MICHELLE LUJAN GRISHAM
Governor

DAVID R. SCRASE, M.D.
Acting Cabinet Secretary

August 22, 2022

Via email: craig@uttonkery.com

RE: Response to comments for proposed rule 7.4.8

Dear Mr. Erickson,

Thank you for the opportunity to respond to the comments presented at the rulemaking hearing for the adoption of the proposed rule 7.4.8 Maternal Mortality and Severe Maternal Morbidity Review. We are grateful for all of the public input at the rulemaking hearing and for the opportunity to hear the community feedback and concerns. We heard these concerns and based on the comments entered into the record, made a number of changes to the rules in an attempt to resolve the majority of the concerns. Those changes are addressed in the proposed changes and explanations below. Additionally, for ease of viewing, a full redline draft of the changes to the proposed rules is also attached to this response.

You posed two specific issues listed below, and we would also like to respond to a number of other comments to show how the issues were already addressed or what changes we are proposing to address those concerns.

Hearing officer issue 1. A number of individuals stated at hearing raised their concern that the proposed rules do not address diversity concerns that they believe are raised by SB 96.

NMDOH asserts that the rules as written do in fact address all the requirements both in letter and spirit of SB 96 which was codified into the Maternal Mortality Prevention Act Section 24-32-1, NMSA 1978.

SB 96 was written with the understanding that the spirit of the law must be incorporated into the language of the law itself. Rules can only expand so far on the intent firmly stated in the law as written. All definitions and requirements written into the rules use the same language provided in the statue and even significantly expand on the statutory language in sections that address diversity.

A number of the comments provided verbally at the hearing and in written form ask for the rules to address systemic racism and inequity. The New Mexico Black and Indigenous Maternal Health Policy Coalition's formal written submission asks for specific language requiring systemic racism and inequity to be addressed within the rules in order to achieve the goals of SB 96.

In the initial draft of the rules, NMDOH attempted to address the intent of SB 96 by centering it prominently within the objective statement found near the beginning of rules. 7.4.8.5 Objective requires consideration of systemic racism and inequity in every aspect of the committee's actions by stating:

> …
> Given the persistent and significant disparities in maternal morbidity and mortality experienced by people of color in New Mexico and the United States overall, the committee will apply lenses of racial justice, diverse representation and health equity across all functions including staffing, committee membership and leadership, case review and analysis.

This Objective statement addresses systemic racism and inequity by requiring diverse staffing and membership and asserting that lenses of racial justice and health equity be applied to all actions of the committee.

Another expressed concern relates to the work of abstractors. In written comments, the Coalition requests "that the rules clearly state that any committee member may request to the co-chairs that the lead abstractor's work be reviewed, or that an alternative abstractor be assigned, or that the materials the abstractor used to create the summaries be reviewed if the committee member is concerned that information related to racial justice and health equity is being missed by the abstractor in creating summaries."

In the original draft, Section 7.4.8.14(B) Case Review Process states:

> **B.** Any committee member who is concerned that any essential information is being missed by the decisions the abstractor makes in creating summaries may initiate a request to the clinical co-chair or operational staff with the authority to collect information that:
> **(1)** an abstractor's work be reviewed by the clinical co-chair and designated operational staff; or
> **(2)** an alternative abstractor be assigned.

This section was drafted to be inclusive of the racial justice and health equity information the coalition highlighted along with any other details that could constitute "any essential information" needed to develop an accurate and complete case summary. It identifies the clinical co-chair and operational staff as the intended recipients of a request to review an abstractor's work because, under the statute, only the clinical co-chair and designated operational staff have the authority to directly review confidential records.

Although NMDOH believes it has met both the letter and spirit of SB96 in all ways, we heard the concerns and have incorporated many changes to the proposed rules in order to address each of them to the best of our ability. Those changes and explanations are listed in the proposed changes section below.

Hearing Officer issue 2. The NMHA has raised a concern in written and oral comments that relevant portions of 7.4.5 NMAC should be repealed as part of this rulemaking process.

When drafting the proposed new rules governing the Maternal Mortality Review Committee, NMDOH specifically chose not to amend section 7.4.5 NMAC Maternal Fetal Infant and Child Death Review because maternal death as covered by the newly proposed rules is only one part of the rules encompassing 7.4.5. It would be difficult to specifically parse out the sections applying to maternal death and keep the rules pertaining to other review committees intact.

