



State of New Mexico
Human Services Department
Human Services Register



I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT

8.320.6 NMAC, EPSDT, SCHOOL-BASED SERVICES FOR MAP ELIGIBLE RECIPIENTS
UNDER TWENTY-ONE YEARS OF AGE

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

FINAL RULE

V. BACKGROUND SUMMARY

The New Mexico Human Services Register Volume 45, Register 01, dated February 3, 2022, issued the proposed New Mexico Administrative Code (NMAC) rule 8.320.6 NMAC, *Early and Periodic Screening, Diagnosis and Treatment (EPSDT), School-Based Services for MAP Eligible Recipients Under Twenty-One Years of Age*.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: February 8, 2022

Hearing Date: March 11, 2022

Adoption Date: July 1, 2022

Technical Citations: 34 CFR 300.142

A public hearing was held on March 11, 2022 to receive public comments and testimony on this proposed rule. The Human Services Department (the Department) received four written comments and did not receive any oral comments. These rules are being implemented as proposed, except as noted below.

Summary of Comments and Responses

Section 9

A comment was received that the proposed regulations, as written, state that “MAD pays for medically necessary services...when the services are part of the MAP eligible recipient’s (eligible recipient’s) individualized education program (IEP), or an individualized family service plan (IFSP), a section 504 accommodation plan pursuant to 34 CFR 104.36 (504 plan), and individualized health care plan (IHCP), or are otherwise medically necessary as appropriate for each covered service...”. 8.320.6.9 NMAC.

We assert that despite the clear language that MAD “pays for medically necessary services...as appropriate for each covered service,” HSD should expressly include language that would include applicable EPSDT-covered behavioral health services.

Our proposed language for 8.320.6.9 NMAC reads: “MAD pays for medically necessary services, *including covered behavioral health services*, for a MAP eligible recipient under twenty-one years of age when the services are part of the MAP eligible recipient’s individualized education program (IEP), or an individualized family service plan (IFSP), a section 504 accommodation plan pursuant to 34 CFR 104.36 (504 plan), and individualized health care plan (IHCP), or are otherwise medically necessary as appropriate for each covered service...”
(*Emphasis added for proposed language.*)

Department Response: *The Department appreciates this comment. This section is intended as a general overview defining that services are covered when provided as part of a recipient’s individualized education program (IEP) or an individualized family service plan (IFSP), a Section 504 Accommodation Plan pursuant to 34 C.F.R. 10436 Subpart D (504 Plan), an Individual Health Care Plan (IHCP), or are otherwise medically necessary as appropriate for each covered service for treatment (correction, amelioration, or prevention of deterioration) of an identified medical condition. This section is not intended to specify what services are covered and will remain unchanged.*

Sections 9 and 14.D

A comment was received that the proposed language in both sections refers to a section 504 plan “pursuant to 34 CFR 104.36”. That section requires procedural safeguards in connection with actions relating to identification, evaluation, or educational placement of persons who may need special services due to a disability. It does not embody the right to a plan or lay out the contents of one and it’s not clear why this one regulatory section was selected to be included here. If a citation to federal regulations is needed, we suggest changing this to read “pursuant to 34 CFR Part 104, Subpart D”.

Department Response: *The Department appreciates this comment and is in agreement with the change to the federal regulation citation. The Department will make the changes to reference 34 CRF 104 Subpart D.*

Section 11.B.

A comment was received with concerns with the lack of clarity in the regulations under 8.320.6 with respect to EPSDT funding and the provision of medically necessary behavioral health services in the public schools. Specifically, it does not appear that all EPSDT-covered behavioral health services are represented in the Eligible Providers section of 8.320.6. *See* 8.320.6.11 NMAC.

The regulations under 8.320.6.13(H) state that “MAD covers counseling, evaluation, and therapy required for treatment of an identified behavioral health condition that is part of an eligible recipient’s ITP.” However, HSD’s regulations on “Eligible Providers” for school-based Medicaid services (*see* 8.320.6.11(B) NMAC) fail to adequately include providers credentialed for the provision of certain medically necessary behavioral health services covered under EPSDT.

We are identifying the general issue of needed revisions to 8.320.6.11(B) to adequately account for all EPSDT-covered, medically necessary behavioral health service providers; however, we limit these comments by providing the specific example of Applied Behavior Analysis (ABA) Therapy. At a minimum, we note that ABA Therapy providers are not included (and should be) as “Eligible Providers” under the applicable section found at 8.320.6.11(B) NMAC, and that there are other behavioral health service providers that ought to be reviewed by HSD to be included as eligible providers under that section.

