

From: [Julie Rwan](#)
To: [Apodaca, Sheila, DOH](#)
Cc: [Kate Boulton](#); [Derek Carr](#); [Donette Perkins](#)
Subject: [EXTERNAL] Vital Strategies comment on proposed repeal and replace of 7.4.6 NMAC (Harm Reduction/Syringe Exchange Program)
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Attachments: [7.4.6NMAC_PublicComments_VitalStrategies_FINAL.pdf](#)

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Dear Ms. Apodaca,

On behalf of the Vital Strategies Overdose Prevention Program, I am submitting comments on the New Mexico Department of Health’s proposed repeal and replace of 7.4.6 NMAC, “Requirements Governing the Harm Reduction/Syringe Exchange Program.” The enactment of 2022 New Mexico House Bill 52 and the proposed rule implementing the legislation are major milestones for advancing overdose prevention and harm reduction in New Mexico. Vital Strategies commends the state on these noteworthy achievements, which will undoubtedly save lives, and offers recommendations in the attached document to further clarify and strengthen the proposed rules.

We appreciate the opportunity to submit these public comments. Should you have any questions or experience difficulties accessing the attached PDF, please do not hesitate to contact me at jrwan@vitalstrategies.org.

Sincerely,
Julie Rwan

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August 16, 2022

Sheila Apodaca
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RE: Proposed repeal and replace of 7.4.6 NMAC, “Requirements Governing Harm Reduction/Syringe Exchange Program”

On behalf of the Vital Strategies Overdose Prevention Program, we write to express our support for the Department of Health’s (“Department”) proposal to revise its regulations governing harm reduction services in New Mexico. Vital Strategies is a global public health organization working with governments and communities in over 70 countries to help reduce preventable deaths, bringing expertise and technical assistance on health issues like cardiovascular health, road safety, tobacco control, food policy, and drug overdose. Our organization is the lead partner in the Bloomberg Overdose Prevention Initiative, which expanded to include New Mexico in late 2021. We look forward to working with state, tribal, and local governments, providers, and community organizations in the coming years to support an equitable and sustainable reduction in overdoses in New Mexico.

Amidst the COVID-19 pandemic, the country’s drug overdose crisis has reached tragic new heights. The latest data from the Centers for Disease Control and Prevention (“CDC”) show that overdose deaths in the United States continue to rise and, for the first time ever, surpassed 100,000 deaths in a single year.¹ Recent CDC data also show striking racial and ethnic disparities in drug overdose death rates, with non-Hispanic Black and non-Hispanic American Indian or Alaska Native persons more likely to experience a fatal overdose and less likely to have previously received substance use treatment.² Although early stages of the overdose crisis primarily involved prescription opioid analgesics, most overdose deaths now involve more potent illicitly manufactured fentanyl and fentanyl analogs as well as, increasingly, stimulants such as cocaine and methamphetamine.³ Consumption patterns have also

¹ Ahmad FB, Cisewski JA, Rossen LM, Sutton P. Provisional drug overdose death counts. National Center for Health Statistics. 2022. Designed by LM Rossen, A Lipphardt, FB Ahmad, JM Keralis, and Y Chong: National Center for Health Statistics.

² Kariisa M, Davis NL, Kumar S, et al. Vital Signs: Drug Overdose Deaths, by Selected Sociodemographic and Social Determinants of Health Characteristics — 25 States and the District of Columbia, 2019–2020. *MMWR Morb Mortal Wkly Rep* 2022;71:940–947.

³ Other drugs. Centers for Disease Control and Prevention. <https://www.cdc.gov/drugoverdose/deaths/other-drugs.html>. Last Reviewed November 18, 2021. Accessed August 10, 2022.



shifted, with an increasing number of people who use drugs (PWUD) smoking, rather than injecting, drugs.⁴

Tailored overdose prevention and harm reduction strategies can help mitigate the risks created by a more potent and unpredictable drug supply, increased stimulant use, and changes to consumption patterns, ultimately reducing overdose deaths and other drug-related health harms. These strategies include building on the services and capacity of sterile syringe access programs to ensure that PWUD have access to sterile supplies regardless of the type of drug involved (e.g., opioids vs. stimulants) or means of consumption (e.g., injection vs. smoking or inhalation). They also include the widespread distribution of drug checking tools like fentanyl test strips (FTS), used to test drugs for dangerous adulterants.

