UTTON & KERY

January 28, 2021

VIA FEDERAL EXPRESS

Dr. Tracie C. Collins, M.D., Secretary-Designate
New Mexico Department of Health
Office of the Secretary
1190 St. Francis Drive, Room N-4100
Santa Fe, NM 87502

Re: *Rule Promulgation Hearing for Proposed Amendments to 7.34.2.28 NMAC ("Reciprocity")*

Dear Dr. Collins:

Enclosed is the Report and Recommendation of Hearing Officer pertaining to the above-referenced hearing. Also, enclosed is the official file for the hearing which contains all exhibits that were entered into the hearing record.

Thank you for the opportunity to serve as a Hearing Officer in this matter.

Very truly yours,

UTTON & KERY, P.A.

By: CRAIG T. ERICKSON

CTE:tmm
Enclosures

Copy (via e-mail w/report only): Chris Woodward, Esq.

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NEW MEXICO DEPARTMENT OF HEALTH
MEDICAL CANNABIS PROGRAM RULE PROMULGATION HEARING

Public Hearing:	Proposed Amendments to Medical Cannabis Program Rules ("Reciprocity")
Actions in Question:	Rule Promulgation Hearing for Proposed Amendments to 7.34.2.28 NMAC ("Reciprocity").
Hearing Date:	December 4, 2020
Report Date:	January 28, 2020

REPORT OF HEARING OFFICER

A Public Hearing was held on Friday, December 4, 2020 at 9:00 a.m. via Cisco Webex and telephone. The hearing was held for the purpose of considering the Department of Health's ("DOH" or "the Department") proposed amendments to 7.34.4.28 NMAC ("Reciprocity") in the Medical Cannabis Program rules. Craig T. Erickson presided as Hearing Officer. The DOH was represented by Chris Woodward, Assistant General Counsel.

The proceeding was recorded via Cisco Webex and hosted in that platform by Mr. Woodward. The original recording is in the possession of the DOH, Office of General Counsel.

The Hearing Officer opened the proceeding by introducing himself and Mr. Woodward, and Dr. Dominick Zurlo, the Medical Cannabis Program ("MCP") Director. The Hearing Officer then explained that the purpose of this public hearing was to give the public an opportunity to comment on the proposed amendments to 7.34.4.28 NMAC ("Reciprocity") and stated that the amendments include new requirements concerning what does and what does not constitute "proof of authorization" for purposes of reciprocal participation in the MCP, as well as revisions to registration, verification, and tracking requirements. The Hearing Officer further stated that the proposed amendments include, but are not limited to, revisions to the reciprocal limit on the quantity of medical cannabis that a reciprocal participant can possess, and new material limiting the period of time in which a reciprocal participant can participate in the MCP.

The Hearing Officer further stated that, pursuant to Notice, this matter was being heard on the 4th day of December 2020 via Cisco Webex online, and via telephone. He also stated that pursuant to notice, the public has been given the opportunity to comment on the proposed rule via Cisco Webex and telephonically, and through the submission of written comments. The opportunity was also given to the public to submit written comments via email messages, through the close of business on December 4, 2020.

The Hearing Officer announced that he had been appointed as Hearing Officer in this matter by Acting Cabinet Secretary Billy Jimenez to preside over the hearing. He further stated

that Assistant General Counsel Chris Woodward would be advising the Department in this matter, and that Dr. Dominick Zurlo, MCP Director, would also be participating in the hearing.

The Hearing Officer also stated that this proceeding was being held in accordance with NMSA 1978, § 9-7-6(E) of the Department of Health Act, and the Default Procedural Rule for Rulemaking found at 1.24.25 NMAC.

The Hearing Officer also explained that after his opening remarks, the Department would provide a brief introduction to the proposed amendments to the rule, introduce the Department's Exhibits, and move for admission of the Department's Exhibits into the record. The public would then be provided the opportunity to make public comment.

The Hearing Officer also stated that the Department is not bound by the formal rules of evidence during these proceedings, and the Hearing Officer may, in his discretion, exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious. He further noted that the Hearing Officer may take notice of judicially cognizable, technical, or scientific facts within the Department's specialized knowledge.

Dr. Zurlo and Mr. Woodward both offered introductory remarks at the hearing, and their remarks are summarized below.

Introductory Remarks of Dominick Zurlo, Ph.D., Medical Cannabis Program Director

Dr. Zurlo stated that he would provide a summary of the proposed amendments to 7.34.4.28 NMAC. Dr. Zurlo stated that the purpose of the proposed amendments to 7.34.4.28 NMAC is to revise requirements for participation as a "reciprocal participant" in New Mexico's Medical Cannabis Program. He stated that these amendments fall under several different portions of the rule.

The first portion of the proposed amendments to the rule is found at 7.34.4.28 NMAC, Reciprocity, to amend the first paragraph by adding a sentence stating: "A qualified patient may not be registered or participate as a reciprocal participant in the New Mexico medical cannabis program." Dr. Zurlo stated that the reasoning behind this amendment is to ensure that individuals who are or may be enrolled as qualified patients in the New Mexico Medical Cannabis Program do not become registered or attempt to participate in the program as reciprocal participants. In essence, he stated, this amendment would ensure that participants not be allowed to "double dip" by participating in the program both as a qualified patient and a reciprocal participant.

The next proposed amendment addressed by Dr. Zurlo is found at 7.34.4.28(A)(3)(a) NMAC, which addresses residency requirements. This proposed amendment would require that "[a] person who is not a resident of New Mexico may participate in the Medical Cannabis Program as a reciprocal participant, provided that the reciprocal participant's place of resident is consistent with their place of enrollment." Dr. Zurlo stated that this amendment is designed to ensure and address a "concerning trend" where persons who have been allowed to participate reciprocally in the program actually reside in the same state as their enrollment in another medical cannabis program. The Department has found that it is not the intention of the New Mexico Legislature to permit an individual to participate in the New Mexico Cannabis Program as a reciprocal participant

on the basis of an authorization issued by a jurisdiction other than the person's place of residence. He stated that the purpose of reciprocity was to enable a person who travels to New Mexico from their home state to obtain medicine during their visit, based upon the authorization of their home state. With this in mind, the Department has proposed to amend that rule in a manner consistent with that legislative purpose.

Dr. Zurlo next addressed the proposed amendment to 7.34.4.28(A)(3)(b) NMAC (New Mexico residents), stating that this amendment would require that "[a] New Mexico resident who is not a member of a New Mexico Indian nation, tribe, or pueblo shall not participate in the medical cannabis program as a reciprocal participant, but may pursue enrollment as a qualified patient in accordance with rule 7.34.3 NMAC." Dr. Zurlo stated that this amendment is being proposed to address another trend in which New Mexico residents have utilized authorizations to participate in medical cannabis programs of other states to participate reciprocally in New Mexico, effectively bypassing the current enrollment requirements that would otherwise apply to them. Dr. Zurlo further stated that the Department has found that reciprocity was not created in the statute to enable New Mexico residents to circumvent the current enrollment criteria of the Lynn and Erin Compassionate Use Act, and this amendment is a way to ensure that that does not happen in the future.

