May 8, 2024

BY REGULAR MAIL AND EMAIL

Human Services Department
Office of the Secretary
Attn: Medical Assistance Division Public Comments
P.O. Box 2348
Santa Fe, NM 8504-2348
Email: HSD-madrules@hsd.nm.gov

Re: Proposed Rule Regarding Medicated Assisted Treatment (MAT) Services in Correctional Settings, 8.325.12 NMAC

Dear Human Services Department:

I am writing on behalf of Santa Fe County (County) to respectfully comment on the Proposed Rule of the Medical Assistance Division (MAD) regarding Medicated Assisted Treatment (MAT) Services in Correctional Settings, 8.325.12 NMAC (Proposed Rule). The Proposed Rule is being promulgated pursuant to NMSA 1978, § 24-1-5.11 (Statute).

All terms defined in the Proposed Rule have the same meaning herein. In addition, citations are to the Proposed Rule, unless otherwise noted.

I. Background and Summary

The County Adult Detention Facility (ADF) believes in and supports MAT treatment and has provided and continues to provide treatment to detainees with OUDs and SUDs. We also appreciate MAD's efforts to develop the Proposed Rule. Depending upon its intended scope and interpretation, however, the Proposed Rule:

- exceeds the authority granted by the Statute to the Health Care Authority (HCA) for rulemaking by requiring counties to provide MAT;
- would appear to violate a constitutional prohibition on a rule imposing an unfunded mandate on counties;
- fails to account for the significant different in populations and operations of County Detention Facilities and State Correction Facilities; and
- has a variety of technical issues that should be addressed to avoid ambiguity and resulting disputes over interpretation.

The Statute created the "medication-assisted treatment for the incarcerated program fund" (Fund) in the State treasury. The purpose of the fund is to assist counties "to establish and operate medication-assisted treatment programs for people who are incarcerated in county correctional facilities." NMSA 1978, § 24-1-5.11(A).

The Statute also requires HCA to promulgate rules for the operation of medication-assisted treatment programs in correctional facilities. NMSA 1978, § 24-1-5.11(B).

The Statute also commands the Corrections Department to do certain things in subsection D, as follows:

> "D. The *corrections department* shall:
> (1) expand and continue to operate currently existing medication-assisted treatment programs for people who are incarcerated in a *state correctional facility*; (emphasis added)
> (2) by December 31, 2025, establish and operate a medication-assisted treatment program to continue medication-assisted treatment for incarcerated people with a prescription who are booked into a *state correctional facility*; and (emphasis added)
> (3) by the end of fiscal year 2026, offer medication-assisted treatment to all people who are incarcerated in *state correctional facilities* and in need of medication-assisted treatment." (emphasis added)

Importantly, while the Fiscal Impact Report details anticipated costs and resources for NMCD to implement MAT, it does not include fiscal and resource impacts on the various County Detention Facilities to fully implement the type of program described in state law.

Most importantly, the Legislature did not appropriate any money to the Fund, and we are aware of no other source of revenue through which HCA could reimburse counties for the cost of MAT programs County Detention Facilities.

II. Overarching Comments

1. Clarify Scope of Proposed Rule to Only Apply to County Detention Facilities that Voluntarily Seek Funding from the Fund. The scope of the Proposed Rule is unclear. As written, one could interpret the Proposed Rule two different ways, neither of which is consistent with the Statute and both of which raise grave constitutional issues.

Interpretation 1: The Proposed Rule mandates NMCD and all County Detention Facilities to implement MAT.

The Statute does not require County Detention Facilities to provide MAT. A rule requiring counties to provide MAT would, therefore, exceed the statutory rule making authority of HSD and violate a constitutional prohibition on a rule imposing an unfunded mandate on Counties.

It is well settled that "an agency may not create a regulation that exceeds its statutory authority." *Gonzales v. N.M. Educ. Ret. Bd.,* 109 N.M. 592, 595, 788 P.2d 348, 351 (1990) (citation omitted). If there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail. An agency by regulation cannot overrule a specific statute. *Jones v. Empl. Servs. Div. of Human Servs. Dep't,* 1980-NMSC-120, ¶ 3, 95 N.M. 97, 619 P.2d 542.

