To: NM Human Services Department

From: Katherine Loewe

Re: Public Comment on Proposed Rule 8.325.12 NMAC: Medication Assisted Treatment Services in Correctional Settings

Date: May 9, 2024

My name is Katherine Loewe and I am a community member who is passionate about Medication for Addiction Treatment, and I am also a civil rights lawyer – largely for incarcerated people. In the course of my practice, my clients have made clear that access to medication for opioid use disorder (MOUD) is not only life-saving, but life-enriching – and that being forced to withdraw from MOUD – whether tapered or abruptly -- is agonizing.

For the last several years, I have worked with others to expand access to MOUD for incarcerated individuals with a particular focus on continuity of care and the use of MOUD to treat withdrawal from opioids. This is in accord with guidance from the United States Department of Justice that has made clear that a blanket ban on MOUD in correctional settings violates the Americans With Disabilities Act and that all facilities should have same day access to MOUD to treat withdrawal.[1]

I wear many hats. I am an attorney that represents people incarcerated at the Bernalillo County Metropolitan Detention Center on their conditions of confinement in the *McClendon* lawsuit. There we have secured court orders requiring the provision of timely MOUD continuity and the use of MOUD to treat withdrawal. I also worked on the settlement agreement between Disability Rights New Mexico (DRNM) and the New Mexico Corrections Department (NMCD). This agreement was signed in December 2023 and entered by the Court in March 2024.

I first want to acknowledge the work of HSD and the committee that put these rules together. They bring New Mexico a step closer to safeguarding the rights of incarcerated people and giving them access to the medical standard of care. And the have been a long time in coming. I know many people in HSD, DOH, and other areas have been working on this for more than a decade.

In November 2020, the Governor's Council on Racial Justice's Medical Subcommittee met with the Secretary of Corrections. Following that meeting, the Council recommended that the Governor issue an executive order requiring NMCD to provide MOUD within 24 hours of intake.

In 2021, HSD and many other stakeholders participated in the New Mexico Overdose Fatality Review Panel. The number one recommendation of that group was simple: provide access to MOUD/MAT to incarcerated individuals.

In the 2023 Legislative Session, the State passed the bill requiring NMCD to provide MOUD continuity – but not until December 31, 2025. It also required the promulgation of this rule (albeit by December 1, 2023). I want to recognize that, to a large extent, the Rule reflects evidenced based best practices – and am grateful for those of you who worked to make this so.

Here we are in May 2024. I have 4 comments. The first is the most important.

1. **Make June 1, 2024 the effective date of the Rule**.

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[1] https://archive.ada.gov/opioid_guidance.pdf
https://bja.ojp.gov/news/new-resource-guidelines-managing-substance-withdrawal-jails

NMCD's settlement agreement with DRNM, which is incorporated into a court order, requires NMCD to act "[w]ithin 90 working days of the effective date of the final rules . . . to implement a pilot program to provide buprenorphine treatment regimens for inmates entering NMCD's custody that are currently receiving MOUD under the supervision of a qualified, licensed medical provider until NMCD fully implements the continuity program under" the statute. The effective date is important.

DRNM and NMCD finalized this agreement in December 2023. At the time, there was no reason to believe that the rule would not be promulgated – put into effect – much past the statutory deadline of December 1, 2023. In fact, on November 30, 2023, NMCD's Secretary testified at the LHHC that the rules would be out any day.

Even if HSD moves this effective date up to June 1, 2024, NMCD will still have months to prepare. NMCD's settlement required that it to begin developing policies for this buprenorphine program by December 30, 2023. NMCD can be prepared to provide the medical standard of care to people entering its custody.

Let's be clear. Under federal law, NMCD should be providing continuity now. But it is not. Ninety (90) working days from the effective date of this Rule is the longest NMCD can take to start buprenorphine continuity. However, as recently as January 12, 2024, the NMCD Secretary testified that NMCD would not begin providing continuity any time soon.

The urgency is real. My clients – our community members - at MDC cannot wait. They are treated with Suboxone for OUD, they are stable on their medications, but when ordered to NMCD are forced into withdrawal putting them at risk of relapse, overdose, and death. Overdoses in facilities and in the community are increasing. As I understand it, there are counties that want to increase their provision of MOUD but feel hindered by NMCD's lack of medical care for their patients.

Bottom line: Make June 1, 2024 the effective date of the Rule. Start reducing harm and saving lives.

