

TITLE 9 HUMAN RIGHTS
CHAPTER 4 PERSONS WITH DISABILITIES
PART 21 GUARDIANSHIP SERVICES

9.4.21.1 ISSUING AGENCY: New Mexico Developmental Disabilities Planning Council Office of Guardianship (NMDDPC office of guardianship).
[9.4.21.1 NMAC - N, 04/14/2006]

9.4.21.2 SCOPE: These rules apply to all New Mexico residents and other New Mexico state agencies requesting guardianship services from the NMDDPC office of guardianship and other private businesses that contract directly with the NMDDPC office of guardianship to provide guardianship services.
[9.4.21.2 NMAC - N, 04/14/2006]

9.4.21.3 STATUTORY AUTHORITY: Section 28-16B-1 through 28-16B-6 NMSA 1978 permits the NMDDPC office of guardianship to promulgate rules in accordance with the State Rules Act to carry out the provisions of the Office of Guardianship Act.
[9.4.21.3 NMAC - N, 04/14/2006]

9.4.21.4 DURATION: Permanent.
[9.4.21.4 NMAC - N, 4/14/2006]

9.4.21.5 EFFECTIVE DATE: April 14, 2006, unless a later date is cited at the end of a section.
[9.4.21.5 NMAC - N, 4/14/2006]

9.4.21.6 OBJECTIVE: The objective of this rule is establish standards for the provision of guardianship services to income and resource eligible incapacitated adults who are residents of the state of New Mexico, when there are no lesser forms of intervention, such as a power of attorney or surrogate decision maker, available, and to monitor contracts that provide guardianship services.
[9.4.21.6 NMAC - N, 4/14/2006]

9.4.21.7 DEFINITIONS: Unless defined below, terms used in 9.4.21 NMAC correspond to those defined in NMSA 1978, Section 45-5-101 (2009), NMSA 1978, Section 45-1-201 or in NMSA, 1978, Section 43-1-15. The following words and terms when used in this part shall have the following meanings unless the context clearly indicates otherwise.

A. “Complaint” means an allegation of wrongdoing by a contractor or a violation of the contract with the NMDDPC office of guardianship and the contractor, including but not limited to:

- (1) failure to provide appropriate services;
- (2) violations of the civil rights of the wards; and
- (3) abuse, neglect or exploitation of the ward.

B. “Complaint against the office of guardianship” means an allegation of wrongdoing by the NMDDPC office of guardianship or its staff, including but not limited to:

- (1) failure to appropriately monitor and supervise contractors;
- (2) violations of the due process rights of the protected person or contractor; and
- (3) failure to comply with complaint procedures as set forth herein.

C. “Comprehensive evaluation” is an assessment using a variety of diagnostic tools to determine the appropriate level of intervention, if any, in order to maximize self-reliance and independence for a [ward] protected person as mandated by NMSA 1978, Section 45-5-301.1 (2009).

D. “Contracted guardianship providers” means some private/public entity or individual under contract with the NMDDPC office of guardianship to act as guardian for an adjudicated incapacitated person who has no family or friends willing, able and appropriate to be his/her guardian.

E. “Contractor” means an entity or individual under a contract with the NMDDPC office of guardianship to provide some type of guardianship service; i.e., attorneys, court visitors, or guardians.

F. “Designated entity” is a person or organization contracted or appointed by the NMDDPC office of guardianship to conduct the comprehensive evaluations.

[9.4.21.7 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.8 ELIGIBILITY:

