

**From:** [Chris Mechels](#)  
**To:** [Burmeister, Christopher, DOH](#)  
**Cc:** [Chris Goad](#); [Mim Chapman](#)  
**Subject:** [EXT] The 7.28.2 Hearing  
**Date:** Friday, August 14, 2020 1:16:37 PM  
**Attachments:** [42 CFR § 484.2 - Definitions. CFR US Law LII Legal Information Institute.pdf](#)  
[42 CFR § 410.75 - Nurse practitioners' services. CFR US Law LII Legal Information Institute.pdf](#)  
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Dear Sir,

I received, on request, the original 7.28.2, from Ms. Apodaca. I suggested a mark up should be provided, but have no response on that.

Having the original in hand, and comparing it to the proposal, a number of problems are apparent, which call proceeding to Hearing into question.

The SSP file shows the most problems, and the need for replacing it. The description is simply wrong; "The amended Subsection A of [7.28.2.33](#) NMAC-Plan of Care will change Subsection A and Paragraph (2) and (3) of Subsection A to expand the list", fails to include Paragraphs 4 and 5, which are also modified, and is thus incorrect. It lists "Critical Nurse Specialists" which are in fact "Clinical Nurse Specialists".

These corrections should be made, immediately, as failure to do so shows bad faith, as it confuses those interested in participation.

Also, a mark up file should be provided, as this is common in such hearings. It is also required under NMAC [1.24.25.14](#).

Examination of past DOH Rules Hearings shows a failure to comply with the Rules Act, ever since July 2017. This must stop.

Perhaps even more serious, the proposal seems out of compliance with the CMS requirements, thus perhaps putting reimbursement at risk.

The CFR sections I have attached shows some collaboration requirements, which are not present in the proposal. This suggests that some new definitions were needed, but not supplied in the proposal. Again, this failure would seem to be a problem.

As changes to meet those requirements seem beyond the scope of the proposal, perhaps a new Public Hearing would be a better course.

The overall problems, both clerical and legal, call into question the use of Emergency Rule Hearings, which exclude outside participation, allowing errors to propagate.

I also question that this use of the Emergency Rule Hearing was appropriate, as it was not necessary. CMS was "expanding" not "contracting" the list of providers, thus the resulting changes could be done at leisure. Suggest that the change was "mandated" is simply false.

Please contact me for any questions or clarifications.

Regards,

Chris Mechels  
505-982-7144

## 42 CFR § 484.2 - Definitions.

CFR

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### **§ 484.2 Definitions.**

As used in subparts A, B, and C, of this part -

*Allowed practitioner* means a physician assistant, nurse practitioner, or clinical nurse specialist as defined at this part.

*Branch office* means an approved location or site from which a home health agency provides services within a portion of the total geographic area served by the parent agency. The parent home health agency must provide supervision and administrative control of any branch office. It is unnecessary for the branch office to independently meet the conditions of participation as a home health agency.

*Clinical note* means a notation of a contact with a patient that is written, timed, and dated, and which describes signs and symptoms, treatment, drugs administered and the patient's reaction or response, and any changes in physical or emotional condition during a given period of time.

*Clinical nurse specialist* means an individual as defined at § 410.76(a) and (b) of this chapter, and who is working in collaboration with the physician as defined at § 410.76(c)(3) of this chapter.

*In advance* means that HHA staff must complete the task prior to performing any hands-on care or any patient education.

*Nurse practitioner* means an individual as defined at § 410.75(a) and (b) of this chapter, and who is working in collaboration with the physician as defined at § 410.75(c)(3) of this chapter.

*Parent home health agency* means the agency that provides direct support and administrative control of a branch.

*Physician* is a doctor of medicine, osteopathy, or podiatric medicine, and who is not precluded from performing this function under paragraph (d) of this section. (A doctor of podiatric medicine may perform only plan of treatment functions that are consistent with the functions he or she is authorized to perform under State law.)

*Physician assistant* means an individual as defined at § 410.74(a) and (c) of this chapter.

*Primary home health agency* means the HHA which accepts the initial referral of a patient, and which provides services directly to the patient or via another health care provider under arrangements (as applicable).

*Proprietary agency* means a private, for-profit agency.

*Pseudo-patient* means a person trained to participate in a role-play situation, or a computer-based mannequin device. A pseudo-patient must be capable of responding to and interacting with the home health aide trainee, and must demonstrate the general characteristics of the primary patient population served by the HHA in key areas such as age, frailty, functional status, and cognitive status.