The regulations which currently describe New Mexico’s EPSDT program are found at 8.320.2 NMAC. Relevant provisions for the purposes of these comments include:

- “MAD covers services considered medically necessary for the treatment or amelioration of conditions identified as a result of a complete tot to teen health check screen, partial medical screen, or inter-periodic screen... If appropriate, treatment is furnished by the screening provider at the time of the tot to teen health check.” 8.320.2.15(C) NMAC.
- “For a MAP eligible recipient requiring extensive or long-term treatment, he or she must be referred to a MAD behavioral health professional for further evaluation, and if medically necessary, treatment.” *Id* at (C)(2).
- “See to [*sic*] 8.321.2 NMAC for additional information regarding specialized behavioral health services for an ESPDT [*sic*] MAP eligible recipient.” *Id.* at (C)(2)(d).
- “Behavioral health services are diagnostic or active treatments with the intent to reasonably improve the MAP eligible recipient’s condition; see 8.321.2 NMAC for a detailed description of behavioral health services.” 8.320.2.16(D)(2)(e) NMAC.

New Mexico’s rules under 8.321.2 NMAC regulate Behavioral Health Services covered by MAD, including behavioral health services that, if medically necessary, are covered under EPSDT. Among those allowed to bill for reimbursement for the delivery of behavioral health services (when all conditions for providing services are met) are school based health centers with behavioral health supervisory certification. 8.321.2.9(D)(15) NMAC.

The regulations under 8.321.2 NMAC identify specific behavioral health services that are covered by MAD. Each service contains subsections addressing eligible providers, coverage criteria, identified population, covered services, and non-covered services. For instance, Behavior Management Skills (BMS) is a covered behavioral health service. However, the

regulations under BMS specifically state that “BMS is not a reimbursable service through the Medicaid School-Based Services Program.” 8.321.2.16(D)(4) NMAC.

ABA Therapy is covered by MAD for eligible recipients when medically necessary and empirically supported, and when the recipient has a well-documented medical diagnosis of ASD or if the eligible recipient has a well-documented risk of developing ASD. 8.321.2.12 NMAC. ABA services “may be provided in coordination with other medically necessary services (e.g. family infant toddler program (FIT) services, occupational therapy, speech language therapy... etc.)” Id. Unlike the regulatory prohibition on reimbursing BMS services under the school based service program, there exists no such prohibition on ABA services. Rather than a total exclusion, as seen with BMS, ABA services would not be covered if it were provided in the school setting “and have the potential to supplant educational services.” 8.321.2.12(F)(4) NMAC.

While it remains unclear what it means to “have the potential to supplant education services,” we do not see how ABA services provided through the public-school system would supplant educational services. ABA services are encouraged to be provided in conjunction with other medically necessary services, including other EPSDT-covered school-based Medicaid services like Physical Therapy (PT), Occupational Therapy (OT), and Speech-Language Pathology (SLP). See New Mexico Human Services Department, State of New Mexico Medical Assistance Program Manual, Supplement 22-02, Applied Behavior Analysis (ABA) Guidance, at 25 Jan. 27, 2022 (listing school among natural settings for delivery of ABA treatment). For many students with disabilities, functional performance and behavioral goals are central focuses of their educational experience and their IEPs. ABA does not supplant educational services for children with disabilities who have an established medical need for them. Rather, ABA services integrates with and enhances students’ special education and related services. See id. (“ABA services are not replacing educational instruction, they are supporting the recipient to participate in their educational services”).

Stages two and three of HSD’s approved “three-stage comprehensive approach” to ABA services must be provided by Behavior Analyst Certification Board (BACB) approved behavior analysts (BA), or by assistant behavior analysts, or behavior technicians under the supervision of a BACB certified Behavior Analyst (referred to as BCBA or BCBA-D). See 8.321.2.12(B). Some exceptions exist for independent providers. Id. at (B)(6). These providers are not included in HSD’s “Eligible Providers” regulations under 8.320.6.11(B) NMAC, either in its current or its proposed form. We urge that they be included.