- A.** The alleged incapacitated person must be eighteen (18) years old to qualify for services from the NMDDPC office of guardianship.
 - B.** The alleged incapacitated person must be financially and otherwise eligible for medicaid or a similar public benefit.
 - C.** For a guardianship where the proposed guardian is not a contracted service provider, to obtain legal services the proposed guardian's household income must not exceed 200% of the federally established poverty level as that term is defined by the federal HHS poverty guidelines.
 - (1)** Proof of income is required and is determined by the following:
 - (a)** providing the NMDDPC office of guardianship a copy of the proposed guardian's most recent federal income tax return and proof of all income and benefits such as unemployment compensation, child support, food stamps or social security income; or, if no income tax return, by completing a financial eligibility form provided by the office of guardianship; or
 - (b)** proof of qualification by the proposed guardian under any federal or state program with income restrictions equal to or greater than that required above.
 - (2)** At the discretion of the director of the NMDDPC office of guardianship, exceptions may be made for financial hardship.
 - (3)** The NMDDPC office of guardianship may develop a sliding-fee scale for private guardianships for persons who do not meet income eligibility guidelines.
 - (4)** This program is for low income New Mexicans with very limited resources who are unable to pay for private legal services to be appointed as the guardian. The proposed guardian will be required to attest to not having net liquid assets after appropriate exclusions (which are the principal residence, vehicles used for transportation, assets used in producing income and any other asset exempt from attachment under state or federal law) to pay for the legal services. Services may be declined to a proposed guardian whose income is at or below 200% of the federal poverty level if evidence exists of sufficient resources to pay for private legal services.
- [9.4.21.8 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.9 PRIORITIZATION OF SERVICE:

- A.** In general, service will be provided based on the date of application.
 - B.** When service requests exceed capacity, funding or resources, individuals in the categories noted in Subparagraph C below will be prioritized to receive the first available services, as appropriate.
 - C.** Priority categories:
 - (1) high need guardianships:**
 - (a)** high need for a guardian of last resort (with no family member or other willing, able and appropriate to serve as guardian) for an adult protective services (APS) referral, military veteran, Jackson class member (former resident of the state training schools from 1987 to 1997), Foley referral (former resident of the state training schools who was discharged between 1970 and 1987), and others;
 - (b)** high need for a guardian with a family member or other willing, able and appropriate to serve as guardian for a military veteran, Jackson class member or Foley referral (does not include others);
 - (2) lesser need guardianships:**
 - (a)** lesser need for a guardian of last resort for an APS referral, military veteran, Jackson class member or Foley referral (does not include others);
 - (b)** lesser need for guardian with a family member or other willing, able and appropriate to serve as guardian for a military veteran, Jackson class member or Foley referral (does not include others); requests for legal services paid by the state seeking to appoint family members or other willing, able and appropriate to serve as guardian are not in the priority categories unless the person to be served is a military veteran, Jackson class member or Foley referral.
 - D.** If service requests in general, including those from the Subsection C categories above, exceed the NMDDPC office of guardianship's ability to provide services due to limited funding or resources, the NMDDPC office of guardianship may prioritize the requests by rating them according to a referred individual's need for guardianship. Rating criterion may include such factors as the status of an individual's support system, services, finances, medical needs, and safety and stability of placement or residence.
- [9.4.21.9 NMAC - N, 4/14/2006; A, 9/15/11]

9.4.21.10 DESIGNATION OF SERVICE AREA: Services are to be provided throughout the state of New Mexico. The NMDDPC office of guardianship recognizes the individual sovereignty of each tribe and pueblo in the state of New Mexico.
[9.4.21.10 NMAC - N, 4/14/2006; A, 9/15/11]

9.4.21.11 SERVICES TO BE PROVIDED BY THE NMDDPC OFFICE OF GUARDIANSHIP:

- A.** The provision of adult guardianship services to income eligible, incapacitated persons as follows:
- (1) contracting with attorneys to petition for the appointment of probate code guardians;
 - (2) contracting with entities/individuals to serve as probate code guardians;
 - (3) contracting with entities/individuals to serve as visitors (court visitors) in probate code guardianship proceedings;
 - (4) contracting with attorneys to serve as guardian ad litem in probate code guardianship proceedings;
 - (5) serving as an interested person pursuant to Subsection 6 of Section 28-16B-3, NMSA 1978;
 - (6) identifying available persons to serve as mental health treatment guardian;
 - (7) contracting to provide for recruitment and training for persons interested in serving as mental health treatment guardians;
 - (8) providing information regarding the duties and responsibilities of probate code guardianship, including less restrictive alternatives; and
 - (9) investigating and addressing complaints made against the NMDDPC office of guardianship contractors.
- B.** The provision of recruitment and training for persons interested in serving as probate code guardians.
- C.** The provision of information regarding the duties and responsibilities of probate code guardianship, including less restrictive alternatives.
- D.** The provision of investigative measures/ processes to address complaints made against entities and individuals providing contracted guardianship services.
[9.4.21.11 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.12 REQUIREMENTS OF CONTRACTED GUARDIANSHIP PROVIDERS:

