



State of New Mexico  
Human Services Department  
**Human Services Register**



**I. DEPARTMENT**  
NEW MEXICO HUMAN SERVICES DEPARTMENT

**II. SUBJECT**  
8.314.6 NMAC MI VIA WAIVER SERVICES

**III. PROGRAM AFFECTED**  
(TITLE XIX) MEDICAID

**IV. ACTION**  
FINAL RULE

**V. BACKGROUND SUMMARY**

New Mexico Human Services Register Volume 38, Number 36, dated November 30, 2015, issued the proposed rule, 8.314.6 NMAC Mi Via Waiver Services.

A public hearing was held on January 23, 2015 and January 4, 2016, to receive public comments and testimony on this proposed rule. The Human Services Department (the Department) received 21 comments.

**Comments - Oral Testimony and Written Comments**

**8.314.6.7 NMAC**

**Section A**

Commenter is requesting the Department to clarify the deletion of the term “authorized agent” and if this would cause confusion with the role of the Authorized Representative.

**Department Response:** The deletion of authorized agent and change in definition of authorized representative was made to align the terms with other Medical Assistance Division (MAD) New Mexico Administrative Code (NMAC). The language stands as proposed.

Commenter is requesting the Department to delete the term “member” and replace it with “eligible recipient.”

**Department Response:** The term “member” within the definition of term “authorized agent” will not be replaced with “eligible recipient” as the term “authorized agent” has been removed

from the NMAC to align the terms with other Medical Assistance Division (MAD) New Mexico Administrative Code (NMAC).

### **Section B**

Commenter is requesting the Department to clarify of the role of the Authorized Representative in relation to directing recipient benefits.

**Department Response:** The authorized representative has the authority to direct Mi Via Waiver Services. The language stands as proposed.

Commenter is requesting the Department to clarify the authorized representative's ability to sign his or her own timesheet as the proposed language states that an authorized representative cannot sign his or her own timesheet but timesheets have spaces for two signatures, the Employee Signature and the Employer Signature.

**Department Response:** Authorized Representatives can sign timesheets if they are a paid provider as an Employee but they cannot approve their own timesheet as this must be done by the participant or the Employer of Record. The language stands as proposed.

### **Section C**

Commenter is requesting the Department to define the acronyms MAP and MAD which have not been previously defined.

**Department Response:** The Department agrees and has defined the acronyms.

### **Section N**

Commenter is requesting the Department to change the language from "the" to "his or her" and that the original language is retained.

**Department Response:** The Department agrees and has revised this section with the suggested language.

### **Section O**

Commenter is requesting the Department to clarify the role of the personal representative to include the responsibility of assisting the participant in understanding the regulations.

**Department Response:** Under Mi Via, it is the responsibility of the participant and Employee of Record (EOR) to review and have a clear understanding of 8.314.6 NMAC and the Service Standards. The language stands as proposed.

Commenter states that the inclusion of both an Authorized Representative and a Personal Representative is confusing and potentially duplicative.

**Department Response:** As defined in NMAC 8.314.6.7.O, the Personal Representative may be selected by an individual for the purpose of offering support and assisting the eligible recipient understand his or her Mi Via services. The Personal Representative will not have the authority to direct the member's Mi Via waiver services or make decisions on behalf of the eligible recipient. This is distinct from the Authorized Representative who may act on the member's behalf as defined in NMAC 8.314.6.7.A. The language stands as proposed.

### 8.314.6.10 NMAC

#### **Section B, Subsection (1)**

Commenter is requesting the Department to clarify language regarding HSD approval of agreed upon location for in-home assessments as current language excludes the participant's needs in the decision making for a location.

**Department Response:** The Department agrees and has revised this section with language that clarifies the role of the participant's needs in determining the location of in-home assessments as necessary.

#### **Section B, Subsection (2)**

Commenter states that the acronyms ICF/IID have not been defined prior.

**Department Response:** The acronym was previously defined in 8.314.6.7(K). The language stands as proposed.

### 8.314.6.11 NMAC

#### **Section A, Subsection (1) (a)**

Commenter is requesting the Department to clarify language regarding the requirement of employees and independent contractors to obtain a letter from the IRS and states that this requirement may create a burden on participants.

**Department Response:** The requirement to obtain an IRS-SS8 letter is specific to individuals providing services as an independent contractor and is required by state and federal regulation. It is the responsibility of the individual seeking to provide services as an independent contractor to obtain this letter and not the responsibility of the participant as noted in 8.314.6.11(1). The language stands as proposed.