Department Response: *The Department has confirmed with the NM Public Education Department that ABA Therapy is not recognized as a related service under the Individuals with Disabilities Education Act (IDEA). As such, ABA Therapy is not covered under the existing MSBS program. Further, the Department has clarified through Provider Supplement 22-02 that ABA Therapy can be provided by outside providers in the school setting and billed through the child’s regular Medicaid benefits. The Supplement states that ABA services should “support access to, and participation in, services afforded through the Individuals with Disabilities Education Act (IDEA), including Part C for infants and toddlers and Part B for pre-school-aged children.” This supports that fact that if deemed appropriate, outside ABA providers can work with the school to come on campus (via MOUs or other agreements) and*

provide their services to the child. The provider would bill Medicaid as per their usual process; the school is not responsible for paying them. Because the mechanism exists for billing ABA services outside of MSBS, the department will not add ABA services as part of the MSBS expansion. The current language will stand.

Section 11.B.15

A comment was received that the new language would add registered nurses (RNs) and licensed practical nurses (LPNs) as well as unlicensed school personnel providing delegated services to the list of eligible providers. Since nursing services are already a covered service under the rule (section 13(G)), we assume the failure to include RNs and LPNs in the list of eligible providers was an oversight and we support correction of that oversight here. We support the proposed change to cover services by unlicensed personnel when delegated by an RN as authorized by the Board of Nursing.

Department Response: *The Department appreciates this comment and confirms the change is to correct a previous oversight.*

A comment was received that we are naturally concerned about the quality and oversight of “unlicensed” providers offering “delegated nursing services” under the proposed 8.320.6.11(B)(15). HSD’s cover letter announcement for the proposed amendments highlights the need to increase providers in “rural and underserved areas” (2/3/22 “Interested Parties” letter, p. 2), but the proposed change seems equally open to allow for cutting corners to save money at the expense of student safety. We ask, at a minimum, that the final rules include: [1] a specific citation to the applicable NM Board of Nursing standards for “delegated nursing services” in 8.320.6.11(B)(15), and [2] language to limit the use of unlicensed services to cover insufficient access to RNs or the other 8.320.6.11(B) providers.

Department Response: *The Department appreciates this comment. Section 11.B.15 has been revised to include language that references the NM Board of Nursing requirements for delegated nursing services in accordance with 16.12.2.12.B NMAC. The proposed billing change is to allow billing for delegated nursing services that are currently being provided but not billed. This will allow schools to seek additional reimbursement for currently uncompensated services. The department feels the language in Section 11.15 requiring that delegated nursing services must be provided under the supervision of an RN is sufficient to prevent the use of unlicensed persons to cover insufficient access to RNs. No other services in Section 11 can be delegated. The current language will stand.*

A comment was received that HSD proposes to amend language on certain provisions of 8.320.6 with respect to the delegation of nursing services. Those provisions are found at 8.320.6.11(B)(15) and 8.320.6.13(G). However, the proposed regulations could be made more clear with slight revisions. We propose that HSD’s vague reference to the delegation of nursing services “in accordance with the New Mexico board of nursing...” be changed to the specific regulatory authority found at 16.12.1.12(B) NMAC, which is the New Mexico board of nursing’s standards with respect to the delegation of nursing services.

HSD proposes to amend the following language of 8.320.6.11(B)(15) NMAC to add to the list of individual service providers who must be employed by or under contract with schools: “(15) registered nurse (RN), licensed practical nurse (LPN) or unlicensed school personnel providing delegated nursing services in accordance with the New Mexico board of nursing under the supervision of an RN.”

Department Response: *Section 11.B.15 has been revised to include language that references the NM Board of Nursing requirements for delegated nursing services in accordance with 16.12.2.12.B NMAC.*

Section 12.B.3.c

A comment was received expressing confusion by the proposed additions to 8.320.6.12(B)(3)(c). Why specify “IEP/IFSP”? Why are 504s and IHCPs excluded here? We presume this is just an editing error, since 504s and IHCPs are what make this entire proposed amendment worth doing and are explicitly added to the proposed 8.320.6.12(B)(1), (B)(2), and even (B)(3)(a). We strongly suggest adding 504 plans and IHCPs to the “IEP/IFSP” language in the proposed 8.320.6.12(B)(3)(c).

Department Response: *The Department has a requirement for IEP/IFSP services that the LEA/REC/SFEA must communicate with the child’s primary care provider regarding the services that are being provided through the IEP/IFSP. Because non-IEP services may be provided on an emergency or ongoing basis, the Department has decided not to require this administrative task for non-IEP services as it would place unnecessary administrative burden in the LEA/REC/SFEA. The current language will stand.*

Section 13

A comment was received that HSD proposes to modify the provisions of subsections A and B to include Section 504 plans, IHCPs and other care plans along with IEPs and IFSPs. However, this change is not consistently incorporated into the following portions of Section 13. Some of the subsequent subsections refer generically to an individualized treatment plan (ITP) without tying it specifically to an IEP or IFSP, but others continue to refer to only IEPs and IFSPs, without including other types of plans. See subsections E (transportation) and F (case management). This should be clarified to avoid confusion.