- A.** meet RFP Requirements when published;
- B.** meet office of guardianship requirements including but not limited to:
- (1) comply with all the terms of one's contract;
 - (2) agree to be paid at the state approved rate;
 - (3) must comply with the Caregivers Criminal History Screening Act (See NMSA, 1978 29-17-2);
 - (4) must become a registered guardian within 18 months after the award of a contract;
 - (5) assure the civil rights of the incapacitated persons;
 - (6) guarantee access to all records on incapacitated persons assigned through the office of guardianship; and
 - (7) comply with the office of guardianship individual caseloads, standards of practice and ethics.
[9.4.21.12 NMAC - N, 04/14/2006; A, 4/30/07]

9.4.21.13 REFERRAL PROCESS: Any person interested in the well being of an alleged incapacitated person, and seeking guardianship services to be paid for by the NMDDPC office of guardianship, must submit or have submitted a completed application form and provide supporting documentation to the NMDDPC office of guardianship.
[9.4.21.13 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.14 COMPLAINTS AGAINST A CONTRACTED PROVIDER WITH THE NMDDPC OFFICE OF GUARDIANSHIP:

- A.** A complaint shall be made in writing by the client or another person on behalf of the client, including but not limited to a friend, relative, advocate, or other interested person, such as a caregiver or provider. An exception to the requirement that a complaint shall be made in writing shall be made if a reasonable accommodation is necessary.
- B.** Except as provided in Subsection D of 9.4.21.14 NMAC, below, prior to filing a complaint against a provider contracting with the NMDDPC office of guardianship, individuals shall first try to resolve their complaints with the contracted provider through that provider's grievance process.

C. If the complaining party and contractor are unable to reach a resolution or agreement then the complaining party may file a complaint with the office of guardianship and may file a copy with the contractor.

D. Exceptions shall be made to Subsections A & B of 9.4.21.14 NMAC when the NMDDPC office of guardianship has reason to believe that an emergency situation exists or that a delay of the investigation could result in harm to the protected person or retaliation by the contractor.

E. The complaint should include as much information as possible, including the following:

- (1) name of the incapacitated person;
- (2) name of the contact information for the individual making the complaint on behalf of the incapacitated person;
- (3) relationship of the complaining party to the incapacitated person;
- (4) name of the individual contractor against whom the complaint is being made;
- (5) name of the party who has attempted to resolve the complaint, if known;
- (6) what actions have been taken to attempt to resolve the complaint;
- (7) details of the complaint including the alleged wrongdoing, the involved parties and when and where the wrongdoing occurred;

F. The complaint made to the office of guardianship may be submitted by mail or fax unless a reasonable accommodation is necessary.

G. In order to preserve the confidentiality of the incapacitated person, the complaint shall be submitted to: The NMDDPC Office of Guardianship; 810 W. San Mateo, Ste. C; Santa Fe, NM 87505-4144; (505) 476-7324; (505) 476-7322 (Fax).

H. Upon receipt of a verbal or written complaint, the NMDDPC office of guardianship shall:

- (1) acknowledge receipt of a the complaint in writing;
- (2) notify all parties involved; and
- (3) initiate an investigation within 15 working days of the filing of the complaint with the NMDDPC office of the guardianship;
- (4) where sufficient information is provided to allow the NMDDPC office of guardianship to continue the investigation, the NMDDPC office of guardianship will make further inquiries if possible or discontinue the investigation; justification for closure of investigations based on insufficient information will be documented.

I. A determination decision shall be made within 60 working days after the complaint is filed with the NMDDPC office of guardianship unless a shorter time frame is required to protect the protected person.