Further, pursuant to NMA 1978 Section 12-2A-10, New Mexico law does not require the repeal of a rule once a new rule covering the same topic is promulgated by the agency. 12-2A-10(D) states "If a rule is a comprehensive revision of the rules on the subject, it prevails over previous rules on the subject, whether or not the revision and the previous rules conflict irreconcilably." Therefore, the new proposed rule legally controls all aspects of the committee's governance as a comprehensive revision of the maternal mortality review committee.

Proposed changes in response to comments:

1. In response to comments that an abstractor should have appropriate experience, lived or otherwise, to appropriately incorporate factors such as racism, bias and discrimination into the creation of case summaries, we propose the following to be the final language regarding the definition of abstractor:

    (1) "Abstractor" means an individual who is trained to comprehensively gather pertinent information from a variety of available sources in order to accurately capture the events of a person's life leading up to and including their death in the form of a case summary for committee review. All abstractors will possess a professional background in maternal health and the requisite training, provided or endorsed by the department, to approach cases with a health equity lens. Given the critical role of the abstractor in identifying the defining details leading to a death, including factors such as racism, bias and discrimination, the department shall undertake deliberate, demonstrable efforts to engage abstractors who possess lived experience as members of communities of color disproportionately impacted by maternal mortality who are able to apply an anti-racist lens to the abstracting process.

2. In response to comments regarding concerns that the administrative co-chair have the ability to incorporate community experience and the diversity of New Mexico, we propose the following to be the final language for the definition of Administrative co-chair"

    (3) "Administrative co-chair" means the chief medical officer, or another representative of the department and who is appointed by the secretary to serve as co-chair of the committee for administrative matters. The administrative co-chair shall be equipped with the measurable skills, training or lived experience to

incorporate the racial, ethnic and linguistic diversity of New Mexico into this leadership role.

3. In response to the comments asking that the clinical co-chair be appointed "with an intent that includes but is not limited to ensuring the broad regional, racial, and ethnic diversity of New Mexico, demonstrated by lived experience and professional background. The rules should ensure that the clinical co-chair is nominated and voted on by committee members.", we propose the following be the final language for the definition of clinical co-chair:

   (5) "Clinical co-chair" means a committee member with maternal child health clinical or paraprofessional training nominated and approved by a two-thirds vote of the committee and approved by the department to serve in this position for a term that aligns with the overall duration of their membership on the committee, unless the member chooses to step down from the co-chair role prior to the end of their membership term. The clinical co-chair shall be equipped with the measurable skills, training or lived experience to incorporate the racial, ethnic and linguistic diversity of New Mexico into this leadership role.

   This definition incorporates the requested two-thirds vote and requires training or lived experience to incorporate the racial, ethnic and linguistic diversity of New Mexico as requested.

4. In response to the comments and concerns regarding the centralization of governance of the committee not being expansive or inclusive enough, the NMDOH proposes to now incorporate a Community Co-Chair. This is a third co-chair who would also be nominated and approved by a two-thirds vote. The Community Co-Chair would be required to possess lived experience as a community member able to represent New Mexico's diversity and bring that to this newly created leadership role. For this change we propose the following language:

   (8) "Community co-chair" means a committee member nominated and approved by a two-thirds vote of the committee to a term that aligns with the overall duration of their membership on the committee, unless the member chooses to step down from the co-chair role prior to the end of their membership term. The community co-chair shall possess lived experience as a community member able to represent the regional, racial, linguistic, and ethnic diversity of New Mexico's communities disproportionately impacted by maternal mortality in this leadership role.

5. In response to the written comment related to the term "Expert" we propose to include the following definition:

   (2) "Expertise" means special skill, knowledge, or judgement that results from training, practice or lived experience.

6. In response to the multiple comments regarding the missing terminology related to health equity, we propose to add the following "Health equity" definition:

    (2) **"Health equity"** means the attainment of the highest level of health for all people through focused and ongoing efforts to address avoidable inequalities, historic and contemporary injustices, and the elimination of health and healthcare disparities.