2. **Strike Paragraph F(4) or in the alternative recraft it to remove the mandatory language. F(3) is sufficient.**

Paragraph F(4) addresses "Transitional Services (to include discharge)." It states: [p]rogram participants who are transitioning to a community or region that does not have resources available to continue treatment **shall** receive supervised clinical taper from MOUD… (emphasis added)

This paragraph does two things: (1) it removes provider discretion and patient decision making as the word **shall** is a mandate and (2) it allows an unknown individual at an unknown time to make the assessment that resources are not available and force an individual off their medication.

Paragraph F(4) should be struck because it is surplusage: F(3) is sufficient. F(3) provides that MOUD program participants "who elect to discontinue MOUD upon their release shall receive education on the risks of MOUD discontinuation and supervised clinical taper from MOUD…"

Paragraph F(3) allows providers and patients to discuss the availability of resources in the community and to make the decision to discontinue and taper, or not.

Paragraph F(4) is objectionable because (1) it creates a mandate removing providers and patients from medical decision-making, (2) it is so vague as to who and how this determination is made that it puts patients at risk, (3) ignores that patients may be willing to drive long distances for methadone doses, have access to take home doses, or can engage telehealth for suboxone – and it does not reflect the expanding access to MOUD, (4) requires releasing people who are now opioid naïve and are at higher risk of overdose, and (5) correctional facilities need to be encouraged/required to do better discharge planning. Paragraph F(4) does not do that.

Bottom line: Paragraph F(4) should be struck. F(3) is sufficient. In the alternative F(4) should be drafted so that it does not create a mandate for discontinuation.

3. Remove discipline from medicine: Paragraph G(5).

Paragraph G(5) states: MAT/MOUD services shall not be denied to any eligible program participant as a form of disciplinary action unless that action is directly related to program participation or program abuse. (emphasis added)

The underlined phrase starting with "unless" should be struck. NMCD and all correctional institutions have robust disciplinary systems that allow for a wide range of sanctions for misconduct. Inmates can lose months of good time – lengthening their sentence. They can lose months of calls to their family and access to canteen. Corrections facilities use restrictive housing (solitary confinement) as discipline. While I do not advocate for these things, I point to their existence to illustrate that there are many things correctional facilities already do to discipline people.

Taking away someone's life-saving medication, forcing them to go through agonizing withdrawal – tapered or otherwise – is inappropriate as a form of discipline. It is cruel and unusual and may violate the ADA. I cannot think of any other medication – even those identified as abused in correctional settings – that can be taken away for misconduct of any kind.

Bottom line: Remove discipline from medicine and strike the underlined phrase.

4. Take security out of medical decision making: Paragraph C(3).

Paragraph C(3) states:

> The decision as to which FDA-approved medication is prescribed, dispensed and administered shall be made by the healthcare provider in consultation with the program participant, taking into consideration security, health and safety level, and community resource availability. (emphasis added).

The underlined portion should be struck. Which medication to use to treat MOUD is a decision made between the physician and the patient, like any other medication. This decision making already takes into account all things in a physician's clinical judgment.

There is language in the NMCD settlement agreement regarding a physician's assessment that could be incorporated here. It addresses when a physician assesses whether a patient should continue buprenorphine treatment and states:

> The assessment shall be consistent with the current standards of medical care and may take into account any appropriate factors within the judgment of the medical provider who may consult with appropriate NMCD officials and staff as necessary so long as such consultation comports with medical privacy laws.

Language like this could be used here to support physicians in taking into account any appropriate factors while working within the medical standard of care. As it stands, C(3) is vague, leaves too much room for security's input into clinical decision making, and raises the specter again of facilities determining on their own that the resources are available.

Bottom line: I propose substituting the language "taking into consideration any appropriate factors within the judgment of the medical provider" for the underlined language above. This would reduce stigma and security decision making from creeping into medical care and allow providers to work within the confines of the medical standard of care.

Conclusion

Please make June 1, 2024 the effective date of the Rule. Begin saving lives and reducing harm sooner. Please move up the date so people can continue to receive their medication sooner and so that more people in county detention facilities can access this medication when they are transported to NMCD.

Thank you for your hard work. If you have any questions or concerns, I can be reached at kate@rjvlawfirm.com or 505.639.5709.

Sincerely,

Katherine Loewe

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