

TITLE 16 OCCUPATIONAL AND PROFESSIONAL LICENSING
CHAPTER 12 NURSES AND HEALTH CARE RELATED PROVIDERS
PART 20 HEARING REQUIREMENTS FOR CERTIFIED NURSE AIDES

16.12.20.1 ISSUING AGENCY: New Mexico Department of Health; Public Health Division; Health Facility Licensing and Certification Bureau.
[16.12.20.1 NMAC - Rp, 16 NMAC 12.20.1, 10/15/12]

16.12.20.2 SCOPE: These regulations apply to nurse aides on the nurse aide registry who may perform nurse aide duties at medicare or medicaid facilities.
[16.12.20.2 NMAC - Rp, 16 NMAC 12.20.2, 10/15/12]

16.12.20.3 STATUTORY AUTHORITY: The regulations set forth herein have been promulgated by the secretary of the New Mexico department of health by authority of Sections 9-7-6(E), 24-1-3(0), and 24-2-5(B) NMSA 1978.
[16.12.20.3 NMAC - Rp, 16 NMAC 12.20.3, 10/15/12]

16.12.20.4 DURATION: Permanent.
[16.12.20.4 NMAC - Rp, 16 NMAC 12.20.4, 10/15/12]

16.12.20.5 EFFECTIVE DATE: October 15, 2012, unless a different date is cited at the end of a section.
[16.12.20.5 NMAC - Rp, 16 NMAC 12.20.5, 10/15/12]

16.12.20.6 OBJECTIVE: The purpose of these regulations is to:

- A.** provide for notification to the nurse aide of allegations of abuse, neglect, or exploitation;
- B.** provide the opportunity for a hearing to the nurse aide against whom an allegation of abuse, neglect, or exploitation has been made;
- C.** provide for notification to the nurse aide and the nurse aide registry if the allegations are substantiated and upheld following any appeal requested pursuant to these regulations.

[16.12.20.6 NMAC - Rp, 16 NMAC 12.20.6, 10/15/12]

16.12.20.7 DEFINITIONS: For purposes of these regulations the following shall apply.

- A.** **“Abuse”** means any act or failure to act performed intentionally, knowingly or recklessly that causes or is likely to cause harm to a resident, including:
 - (1) physical contact that harms or is likely to harm a resident of a health facility;
 - (2) inappropriate use of a physical restraint, isolation, or medication that harms or is likely to harm a resident;
 - (3) inappropriate use of a physical or chemical restraint, medication, or isolation as punishment or in conflict with a physician’s order;
 - (4) medically inappropriate conduct that causes or is likely to cause physical harm to a resident;
 - (5) medically inappropriate conduct that causes or is likely to cause great psychological harm to a resident;
 - (6) an unlawful act, a threat or menacing conduct directed toward a resident that results and might reasonably be expected to result in fear or emotional or mental distress to a resident.
- B.** **“Exploitation”** of a resident consists of the act or process, performed intentionally, knowingly, or recklessly, of using a resident’s property for another person’s profit, advantage or benefit without legal entitlement to do so.
- C.** **“Facility”** means a skilled nursing facility or nursing facility, or a distinct part of a skilled nursing facility or nursing facility.
- D.** **“Great psychological harm”** means psychological harm that causes mental or emotional incapacitation for a prolonged period of time or that causes extreme behavioral change or severe physical symptoms that require psychological or psychiatric care.
- E.** **“Licensed health professional”** means a physician, physician assistant, nurse practitioner, physical, speech, or occupational therapy assistant, registered professional nurse, licensed practical nurse, or licensed or certified social worker.

F. “Neglect” means subject to the resident’s right to refuse treatment and subject to the caregiver’s right to exercise sound medical discretion, the grossly negligent:

(1) failure to provide any treatment, service, care, medication or item that is necessary to maintain the health or safety of a resident;

(2) failure to take any reasonable precaution that is necessary to prevent damage to the health or safety of a resident;

(3) failure to carry out a duty to supervise properly or control the provision of any treatment, care, good, service or medication necessary to maintain the health or safety of a resident.

G. “Nurse aide” means any individual who provides nursing or nursing related services to residents in a facility and who is not a licensed health professional, a registered dietitian, or someone who volunteers to provide such services without pay.

H. “Registry” means a listing by the state survey agency of all individuals who have satisfactorily completed a nurse aide training or competency evaluation program approved by the department of health and state survey agency, or who have qualified by reciprocity.

I. “Resident” means any person who resides in a health care facility or who receives treatment from a certified health care provider.

J. “Survey agency” means the health facility licensing and certification bureau of the New Mexico department of health.

[16.12.20.7 NMAC - Rp, 16 NMAC 12.20.7, 10/15/12]

16.12.20.8 INVESTIGATION: Following review by the survey agency, all allegations for which there is reason to believe, either through oral or written evidence, that the resident has been abused, neglected or exploited will be investigated.