*Public agency* means an agency operated by a state or local government.

*Quality indicator* means a specific, valid, and reliable measure of access, care outcomes, or satisfaction, or a measure of a process of care.

*Representative* means the patient's legal representative, such as a guardian, who makes health-care decisions on the patient's behalf, or a patient-selected representative who participates in making decisions related to the patient's care or well-being, including but not limited to, a family member or an advocate for the patient. The patient determines the role of the representative, to the extent possible.

*Simulation* means a training and assessment technique that mimics the reality of the homecare environment, including environmental distractions and constraints that evoke or replicate substantial aspects of the real world in a fully interactive fashion, in order to teach and assess proficiency in performing skills, and to promote decision making and critical thinking.

*Subdivision* means a component of a multi-function health agency, such as the home care department of a hospital or the nursing division of a health department, which independently meets the conditions of participation for HHAs. A subdivision that has branch offices is considered a parent agency.

*Summary report* means the compilation of the pertinent factors of a patient's clinical notes that is submitted to the patient's physician, physician assistant, nurse practitioner, or clinical nurse specialist.

*Supervised practical training* means training in a practicum laboratory or other setting in which the trainee demonstrates knowledge while providing covered services to an individual under the direct supervision of either a registered nurse or a licensed practical nurse who is under the supervision of a registered nurse.

*Verbal order* means a physician, physician assistant, nurse practitioner, or clinical nurse specialist order that is spoken to appropriate personnel and later put in writing for the purposes of documenting as well as establishing or revising the patient's plan of care.

[82 FR 4578, Jan. 13, 2017, as amended at 84 FR 51825, Sept. 30, 2019; 85 FR 27627, May 8, 2020]

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## 42 CFR § 410.75 - Nurse practitioners' services.

CFR

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### § 410.75 Nurse practitioners' services.

**(a) *Definition.*** As used in this section, the term “physician” means a doctor of medicine or osteopathy, as set forth in section 1861(r)(1) of the Act.

**(b) *Qualifications.*** For Medicare Part B coverage of his or her services, a nurse practitioner must be a registered professional nurse who is authorized by the State in which the services are furnished to practice as a nurse practitioner in accordance with State law, and must meet one of the following:

**(1)** Obtained Medicare billing privileges as a nurse practitioner for the first time on or after January 1, 2003, and meets the following requirements:

**(i)** Be certified as a nurse practitioner by a recognized national certifying body that has established standards for nurse practitioners.

**(ii)** Possess a master's degree in nursing or a Doctor of Nursing Practice (DNP) doctoral degree.

**(2)** Obtained Medicare billing privileges as a nurse practitioner for the first time before January 1, 2003, and meets the standards in paragraph (b)(1)(i) of this section.

**(3)** Obtained Medicare billing privileges as a nurse practitioner for the first time before January 1, 2001.

**(c) *Services.*** Medicare Part B covers nurse practitioners' services in all settings in both rural and urban areas, only if the services would be covered if furnished by a physician and the nurse practitioner -

**(1)** Is legally authorized to perform them in the State in which they are performed;



(2) Is not performing services that are otherwise excluded from coverage because of one of the statutory exclusions; and

(3) Performs them while working in collaboration with a physician.

(i) Collaboration is a process in which a nurse practitioner works with one or more physicians to deliver health care services within the scope of the practitioner's expertise, with medical direction and appropriate supervision as provided for in jointly developed guidelines or other mechanisms as provided by the law of the State in which the services are performed.

(ii) In the absence of State law governing collaboration, collaboration is a process in which a nurse practitioner has a relationship with one or more physicians to deliver health care services. Such collaboration is to be evidenced by nurse practitioners documenting the nurse practitioners' scope of practice and indicating the relationships that they have with physicians to deal with issues outside their scope of practice. Nurse practitioners must document this collaborative process with physicians.

(iii) The collaborating physician does not need to be present with the nurse practitioner when the services are furnished or to make an independent evaluation of each patient who is seen by the nurse practitioner.

**(d) *Services and supplies incident to a nurse practitioners' services.***

Medicare Part B covers services and supplies incident to the services of a nurse practitioner if the requirements of § 410.26 are met.

**(e) *Professional services.*** Nurse practitioners can be paid for professional services only when the services have been personally performed by them and no facility or other provider charges, or is paid, any amount for the furnishing of the professional services.