In *Alarcon v. Albuquerque Pub. Sch. Bd. Of Educ.,* 2018-NMCA-021, ¶ 29, 413 P.3d 507, the Court stated "The discretion otherwise afforded the Public Education Department…may not justify altering, modifying or extending the reach of a law created by the Legislature. With respect to the principle of separation of powers, 'an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own." (Citing *In re Adjustments to Franchise Fees,* 2000-NMSC-035, ¶ 19, 129 N.M. 787, 14 P.3d 525).

Additionally, such a mandate would be an infringement by HCA on "the essence of legislative authority- the making of law." *In re Adjustments to Franchise Fees,* at ¶ 20. Finally, pursuant to the State Rules Act, "[n]o rule is valid or enforceable if it conflicts with a statute" and "a conflict between a rule and a statute is resolved in favor of the statute." NMSA 1978, §14-4-5.7(A).

Moreover, N.M. Const. Art. X, Sec. 8 provides that "[a] state rule or regulation mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed." As indicated above, the state has not provided any funding (let alone sufficient funding) for MAT in County Detention Facilities.

Interpretation 2: The Proposed Rule applies only to NMCD and Counties who voluntarily choose to provide MAT.

This interpretation would suffer from many of the same legal defects described above, even though the mandate would be more limited in scope.

It could also deter counties from offering MAT in County Detention Facilities by increasing the cost of doing so and reducing their flexibility in establishing programs that meet their budgetary and other constraints.

Proposed revision: Revise the Proposed Rule so that it only applies to counties who apply for funding from the Fund.

The Proposed Rule should be revised by replacing the existing definition of Correctional Facility with the following:

> "**Correctional facility:** A prison or other detention facility, whether operated by a government or private contractor, that is used for confinement of adult persons who are charged with or convicted of a violation of a law or an ordinance. A County Detention Facility is a Correctional Facility within the meaning of this rule only if it receives funding from the medication-assisted treatment for the incarcerated program fund created by Section 24-1-5.11(A) NMSA 1978."

This revision would:

- make the Proposed Rule consistent with the Statute;
- avoid constitutional issues with unfunded mandates; and
- not deter counties from providing MAT in County Detention Facilities.

2. Revise Proposed Rule to Account for Practical Differences in Populations and Operations of State Correction Facilities and County Detention Facilities. The Proposed Rule does not differentiate or take into account the practical considerations and differences between County Detention Facilities and State Correctional Facilities. ADF books and releases a combined average of five hundred (500) detainees daily. Ninety-three percent (93%) of ADF detainees stay at the facility for thirty days or less. Eighty-six percent (86%) of detainees stay at the facility for fourteen days or less. Additionally, releases can be filed at any given time for a multitude of reasons and the amount of notice the County Detention Facility receives for releases is inconsistent, at best. Typically, they are notified the same day of the release. Given the average length of stays, sudden releases, the time it takes to detoxify inmates that need it, the time it takes to assess this transient population, the time it takes to obtain corroborating records, if any are obtained at all, and the time it would take to safely induce an inmate in many if not most situations, it would appear to be impractical for County Detention Facilities to comply with the Proposed Rule. These requirements do not reflect the reality of County Detention Facilities.

State Correctional Facilities, in contrast, house inmates for at least a year, and often longer, and know when the inmates will be released. State Correctional Facilities do not face the same practical considerations as County Detention Facilities, in providing treatment. These differences must be considered and addressed.

The effective date of the Proposed Rule, as discussed below should also be clarified. If anything, the drafting of the Proposed Rule appears to state that the rule would be applicable to County Detention Facilities on September 1, 2024, while giving State Correctional Facilities until December 31, 2025 and June 30, 2026; which appears to be impractical, given the considerations and differences between the two types of facilities discussed above.

3. Clarify Effective Date on Those County Facilities to Which the Proposed Rule Applies. The effective date of the rule is ambiguous as to County Detention Facilities. The effective date of the rule is proposed to be September 1, 2024, following the rule hearing and the

timeline required for rulemaking by statute. Section A of the "Effective Date" section states the timeline for MAT for individuals with OUD's is by December 31, 2025, and directly mentions the New Mexico Corrections Department (NMCD) at the outset of the sentence and at the very end includes a brief mention to county detention facilities. Section B of the "Effective Date" section provides June 30, 2026 as the date required for NMCD to provide MAT to individuals diagnosed with an SUD.