The enactment of 2022 New Mexico House Bill 52 and the proposed rules implementing the legislation are major milestones for advancing overdose prevention and harm reduction in New Mexico. Vital Strategies commends the state on these noteworthy achievements, which will undoubtedly save lives, and offers these recommendations to further clarify and strengthen the proposed rules.

I. Expand the types of supplies a harm reduction provider may distribute to be consistent with best practice and the statutory framework

Vital Strategies strongly believes that harm reduction services should be inclusive of all PWUD, regardless of the types of drug(s) used or means of consumption. As noted in the Department’s notice of public hearing, such inclusivity is particularly important given continued shifts in the drug supply and drug consumption patterns, disparities in engagement with harm reduction services, and evidence that smoking or inhaling substances is generally safer than injecting them.

We are encouraged that the proposed rules expand the types of supplies that harm reduction providers may distribute to participants, including authorization to distribute safer smoking supplies and safer snorting supplies. We also strongly support the removal of language specifying the number of syringes a harm reduction provider must offer upon a participant’s enrollment and during subsequent harm reduction sessions.⁵ These changes align with the extensive research demonstrating that harm

⁴ Kral AH, Lambdin BH, Browne EN, Wenger LD, Bluthenthal RN, Zibbell JE, Davidson PJ. Transition from injecting opioids to smoking fentanyl in San Francisco, California. *Drug Alcohol Depend.* 2021 Oct 1;227:109003.

⁵ This language is presently codified at N.M.A.C. § 7.4.6.10(B)(10).

reduction programs are most effective when they adopt a needs-based approach to distributing sterile syringes and other safer use supplies.⁶

However, we believe the proposed rules may unnecessarily restrict the types of supplies that harm reduction providers may distribute. More specifically, proposed N.M.A.C. 7.4.6.10 establishes an *exclusive* list of permitted supplies rather than allowing harm reduction providers to tailor their programs to the unique needs of the participants and communities they serve. These restrictions are neither consistent with evidence-based best practices nor required by statute.

The authorizing statute requires the Department to “promulgate rules as necessary for the administration of the Harm Reduction Act, including *developing criteria for the types of supplies and devices provided pursuant to the harm reduction program* and standards for distribution of those supplies or devices through that program.”⁷ The statute further provides,

*“The criteria and standards shall be developed to provide supplies and devices in order to reduce: (1) cases of negative health outcomes associated with drug use, such as overdoses or the spread of infectious disease; and (2) harm by promoting reduced use of non-sterile items and improving participant engagement in harm reduction services and prevention education.”*⁸

The statute thus contemplates rules that establish types and qualifying criteria for supplies or devices that further these goals rather than an enumerated and inflexible list of specific items which do so.

Another section of the authorizing statute – N.M.S.A. 24-2C-5(D) – arguably calls for the Department to approve specific supplies or devices.⁹ However, we believe this provision must be read in the full context of N.M.S.A. 24-2C-5. More specifically, subsections A through C of N.M.S.A. 24-2C-5 outline three categories of items that harm reduction programs *shall* provide participants:

A. sterile hypodermic syringes and needles in exchange for used hypodermic syringes, needles or other objects used to inject controlled substances or controlled substance analogs into the human body;

⁶ Javed, Z., Burk, K., Facente, S., Pegram, L., Ali, A. & Asher, A. (2020). *Syringe Services Programs: A Technical Package of Effective Strategies and Approaches for Planning, Design, and Implementation*. Atlanta, GA: US Department of Health and Human Services, National Center for HIV/AIDS, Viral Hepatitis, STD and TB Prevention, Centers for Disease, Control and Prevention; 2020.

⁷ N.M. Stat. Ann. § 24-2C-4(E) (emphasis added).

⁸ N.M. Stat. Ann. § 24-2C-4(E).