Department Response: *Sections C, D and H include reference to the ITP which is identified in Section 13.B.2. as a part of the IEP, IFSP, 504 Plan, IHCP or other care plan. Section 13.E. Transportation Services is being maintained as an IEP-only service and the language will not be changed. Section 13.F. Case Management will be updated to remove the reference to IEP or IFSP making it consistent with sections C, D and H.*

Section 13.E.

A comment was received that the inclusion of 504 plans and IHCPs should certainly extend to transportation services in 8.320.6.13(E). We do not notice any proposed changes here. The language specifically identifies qualifying plans as an “IEP or IFSP” in (E), (E)(1), and (E)(2); each of those should also include 504 plans and IHCPs.

While amending 8.320.6.13(E), this would be a good time to improve the language regarding the bus in (E)(3). Transportation doesn't actually have to be provided only in a "modified school bus," does it? That doesn't make sense. We presume the intention here is to emphasize accessible transportation, and we hope HSD will clarify that here.

Department Response: *As mentioned in the previous comment, the Department has decided that Transportation Services are being maintained as an IEP-only service. Medicaid reimbursement for transportation is intended to cover transportation when a Medicaid recipient receives a covered service. In the case of school-based services, Medicaid transportation only covers days on which a child receives a service covered by their IEP. Further, federal Medicaid rules require that transportation be provided in a specially modified bus for disabled students (wheelchair lift, seatbelts or harnesses, etc.) and that the need for such transportation is medically necessary. The current language will stand.*

Section 13.G

A comment was received that we can only imagine that the omission of 504 plans and IHCPs along with the "IEP or IFSP" in 8.320.6.13(G) is a mere oversight. Please amend.

Department Response: *Section 13.G has been amended to include IHCP. If a child is receiving Nursing Services through a Section 504 Plan, the school nurse would develop an Individual Health Care Plan as is standard practice required by the NM Department of Health School Health Manual.*

A comment was received that the department proposes to allow students with an IHCP to qualify for Medicaid coverage of school-based services. Unlike individualized education programs (IEPs) and individualized family services plans (IFSPs), which are clearly defined terms under federal law, there appears to be no generally-accepted definition of an IHCP, either in this proposed rule or elsewhere in the department's regulations, or in the department's Glossary of Acronyms, Abbreviations and Terms found at <https://www.hsd.state.nm.us/lookingforinformation/glossary-of-acronyms-abbreviations-and-terms-for-recipients/>. We suggest inclusion of a definition in the rule.

Department Response: *The Department has added language under 13.G.1 to include a reference that the IHCP should be written by the RN in accordance with the NM DOH School Health Manual.*

A comment was received that regarding the addition of "Delegated nursing services" in the proposed 8.320.6.13(G), we reiterate our concerns as stated above covering the proposed addition of 8.320.6.11(B)(15). We also reiterate our plea to reconsider, or to at least: [1] specifically cite relevant NM Board of Nursing guidance, and [2] limit use to necessitating conditions.

Department Response: *The Department has added language under 13.G.2. to reiterate that delegated nursing services must be provided in accordance with the NM Board of Nursing 16.12.2.12.B NMAC.*

A comment was received that at 8.320.6.13(G) NMAC, HSD proposes the following: "... Delegated nursing services which are tasks in accordance with the New Mexico board of nursing that may be delegated by the RN to unlicensed school personnel. Delegated staff may include, but is not limited to, school or contracted staff, such as health assistants, teachers, teacher assistants, therapists, school administrators, administrative staff, cafeteria staff, or personal care aides."

Department Response: *As noted in the previous comment, the Department has added language under 13.G.2. to reiterate that delegated nursing services must be provided in accordance with the NM Board of Nursing 16.12.2.12.B NMAC.*

A question was received regarding what does "delegated nursing services" entail as far as specific actions or interventions?

Department Response: *According to 16.12.2.12.B. the nurse shall assign/delegate to licensed and unlicensed persons only those actions which that person is prepared, qualified or licensed to perform. To that extent, the nurse will ensure that the unlicensed person will demonstrate knowledge and competency of the task being delegated to them and that this will be reviewed by the delegating nurse on a regular basis. The NM DOH School Health Manual also has requirements for services delegated within the school setting.*

A question was received regarding whether the school RN can be legally responsible for oversight of the unlicensed personnel rendering the delegated nursing services?