Dr. Zurlo stated that 7.34.4.28(B) NMAC ("reciprocal limit") is also proposed for amendment. He stated that this amendment would modify the reciprocal limit from 230 units for three months to 230 units for one year. The amendment was proposed in recognition of the fact that reciprocity was intended to allow persons from other jurisdictions to visit New Mexico and participate temporarily in the New Mexico Medical Cannabis Program while visiting this state. The Lynn and Erin Compassionate Use Act, Dr. Zurlo stated, expressly authorizes the Department to "identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the Medical Cannabis Program." *See* NMSA 1978, § 26-2B-7(l), and DOH Exhibit No. 2 at 2. Dr. Zurlo also noted that the Department has proposed to limit the amount of cannabis that a reciprocal participant can obtain, without decreasing the time period in which a person can participate reciprocally. This change will help to ensure that supplies of medical cannabis are reserved to qualified patients who are enrolled in the Program, as well as providing medication for those reciprocal patients who are also obtaining medication through the Program during their visit to New Mexico.

Dr. Zurlo next addressed 7.34.4.28(C) NMAC ("Registration; verification; tracking"), as follows:

- The amendment proposed in 7.34.4.28(C)(2) NMAC would require licensed nonprofit producers to compare a person's proof of authorization to participate in the medical cannabis program of another jurisdiction with their government-issued photo identification card, and verify that the information, including but not limited to place of residence, is consistent.

- The proposed amendment to 7.34.4.28(C)(4) NMAC would require that "[a] licensed non-profit producer shall not register an employee or board member of the producer as a

reciprocal participant." This amendment is intended to avoid conflicts of interest for licensed non-profit producers in registering reciprocal participants.

- The proposed amendment to 7.34.4.28(C)(5) would require that "[a]t the time of registration, a licensed non-profit producer shall electronically upload a copy of the reciprocal participant's proof of authorization, and a copy of the reciprocal participant's government-issued photo identification which indicates the person's place of residence, into the electronic tracking system specified by the department." This amendment is intended to ensure that appropriate documentation concerning a reciprocal participant is kept on file.

- The proposed amendment to 7.34.4.28(C)(6) would require that "[a] licensed non-profit producer shall ensure the individual registering as a reciprocal participant is not already registered as a reciprocal participant or a qualified patient in the New Mexico Medical Cannabis Program before entering registration information for the individual." This amendment would further provide that "repeated registration of a reciprocal participant who was previously registered may result in disciplinary action in accordance with this rule." These amendments are intended to ensure that reciprocal participants are not registered multiple times or permitted to purchase medical cannabis under duplicate registrations.

- The proposed amendment to 7.34.4.28(C)(7) would require that license non-profit producers ensure, when registering a reciprocal participant, that the reciprocal participant signs their registration in the electronic tracking system, acknowledging that the individual understands participation requirements in the Program. This would also expressly prohibit producers from substituting any signature for that of the reciprocal participant, subject to potential disciplinary action. These provisions are intended to ensure that reciprocal participants acknowledge their understanding of Program requirements, and to ensure that the reciprocal participant's acknowledgement is appropriately documented.

Finally, Dr. Zurlo addressed the proposed amendments to 7.34.4.28(D), ("Proof of authorization). The proposed amendment to this subsection would specify that "[p]roof of authorization to participate in the medical cannabis program of another jurisdiction ('an originating jurisdiction') shall consist of a card or other physical document issued by a governmental entity authorized by law to enroll the applicant in the medical cannabis program in the originating jurisdiction." Dr. Zurlo stated that this passage would also specify that "permission from a medical practitioner shall not in itself be deemed proof of authorization to participate in the medical cannabis program of another jurisdiction.

Further, Dr. Zurlo stated that the Department finds that a letter from a medical practitioner, taken alone, is not sufficient to demonstrably prove that an individual has been authorized to participate in the medical cannabis program of another jurisdiction. A letter that is issued by a medical practitioner can easily be falsified, and a letter, taken alone, does not afford the same degree of proof as a card or other legal document that is issued by the originating jurisdiction to authorize participation in that jurisdiction's medical cannabis program.

Dr. Zurlo also stated that a letter from a medical practitioner, taken alone, also does not provide any verification that the practitioner who signed the letter is in good standing with their licensing body; whereas a card or other authorization issued from a governmental entity in the originating state provides greater assurance that the reciprocal participant has met the eligibility requirements of the originating jurisdiction.

Accordingly, Dr. Zurlo stated that the Department interprets the expression "proof of authorization," as it is used in NMSA 1978, § 26-2B-7, as a card or other physical document issued by a governmental entity authorized by law to enroll the applicant in the medical cannabis program in the originating jurisdiction. The Department proposed to modify the rule to reflect this understanding, consistent with the agency's statutory authority to establish "requirements for the granting of reciprocity." *See* NMSA 1978, § 26-2B-7(I).

In addition, Dr. Zurlo added that these proposed amendments and summaries (DOH Exhibit No. 2) have also been referred to the Medical Cannabis Advisory Board for their consideration.

Introductory Remarks of Chris Woodward, DOH Office of General Counsel

Mr. Woodward began his introductory remarks by stating that an earlier version of this rule was adopted as an emergency rule in early October, on October 8, 2020, by the Acting Cabinet Secretary Billy Jimenez. After the adoption of the emergency rule, litigation was initiated by Ultra Health against the Department. That litigation is ongoing in Santa Fe District Court in Case No. D-1-01-CV-2020-2059, a case before Judge Wilson in the Santa Fe District Court.

A Writ of Mandamus was issued in the foregoing case on October 13, 2020. The Writ had the effect of invalidating the emergency rule on the stated basis that it did not satisfy the "imminent peril" requirement of the emergency rules requirements in the State Rules Act. There is a pending motion and order to show cause in that case. There is a contest between the parties regarding the meaning and the effect of the Writ of Mandamus. The motion for an order to show cause was scheduled for December 10, 2020 [six days after the rulemaking hearing that is the subject of this Report.]

Mr. Woodward stated that this particular rule is being pursued pursuant to the State Rules Act. He argued that this rulemaking proceeding is permitted within the terms of the Writ of Mandamus, to continue pursuing an ordinary rule following the ordinary rulemaking requirements of the State Rule Act, rather than the emergency rules.

Mr. Woodward stated that he anticipated that Judge Wilson would make a decision on the motion for an order to show cause during the week of the hearing on the motion. He stated that he would apprise the Hearing Officer in this matter of whatever result comes out of the hearing on the motion. He stated that it is possible that a hearing on the motion could have an impact on whether the agency is able as a matter of law to adopt some or all of the proposed rule in this case.

Individuals who were present at the Public Hearing on January 16, 2020 were:

SUMMARY OF PROCEEDINGS

Preliminary Matters

Mr. Woodward offered the Department's exhibits into the record, and the exhibits were admitted by the Hearing Officer into the record. The exhibits are as follows:

DOH Exhibit No. 1: Proposed Amendments to 7.34.4.28 NMAC

DOH Exhibit No. 2: Summary of Medical Cannabis Program Rule Amendments to 7.34.4.28 NMAC ("Reciprocity")

DOH Exhibit No. 3: Notice of Public Hearing

DOH Exhibit No. 4: Affidavit of Notice to the Public

DOH Exhibit No. 5: Affidavit of Publication in the Albuquerque Journal

DOH Exhibit No. 6: Affidavit of Publication in the New Mexico Register

DOH Exhibit No. 7: Letter Appointing Hearing Officer

DOH Exhibit No. 8: Public Comment from SBRAC [Small Business Regulatory Advisory Commission][1]

DOH Exhibit No. 9: Additional Written Public Comments

DOH Exhibit No. 10: MCAB 11-16-20[2]

DOH Exhibit No. 11: MCAB Meeting Minutes

DOH Exhibit No. 12: The Department's January 12, 2021 Supplemental Written Statement

Public Comments

The following is a summary of the public comments[3] offered into the record at the December 4, 2020 Public Hearing.