7. In continued response to further enhance our commitment to health equity in these proposed rules, we propose to amend the program administration rule 7.4.8.8 to read as follows:

    7.4.8.8 **PROGRAM ADMINISTRATION:** The committee's activities shall be administered by the department using a health equity framework across all functions including staffing, committee membership and leadership, and case review and analysis in order to assure that the values of cultural awareness, racial justice, and equity are infused throughout these functions. The department shall designate a committee coordinator in an employed or contracted position and hire contractors and employ operational staff to support the work of the committee. The co-chairs may designate an executive committee to conduct business as outlined herein.

8. There were multiple comments related to the concern of an imbalance of power and requesting that the full committee have more voting rights when it comes to the formation of an executive committee. In order to address those concerns, NMDOH is proposing to change the proposed rules to require a two-thirds vote for the formation of an executive committee, include the third community co-chair in the executive committee, and to allow for three additional committee members to serve on the committee with the same two-thirds vote confirmation for those members. The changes proposed are as follows:

    7.4.8.9 **EXECUTIVE COMMITTEE:** If called, the executive committee must include and reflect the ethnic, geographic, and disciplinary make-up of the committee, state and the communities disproportionately impacted by maternal mortality and morbidity.

    A. The formation of an executive committee must be endorsed by a vote of a two-thirds majority of the current membership.

    B. An executive committee shall consist of co-chairs of the committee and up to three additional committee members nominated and approved by a two-thirds majority of the current membership to effectuate the objectives of the committee. No less than one appointee from either IAD or OAAA will be offered the opportunity to serve on the executive committee. Appointment to the executive committee will be for the duration of the term of membership, or until the member elects to step down from the executive committee, whichever is sooner.

9. In response to the request that NMDOH clarify that the critical income reimbursement rate for members is per meeting, 7.4.8.10(F)(1) was changed to appropriately reflect that the reimbursement rate applies to each meeting.

10. In response to the request that the rules reflect the humanness of the lives being reviewed, that appropriate viewpoints are being used for abstraction, and that an abstractor have appropriate experience for such role, we propose to add a description of the case abstraction process as follows:

    F. **Case abstraction process:** Information and records obtained through a formal request initiated by operational staff will be provided to an abstractor who is assigned to develop a case summary. An abstractor enters information directly into the MMRIA database. It is the responsibility of the abstractor to employ training, experience, and abstracting tools endorsed or provided by the department or CDC in order to create a comprehensive, accurate summary of the events of a person's life leading up to and including their death. This process must include tools that have been developed to facilitate the identification of racism, discrimination, and interpersonal and structural bias in health care or lifecourse events that may have been contributing factors to the death. An abstractor may consult the co-chairs or other operational staff as needed to confirm interpretations of data and the relevance of details for inclusion in a case summary.

11. In continuing response to the concerns regarding voting decisions, NMDOH proposes the following changes to 7.4.8.13 Committee Responsibilities:

    C. The affirmative vote of at least a majority of a quorum present and approval by the co-chairs shall be necessary for any decisions pertaining directly to case review to be taken by the committee. A quorum shall not be achieved without at least one IAD appointee and OAAA appointee in attendance. Administrative decisions not pertaining to case review may be voted on electronically outside of the course of a committee meeting to allow all members ample opportunity to cast a vote.

12. In response to the New Mexico Hospital Association's written comments requesting a definition of "pregnancy associated death" we propose adding the following definition:

    (2) **"Pregnancy-associated death"** means a death during or within one year of pregnancy, regardless of the cause. If the definition is updated by the CDC, that definition shall be the applicable definition for these rules.

13. In response to the New Mexico Hospital Association's written comments requesting a language change to the committee's authority to collect information, we are proposing the following change to 7.4.8.12(B)

B. Authority to collect information: Except as otherwise restricted or prohibited by state or federal statute or regulation, designated operational staff may access medical records and other information relating to an incident of maternal mortality at any time within five years of the date of the incident.

Thank you for your consideration of this response in your review of the hearing and review of our proposed changes. Please let me know if you require any additional information in making your final recommendations.

Sincerely,

//s// M. Shelley Strong //s//
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M. Shelley Strong

Enc: full draft redline of proposed changes based on hearing comments