#### **Section B**

Commenter is requesting the Department to require that individual employees and independent providers be required to pass a caregiver criminal history screening annually rather than every three years.

**Department Response:** Since 2013, all providers are entered in Caregiver Online Registry (COR). When evidence of a criminal nature occurs, such as an arrest, the Fiscal Management Agency (FMA) is automatically notified and the provider is removed from services. As well, every time a provider is chosen by a participant to provide services, he/she must undergo a background check and screening, even if he/she has already been providing services. Providers from an agency must complete and pass agency requirements. The language stands as proposed.

Commenter is requesting the Department to clarify who will be the responsible party to monitor that caregiver criminal history screenings are completed every three years.

**Department Response:** The State will monitor the requirement of employees and providers to pass a nationwide caregiver criminal history screening pursuant to NMSA 1978 Section 29-17-2 et seq. and 7.1.9 NMAC and an abuse registry screen pursuant to NMSA 1978, Section 27-7a-1 et seq. and 8.11.6 NMAC, initially and every three years. The language stands as proposed.

**Section B, Subsection (2)**

Commenter is requesting the Department to clarify required trainings and the potential for this rule leading to punitive measures.

**Department Response:** This section refers to vendor qualifications. It is the responsibility of the vendor that their employees receive and complete training specific to the eligible recipients' needs. The language stands as proposed.

**Section B, Subsection (4) (e)**

Commenter is requesting the Department to add "for minors" to clarify the term legal guardian.

**Department Response:** The Department agrees and has edited this section with the language suggested.

**Section B, Subsection (5) (a)**

Commenter is requesting the Department to adjust the rule to allow a provider to work in excess of 40 hours per week.

**Department Response:** The comment has been noted by the Department. The language stands as proposed.

**Section B, Subsection (5) (c)**

Commenter is requesting the Department to add language clarification to preclude providers from soliciting eligible recipients "or their authorized representatives" by offering gratuities.

**Department Response:** The Department agrees and has revised this section with the language suggested.

**Section B, Subsection (6)**

Commenter is requesting the Department to revise the sentence: "An eligible recipient is required to have an EOR when utilizing employees, whether the EOR is the eligible recipient or a designated qualified individual when the eligible recipient utilizes employees for mi via services."

**Department Response:** The Department agrees and has revised the language in this section.

**Section B, Subsection (6) (c)**

Commenter states that participants should be able to choose their EOR without restrictions such as the requirement that the EOR live within 100 miles of the New Mexico border and should not be restricted in paying the EOR.

**Department Response:** This comment has been noted by the Department. The language stands as proposed.

**Sections C and F**

Commenter is requesting the Department to explain why the age requirements to provide specific services differ and suggests consistency.

**Department Response:** Age requirements vary based on educational and work experience requirements specific to each service. The language stands as proposed.

**Section E, Subsection (3)**

Commenter is requesting the Department to remove of the word “customized” in relation to in-home living supports to be in line with the newly approved waiver.

**Department Response:** The Department agrees and has removed this term.

**Section F**

Commenter is requesting the Department to clarify who will be the responsible party for ensuring that supported employment providers meet the outlined qualifications.

**Department Response:** The provider agency is responsible to ensure providers meet the required qualifications. The language stands as proposed.

**Section F, Subsection (1)**

Commenter is requesting the Department to include more language regarding communities – this could potentially encourage natural supports on the job in the community that they serve.

**Department Response:** This comment has been noted by the Department. The language stands as proposed.

**Section F, Subsection (2)**

Commenter is requesting the Department to remove the acronyms MAD and DOH.

**Department Response:** The Department agrees and has edited this section as suggested.

**Section H, Subsection (1) (c)**

Commenter is requesting the Department to state that the responsibility to maintain a first aid kit in a vehicle, used to transport a participant, should be the responsibility of the driver.

**Department Response:** This comment has been noted by the Department. The language stands as proposed.

**8.314.6.12 NMAC**

Commenter expresses that there should be more accountability in the Mi Via waiver and suggests adopting the use of reports required by providers under the Developmental Disabilities waiver.

**Department Response:** In self-direction the agreement for the provision of services is between the provider and participant or the provider and the participant’s Employer of Record. Service providers and vendors who furnish goods and services under the Mi Via program are subject to audits from the State and Centers for Medicare and Medicaid Services (CMS) per NMAC 8.314.6.12. The language stands as proposed.

**8.314.6.13 NMAC****Sections A, B, C**

Commenter is requesting the Department to clarify eligibility requirements with the deletion of developmental disability and medically fragile definitions. Comments suggest that these definitions not be deleted because it may cause confusion.

