service is achieved by the attempts described above to personally deliver or leave the notice.

B. Service on a representative: service shall be complete when the individual, applicant, licensee or recipient is absent, by personal delivery at the facility to an administrative or other employee who reasonably appears to be capable of delivering the notice to the applicant licensee, recipient; or if no such person is available or

willing to accept delivery, service may be made by posting notice on the most public part of the facility and by mailing, by U.S. postal service return receipt requested mail, a copy of the notice to the individual, applicant licensee, or recipient at the facility address or to the known address of the individual.

C. Mail: when notice is given by U.S. postal service certified return receipt requested mail, service shall be deemed to have been made on the date delivered, or if delivery is refused, service shall be deemed to have been made on the date on which delivery is attempted for the purpose of calculating all time requirements in this rule. When notice or service is given by regular first class mail, then receipt shall be deemed to have occurred on the third day following deposit in the U.S. mail, except when the third day falls on a Saturday, Sunday or legal holiday in which case receipt shall be deemed to have occurred on the next working day.

[7.1.2.37 NMAC - Rp, 7 NMAC 1.2.226, 12/15/09]

7.1.2.38 PROOF OF SERVICE: The licensing authority employee, department representative, or other individual making such service shall prepare and sign a statement indicating upon whom, where and when such personal service was made. If possible, the licensee's or applicant's or other recipient's signed acknowledgment of notice may be obtained. Failure to make proof of service shall not affect the validity of service. Personal service shall be deemed to be made at the time that notice is handed to the recipient of service, left or posted, in accordance with this section.

[7.1.2.38 NMAC - Rp, 7 NMAC 1.2.227, 12/15/09]

7.1.2.39 JUDICIAL REVIEW: District court: to the extent provided by law, a final decision may be reviewed by the district court for the county of Santa Fe.

[7.1.2.39 NMAC - Rp, 7 NMAC 1.2.300, 12/15/09]

7.1.2.40 RULES GOVERNING JUDICIAL REVIEW: The procedural rules for review of a final order are contained in the New Mexico statutes governing procedure for civil cases in the court of appeals and the district courts.

[7.1.2.40 NMAC - Rp, 7 NMAC 1.2.301, 12/15/09]

7.1.2.41 RECORD:

A. The appellant shall make satisfactory arrangements with the department for the preparation of the record of the proceeding for which judicial review is sought.

B. The record shall consist of the official file maintained by the hearing officer together with exhibits admitted into evidence, and the tapes or other transcript of the hearing.

C. The expense of copying tape recorded testimony and any other expense of preparing the record, including copying costs, shall be borne by the appellant.

D. The appellant shall certify in applicable pleadings filed with the court that arrangements have been made for preparation of a sufficient number of transcripts of the hearing and other items making up the record of the proceedings.

E. Within thirty (30) days after service of notice of judicial appeal, the department shall file in the appropriate court a certified copy of the original and duplicate copies of the tapes of the hearing under review together with the original and copies of the official file maintained and certified by the hearing officer.

[7.1.2.41 NMAC - Rp, 7 NMAC 1.2.302, 12/15/09]

7.1.2.42 COURT ORDERED STAY: Filing for judicial review does not itself stay enforcement of the final decision. Any party may petition the court whose jurisdiction has been properly invoked for an order staying enforcement.

[7.1.2.42 NMAC - Rp, 7 NMAC 1.2.303, 12/15/09]

7.1.2.43 STANDARD OF REVIEW: The reviewing court shall set aside the final order only if it is found to be:

- A. arbitrary, capricious, or an abuse of discretion;
- B. not supported by substantial evidence in the record;
- C. beyond the authority of the department; or
- D. otherwise not in accordance with law.

[7.1.2.43 NMAC - Rp, 7 NMAC 1.2.304, 12/15/09]

History of 7.1.2 NMAC:

Pre-NMAC History: The material in this part was derived from that previously files with the commission of public records, state records center:

HED 86-1 (HSD), Regulations Governing Health Facilities Licensing And Certification Adjudicatory Hearing Proceedings, filed 5/20/86.

HED 86-9 (HSD), Regulations Governing Health Facilities Licensing And Certification Adjudicatory Hearing Proceedings, filed 8/1/86.

History of Repealed Material:

7 NMAC 1.2, Adjudicatory Hearings (filed 12/21/1995) repealed 12/15/09.

Other History:

HED 86-9 (HSD), Regulations Governing Health Facilities Licensing And Certification Adjudicatory Hearing Proceedings (filed 8/1/1986) was renumbered, reformatted, amended and replaced by 7 NMAC 1.2, Adjudicatory Hearings, effective 2/1/1996.

7 NMAC 1.2, Adjudicatory Hearings (filed 12/21/1995) was renumbered, reformatted and replaced by 7.1.2 NMAC, Adjudicatory Hearings for Licensed Facilities, effective 12/15/09.