J. A determination decision shall include:

- (1) the decision made;
- (2) the basis for the decision;
- (3) notice of the complaining party's right to file a complaint about the actions taken by the NMDDPC office of guardianship related to the investigational process pursuant to 9.4.21.15 NMAC;
- (4) further actions to be taken by the NMDDPC office of guardianship and the contractor which may include, but shall not be limited to:
 - (a) the imposition of a corrective action plan on the contractor; and
 - (b) a referral of the complaint to other agencies for investigation and prosecution.

K. Persons objecting to the process of the complaint investigation taken by the NMDDPC office of guardianship may file a grievance against the NMDDPC office of guardianship with the New Mexico human services department pursuant to 9.4.21.15 NMAC below.

L. None of these regulations restrict the due process rights of an individual to request a less restrictive guardianship or to overturn the decision of a guardianship contractor or the NMDDPC office of guardianship through a court of law.

[9.4.21.14 NMAC - N, 04/14/2006; A. 04/30/07; A, 9/15/11]

9.4.21.15 COMPLAINTS AGAINST THE NMDDPC OFFICE OF GUARDIANSHIP: Complaints against the NMDDPC office of guardianship or a staff member of the NMDDPC office of guardianship shall be filed with and investigated by the human services department, by sending a complaint in writing directly to the secretary of human services department with a copy sent to the director of the NMDDPC office of guardianship. (NMSA 2003 28-16B-6E)

[9.4.21.15 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.16 TRANSFER OF PROTECTED PERSON FROM A PRIVATE PAY GUARDIANSHIP TO A PROGRAM FUNDED THROUGH THE NMDDPC OFFICE OF GUARDIANSHIP:

A. Purpose: It is not the intention of the NMDDPC office of guardianship to create a hardship on any private pay provider of guardianship services in cases where resources are being exhausted, but in order to work in a more collaborative fashion these procedures are being developed to move the private pay protected persons into the state funded program under the NMDDPC office of guardianship in a timely and reasonable manner to minimize the impact on the protected person.

B. Requirements: In order to affect a protected person's transfer to a program funded through the NMDDPC office of guardianship, the private pay guardianship must do the following:

(1) obtain an application for services from the NMDDPC office of guardianship and fill it out completely (failure to do so will result in delay of transfer);

(2) the filing of the request for services with the NMDDPC office of guardianship does not guarantee the request will be granted;

(3) to be eligible for transfer into this program, a protected person must be financially eligible for institutional medicaid and medicaid in New Mexico;

(4) appropriate placement must be secured by the private pay guardians for the protected person prior to transfer to a publically funded guardian;

(5) all necessary medical and other information regarding the protected person must be provided to the new guardian in a timely manner;

(6) any original legal documents such as birth certificates, social security cards, medicaid cards, etc. shall be turned over to the new guardian upon appointment;

(7) legal fees for the transferring of the case must be paid by the private provider (this would include the closing of the conservatorship);

(8) if the protected person has a conservatorship and no assets, then the conservatorship must be closed prior to transfer; if the conservatorship cannot be closed for some appropriate reason, then a complete accounting must be given to the NMDDPC office of guardianship at the time of transfer;

(9) there must be a burial policy for the ward; ownership is to be transferred by the private provider to the NMDDPC office of guardianship's appointed guardian;

(10) these transfers will not be given any priority status;

(11) the private pay provider will agree to cooperate with the new guardian on matters, including, but not limited to, providing any information the new guardian might need, which may be in the possession of the private guardian;

(12) these transfers will be effectuated according to NMSA 1978, Section 45-5-307.

[9.4.21.16 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.17 REQUESTS FOR INFORMATION:

A. Any requests for non-confidential information will be treated as a request for inspection of public records under the state inspection of public records act. (NMSA 1978, Section 14-2-1 through 14-2-12).

B. Any requests for confidential information or client specific information will be handled according to state and federal law. (NMSA 2003 28-16B-4B).

[9.4.21.17 NMAC - N, 04/14/2006]

9.4.21.18 COMPREHENSIVE EVALUATIONS:

A. Depending upon the availability of funding and resources, and unless otherwise provided for by another agency or program, comprehensive evaluations for protected persons with contracted providers may be obtained through a referral to the NMDDPC office of guardianship by the contract guardian if the protected person appears to have made gains in her/his capacity or to be in need of increased protection or other such that a request for review of the guardianship by the court appears indicated.