(1) Supervision of other nonphysician staff by a nurse practitioner does not constitute personal performance of a professional service by a nurse practitioner.

(2) The services are provided on an assignment-related basis, and a nurse practitioner may not charge a beneficiary for a service not payable under this provision. If a beneficiary has made payment for a service, the nurse practitioner must make the appropriate refund to the beneficiary.

**(f) *Medical record documentation.*** For nurse practitioners' services, the nurse practitioner may review and verify (sign and date), rather than re-document, notes in a patient's medical record made by physicians; residents; nurses; medical, physician assistant, and advanced practice registered nurse

students; or other members of the medical team, including, as applicable, notes documenting the nurse practitioner's presence and participation in the service.

[[63 FR 58908](#), Nov. 2, 1998; [64 FR 25457](#), May 12, 1999, as amended at [64 FR 59440](#), Nov. 2, 1999; [73 FR 69933](#), Nov. 19, 2008; [78 FR 74811](#), Dec. 10, 2013; [84 FR 63191](#), Nov. 15, 2019]

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### Public Notice:

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NOTICE OF PUBLIC HEARING The New Mexico Department of Health will hold a public hearing on the proposed repeal and replacement of rule 7.28.2 NMAC, "Requirements for Home Health Agencies." The public hearing will be held on September 17, 2020, at 9:30 am via Cisco Webex online, via telephone, and, comments will be received via email through the day of the hearing until 5:00 pm. The hearing is being held via internet, email and telephonic means due to the concerns surrounding Coronavirus and in accord with Governor Michelle Lujan Grisham's Executive Order 2020-004, Declaration of a Public Health Emergency, and any subsequent executive orders, and the March 12, 2020 Public Health Emergency Order to Limit Mass Gatherings Due to COVID-19. This hearing will be conducted to receive public comment regarding the proposed repeal and replacement of the emergency rule in effect which governs public, profit or nonprofit home health agencies providing medically directed therapeutic or supportive services to a patient or client in their place of residence. All facilities licensed as home health agencies, pursuant to Section 24-1-5 (A) NMSA 1978, are subject to all provisions of these regulations. The hearing will be conducted to receive public comments regarding the proposed repeal and replacement of the emergency rule to amend 7.28.2 NMAC, including the following rule parts: Amended Subsection A of 7.28.2.33 NMAC-Plan of Care: change to Subsection A and Paragraph (2) and (3) of Subsection A to expand the list of providers who can write and review a plan of care for a patient or client of a home health agency and who will be consulted to approve additions or modifications to the original plan. The legal authority authorizing the proposed repeal and replacement of the rule by the Department is at Subsection E of Section 9-7-6, Subsection F of Section 24-1-2, Subsection J of Section 24-1-3 and Subsection B of Section 24-1-5 NMSA 1978. A free copy of the full text of the proposed rule can be obtained from the Department's website at <https://nmhealth.org/publication/regulation/>. Any interested member of the public may attend the hearing and offer public comments on the proposed repeal and replacement of the rule during the hearing. To access the hearing by telephone: please call 1-408-418-9388. Your telephone comments will be recorded. To access the hearing via internet: please go to Webex.com; click the "Join" button; click the "Join a meeting" button; enter the following meeting number and password where indicated on screen- Meeting number (access code): 146 936 0124 #, Meeting password: 8jhCqugKY43; click the "OK" button. You may also provide comment via Chat during the live streaming. Written public comments may also be submitted to the mailing address shown below. Please submit any written comments regarding the proposed rule to the attention of: Christopher Burmeister Division Director, Health Improvement New Mexico Department of Health 2040 S. Pacheco, Santa Fe, NM 87505 Christopher.Burmeis@state.nm.us 505-476-9074 Mailed written comments must be received by 5 pm MST on September 17, 2020. Written comments may also be submitted to the email address shown above through 5:00 pm MST on the date of the hearing. All written comments will be published on the agency website at <https://nmhealth.org/publication/regulation/> within 3 days of receipt, and will be available at the New Mexico Department of Health Office of General Counsel for public inspection. If you are an individual with a disability who is in need of special assistance or accommodations to attend or participate in the hearing, please contact Sheila Apodaca by telephone at (505) 827-2997. The Department requests at least ten (10) days advance notice to provide requested special accommodations. Journal: August 11, 2020