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[1] This comment stated that the SBRAC had identified no adverse findings to the proposed amendments to the rule.
[2] This is a meeting agenda for the Medical Cannabis Advisory Board, which indicates that in a meeting on November 16, 2020, one of the items on their agenda was to review the proposed rule changes in the rulemaking process. The MCAB did not render a final recommendation regarding the proposed rules. The Board tabled the issue and stated it would address issue at a meeting scheduled for the week of December 7, 2020. Mr. Woodward asked that the comment period be left open for submission of minutes or a communication from the MCAB from that expected meeting regarding this proposed rule.
[3] A time limit of 15 minutes per person was established for public comments.

The Comments of Jacob Candelaria

Jacob Candelaria is an attorney representing New Mexico Organics Ultra Health, Inc. in this proceeding. Mr. Candelaria noted that his client submitted extensive written exhibits (which were received by the Hearing Officer on the morning of December 4, 2020, just prior to the rulemaking hearing.)

Mr. Candelaria directed the attention of the Hearing Officer to Ultra Health's written submission, which were submitted to the Department the afternoon prior to the hearing. In particular, he focused on the Writ of Mandamus issued by Judge Wilson in the case pending in Santa Fe District Court (discussed by Mr. Woodward in his introductory remarks.) Mr. Candelaria stated that it was represented by the Department that the scope or the effect of the Writ of Mandamus was limited to simply whether the October 8, 2020 emergency rule was barred by the "imminent peril" standard for issuance of an emergency rule under the State Rules Act. He stated that "as you can see" Judge Wilson's order is not the full holding of the District Court. He asserted that, in the Writ of Mandamus, the District Court, at page 3 of Ultra Health's written comments, specifically holds that the language of the Department's 9/11 mandate, the language of the Department's 10/8 emergency rule, and the language that the Department has copied and pasted into its October 27 rule Notice regarding to amendments to 7.34.4.28(A)(3) NMAC regarding residency requirements and the Department's amendments to 7.34.4.28(D) NMAC regarding "proof of authorization," were all determined by the District Court to be unlawful. *See* DOH Exhibit No. 9, Ultra Health's written comment at 3.

Mr. Candelaria argued that these proposed changes to the New Mexico Medical Cannabis Act and to the reciprocity section exceed the Department's authority and are contrary to the Medical Cannabis Act.[4] He stated that the Department has offered again today as evidence of various policy reasons why it as an agency thinks that it should be allowed to adopt the rules it wishes to adopt are better policy than what the legislature has put in place. However, as the District Court held, he argued, the legislative intent is very clear. When the legislature established the reciprocal cannabis program, they did not define a reciprocal patient with respect to residency. He argued that the District Court has already found regarding "this specific language" that the legislature did not intend to prevent New Mexico residents from enrolling as reciprocal patients. He stated that the District Court found, and his client argued before the court, that it is equally possible that the legislature created a new avenue, whereby New Mexico residents and non-New Mexico residents could become medical cannabis patients.

Mr. Candelaria argued that we should not lose sight of what we are talking about here. He stated that we are talking about access to medicine. He stated that these are medically frail people. The Department enrolled thousands of these types of people between June and September 2020, prior to initiating this attempt to restrict access to the reciprocal cannabis program, in a way, he argued that the District Court has said already violates legislative intent.

[4] The Hearing Officer assumes that this reference is to the Lynn and Erin Compassionate Use Act.

Mr. Candelaria stated that the next issue is that, as an officer of the court, he has a lot of concern about this rulemaking hearing being conducted on December 4, 2020. He stated that Judge Wilson granted his client's motion for a show cause order. He stated that the Department has been ordered to produce a response and appear at a hearing on December 10, 2020, to determine whether or not the Department's publication of these rule changes in the "proof of authorization" section and in the "residency" section already constitutes a violation of the court's order and already puts the Department in contempt of the court's mandamus order. He argued that the District Court was very specific and prospective in the relief it granted. The District Court said that the Department must run the reciprocity program in compliance with the Medical Cannabis Act, and it must immediately re-enroll all the persons that the Department had, as of the date of the Mandamus order, kicked out of the program because they were New Mexico residents who enrolled as reciprocal patients, or the residency of their government-issued I.D. did or did not match their proof of authorization. Further, he argued, the Department's insistent that the Medical Cannabis Act allows them to require a medical cannabis card or some other form of government issued I.D. proof of authorization. Mr. Candelaria asserted that all of those questions have already been asked and answered by the District Court.

For the foregoing reasons, Mr. Candelaria argued that the Hearing Officer should suspend the hearing and reconvene the hearing after the District Court has heard and ruled on whether the Department is already in contempt. He also noted that his clients had filed, several days earlier, an application for a temporary restraining order to prevent this rulemaking hearing from occurring. He argued that the judge did not deny that application for relief but has held it in abeyance. He argued that the fact that there are pending applications for injunctive relief further supports has argument that the Department is violating the Writ of Mandamus.

Mr. Candelaria next addressed the proposed rule changes that were not subject to the District Court's Writ of Mandamus and that were not otherwise incorporated into the Department's prior versions of the proposed amendments to these rules. He stated again that we have seen this language before in the September 11 order and the October 8 emergency rule. The new material the Department seeks contains both a time limit and a quantity limit for reciprocal patients. He argued that both of those proposed rules are arbitrary and capricious and far exceed the Department's authority in the Lynn and Erin Compassionate Use Act. He argued that nowhere in the reciprocal section of the statute did the Legislature contemplate that reciprocal patients would be offered access to less medicine than a qualified patient. The Department's attempt to create an unequal system, that denies certain classes of patients, certain medically frail people, the medicine that they need to get through the day, simply because they are a reciprocal patient versus a qualified patient is not only not supported by the medical cannabis act, it also violates equal protection.

Mr. Candelaria argued that none of the Department's exhibit provide evidence that substantiates the restriction to 230 units per year for reciprocal patients is in any way based upon science or data. He argued that it seems to be what it is—an arbitrary selection to try to discourage and put in place additional barriers that are unlawful for people to become reciprocal patients.

Mr. Candelaria stated that the last issue he wanted to raise is that the Department stated its interest in reducing the amount of medicine that a reciprocal patient can purchase is because the

Department is concerned about quantity and assuring a supply for qualified patients. Mr. Candelaria argued that that argument is a red herring. He argued that this position indicates that the Department recognizes that there is not an adequate supply of medical cannabis in the state. He stated "we've all known that. Everyone knows that apparently except the Department." He argued that there are supply issues in the marketplace because the Department continues to impose a non-statutorily mandated, arbitrary, and capricious plant count that limits the number of plants that any licensed cannabis producer can grow in New Mexico. He argued that if the Department is truly concerned about ensuring adequate supply, they simply need to remove the arbitrary barriers to growing the amount of medicine in New Mexico that needs to be grown to meet the need of patients.