[16.12.20.8 NMAC - Rp, 16 NMAC 12.20.8, 10/15/12]

16.12.20.9 SOURCE OF COMPLAINTS: All complaints received by the survey agency for which there is reason to believe that the resident has been abused, neglected or exploited will be investigated regardless of their source.

[16.12.20.9 NMAC - Rp, 16 NMAC 12.20.9, 10/15/12]

16.12.20.10 NOTIFICATION: If the survey agency determines, based on oral or written evidence, that resident abuse, neglect or exploitation occurred, it shall notify by mail the nurse aide implicated in the investigation and the administrator of the facility that employs the nurse aide of the:

A. nature of the allegation(s);

B. date of the occurrence;

C. right to a hearing;

D. survey agency’s intent to report the substantiated findings, once the nurse aide has had the opportunity for a hearing, to the nurse aide registry and other appropriate licensure authorities;

E. fact that the nurse aide’s failure to request a hearing in writing within 30 days from the date of the notice will result in the survey agency reporting the substantiated findings to the administrator of the facility that employs the nurse aide to the nurse aide registry.

[16.12.20.10 NMAC - Rp, 16 NMAC 12.20.10, 10/15/12]

16.12.20.11 REQUEST FOR HEARING: A nurse aide determined by the survey agency to have committed abuse, neglect, or exploitation may request an administrative hearing. The request for a hearing shall be in writing and mailed or delivered to the New Mexico department of health as directed in the notification sent pursuant to 16.12.20.10 NMAC.

[16.12.20.11 NMAC - Rp, 16 NMAC 12.20.11, 10/15/12]

16.12.20.12 IMPARTIAL HEARING OFFICER: Upon receipt of a timely request for a hearing, the secretary of the department of health or his or her designee shall appoint an impartial hearing officer to conduct the hearing and issue a report and recommended decision. The hearing officer need not be an attorney. The hearing officer must not have been involved in any way in the action which is challenged in the hearing.

[16.12.20.12 NMAC - Rp, 16 NMAC 12.20.12, 10/15/12]

16.12.20.13 PARTIES: The parties to a hearing conducted under these regulations shall be the survey agency and the nurse aide.

[16.12.20.13 NMAC - Rp, 16 NMAC 12.20.13, 10/15/12]

16.12.20.14 PRE-HEARING DISCOVERY:

A. Upon written request, the nurse aide who has requested a hearing shall be entitled to review and copy documents in the survey agency's file that are relevant to the challenged action. Documents protected by confidentiality or privilege, however, shall not be inspected or copied.

B. The parties shall disclose to each other verbally, or in writing, and to the hearing officer, the names of witnesses to be called and the general subject matter of their testimony no later than two days prior to the hearing. No formal depositions shall be allowed, although if the witnesses do not object, they may be informally interviewed prior to their testimony.

[16.12.20.14 NMAC - Rp, 16 NMAC 12.20.14, 10/15/12]

16.12.20.15 SCHEDULING THE HEARING:

A. The hearing shall take place within 30 days after the survey agency's receipt of the request for a hearing.

B. The survey agency or, if so delegated, the hearing officer shall schedule the hearing at a place and time reasonably convenient for the nurse aide and shall provide reasonable notice to the parties and to the administrator of the facility that employs the nurse aide of the place and time of the hearing.

[16.12.20.15 NMAC - Rp, 16 NMAC 12.20.15, 10/15/12]

16.12.20.16 CONDUCT OF HEARING:

A. The hearing officer shall conduct the hearing in public except when a closed hearing is requested in order to protect confidential information.

B. The survey agency has the burden of proving, by a preponderance of the evidence, the existence of the conduct relied upon to take the challenged action.

C. Testimony shall be under oath and witnesses are subject to cross examination.

D. The rules of evidence do not apply, however, evidence shall be admitted if it is the type that a reasonable person would rely on in the conduct of his/her affairs.

E. If a nurse aide demonstrates that resident neglect was caused by factors beyond his or her control, such showing shall constitute a defense to the charge of neglect.

F. A record made by audio recording device shall be maintained with the hearing officer's file.

[16.12.20.16 NMAC - Rp, 16 NMAC 12.20.16, 10/15/12]

16.12.20.17 REPORT AND RECOMMENDATIONS OF HEARING OFFICER: The hearing officer shall render and mail a written report and recommended decision within five working days of the conclusion of the hearing to the secretary of the department of health or his or her designee. The report shall state the basis of such decision and recommend final action to the secretary or the designee. The decision need not contain formal findings of fact or conclusions of law.