Department Response: *The RN is legally responsible for oversight of the unlicensed personnel rendering the delegated nursing services. According to 16.12.2.12.B.2 NMAC, the delegating nurse is accountable for each activity delegated, for supervising the delegated function or activity and for assessing the outcome of the delegated function or activity.*

A question was received regarding whether the school RN can be held liable for the actions, interventions, or lack thereof, of the unlicensed personnel?

Department Response: *The RN can be held liable for the actions, interventions, or lack thereof, of the unlicensed personnel. According to 16.12.2.12.B.2 NMAC, the delegating nurse is accountable for each activity delegated, for supervising the delegated function or activity and for assessing the outcome of the delegated function or activity.*

A question was received regarding whether services from unlicensed personnel can be billed and reimbursed the same as if a licensed nurse rendered the care?

Department Response: *Delegated nursing services interim claims will be billed at the same rate as if a licensed nurse rendered the care. Further, the NM MSBS program is structured under a cost settlement methodology as defined in 8.320.6.17.B where the LEA/REC/SFEA's reimbursement is ultimately determined based on their actual costs for providing covered services.*

Section 13.H

A comment was received that HSD should include all applicable behavioral health services providers in its regulations on “Eligible Providers” under 8.320.6.11 NMAC, including those providers which HSD requires for the provision of ABA services under 8.321.2.12 NMAC. We further assert that HSD should include additional language to 8.320.6.13(H) which would clearly refer to EPSDT-covered behavioral health services under 8.321.2 NMAC.

Our proposed language reads: “MAD covers counseling, evaluation, therapy *and other behavioral health services, as described in 8.321.2 NMAC*, required for treatment of an identified behavioral health condition that is part of an eligible recipient’s ITP.”

Department Response: *As mentioned in the response in relation to comments for Section 11.B, the Department will not be adding ABA Therapy as a service under the expanded Medicaid School-Based Services Program.*

Section 14.C

Two comments were received that this section also continues to refer only to ITPs that are part of IEPs and IFSPs. If an ITP is to be required only in the case of those types of plans, with other documentation accepted for students who are not in special education, that should be clarified and the provisions of section 13 modified accordingly to eliminate the requirement of an ITP for students whose eligibility for services is based on other types of plans and for whom other types of documentation will be accepted. If, on the other hand, an ITP is to be required as the basis for services for all students receiving school-based EPSDT services, the provisions of section 13 that tie coverage to an ITP will have to be modified.

Department Response: *Section 14.C. speaks specifically to the requirements for the ITP that is for services provided as part of an IEP or IFSP. Section 14.D has been modified to include additional language related to the ITP that would be included in a Section 504 Accommodation Plan, and Individual Health Care Plan or are otherwise medically necessary.*

Section 14

A comment was received that the department proposes to add a new subsection D, which applies to “Medicaid expansion”. We assume this is intended to refer to what HSD usually calls the “other adult group” or OAG. If so, it would be helpful to clarify the term since it is not the one usually used by HSD for this group of recipients.

The new subsection D would provide for coverage of services under a section 504 plan, IHCP or other determination of medical necessity but not under an IEP. Although IFSPs are for very young children and therefore would not be relevant to OAG enrollees, individuals may continue to qualify for special education services under IDEA through age 21 and OAG enrollees therefore may have an IEP. That type of plan should be included in this subsection.

Department Response: *The reference to Medicaid expansion was not meant to refer to the Other Adult Group (OAG) Category. It was intended to refer to the expansion of the school-based services program to non-IEP services. Section 14.D. has been revised to remove the*

“Medicaid expansion” language and clarify that an ITP may also be listed in a Section 504 Plan, Individual Health Care Plan or other plan of care.

VI. RULE

These amendments will be contained in 8.320.6 NMAC. The final register and rule language is available on the HSD website at: <https://www.hsd.state.nm.us/lookingforinformation/register/> and <https://www.hsd.state.nm.us/providers/rules-nm-administrative-code/>. If you do not have internet access, a copy of the final register and rules may be requested by contacting the Medical Assistance Division at (505) 827-1337.

VII. EFFECTIVE DATE

This rule will have an effective date of July 1, 2022.

VIII. PUBLICATION

Publication of this rule approved by:

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DAVID R. SCRASE, M.D., SECRETARY
HUMAN SERVICES DEPARTMENT