Mr. Candelaria also argued that New Mexico has the highest price per gram for cannabis medicine for our surrounding states. He argued that this is because of the Department's artificial limit on the number of plants that licensed cannabis producers can grow. Thus, with respect to the cap on time of one year and the cap of 230 units, those changes, while not at issue in the original Mandamus order, are both arbitrary and capricious, and for the reasons he has stated, go beyond the Department's scope and are unlawful.

At the end of his public comment, Mr. Candelaria returned to his comments about the unique procedural posture of this rulemaking hearing. He argued again that the Department of Health has already before it a ruling from a District Court judge saying that the language and the amendments in the proposed rule related to the residential requirement at 7.34.4.28(A)(3) NMAC and the proposed changes to the proof of authorization requirements at 7.34.4.28(D) NMAC are unlawful. He argued that there is no equivocation, no cracks in that interpretation of what the district court judge has done. He argued that Judge Wilson's order is "very, very clear." He said that if these rules are adopted by the Department, there will be additional litigation before Judge Wilson. He said it needs to be noted that he as counsel for Ultra Health before Judge Wilson and as a member of the bar that in deference to the district court's order requests that the Hearing Officer suspend this hearing and that it not be reconvened until such time as the district court has rendered its decision on the pending show cause order for sanctions against the Department as well as the verified petition for temporary injunction which currently sits before Judge Wilson. He said that both of those hearings would occur on December 10. He argued it would not cause material prejudice to the Department to simply wait less than ten days to at least demonstrate good faith compliance with a standing lawful order of the district court judge.

The Hearing Officer's Response to the Request for Suspension of the Public Hearing

In response to the request of counsel for UltraHealth for a suspension of the public hearing, the Hearing Officer stated just after his remarks that he wanted to hear from the other participants to the hearing prior to making a decision on the request. At the conclusion of the public comments at hearing, the Hearing Officer stated that, as was apparent at the hearing, he did not suspend the hearing prior to giving other participants the opportunity to comment. However, he stated that he understands that there are relevant proceedings pending in Judge Wilson's court and he would not be issuing a report and recommendation to the Cabinet Secretary on this matter until we know more about what happens in that pending case. Thus, in that sense, he stated he was suspending making a recommendation until we learn more from the district court.

The Comments of Duke Rodriguez[5]

Duke Rodriguez from Ultra Health appeared telephonically to offer his public comment in this hearing. He offered his thanks for the opportunity to comment.

Mr. Rodriguez stated that he is completely bewildered by the agency's desire to be callous and uncaring about the needs of medical cannabis patients. He stated that the purpose of the Lynn and Erin Compassionate Use Act is clearly spelled out in the law to allow the beneficial use of medical cannabis; it is not about denying, restricting, or limiting participation. It is simple and clear—to allow the beneficial use of medical cannabis, he argued, without exception or debate. He argued that we should all be putting emphasis on the word "allow."

Mr. Rodriquez noted that the current pandemic is the single biggest health event in the last 100 years. New Mexico is breaking record after record of new COVID-19 cases, and, even more sadly, deaths. Those who we have lost we cannot recover nor should we forget. For those who remain, those who get infected and those who have not been infected, there is left a painful trail of depression, anxiety, stress, anger, fear, isolation, suicide, insomnia, increased use of alcohol and illicit drugs, and overall increase in general suffering, and a substantial decrease in well-being.

Mr. Rodriguez stated that he personally has received more than one note from a patient saying that the single ability to access cannabis through the reciprocal participant program saved the patient's marriage. One patient said, you saved my life.

Mr. Rodriguez stated that, as we are all aware, New Mexico is last on so many lists. He asked whether we will be last in realizing that this is a medicine like any other prescription. It is a medicine that is need today and a need that will exponentially increase going forward. He argued that cannabis is a meaningful medicine that changes and saves lives. Instead of continuing to put up barriers to access, he argued, we should be opening up our hearts and minds to the clear fact that we need more not less of available cannabis. He argued that this means broader more compassionate reciprocity requirements.

He argued that the barriers that the DOH is proposing are done not with a heart of compassion but in the "thoughts and minds of racism and discrimination." He stated that there are now more than 5,000 reciprocal patients in the program. He argued that DOH has failed to evaluate how devasting these new requirements will be for thousands of individuals. He stated there have been no official reports, no memos, and no examination of how these regulations would strip access to medicine. He argued that the DOH is acting with reckless disregard concerning access to medicine for thousands of people.

[5] Appeared in the Cisco Webex list of participants as Phone No. ending in #00.

Mr. Rodriguez states that the Department first promulgated regulations that did reflect the Lynn and Erin Compassionate Use Act. He argued that the agency cannot strip these regulations and jeopardize the well-being of thousands of individuals during the biggest healthcare event in the last 100 years "all because they did not like the outcome of the regulations that reflect the statute." Mr. Rodriguez stated, "for once, I ask you, please set aside your absurd rulemaking on reciprocal participants and simply carry out the statute as written." He stated to the Department, if you are not happy with the statue, then go talk to the Legislature. Otherwise, he said, simply follow the law and "allow the beneficial use of medical cannabis."

The Comments of Kylie Safa[6]

Ms. Safa, also a representative of Ultra Health, also offered public comment. She first noted that Ultra Health had submitted lengthy written comments. The Hearing Officer confirmed receipt of those materials.

Ms. Safa stated that in addition to the comments already made about the proposed regulations being unlawful, there is also no rationale for why the new amount of 230 units for the year is reasonable or not arbitrary and capricious. She argued that part of the policy or position of the Department articulated by Dr. Zurlo is that the reduced purchase limit would ensure sufficient supply for New Mexico qualified patients. She stated that she thinks it is pretty clear that the solution to the supply issue is to increase the production limits so that licensed cannabis producers can ensure an adequate supply and that patients are not further restricted from access to that medicine. The solution is not to restrict patient access. The solution is to increase supply so that patients have the access that they are granted by the law.

Ms. Safa also said she wanted to acknowledge that there are many populations that are not being considered in this rule, for example, students who come to the University of New Mexico or New Mexico State University. Many students who come from out of state who do not change their residency. She argued that restricting their access to 230 units within a year is too limited when they are here for at least nine months of the year. She said that another group that is not being considered are snowbirds, people who spend seasonal time in the state, whether they come for the winter, the summer or the fall. She noted that there are a lot of people with second homes in New Mexico. They may be here for a time but are not considered residents of the state. She argued that those people should not be restricted from use of medical cannabis, as is allowed by the statute. She reiterated the point that the purpose of the act is to allow the beneficial use of medical cannabis, not to restrict or prevent access. She argued that what this rule does is clearly the opposite.

Ms. Safa noted that in the last Medical Advisory Board hearing the Board recommended that the Department increase the purchase limit for qualified patients. She argued that the proposed limit of 230 units for a 90-day period is unreasonable and to restrict it even further to a year is simply absurd. She argued that it is clear that these rules should not be promulgated as written.

There were two other individuals listed as participants in the Cisco Webex platform (Ms. Novell and Kristine Caffrey), but both declined to offer public comment.

[6] Ms. Safa was identified in the Cisco Webex platform as caller from Phone No. ending in #64.

The Hearing Officer then closed the proceeding and went off the record.

Written Comments

Ultra Health submitted the only written comments in opposition to the proposed amendments in this proceeding. They are lengthy (244 pages). This report will summarize the key comments made by Ultra Health in their written comments, which are found at DOH Exhibit No. 9. Ultra Health asserts that the proposed amendments to 7.34.4.28 NMAC are unlawful.