⁹ N.M. Stat. Ann. § 24-2C-5(D) (“The harm reduction program shall provide participants with: *supplies or devices approved by the department* for distribution in accordance with rules established pursuant to Subsection E of Section 24-2C-4 NMSA 1978”) (emphasis added).

B. other objects used to prepare or consume controlled substances or controlled substance analogs;

C. supplies or devices used for testing controlled substances or controlled substance analogs for potentially dangerous adulterants;

When reading N.M.S.A. 24-2C-5 in its entirety, subsection D is best understood as instructing the Department to approve specific supplies or devices only to the extent the supplies or devices do not otherwise fall within one of the more general categories of N.M.S.A. 24-2C-5(A) through (C). Any requirement for the Department to approve specific supplies or devices under subsection D thus operates to expand, rather than restrict, the items that harm reduction providers may distribute to participants.¹⁰

The proposed language of N.M.A.C. 7.4.6.10 raises additional concerns, including conflicts with other provisions in the proposed rules. Proposed N.M.A.C. 7.4.6.8(C), for example, authorizes organizations who provide direct services to individuals who use substances to operate as a harm reduction provider for the purposes of “providing fentanyl test strips or other devices approved by the department to check for potential adulterants.” But N.M.A.C. 7.4.6.10 – the exclusive list of items harm reduction providers may distribute – does not include fentanyl test strips or other drug checking supplies.

Similarly, proposed N.M.A.C. 7.4.6.10 does not include opioid overdose reversal agents like naloxone, nor any variety of other supplies which may be beneficial for harm reduction providers to make available to participants, including food, over-the-counter medications, and wound care supplies. The proposed rules even exclude several basic items permitted under the current rules such as alcohol wipe pads, antibiotic ointment, gauze pads, and medical gloves.¹¹ These exclusions illustrate an inherent challenge when attempting to create an exhaustive list of permissible supplies – something important is invariably excluded.

¹⁰ Importantly, the immunity from civil or criminal liability under New Mexico’s drug paraphernalia law is not contingent on the Department’s approval of specific supplies or devices. With respect to harm reduction providers, the law exempts all conduct for activities authorized by the Harm Reduction Act, which includes distributing not only specifically enumerated supplies or devices, but also those authorized by N.M.S.A. 24-2C-5(A) through (C). See N.M.S.A. § 30-31-25.1(B)(1). Similarly, the protections for participants apply to the possession of “supplies or devices obtained pursuant to the Harm Reduction Act in accordance with rules established by the department of health for the harm reduction program.” N.M.S.A. § 30-31-25.1(A)(2). Accordingly, possession of supplies and devices meeting general criteria established in the Department’s rules would receive the same protections applicable to the possession of supplies and devices specifically enumerated in such rules.

¹¹ N.M.A.C. § 7.4.6.7(R) (defining “Works”); N.M.A.C. § 7.4.6.10(B)(11) (providing that “[c]lients shall be offered SHARPS and works, if available.”)

We strongly urge the Department to reconsider proposed N.M.A.C. 7.4.6.10 given the potential for inadvertent exclusions, broader lack of flexibility for harm reduction providers to respond to changing conditions and community needs, and inconsistency with the statutory framework. **We recommend that the Department:**

