

# NMAC

## Transmittal Form



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Volume:  Issue:  Publication date:  Number of pages:  (ALD Use Only) Sequence No.

Issuing agency name and address:  Agency DFA code:

Contact person's name:  Phone number:  E-mail address:

Type of rule action: New  Amendment  Repeal  Emergency  Renumber  (ALD Use) Recent filing date:

Title number:  Title name:

Chapter number:  Chapter name:

Part number:  Part name:

Amendment description (If filing an amendment):   
Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes  No  Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes  No  Public domain

### Specific statutory or other authority authorizing rulemaking:

Subsection E of Section 9-7-6 NMSA 1978, Section 24-1-3 NMSA 1978; Section 24-2C-1 to 24-2C-6 NMSA 1978; Section 24-1-3 NMSA 1978; and Section 30-31-25.1 NMSA 1978.

Notice date(s):  Hearing date(s):  Rule adoption date:  Rule effective date:

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# Concise Explanatory Statement For Rulemaking Adoption:

## Findings required for rulemaking adoption:

### Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

Please see the attached Statement of Reasons for the Repeal and Replacement of Rule 7.4.6 NMAC, Requirements Governing the Harm Reduction/Syringe Exchange Program.

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:


Billy J. Jimenez

Check if authority has been delegated

Title:

General Counsel-Acting Deputy Cabinet Secretary

Signature: (BLACK ink only OR Digital Signature)



Date signed:

11/17/22

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STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF HEALTH

IN THE MATTER OF PROMULGATION  
OF RULE 7.4.6 NMAC, REQUIREMENTS GOVERNING THE HARM  
REDUCTION/SYRINGE EXCHANGE PROGRAM

STATEMENT OF REASONS FOR ADOPTION OF PROPOSED RULE 7.4.6 NMAC,  
REQUIREMENTS GOVERNING THE HARM REDUCTION/SYRINGE EXCHANGE  
PROGRAM

The Acting Cabinet Secretary for the New Mexico Department of Health (“Department,”) David R. Scrase, M.D., following a public hearing conducted on August 17, 2022, hereby adopts the proposed rule, as revised after the hearing in response to public comments received as attached herein. This decision is based on the entire record in this matter, which includes a recording of the hearing and the Report and Recommendation of the Hearing Officer, Craig T. Erickson, dated September 27, 2022.

The Acting Cabinet Secretary has familiarized himself with the rulemaking record, and finds as follows:

1. The Department is authorized to promulgate rules as may be necessary to carry out the duties of the Department and its divisions, NMSA 1978, Section 9-7-6(E) NMSA 1978, and to enact this rule pursuant to the Harm Reduction Act at NMSA 1978, Section 24-2C-1 to 24-2C-6, the Public Health Act, Section 24-1-3, and Section 30-31-25.1 of the Controlled Substances Act.
2. By a letter dated July 13, 2022, the Acting Secretary of the Department, David R. Scrase, M.D. designated Craig T. Erickson to serve as hearing officer for the purpose of conducting the hearing and submitting a recommendation regarding the proposed rules.

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3. In accordance with NMSA 1978, Section 14-4-5.2, notice of the public hearing for the proposed rule adoption was provided to the public, through the following:

- a. In accordance with NMSA 1978, Section 14-4-5.2, more than 30 days prior to the date of the rule hearing, notice of the public hearing and proposed rule text was posted to the agency website at <http://www.nmhealth.org>, as well as to the New Mexico Sunshine Portal at [Home - New Mexico Sunshine Portal \(nm.gov\)](#).
- b. In accordance with NMSA 1978, Section 9-7-6(E), notice of the public hearing for the proposed rule was published in the Albuquerque Journal newspaper on July 12, 2022.
- c. In accordance with NMSA 1978, 14-4-5.2, notice of the public hearing for the proposed rule was published in the New Mexico Register on July 12, 2022.
- d. In accordance with the State Rules Act at NMSA 1978, § 14-4-2(E), the Notice of Public Hearing was emailed on July 12, 2022, to the following persons who have made a written request for notice from the department of announcements addressing the subject of rulemakings and who have provided the department an electronic mail address: Tom Gardner at Disability Rights New Mexico (DRNM); Marilyn Wolf at Disability Rights New Mexico (DRNM); and Crystal Hodges at New Mexico Attorney General's Office.
- e. In accordance with NMSA 1978, § 14-4-2(E), the Notice of Public Hearing was emailed to the New Mexico Legislative Counsel Service at [lcs@nmlegis.gov](mailto:lcs@nmlegis.gov) on July 12, 2022.

- f. In accordance with NMSA 1978, § 14-4A-4, the Notice of Public Hearing was emailed to Westlee Painter at the New Mexico Small Business Advisory Commission on July 12, 2022.
4. A public rule hearing was held via Microsoft Teams Online and by telephone in Santa Fe, New Mexico, on August 17, 2022 pursuant to NMSA 1978, Section 9-7-6(E).
5. Members of the public were afforded an opportunity to comment on the proposed rule at the hearing, in writing prior to the hearing and via email through the close of business on the date of the hearing.
6. Oral and written comments from members of the public were received prior to the rule hearing, at the rule hearing, and by email through the close of business on the day of the hearing, and the written comments are described in the Hearing Officer report.
7. Upon review of the entire record, the Secretary finds that with the following exceptions, the recommendations of the Hearing Officer are appropriate.
  - a. Exceptions to the hearing officer report
    - i. The Secretary disagrees with the hearing officer that an additional rule making process is necessary for the development of criteria for the types of supplies or devices provided by the harm reduction program and the standards for the distribution of those supplies and devices. Proposed section 7.4.6.10 provides specific lists of what supplies can be provided. Although the list of supplies is limited, the criteria is clearly stated that the supplies or devices to be provided must be an item on the approved list. The criteria are very specific, however, there is no requirement that the criteria be broad and flexible. Criteria is the plural of the noun criterion.

Merriam-Webster defines criterion as “a standard on which a judgment or decision may be based” Criterion Definition & Meaning - Merriam-Webster

The criteria used to satisfy the statutory requirement found at NMSA 1978 Section 24-2D-4(E) are the regulations which list the types of items that may be distributed by the harm reductions sites. The judgment or decision that one must make is whether the item the site is permitted to distribute is an item on one of the regulatory lists. Therefore, the standard on which the decision must be based is the list itself. With those criteria in place, the regulations meet the statutory requirements and no further rule making process to answer this question is necessary.

Additionally, the standards for distribution of items meeting the regulatory criteria are found throughout the proposed regulations including the requirements for becoming a harm reduction provider, site operations requirements, participant registrations, and all other requirements found in the regulations. No additional rule making is required for this obligation to be met.

8. The Secretary hereby adopts and incorporates recommendation (1) and rejects recommendation (2) as stated in the Hearing Officer’s Report issued by the Hearing Officer on September 27, 2022.

9. The Acting Cabinet Secretary finds that the proposed rule 7.4.6 NMAC, as revised by public comment received, the response of the Department, the Hearing Officer’s recommendations, and the exception in paragraph 7 of this statement is appropriate and

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consistent with the authorizing law, and the proposed revised rule, a copy of which is attached hereto, is hereby adopted.

NEW MEXICO DEPARTMENT OF HEALTH



David R. Scrase, M.D., Cabinet Secretary

11/16/2022

Date