Ultra Health first offers a description of the history of the proposed amendments. It states that on September 11, 2020, the MCP issued a letter to all licensed medical cannabis producers, which was sent by Martinik Gonzales, the MCP License and Compliance Program Manager. The letter was titled "MCP Guidance on Complying with Reciprocal Requirements." *See* Exhibit I to DOH Exhibit No. 9. Ultra Health refers to the letter as the September 11 Mandate.

Ultra Health states that the September 11 Mandate affects thousands of reciprocal medical cannabis patients who were permitted to enroll in the program between June and September 2020 in the following manner: (1) the Department would not allow New Mexico residents to register as "reciprocal participants," and would instead mandate that New Mexico residents apply to by qualified patients through the NM Medical Cannabis Program; " the Department mandated that for "reciprocal patients" claiming authorization to participate in California's medical cannabis program, the individual must possess and present at a dispensary a "medical marijuana identification card" issued by a California county; (3) the Department mandated that a reciprocal participant's medical card, driver's license, and/or state issued identification card must match the information on their proof of authorization, including the name, date of birth, address, and state of residence. *Id.* at 1-2.

In addition, with respect to individuals claiming authorization to participate in California's medical cannabis program, Ultra Health asserts that the Department's letter of September 11 states: "California medical marijuana participants are not issued letters of eligibility by the state of California. Individuals submitting 'letters of eligibility in the California medical program' will need to also show the California medical marijuana identification card issued to them by the authorizing California county entity." *Id.* at 2.

Ultra Health asserts that the September 11 letter contained several legal inaccuracies and did not comply with the requirements of the Lynn and Erin Compassionate Use Act, NMSA 1978, § 26-2B-1, *et seq.* Consequently, Ultra Health sent a letter to the DOH on September 14, 2020, outlining its concerns about the DOH's Mandate. *See* Exhibit II to DOH Exhibit No. 9.

In its September 14, 2020 letter to the Department, Ultra Health explains how California law affects New Mexico reciprocity. Ultra Health begins by stating that the relevant statute in California defines a "qualified patient" as "a person who is entitled to the protections of Section 11362.5 who does not have an identification card issued pursuant to this article." *See* Exhibit I to DOH Exhibit No. 9 at 2. Ultra Health further argues that the relevant California statue also provides that a "qualified patient" in California must possess a physician's recommendation, and that

recommendation is what authorizes an individual's participation in the California medical cannabis program. *Id.* Ultra Health goes on to argue that the relevant statue in California provides that issuance of identification cards in California is voluntary, not mandatory. *Id.* In addition, Ultra Health argues that California regulations provide that California retailers can sell medical cannabis to individuals who possess a physician's recommendation, and there is no need in California for a retailer to see an identification care or enrollment card. *Id.* at 2-3.

Ultra Health states that the Department did not respond to its September 14, 2020 letter and it continued to enforce its September 11 Mandate. Consequently, Ultra Health filed a petition for a writ of mandamus in the New Mexico First Judicial District Court (District Court) on September 22, 2020. *See* Exhibit III to DOH Exhibit No. 9.

The next event that Ultra Health mentions in its chronology is the October 8, 2020 issuance of the Department's emergency rule, which Ultra Health asserts repeated many of the mandates of the September 11 Mandate. The emergency rule is found at Exhibit IV to DOH Exhibit No. 9. Ultra Health states that the District Court addressed the emergency rule in a hearing held on October 9, 2020 and addressed the emergency rule in its Writ of Mandamus, which was issued on October 3, 2020. The Writ of Mandamus is found at Exhibit V to DOH Exhibit No. 9.

Ultra Health states that the District Court Judge, Judge Matthew Wilson, granted the petition for a writ of mandamus, and ordered as follows:

1. The DOH should allow licensed cannabis producers to authorize and sell medical cannabis to reciprocal patients whose government-issued identification and proof of medical cannabis program authorizations are used by different jurisdictions or the same jurisdiction;

2. The DOH should allow licensed cannabis producers to authorize and sell medical cannabis to reciprocal patients who present a valid proof of authorization, including those reciprocal patients that present a California physicians authorization as their proof of authorization;

3. The DOH should permit all license cannabis producers to authorize and sell medical cannabis to reciprocal patients that meet the definition of "reciprocal participant" in the Compassionate Use Act and the DOH Rule in existence prior to October 8, 2020;

4. Th DOH should refrain from any further enforcement of the emergency rule of October 8, 2020, of the September 11, 2020 mandate; and

5. The DOH should administer the medical cannabis reciprocity program in full compliance with NMSA 1978, § 26-2B-7(J).

See Exhibit I to DOH Exhibit No. 9 at 3.

Ultra Health further asserts that Judge Wilson found that the DOH's issuance of the emergency rule lacked adequate justification and found that the DOH is in violation of the State Rules Act and the emergency rule is unenforceable. *Id.* Ultra Health states that Judge Wilson held that:

> Neither the Legislature, by statute, nor the DOH, by rule, required that a reciprocal patient's government issued identification and medical cannabis proof of authorization be issued where the participant lives, or that the reciprocal participant must produce a medical cannabis card as the only acceptable proof of authorization in order to obtain reciprocal admission into the New Mexico medical cannabis program. *Id.* at 3-4; *see also* Exhibit V to DOH Exhibit No. 9.

Ultra Health argues that the proposed amendments to 7.34.4.28 NMAC violate multiple aspects of Judge Wilson's Writ of Mandamus and the Compassionate Use Act. Ultra Health states that Judge Wilson's Writ commanded the Department to allow cannabis producers to sell medical cannabis to reciprocal patients whose government-issued authorizations are used by different jurisdictions or the same jurisdiction. However, Ultra Health notes that the Department's proposed 7.34.4.28(C)(2) NMAC mandates that a licensed producer verify residence. *See* DOH Exhibit No. 9 at 4.

Ultra Health notes that Judge Wilson's order commanded the Department to allow cannabis producers to sell medical cannabis to reciprocal patients who present a California physician's authorization as proof of authorization, but the proposed 7.34.4.28(D) NMAC redefines "proof of authorization" as a "card or other physical document issued by a governmental entity authorized by law to enroll the applicant in the medical cannabis program," and then states that "permission from a medical practitioner shall not in itself be deemed proof of authorization . . . and a written letter from a physician authorizing the individual to participate in the California medical cannabis program shall not be deemed proof of authorization." *Id.*

Ultra Health next argues that Judge Wilson's order commanded the Department from refraining from any further enforcement of the emergency rule of October 8, 2020 or the September 11 Mandate but the proposed amendment to 7.34.4.28 NMAC is identical to the emergency rule. They argue that Judge Wilson's order was based not just on a violation of rulemaking procedure but also on Judge Wilson's finding that the emergency rule is contrary to statute. They state that Judge Wilson wrote, "[n]either the Legislature, by statute, nor the DOH, by rule, required that a reciprocal participant's government-issued identification and medical cannabis proof of authorization" match, and neither the State Rules Act nor the Compassionate Use Act required that participants "produce a medical cannabis card as the only acceptable proof of authorization." *See* Exhibit V to DOH Exhibit No. 9 at 4.