**Department Response:** This section was amended to make the NMAC more concise. The detailed information on eligibility requirements is addressed in NMAC 8.290.400, as noted in NMAC 8.314.6.13. The language stands as proposed.

#### **8.314.6.14 NMAC**

##### **Section C, Subsection (5)**

Commenter states that record retention should not exceed that required by Federal or State regulation.

**Department Response:** This rule is in line with 45 CFR 164.316(b)(2)(i) and NMAC 8.302.1.17 E which details those providers who receive payments for treatments, services or goods must retain all medical and business records for a period of at least six years from the payment date. The language stands as proposed.

##### **Section E**

Commenter expresses concern over involuntary termination of a participant from the Mi Via program in instances where the participant makes a choice to not include and maintain services in his/her SSP and AAB that would address health and safety issues or that challenges the assessment after repeated and focused technical assistance.

**Department Response:** This regulation aligns with requirements in the approved CMS Waiver NM.0448, Appendix E: Participant Direction of Services, Involuntary Termination of Participant Direction. A Public Hearing for CMS Waiver NM.0448 appendix E was held on July 14, 2014. The language stands as proposed.

#### **8.314.6.15 NMAC**

Commenter expresses concern over the language that states “services and supports will be approved based on common needs and not individual needs unless the TPA has assessed that the eligible recipient has an individual need for the services.”

**Department Response:** The section has been revised as follows to be in line with CMS Final Rule requirements and approved CMS Waiver NM.0448.

##### **Section C, Subsection (1) (f)**

Commenter states that the responsibility to follow up on complaints against service providers is the responsibility of the participant not the consultant.

**Department Response:** The Department agrees and has struck this language from the rule.

##### **Section C, Subsection (4) (a)**

Commenter is requesting the Department to clarify the term “provider” in relation to who is responsible to fax the abuse, neglect and exploitation or report of death form to Division of Health Improvement.

**Department Response:** This word “provider” applies to “consultant provider” or to a provider of services. The language stands as proposed.

##### **Section F, Subsection (2)**

Commenter is requesting the Department clarify how outcomes for employment support will be measured and who will be responsible to auditing and measuring outcomes.

**Department Response:** Outcome of supported employment provider goals is monitored by the participant through the participant's Monthly and/or Quarterly meetings with their consultant. The language stands as proposed.

#### **Section G, Subsection (2) (h)**

Commenter is requesting the Department to clarify why Native Healers are an included health and wellness service and Hispanic/Latino curanderas are not.

**Department Response:** Native Healers are an approved service under the current CMS waiver NM .0448. At this time curanderas have not been included as an approved waiver service. The language stands as proposed.

#### **Section H**

Commenter is requesting the Department to include transportation as an allowable service for minors.

**Department Response:** Transportation for eligible recipients who are minors would be considered a non-covered good as these are goods that a legally responsible individual (parent, guardian) would ordinarily provide for household members of the same age who do not have a disability or chronic illness. The language stands as proposed.

Commenter states that the rule relies too heavily on the use of "natural supports" and does not fully take into account the need for medically necessary services to be covered under the Mi Via program.

**Department Response:** Denials are not based on natural supports. Service requests are reviewed and a clinical determination is made based on Mi Via criteria. Use of natural supports when available is a critical element of ensuring full access to the benefits of community living and community integration. The language stands as proposed.

#### **Section H, Subsection (3)**

Commenter is requesting the Department to add the following clarifying language: "Respite cannot be used for purposes of day-care nor can it be provided to school age children during school (including home school) hours."

**Department Response:** The Department agrees and has added the suggested language.

#### **Section H, Subsection (5)**

Commenter expressed concern that the allocation for environmental modifications was reduced from \$7,000 to \$5,000, due to a survey, and suggests maintaining the prior allocation amount.

**Department Response:** The reduction, which was based on an analysis of Mi Via average costs for environmental modifications, was made to bring equity to both the DD waiver and Mi Via waiver in regards to the Environmental Modification Service. An analysis was completed of Environmental Modification utilization over a two year period. Utilization fell under \$5,000 on average. The language stands as proposed.

### **8.314.6.16 NMAC**

Commenter states that certain non-covered goods are too limited and prevents participant's access to activities of choice.

**Department Response:** The Department finds that this rule does not preclude or prevent a participant from participating in activities of their choice. This rule outlines what goods and services are allowable to be funded under the waiver. The Mi Via Home and Community-Based Waiver is intended to allow eligible participants control over CMS approved waiver services and supports. The language stands as proposed.