1. **Modify proposed N.M.A.C. 7.4.6.10 to mirror N.M.S.A. 24-2C-5(A) through (D).** This revision of N.M.A.C. 7.4.6.10 would establish four categories of supplies that harm reduction providers may distribute to participants: (1) sterile syringes, needles, and other objects used to inject substances; (2) other objects used to prepare or consume substances; (3) supplies for testing substances for potentially dangerous adulterants; and (4) other supplies approved by the Department. The Department should also clarify whether, how, and under what circumstances the Department will approve other supplies under N.M.S.A. 24-2C-5(D) (e.g., through subsequent promulgation of rules, Department guidance, or other means).
2. **Establish a *non-exhaustive* list of supplies within each of the four categories** by replacing “limited to” with “including, but not limited to.”¹²
3. **Modify proposed N.M.A.C. 7.4.6.10 regarding the “criteria for the types of supplies or devices provided pursuant to the harm reduction program.”** Proposed N.M.A.C. 7.4.6.10 provides that the list of permitted supplies are items the Department has determined: (1) reduce negative health consequences associated with substance use; (2) prevent overdose mortality; and (3) are designed to encourage participant engagement in other programming designed to improve overall community health. However, N.M.S.A. 24-2C-4(E) directs the Department to “develop[] criteria for the types of supplies or devices provided pursuant to the harm reduction program” – not to identify specific supplies meeting those criteria. **The Department should therefore adopt these criteria while clarifying that harm reduction providers may determine whether specific supplies meet the criteria.** This approach is more consistent with the authorizing statute and also ensures that harm reduction providers can effectively respond to diverse participant and community needs. Additionally, the Department should:
 - a. Modify the third criteria to better align with N.M.S.A. 24-2C-4(E)(2), which focuses on “participant engagement in harm reduction services and prevention education.” To

¹² For example, the second category, modeled on N.M.S.A. 24-2C-5(B), could read:

*Other objects used to prepare or consume controlled substances or controlled substance analogs, **including, but not limited to**, safer smoking and safer snorting supplies such as screens, pipe covers, wooden pushers, copper scrub pads, aluminum foil, straws designed to inhale substances, clean spoons for measurement, clean plastic razors, and clean flat surfaces.*

- accomplish this, the third criteria could alternatively specify “items that encourage participant engagement in harm reduction services or other programming designed to improve overall community health.”
- b. Use the disjunctive “or” rather than the conjunctive “and” when specifying the criteria for authorized supplies to ensure that harm reduction providers may distribute supplies if the supplies satisfy *at least one* of the specified criteria. Some supplies such as food and toiletries encourage participant engagement in harm reduction services even if they do not directly reduce negative health consequences associated with substance use or prevent overdose mortality. It is important that harm reduction providers have the flexibility to provide participants such supplies as part of a holistic approach to drug user health.

II. Ensure flexibility in the delivery of harm reduction services

As stated by the Department in its press release on the passage of House Bill 52, the shifting landscape of illicit drug use and overdose requires the “flexibility to move forward in developing effective harm reduction interventions.”¹³ This need for flexibility holds true not only for the Department, but also for harm reduction providers across New Mexico. Indeed, CDC identifies the importance of involving harm reduction program participants “in all aspects of program design, implementation, and service delivery.”¹⁴ We offer several recommendations to ensure that the proposed rules afford harm reduction providers sufficient flexibility to identify and act on the needs and priorities of the participants and communities they serve.

1. Clarify that harm reduction services may be provided through a variety of delivery models and service settings, including through both fixed-site and mobile access components.

The existing rules provide that a “harm reduction session” may be “conducted in a fixed building or through mobile methods; including motor vehicles, bicycles, walking, or other modes of transportation.”¹⁵ The proposed rule eliminates the definition “harm reduction session” and thereby

¹³ Critical enhancement to Harm Reduction Act heads to Governors desk. New Mexico Department of Health. February 2022. <https://www.nmhealth.org/news/awareness/2022/2/?view=1817>. Accessed August 10, 2022.

¹⁴ Javed, Z., Burk, K., Facente, S., Pegram, L., Ali, A. & Asher, A. (2020). *Syringe Services Programs: A Technical Package of Effective Strategies and Approaches for Planning, Design, and Implementation*. Atlanta, GA: US Department of Health and Human Services, National Center for HIV/AIDS, Viral Hepatitis, STD and TB Prevention, Centers for Disease, Control and Prevention; 2020.

¹⁵ N.M.A.C. § 7.4.6.7(I).

makes unclear the locations or means by which a harm reduction provider may deliver harm reduction services. The Department should restore the definition of "harm reduction session" or otherwise specify authorized modes of service delivery.