Ultra Health argues that Judge Wilson's order commanded the DOH to permit all producers to sell cannabis to reciprocal patients who meet the definition of "reciprocal participant" under the Compassionate Use Act and the DOH rule which exists prior to the October 8, 2020 emergency rule, and to administer the medical cannabis reciprocity program in full compliance with NMSA 1978, § 26-2B-7(J). *See* DOH Exhibit No. 9 at 4. They note that the Legislature defined "reciprocal patient" as "an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe, or pueblo." NMSA 1978, § 26-2B-3(W). Ultra Health further notes that the definition of "reciprocal patient" begins with the word "individual" and not the phrase "non-New Mexico resident." They further argue

that "proof of authorization" is broadly used in the statute, and, given the variation between states in how they authorize medical cannabis programs, the term can encompass a variety of regulatory methods. They further argue that proof of authorization need not be issued by the other state, territory, or tribe. It simply must authorize the participation of an individual in the medical cannabis program of another state.

Ultra Health argues that the regulations adopted by the Department in 2019 very closely tracked the language of NMSA 1978, § 26-2B-7(J)(3).

Medical Cannabis Advisory Board Meeting Minutes

The Department submitted the Medical Cannabis Advisory Board (MCAB) Meeting Minutes for their December 9, 2020 meeting as an exhibit to this rulemaking proceeding. *See* DOH Exhibit No. 11.

Dr. Zurlo presented information at the December 9, 2020 meeting of the MCAB regarding the then upcoming rulemaking hearing on proposed changes to the rules related to reciprocal patients. *Id.* at 5-6.

Dr. Zurlo summarized the proposed rule changes as follows:

- The amended rule would clarify how the residency requirement of an individual who is now a resident of New Mexico may participate in the reciprocal participant program provided the reciprocal participant's place of residence is consistent with the place of enrollment.

- The amended rule would ensure that the purpose of reciprocity is to allow individuals who travel from their home state to obtain medical cannabis during their visit can do so.

- The amended rule would provide that, when purchasing medical cannabis, the individual would need to verify the person is actually participating in the medical cannabis program in which they are enrolled.

- The amended rule would clarify the exception for New Mexico residents who are members of a New Mexico Indian nation, tribe or pueblo medical cannabis program and their ability to participate as a reciprocal participant in the NM MCP.

- The amended rule would modify the reciprocal limit to 230 units for one year, which would allow for individuals traveling to New Mexico to have access to their medicine during their travels through the state.

- The amended rule would modify the requirement and require that the LNPP selling an individual medical cannabis as a reciprocal patient to verify the proof of authorization with the individual's place of residence, ensuring that the individual meets the qualifications of the reciprocal program and recording this information in the registration and verification tracking system.

- The amended rule would require that the reciprocal participant is enrolled in a medical cannabis program from the origination state or governmental entity by providing proof from the governmental agency of the participant's enrollment. This change would help to ensure that the medical practitioner is in good standing with their licensing body and that the reciprocal participant has met the eligibility requirements of the originating jurisdiction.

Stephanie Richmond of the MCAB stated that she agreed that a resident of New Mexico should participate in the NM MCP as a qualified patient and should not be eligible to be registered as a reciprocal participant. She stated that this clarification would ensure that New Mexicans are seeing medical providers in the state and avoids "double dipping." J.P. Dedam agreed with this clarification but raised a concern about what items of identification would be required for an individual to prove New Mexico residency, and whether this requirement places an undue burden on the patient.

In response to those concerns, Dr. Zurlo stated that New Mexicans would simply need to show a New Mexico driver's license or government-issued ID. An out-of-state participant would also show a government-issued ID to establish their place of residence. Dr. Zurlo said that this same requirement is placed on individuals seeking to purchase alcohol, and consequently, is not deemed onerous.

J.P. Dedam also raised a concern about "snowbird" patients from another state who reside in New Mexico for nine months of a year. Dr. Zurlo responded that according to current regulations, an individual is considered a resident after six months of residing in New Mexico, and a patient residing in New Mexico for greater that six months should obtain a New Mexico driver's license. Mr. Woodward confirmed this point.

Ariele Bauers then raised a concern that if patients in other states do not have to verify residency is it fair to require reciprocal participants to verify residency in order to participate in the NM MCP? Dr. Zurlo responded that it was simply an issue of equity given that qualified New Mexico patients currently must verify their residency and therefore, so should out-of-state reciprocal participants.

Davin Quinn stated that he supports the proposed amendments.

Stephanie Richmond stated that she supports the residency requirements and agreed that New Mexicans should apply to become "qualified patients" of the NM MCP, and not participate as reciprocal participants.

Ms. Richmond also raised concerns over Section B [of 7.34.4.28 NMAC] which addresses the amount of cannabis that a reciprocal participant has access to and noted that this was a topic of much discussion during the MCAB's last meeting. Examples of purchase limits in other states were discussed.

After counsel was received from Chris Woodward regarding how to vote for the many parts of the proposed rule changes, the MCAB voted to for each rule segment, as follows:

- A unanimous vote of the MCAB resulted in the approval of the following language in the proposed rule: "A qualified patient may not be registered or participate as a reciprocal participant in the New Mexico medical cannabis program."

- A unanimous vote approved the proposed language defining the "Residency Requirements" in Subsection (A)(3) for non-residents and New Mexico residents.

- Discussion took place regarding different options on how to address the "Reciprocal Limit" in Subsection B. Options were discussed ranging from changing the amount of accessible medical cannabis to increasing the timeframe during which a reciprocal participant may access medical cannabis. A motion was made to adopt the following language: "A reciprocal participant may collectively possess within any six-month period a quantity of usable cannabis that is consistent with the limits allowed to the qualified patient."

- An MCAB member raised an issue regarding extension letters and who this would be incorporated in the Board's recommendation and whether the language had to be exact. Dr. Zurlo stated that exact language was not needed for a recommendation, and it was more important that the "intent" of the Board be apparent. Mr. Woodward counseled that if Board members were "on the same page" and that the intent of the Board was easily understandable, the specific language of the recommendation could be clarified at a later time. Dr. Zurlo confirmed that the MCP would use language that clearly demonstrated the intent of the Board. A unanimous vote approved the following language: "A reciprocal participant may collectively possess within any six-month period a quantity of usable cannabis that is consistent with the limits allowed to the qualified patient and the reciprocal participant may have an appeal process to file for a six-month extension."

- A unanimous vote approved the proposed language of Subsection (C)(2) which requires that proof of authorization from another state matches the reciprocal participant's state of residence.

- A unanimous vote approved the proposed language of Subsections (C)(4) through (7).

- Discussion took place with regard to what constitutes "proof of authorization" in Subsection D. Concerns were raised about what role a letter from a provider might have as it relates to proof of authorization and how such a letter might be verified. A question was raised whether requiring an actual document from the jurisdiction responsible for enrolling individuals in their state-sanctioned medical cannabis program put an undue burden on the reciprocal participant. A Board member suggested that the proposed language offered a "good balance" between what is required by the NM MCP and what a patient should expect to provide. A unanimous vote then resulted in the Board's adoption of the proposed language in Subsection D.

Kylie Safa from Ultra Health raised a concern about the "six-month" modification which had been voted on by the MCAB as to how it would be implemented. She also expressed her support for the Board member who suggested granting reciprocal participants access to the

same amount of medical cannabis as is granted to qualified patients. She also shared her interpretation of what the "proof of authorization requirement means [but whatever she said was not.