### **Section G**

Commenter is requesting the Department to remove language restricting goods or services that are considered primarily recreational or diversional citing that this is subjective and such goods or services may service a therapeutic purpose.

**Department Response:** CMS disallows the use of waiver funds for services that are diversional or recreational in nature as these fall outside the scope of §1915(c) of the Act. The Department has revised the language in this section and has removed examples of activities that are considered recreational or diversional.

### **Section I**

Commenter states that certain non-covered goods including the purchase of services dogs are too limited and do not take into account medical need for such services.

**Department Response:** Related goods must address a clinical, functional, medical or habilitative need as per NMAC 8.314.6.15 H (4) (a). The cost of purchase and maintenance for service animals is not a covered service under CMS Waiver NM.0448. The language stands as proposed.

### **Section X**

Commenter contests the exclusion of cell phones as a covered good for minors, data as a non-covered service and the limitation on the number of cell phone lines per eligible recipient.

**Department Response:** The Department agrees and has struck the proposed language on the exclusion of cell phone service for minors. Data will be included under cell phone service with a limitation to the cost of one hundred dollars per month. The language on the limitation on the number of cell phone lines per eligible recipient shall remain as waiver services are intended for only the eligible recipient.

### **Section Z**

Commenter states that dental services should be covered under the waiver and removed as a Non-covered Good.

**Department Response:** Mi Via participants receiving waiver services access medically-necessary acute, ancillary, specialty, and behavioral health benefit services through a Centennial Care Managed Care Organization (MCO). This includes dental services. The language stands as proposed.



### 8.314.6.17 NMAC

#### **Section F, Subsection (3) (c) (ii)**

Commenter is requesting the Department to clarify language on required medical documentation for a participant's request in an increase to his or her budget above his or her annual Individual Budgetary Allotment (IBA) due to behavioral conditions or cognitive difficulties.

**Department Response:** The Department agrees and has edited this section with the suggested language.

### 8.314.6.20 NMAC

Commenter is requesting the Department to change language to clarify that a participant may request an administrative hearing when services are not delivered with "reasonable promptness."

**Department Response:** As a self-directed program it is the responsibility of the participant, or his or her authorized representative, to address issues related to service delivery with their employees or vendors. If there are adverse actions related to services provided by HSD the participant may request a fair hearing under 8.314.6.20A. The language stands as proposed.

#### **Section A, Subsection (7)**

Commenter is requesting the Department to change language to clarify that it is the participant's decision of what constitutes an "adverse action" and when they may request an administrative hearing.

**Department Response:** The rule outlines what is considered adverse action. A participant may request a fair hearing as defined in 8.314.6.20A. The language stands as proposed.

#### **Section B**

Commenter is requesting the Department to change language to clarify the role of DOH and HSD involvement in administrative hearings.

**Department Response:** The Department agrees and edited this section with the suggested language.

### 8.314.6.21 NMAC

#### **Section A**

Commenter is requesting the Department to change language to indicate that repayment "may" be required as repayment is not an "inevitable conclusion" and suggests that continuation of benefits be automatic rather than at the request of the participant.

**Department Response:** Repayment is not required if it is determined that the denied services under appeal are approved as a result of the fair hearing. Continuation of benefits is at the participant's request. This allows the participant the option to request to continue receiving services during the appeal process, with the knowledge that if the finding is not in the participant's favor, repayment of services received during the appeal period, is required.

### 8.314.6.22 NMAC

Commenter expressed concern that the removal of timeline components related to the grievance/complaint system would negatively impact a recipient's ability to receive a resolution.

**Department Response:** This change removes language that described the grievance and complaint process that only applied to consultant providers. Language in this section now affords participants and/or participants' families a primary contact to file complaints regarding any component of the program.

The language in all other sections of these rules stand as proposed.

#### **VI. RULE**

The above referenced rule will be contained in the Medical Assistance Division Program Policy Manual. This Final Register and rule will be available on the HSD website at <http://www.hsd.state.nm.us/LookingForInformation/registers.aspx> and the corresponding rules will also be posted at on the HSD website at: <http://www.hsd.state.nm.us/providers/rules-nm-administrative-code-.aspx>. If you do not have internet access, a copy of the rules may be requested by contacting the Medical Assistance Division at 505-827-6252.

#### **VII. EFFECTIVE DATE**

This rule will have an effective date March 1, 2016.

#### **VIII. PUBLICATION**

Publication of these rules approved by:



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BRENT EARNEST, SECRETARY  
HUMAN SERVICES DEPARTMENT