[16.12.20.17 NMAC - Rp, 16 NMAC 12.20.17, 10/15/12]

16.12.20.18 FINAL DECISION: The secretary, or his or her designee, shall render a final determination within 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.

[16.12.20.18 NMAC - Rp, 16 NMAC 12.20.18, 10/15/12]

16.12.20.19 REPORT OF FINDINGS: If the secretary, or his or her designee, finds that the nurse aide has abused, neglected, or exploited a resident the survey agency shall report these findings to:

A. the nurse aide;

B. the administrator of the facility that employs the nurse aide; and

C. the nurse aide registry.

[16.12.20.19 NMAC - Rp, 16 NMAC 12.20.19, 10/15/12]

16.12.20.20 REPORT OF FINDINGS TO THE NURSE AIDE REGISTRY: Within 10 working days of the secretary's, or his or her designee's, findings, the survey agency shall report the following information to the nurse aide registry:

- A. the finding made by the secretary, or his or her designee, as a result of the hearing;
- B. any statement by the nurse aide disputing the finding;
- C. that the nurse aide waived the right to a hearing, if applicable;
- D. any failure by the nurse aide to respond to the allegation.

[16.12.20.20 NMAC - Rp, 16 NMAC 12.20.20, 10/15/12]

16.12.20.21 REQUIRED CONTENT OF REGISTRY RECORDS: The survey agency shall retain in accordance with state of New Mexico recordkeeping requirements:

- A. records of occurrence;
- B. investigative reports;
- C. hearing findings;
- D. waiver of hearing rights.

[16.12.20.21 NMAC - Rp, 16 NMAC 12.20.21, 10/15/12]

16.12.20.22 APPEAL OF FINAL ACTION: A party may appeal the secretary's, or his or her designee's, final action to the first judicial district court in Santa Fe pursuant to Rule 1-075, NMRA within 30 days from the date of the final action. An appeal does not stay the final action.

[16.12.20.22 NMAC - Rp, 16 NMAC 12.20.22, 10/15/12]

16.12.20.23 RIGHT TO PETITION THE REMOVAL OF NAME FROM THE NURSE AIDE REGISTRY IN CASES OF NEGLECT: A nurse aide may petition the department of health for the removal of his or her name from the nurse aide registry in cases where there was a finding of neglect. Petitions for removal will not be accepted when the finding was for abuse, physical or verbal. Such petitions shall be made in writing and mailed or hand delivered to the Department of Health, Division of Health Improvement, HFL&C Bureau Chief, 2040 South Pacheco St., Santa Fe, New Mexico 87505. The following procedures apply to nurse aides who petition for the removal of his or her name from the nurse aide registry.

A. The nurse aide may petition the department after one year from the date that he or she was placed on the nurse aide registry. In his or her petition the nurse aide must show that through their employment and personal history that their performance as a nurse aide does not reflect a pattern of abusive behavior or neglect; and that neglect involved in the original finding was a singular occurrence.

B. Within 30 days of receipt of a petition the department shall set the date for a hearing. Failure to petition within 30 days from the conclusion of the one year period shall result in forfeiture of the person's right to a hearing. Such a request shall be made in writing and mailed, or hand delivered, and shall be accompanied by a payment of forty dollars (\$40.00) or a sworn statement of indigence on a form provided by the department. The hearing shall be held in Santa Fe, New Mexico at the department of health.

C. In the event that the department denies the petition, the department will notify the nurse aide within 30 days of the reasons for denying the petition and the nurse aide will continue to be placed on the nurse aide registry.

D. If the secretary of the department of health, or his or her designee, determines that the nurse aide does not show a pattern of abusive behavior or neglect, and the neglect involved was a singular occurrence, the nurse aide shall be placed in probationary status on the nurse aide registry. The period of probation will be determined by the secretary, or his or her designee, and shall not exceed one year. During the probationary period the nurse aide must complete necessary training involving resident's rights, or other training approved by the health facility licensing and certification bureau. Upon successful completion of the probationary period the nurse aide's certification will be reinstated, and he or she will be removed from the nurse aide registry.

[16.12.20.23 NMAC - Rp, 16 NMAC 12.20.23, 10/15/12]

HISTORY OF 16.12.20 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:

DOH 93-7 (PHD), Regulations Governing Hearing Procedures for Nurse Aides in New Mexico, filed 9/1/93.

History of Repealed Material:

16 NMAC 12.20, Hearing Requirements For Certified Nurse Aides, filed 10/18/96 - Repealed, effective 10/15/12.

Other History:

16 NMAC 12.20, Hearing Requirements For Certified Nurse Aides, filed 10/18/96 was renumbered, reformatted and amended to 16.12.20 NMAC, effective 10/15/12.