Supplemental Written Response from the Department of Health

At the request of the Hearing Officer, the Department submitted on January 12, 2021 a supplemental written response to the public comments received in this rulemaking proceeding, and in response to recommendations made by the Medical Cannabis Advisory Board in their public meeting on December 9, 2020. *See* DOH Exhibit No. 12.

Ultra Health's Lawsuit

The only adverse public comments received in this proceeding were the comments of Ultra Health. *See* DOH Exhibit No. 9. The DOH asserts that Ultra Health's public comments repeat the same faulty arguments that Ultra Health propounded in *Ultra Health, Inc. v. New Mexico Department of Health, Dominic Zurlo, and Secretary Billy Jimenez,* Case No. D-101-CV-2020-2059, (hereinafter "the Ultra Health lawsuit") which was filed in the First Judicial District Court. The Department asserts that those arguments failed in the District Court.

The DOH describes the background of the Ultra Health lawsuit in its supplemental response. *See* DOH Exhibit No. 12 at 1-4. That background is summarized as follows:

On September 11, 2020, the DOH MCP issued a letter to LNPPs offering guidance concerning compliance with the MCP's reciprocity requirements. The letter stated as follows:

- New Mexico residents may not be registered as reciprocal patients; they must enroll in the MCP as qualified patients.

- Individuals who seek to participate in the NM MCP based on authorization to participate in the California medical cannabis program must show a California-issued medical marijuana ID card, and a letter from a medical practitioner would not constitute "proof of authorization."

- A reciprocal participant's state-issued ID card must match the information on their proof of authorization, including the state of residence.

On September 22, 2020, Ultra Health filed a Verified Petition for Alternative Writ of Mandamus in the Ultra Health lawsuit, which sought to prohibit the MCP from enforcing its September 11 letter. The grounds alleged as support for the relief Ultra Health sought were as follows:

- The Lynn and Erin Compassionate Use Act does not require presentation of a medical cannabis enrollment card as "proof of authorization" and the Legislature did not intend to restrict reciprocity in that manner;

- The state of California allows persons to participate in its medical cannabis program on the basis of a letter from a physician; and

- The statute does not preclude New Mexico residents from becoming reciprocal participants.

Ultra Health also argued that the requirements of the September 11, 2020 letter conflicted with the Lynn and Erin Compassionate Use Act because the Legislature did not require that a reciprocal participant's proof of authorization from another jurisdiction be issued in the same jurisdiction where their government-issued ID card was issued.

Finally, DOH states, Ultra Health further argued that the September 11, 2020 letter constituted a "rule" that had not been duly promulgated under the State Rules Act, and that requirements stated in the letter which were not expressly stated in an existing rule or statute were therefor unenforceable.

DOH next states that on October 8, 2020, Acting Cabinet Secretary Jimenez adopted an emergency rule that amended 7.24.4.28 NMAC. The emergency rule addressed several issues addressed in the September 11 letter, which are also largely identical to the currently proposed amendments in this proceeding. These amendments include proposed revisions to the rule which would require that New Mexico residents, as well as enrolled qualified patients in the NM MCP cannot participate in the reciprocal program. They further require that the jurisdiction in which a person's medical cannabis authorization was issued matches their state of residence, and that "proof of authorization" consist of a card or other document issued by the enrolling entity, rather than, for example, a letter from a health care practitioner.

A hearing was held on October 9, 2020 on Ultra Health's Petition before Judge Matthew Wilson. On October 13, Judge Wilson issued a Writ of Mandamus which invalidated that emergency rule that the DOH had adopted on October 8. The Judge found that the stated basis for the DOH's justification for issuing an emergency rule was inadequate because there was not a sufficient basis to make a finding of "imminent peril" as required by the State Rules Act.

The DOH then states in its supplemental written response that on October 27, 2020, the DOH published a Notice of Hearing for the public hearing which occurred on December 4, 2020 in this rule promulgation process.

In providing background information regarding the Ultra Health lawsuit, the Department states that the next event in the chronology events is a Motion for Order to Show Cause filed by Ultra Health on November 14, 2020. This Motion alleged that the Department had violated the October 13 Writ of Mandamus by pursuing the rulemaking proceeding we are now engaged in. The Motion claims that by doing so, the Department is in violation of the New Mexico Cannabis Act (by that, presumably referring to the Lynn and Erin Compassionate Use Act). The Motion further claimed that the District Court found that the September 11 Mandate and the October 8 emergency rule conflicted with the plan language of NMSA 1978, § 26-28-7 on reciprocity. An Order to Show Cause was issued by the District Court on the foregoing issues on November 23, 2020.

On November 14, 2020, Ultra Health filed a Verified Application for Temporary Injunctive Order, asking the District Court to enjoin this rulemaking process, and asking the Court to enjoin the MCAB from reviewing the proposed amendments at its December 9, 2020 meeting.

On December 3, 2020, the District Court issued an order acknowledging the scheduled December 4 rulemaking hearing and the December 9 MCAB meeting, but declining to grant the Application for injunctive relief. The Court held in abeyance final ruling on the Application for Injunctive Relief and stated it would address all issues at the December 10 hearing on the Motion for an Order to Show Cause.

The DOH next states that on December 10, a hearing was held before Judge Wilson on the Motion for an Order to Show Cause and the Application for Temporary Injunctive Order. The judge denied both the Motion and the Application from the bench, stating that "the Writ does not say that the requirements for reciprocal participation imposed by the emergency rule and the mandate were incompatible with the [statute] or go beyond the Department of Health's rulemaking authority." The Court further stated that the Writ does not forbid the creation or promulgation of a regulation through the normal rulemaking process, and the Court did not previously decide that the emergency rule conflicted with the Act. A written order denying the Motion and Application was issued on December 17 by the Court.

The Department argues that Ultra Health has raised the same legal arguments in this rulemaking proceeding that it made in the foregoing lawsuit, and that these arguments were rejected by Judge Wilson. The Department further argues that the proposed amendments are not prohibited by statute and made pursuant to the authority vested in the Department by NMSA 1978, § 26-2B-7(I) which requires the Department Cabinet Secretary to adopt rules concerning Medical Cannabis Program reciprocity, and authorizes the Cabinet Secretary to "identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program." The Department also notes that the statute also repeatedly references the authority of the agency to specify by rule a limit on the quantity of cannabis that a reciprocal participant can obtain and possess in a given period. NMSA 1978, § 26-2B-4(B), (C)(1) and (2).

Ultra Health's Policy Contentions

In its supplemental written response, the Department also responds to the policy arguments raised by Ultra Health in opposition to the proposed amendments to the rule. *See* DOH Exhibit No. 12 at 4-5. In doing so, the Department also states that its rationales underlying the proposed amendments are found in its "Summary of Medical Cannabis Program Rule Amendments to 7.34.4.28 ("Reciprocity"). *See* DOH Exhibit No. 2. The Department supplements the "Summary" as follows:

First, it argues that the amendment is proposed in the interest of qualified patients in response to Ultra Health's argument that the proposed amendment reflects an inconsiderate attitude toward MCP patients. It argues that the proposed amendment is designed to preserve supplies of cannabis for qualified patients, as well as for reciprocal participants who are

legitimately enrolled in the medical cannabis program of their home state or territory. The Department argues that allowing persons to participate on a reciprocal basis on the basis of a purported "proof of enrollment" from a state or territory that has no relationship to the person's residence would undermine the legitimacy of the MCP and turn it into a *de facto* recreational program. The Department argues that this outcome would be contrary to the interests of qualified patients and would be inconsistent with legislative intent.