As written, in this section, the application of this rule to County Detention Facilities is vague and ambiguous. Furthermore, it is unclear which deadline applies to County Detention Facilities, if they are intended to be covered under this rule? Is it September 1, 2024, earlier than NMCD, or do County Detention Facilities have the same timeline set forth for NMCD of December 31, 2025, for OUD individuals and June 30, 2026, for SUD individuals? *The Proposed Rule should be revised to specify the effective date for County Detention Facilities. This is not necessary if the definition of Correctional Facility proposed above is adopted, since the Proposed Rule would only apply when a County Detention Facility applied for funding from the Fund.*

III. Additional Comments

The following are comments related to more technical details of the Proposed Rule:

1. *Scope/Objective*. The scope states the Proposed Rule would govern the delivery of MAT for SUD, including OUD/MOUD. The objective states the Proposed Rule is to govern the delivery of SUD treatment. Throughout the Proposed Rule, especially in the medication and treatment aspects, the focus is on OUD/MOUD.

As written, both SUD and OUD are mentioned throughout and OUD appears to be focus of treatment. Is the intent of the Proposed Rule to reach all individuals with SUD, and that is only to include OUD? Currently, that intent and focus of the Proposed Rule is unclear. *The Proposed Rule should be revised to specify the intent of treating those with SUD, which would include those with OUD.*

2. *Definitions*. Under the definitions section there is a defined term of "Correctional Facility" which is different from the defined term "Correctional Facility" in the Statute. The definition in the Statute should control and be used in the rule. It should be augmented, however, by adding the following sentence to the statutory definition:

> "**Correctional facility:** A prison or other detention facility, whether operated by a government or private contractor, that is used for confinement of adult persons who are charged with or convicted of a violation of a law or an ordinance. A County Detention Facility is a Correctional Facility within the meaning of this rule only if it receives funding from the medication-assisted treatment for the incarcerated program fund created by Section 24-1-5.11(A) NMSA 1978."

As explained above, this would make the Proposed Rule consistent with the Statute, avoid imposing an unlawful mandate on counties, and avoid deterring counties from providing MAT.

Secondly, under the definitions section, there is a defined term of "Program Participant". Throughout the Proposed Rule, there are references to "participant". It appears those references to "participant" are intended to refer to the definition of "Program Participant". *If so, it would be clearer under the rule to amend the references throughout the rule to "Program Participant" to be consistent with the definitions.*

Finally, throughout the Proposed Rule, there are references to "Healthcare Provider". It appears these references refer to the healthcare provider in the Correctional Facility; however, there is no definition provided for this term. *Adding a definition of this term would prevent any ambiguity that otherwise may occur. A proposed definition of Healthcare Provider from the National Cancer Institute is:* A licensed person or organization that provides health care services. Examples of health care providers include doctors, nurses, therapists, pharmacists, laboratories, hospitals, clinics, and other health care centers.

3. *Therapeutic services*. The therapeutic services section appears to be minimal in required therapeutic services. MAT is designed to include both the therapeutic element along with medication, for the best results, as documented in research. *Therapeutic services should be an essential part of the requirements set forth in the rule, though the realities of County Detention Facilities should be recognized in fleshing out this element of MAT.*

4. *Program Reporting*. 8.325.12.12 requires County Detention Facilities to submit annual program reports. Has it been determined to whom these reports will be submitted, and what data elements or information are being reported? The language in the Proposed Rule does not clearly define the procedures of reporting, to whom the information should be reported, or what information should be reported. *Reporting expectations and requirements should be clearly defined in this section.*

5. *Managed Care Organizations (MCOs)*. 8.325.12.9(E)(5)(d) requires an affiliation with MCOs and 8.325.12.10(B)(4) requires including MCOs in transition of care policies and procedures. In practice, especially, in a county detention facility, where the population is transitory, there are moving parts and dates and releases that occur without much notice or where the MCO may not respond to requests for assistance from the County. *Thus, it would assist in the execution of this rule to have a clearer picture as to the role the MCOs would play and their specific roles in transition of care, compared to the role of the County Detention Facility Reentry Staff.*

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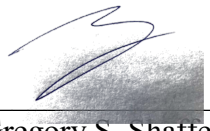
We appreciate the opportunity to provide comments on the Proposed Rule and stand by for any follow-up questions that you may have. Please contact ADF Warden, Derek Williams, for additional information. Warden Williams can be reached at djwilliams@santafecountynm.gov or 505.428.3204.

Respectfully,



Gregory S. Shaffer
Santa Fe County Manager

cc (by email):
Derek Williams, Santa Fe County Warden
Michael A. Nunez, Assistant County Attorney