2. Authorize harm reduction providers to distribute safer use supplies via mail delivery.

People who use drugs experience numerous barriers to accessing harm reduction services, including distance, time, and stigma. Mobile harm reduction services help reduce these barriers but are also limited by staff capacity, hours of operation, and geographic reach. Mail-delivery of harm reduction supplies, including sterile injection equipment, other safer use supplies, and naloxone is an evidence-based practice to further increase PWUD's access to these life-saving resources. Research suggests that online and mail-based harm reduction programs may reach and engage different populations than traditional harm reduction programs, thereby closing gaps in access to safer use supplies.^{16,17} Vital Strategies has also provided direct funding and technical assistance in support of mail-based harm reduction services in other states, allowing us to observe the substantial benefits of this delivery model.

Mail-based delivery of harm reduction supplies may be particularly beneficial in New Mexico given the state's vast geography and limited availability of harm reduction service providers in rural and frontier areas. We recommend that the Department augment the proposed rules by explicitly authorizing harm reduction providers to distribute safer use supplies to participants via postal mail or other delivery services. A new provision could, for example, specify:

To the extent permitted under federal law, and subject to the requirements of federal law, notwithstanding any provision of these regulations to the contrary, an HRP may deliver supplies authorized by N.M.A.C. 7.4.6.10 to participants via postal mail or other delivery service.¹⁸

¹⁶ French, R., Favaro, J., Aronowitz, S. V. (2021). A free mailed naloxone program in Philadelphia amidst the COVID-19 pandemic. *International Journal of Drug Policy*, 94, 103199.

¹⁷ Hayes BT, Favaro J, Davis CS, Gonsalves GS, Beletsky L, Vlahov D, Heimer R, Fox AD. Harm Reduction, By Mail: the Next Step in Promoting the Health of People Who Use Drugs. *J Urban Health*. 2021 Aug;98(4):532-537.

¹⁸ Federal law and United States Postal Service policy permit the mailing of syringes or other items that may qualify as drug paraphernalia when authorized by state law. See 21 U.S.C. § 863(f)(1); Publication 52 - hazardous, restricted, and Perishable Mail. 453 Controlled Substances and Drugs | Postal Explorer. https://pe.usps.com/text/pub52/pub52c4_019.htm. Accessed August 15, 2022.

3. Clarify the scope of authorization and requirements applicable to organizations considered a harm reduction provider for the purpose of distributing drug checking devices.

The proposed rules provide that “[a]ll organizations who provide direct services to individuals who use substances ... shall be considered an HRP for the sole purpose of providing fentanyl test strips or other devices approved by the department to check for potential adulterants.” We understand this provision as authorizing the specified entities to distribute drug checking devices like fentanyl test strips without applying to become a harm reduction provider or complying with the regulatory requirements otherwise applicable to such providers (e.g., participant enrollment procedures, ID cards, data collection and reporting requirements). However, as currently drafted, the proposed rules are ambiguous as to whether organizations considered an HRP under proposed N.M.A.C. 7.4.6.8(C) are exempt from all regulatory requirements or if the exemption is limited to the application requirement. The Department should clarify that organizations considered an HRP under proposed N.M.A.C. 7.4.6.8(C) are exempt from all regulatory requirements otherwise applicable to HRPs.

4. Expand the types of individuals or organizations that are considered a harm reduction provider for the purpose of distributing drug checking supplies. As currently drafted, authorization to distribute fentanyl test strips and other drug checking supplies is limited to organizations who provide direct services to people who use substances. The Department should expand proposed N.M.A.C. 7.4.6.8(C) to authorize *any* individual or organization to distribute drug checking supplies, thereby enabling peer-to-peer (i.e., secondary) distribution. Evidence shows that peer-to-peer distribution is an important channel through which people who use drugs access harm reduction supplies.^{19,20,21,22} The Department should also consider expanding the types of supplies that individuals or organizations may distribute pursuant to proposed N.M.A.C. 7.4.6.8(C) to facilitate additional peer-to-peer distribution of safer use supplies, including sterile syringes.

¹⁹ Quinn B, Chu D, Wenger L, Bluthenthal RN, Kral AH. Syringe disposal among people who inject drugs in Los Angeles: The role of sterile syringe source. *Int J Drug Policy*. 2014;25(5):905-910.