B. Comprehensive evaluations will occur in the following manner:

(1) The comprehensive evaluations will be done by the entity designated by the NMDDPC office of guardianship.

(2) All contracted guardianship providers will provide the names of their protected persons who meet the criterion in Subsection A of this section at any time and upon request by the NMDDPC office of guardianship. The referral process will be established by the NMDDPC office of guardianship.

(3) The components of the comprehensive evaluation will be determined by the designated entity after consultation with the guardian.

- (4) The designated entity will set up the appointments.
- (5) The contracted guardianship provider will provide written authorization for the protected person selected for a comprehensive evaluation.
- (6) The contracted guardianship provider will provide the following documents at a time and place determined by the designated entity:
- (a) name of the protected person, living arrangements of the ward, day placement and daily activity, and relevant contact information;
 - (b) medical history and assessment history of the protected person that may come from other state and federal programs such as the DD waiver program, medicaid, schools, division of vocational rehabilitation, commission for the blind, etc.;
 - (c) the current level of guardianship, and;
 - (d) any additional information requested by the designated entity relevant to the comprehensive evaluation.
- (7) These provisions are in addition to any terms and conditions regarding comprehensive evaluations as set forth in the contract between the NMDDPC office of guardianship and the contracted guardianship provider.
- (8) If a protected person has undergone some part of the comprehensive evaluation within the last three years, the contracted guardianship provider may request to substitute that part of the evaluation for the report of the evaluation undergone within the last three (3) years. The designated entity may deny the request, based on professional judgment, it should not be substituted. If a substitution is allowed, the contracted guardianship provider will provide the report of that evaluation to the designated entity.
- (9) If the contracted guardianship provider has clear and convincing evidence that a protected person does not need an evaluation, the contracted guardianship provider will provide to the NMDDPC office of guardianship a short description explaining why the protected person should not be evaluated.
- (10) The NMDDPC office of guardianship or its agent has the right to review the files and records of any protected person under contract between the NMDDPC office of guardianship and a contracted guardianship provider for the purpose of determining whether the protected person should have a comprehensive evaluation.
- (11) If the NMDDPC office of guardianship determines that a protected person should undergo an evaluation, despite the justification provided in Paragraph (9) of Subsection B of 9.4.21.18 NMAC, the NMDDPC office of guardianship will send a letter to the contracted guardianship provider so stating (“Notice Letter”). If, after receipt of the notice letter, the contracted guardianship provider does not agree with the NMDDPC office of guardianship that a protected person should undergo an evaluation, the following procedure will commence.
- (a) Within ten (10) working days after receiving the notice letter, the contracted guardianship provider will contact the NMDDPC office of guardianship in writing with the basis for its disagreement with the notice letter and during that same time period set up a meeting at the office of the NMDDPC office of guardianship for the purpose of attempting to resolve this issue. The contracted guardianship provider attending the meeting must have full authority to resolve this issue. The proposed location of the meeting will be at the office of the NMDDPC office of guardianship at a day and time proposed by the NMDDPC office of guardianship. The contracted guardianship provider may propose a different time and location. The meeting must be held no more than thirty (30) days from the date of receipt of the notice letter. If the parties cannot agree on a location and time, the NMDDPC office of guardianship may petition the court pursuant to Subparagraph (d) of Paragraph (11) of Subsection B of 9.4.21.18 NMAC.
 - (b) If the parties come to an agreement, the protected person may or may not undergo an evaluation depending on the agreement reached by the parties.
 - (c) The NMDDPC office of guardianship will confirm the outcome of the meeting by letter (outcome letter) within two working days of the meeting between the parties.
 - (d) If there is no agreement, the NMDDPC office of guardianship may, within fourteen (14) working days from the date of the outcome letter, petition the court in which the guardian was appointed to have the protected person evaluated.

[9.4.21.18 NMAC - N, 04/30/07; A, 9/15/11]

HISTORY OF 9.4.21 NMAC: [RESERVED]