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Rule Hearing Search

7.28.2

Hearing Date: All, Comments Deadline Date: All, Agency: Department of Health

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Proposed Rule Name:

7.28.2 - Requirements for Home Health Agencies

Agency:

Department of Health

Purpose:

The proposed repeal and replacement of the 7.28.2 NMAC is necessary to bring the New Mexico regulation into compliance with the federal regulatory changes made by the Centers for Medicare and Medicaid Services (CMS), HHS, to certain rules governing home health agencies in response to changes made with the enactment of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (pub. L. 116-136, March 27, 2020). The proposed rule repeal and replacement of rule 7.28.2 NMAC, and amendment to Section A of 7.28.2.33 NMAC, is in accordance with subsection E of Section 9-7-6 NMSA 1978, Subsection D of section 24-1-2 NMSA, Subsection J of Section 24-1-3, and Section 24-1-5, NMSA 1978, in order to expand the list of practitioners who can order home health services to include physician assistants, nurse practitioners and critical nurse specialists acting within the extent of their licensed scope of practice, which will bring state regulation into compliance with federal law.

In accordance with the State Rules Act at NMSA 1978, § 14-4-5.6, the Department is required to adopt a permanent rule 7.28.2 NMAC via the normal rulemaking process within 180 days of the emergency rule adoption date of 6/5/2020. A repeal and replacement is necessary because the original rule document is no longer in the database of Records and Archives and must be updated to NMAC 2 in order to incorporate any amendment.

Summary:

The New Mexico Department of Health will hold a public hearing on the proposed repeal and replacement of 7.28.2. NMAC, and the proposed amendment to Section A of 7.28.2.33 NMAC, in order to make permanent the expansion of the list of practitioners who can order home health services to include physician assistants, nurse practitioners and critical nurse specialists acting within the extent of their licensed scope of practice, which will bring the state regulation into compliance with federal law. The amended Subsection A of 7.28.2.33 NMAC- Plan of Care will change Subsection A and Paragraph (2) and (3) of Subsection A to expand the list of providers who can write and review a plan of care for a patient or client of a home health agency and who will be consulted to approve additions or modifications to the original plan.

Administratives Codes:

7.28.2

Rule Complete Copy :

A free copy of the full text of the proposed rule can be obtained from the Department's website at https://nmhealth.org/publication/regulation/ (https://nmhealth.org/publication/regulation/)

Corrections:

Not available

Rule Explanatory Statement:

Not available

Related New Mexico Register Publications:

Click Here to access Related New Mexico Publications

(http://164.64.110.134/nmac/nmregister/noticesxxx15)

For any additional information or questions concerning this rule making or posting please contact:

Christopher Burmeister Division Director, Health Improvement New Mexico Department of Health 2040 S. Pacheco, Santa Fe, NM 87505 christopher.burmeis@state.nm.us (505) 476-9074

Last Updated Date

How to submit Comments:

Written public comments may be submitted to the mailing address and email address shown below prior to the date of the hearing. Please submit any written comments regarding the proposed rule to the attention of:

Christopher Burmeister Division Director, Health Improvement New Mexico Department of Health 2040 S. Pacheco, Santa Fe, NM 87505 Christopher.Burmeis@state.nm.us (mailto:Christopher.Burmeis@state.nm.us) 505-476-9074

You may submit comments via email through 5:00 pm on the day of the hearing.

All written comments will be published on the agency website at https://nmhealth.org/publication/regulation/ (https://nmhealth.org/publication/regulation/) within 3 days of receipt, and will be available at the New Mexico Department of Health Office of General Counsel for public inspection.

You may also provide comment via Chat during the live streaming.

When are comments due:

9/17/2020 5:00 PM

Hearing Date:

9/17/2020 9:30 AM

Public Hearing Location:

The public hearing will be held on September 17, 2020 at 9:30 am via Cisco WebEx online, via telephone, and, comments will be received via email through the day of the hearing until 5:00 pm. 9/17/2020 (9:30 AM -11:30 AM )

How to participate:

To access the hearing by telephone: please call 1-408-418-9388. Your telephone comments will be recorded. To access the hearing via internet: please go to Webex.com (https://Webex.com); click the "Join" button; click the "Join a meeting" button; enter the following meeting number and password where indicated on screen—Meeting number (access code): 146 936 0124 #, Meeting password: 8jhCqugKY43; click the "OK" button. You may also provide comment via Chat during the live streaming.

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