²⁰ Lorvick J, Bluthenthal R, Scott A, et al. Secondary syringe exchange among users of 23 California syringe exchange programs. *Subst Use Misuse*. 2006;41(6-7):865-882.

²¹ De P, Cox J, Boivin JF, Platt RW, Jolly AM. Social network-related risk factors for bloodborne virus infections among injection drug users receiving syringes through secondary exchange. *J Urban Heal*. 2008;85(1):77-89.

²² Bardwell G, Kerr T, Boyd J, McNeil R. Characterizing peer roles in an overdose crisis: Preferences for peer workers in overdose response programs in emergency shelters. *Drug Alcohol Depend*. 2018;190:6-8.

Individuals who distribute or possess safer use supplies pursuant to such authorization would qualify for immunity under New Mexico’s drug paraphernalia statute.²³

5. Eliminate the requirement that a harm reduction provider have at least two staff present at all times during harm reduction sessions.

Proposed N.M.A.C. 7.4.6.9(E) requires that a harm reduction provider “have at least two staff present, or within voice or a direct line-of-sight visual signal range, at all times during harm reduction sessions.” Although an improvement from the existing rules, which require at least two staff be present or within voice (rather than visual) range, the Department should consider eliminating the requirement entirely. Staffing capacity is often a significant challenge for harm reduction providers, with programs frequently operating at or beyond full capacity to ensure participant needs are met.²⁴ By requiring that two or more staff be present during harm reduction sessions, the proposed rules risk reducing the overall capacity of harm reduction providers in the state. This concern is particularly acute with respect to service delivery in rural and frontier areas that may rely on a small number of harm reduction providers, or even a single individual who can provide harm reduction services.

Our experience working with harm reduction service providers across the country strongly suggests that harm reduction services can be safely and effectively delivered by a solo individual. Indeed, we are not aware of any other state laws that require multiple staff to be present to deliver harm reduction services. Eliminating the requirement that at least two staff be present or within voice or direct line-of-sight visual range during harm reduction sessions would provide New Mexico’s harm reduction providers with the flexibility needed to maximize their reach and impact.

If the Department chooses not to eliminate the requirement entirely, we recommend the Department clarify its applicability. For example, harm reduction providers implemented a variety of precautions

²³ Individuals distributing safer use supplies pursuant to this authority would be “directly and immediately engaged in activities related to the harm reduction program authorized by the Harm Reduction Act.” N.M.S.A. § 30-31-25.1(B)(1). Immunity for organizations specified in proposed N.M.A.C. 7.4.6.8(C) to distribute fentanyl test strips relies on the same statutory language. Similarly, individuals who receive the safer use supplies would be immune from liability for possession of drug paraphernalia pursuant to N.M.S.A. § 30-31-25.1(A)(2) because they have “obtained [the supplies] pursuant to the Harm Reduction Act in accordance with rules established by the department of health for the harm reduction program.” This means that the differences in statutory language regarding immunity for possession of drug testing supplies, N.M.S.A. § 30-31-25.1(A)(3), versus other safer use supplies, N.M.S.A. § 30-31-25.1(A)(2), should be immaterial so long as the supplies are obtained in accordance with the Department’s rules.

²⁴ See Olding M, Barker A, McNeil R, Boyd J. Essential work, precarious labour: The need for safer and equitable harm reduction work in the era of covid-19. *International Journal of Drug Policy*. 2021;90:103076.



and adaptations in response to the COVID-19 pandemic, including the use of virtual harm reduction sessions. The Department should clarify in its final rules or through subsequent guidance that harm reduction providers may continue to use digital technologies (both audio-video and audio-only communications) to provide harm reduction services, including to satisfy the requirement that two or more staff be present or within voice or direct line-of-sight visual range during harm reduction sessions.

Vital Strategies applauds the New Mexico Department of Health’s proposed rule and its intent to expand access to harm reduction services throughout the state. We encourage you to consider our suggestions for improving the scope and impact of the proposed rule. Should you have any questions, please do not hesitate to contact jrwan@vitalstrategies.org.

Sincerely,

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