In response to Ultra Health's arguments, the Department next argues that the proposed amendment is consistent with legislative intent of the Lynn and Erin Compassionate Use Act. It notes that the stated purpose of the Compassionate Use Act is to "allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." The Department argues that that the statute does not allow New Mexico residents to register in the program as reciprocal participants, but in fact states the opposite—the statue requires that enrolled patients by New Mexico residents and specifies the qualifying conditions for enrollment. The Department argues that to allow New Mexico residents to register as reciprocal participants would enable the circumvention of enrollment requirements for the MCP, requirements that the legislature instituted in the Compassionate Use Act. The legislature's purpose in allowing reciprocity in the statute was to allow persons from out of state to obtain medical cannabis while visiting New Mexico, the Department argues, not to undermine the NM MCP.

The Department further argues that the statute does not express an intent by the Legislature to allow persons to register as reciprocal participants on the basis of a letter from a California licensed medical practitioner. Instead, the statute uses the expression "proof of enrollment" and the Department argues that that indicates an intention for reciprocal participants to be person actually enrolled by another governmental authority to participate in the medical cannabis program of another jurisdiction. The Department asserts that the proposed amendment reflects this intention.

The Medical Cannabis Advisory Board's Recommendations

The Department next addressed the recommendations of the MCAB found in their December 9, 2020 Meeting Minutes (DOH Exhibit No. 11). *See* DOH Exhibit No. 12.

The Department states that the MCAB meet on November 16, 2020 to review the proposed amendment to the reciprocity rule but discussion on that issue was tabled and then revisited at the December 9 meeting. The Board recommended at that meeting in favor of the amendment, with one exception related to the quantity of cannabis that a reciprocal patient be permitted to possess. With respect to that issue, the Board recommended that the Department adopt the following text:

> A reciprocal participant may collectively possess within any 6-month period a quantity of usable cannabis that is consistent with the limits allowed to the qualified patient and that the reciprocal participant may have an appeal process to file for a 6-month extension.

With this language, the Board recommended that persons participate reciprocally in the MCP for a six-month period each year that can be renewed for any additional six months, and that a process be established to allow for this extension on request. The Board also recommended that the quantity of cannabis that a reciprocal participant can possess within the six-month period should be equivalent to the amount allowed for a qualified patient for that period.

The Department states that in the existing rule, reciprocal patients can participate in the MCP for all 12 months of the year, and the "reciprocal limit" (that is, the amount of cannabis that a reciprocal participant can possess) is identical to the "adequate supply" possession limit for qualified patients under 7.34.4.9 NMAC, which is 230 units in each three-month period. The Department further states that in the proposed amendment, reciprocal participants would still be allowed to participate for 12 months each year, but the reciprocal limit would be 230 units for the entire year rather than for every three months. Thus, the Department states, both the existing rule and the proposed rule provide for a longer period for reciprocal participation than the six months proposed by the MCAB. The Department states that it believes that it is appropriate to permit reciprocal participants to have access to medical cannabis throughout the year, rather than limiting the period to six months.

Based upon the foregoing, the Department proposes to rescind the proposed modification to the current reciprocal limit. That is, it no longer recommends that the time period be changed from three months to one year. Instead, 7.34.4.28(B) NMAC would remain as currently written: "A reciprocal participant may collectively possess within any three-month period a quantity of usable cannabis no greater than 230 units."

ANALYSIS AND RECOMMENDATIONS
7.34.4.28 NMAC – RECIPROCITY

Guidance in determining whether a rule adopted by an administrative agency will be upheld can be found in *New Mexico Mining Ass'n v. New Mexico Mining Com'n,* 1996-NMCA-098, 122 N.M. 332, which states as follows:

> Rules adopted by an administrative agency will be upheld if they are in *harmony* with the agency's express statutory authority or *spring from those powers that may be fairly implied therefrom.* [*Citations omitted.*] Similarly, regulations adopted by an agency are presumed to be valid if they are shown to be *reasonably consistent* with the statutory purposes of the agency. [*Citation omitted.*] [Emphasis added.]

See also Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

In addition:

> "The court will confer a heightened degree of difference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'"

Id., quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583 (1995).

The Hearing Officer has fully considered the arguments of the Department and the participants in this rule promulgation proceeding and addresses each of the current group of proposed amendments to the Medical Use of Cannabis Rules as follows:

Based upon the foregoing, the Hearing Officer recommends that the Secretary adopt the proposed amendments to 7.34.4.28 NMAC.

7.34.4.28 NMAC – (opening paragraph)

The Department proposes to revise the opening paragraph of 7.34.4.28 NMAC which has been revised in the proposed rule by adding the following sentence: "A qualified patient may not be registered or participate as a reciprocal participant in the New Mexico medical cannabis program."

The Department offers as support for this proposed addition to the rule the following arguments and justification: The amendment is necessary to ensure that individuals who are or may be enrolled as qualified participants in the MCP do not attempt to become registered as reciprocal participants. This would ensure that participants are not allowed to "double dip."

Ultra Health argues against the proposed amendment, arguing that the amendment is not authorized by the statue because the statue, NMSA 1978, § 26-2B-3(W), does not require expressly that the reciprocal applicant be a non-New Mexico resident.

The plain language of the statutory definitions of "qualified patient" and "reciprocal participant" supports the proposed amendment:

A "qualified patient" is defined as . . . a "resident of New Mexico" . . . . *See* NMSA 1978, § 26-2B-3(V).

A "reciprocal participant" is defined as . . . "an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States . . . [or other governmental entity]." *See* NMSA 1978, § 26-2B-3(W).

The proposed amendment was approved by the MCAB.

Ultra Health's reading of the statue defines common sense. The reciprocal program is clearly designed to provide medical cannabis to non-New Mexico residents who are participants of medical cannabis programs in other states or territories; not as a mechanism to bypass the requirements for qualified patients in New Mexico. *See* NMSA 1978, § 26-2B-7(J). The Hearing Officer agrees with the Department that to adopt Ultra Health's argument would result in turning the reciprocal program into a *de facto* recreational cannabis program.

Recommendation: The Hearing Officer recommends that the Secretary-Designate adopt the proposed amendment to the opening paragraph of 7.34.4.28 NMAC.

7.34.4.28(A)(3) NMAC – Residency Requirements

The Department recommends the adoption of the following amendments to the rules:

7.34.4.28(A)(3)(a) – Non-residents

A person who is not a resident of New Mexico may participate in the medical cannabis program as a reciprocal participant, provided that the reciprocal participant's place of residence with their place of enrollment. (For example: a Colorado resident shall not be registered or otherwise participate as a reciprocal participant on the basis that he or she is enrolled in the medical cannabis program of a state or other jurisdiction other than Colorado."

7.34.4.28(A)(3)(b) – New Mexico residents

A New Mexico resident who is not a member of a New Mexico Indian nation, tribe, or pueblo shall not participate in the medical cannabis program as a reciprocal participant but may pursue enrollment as a qualified patient in accordance with rule 7.34.3 NMAC. A member of a New Mexico Indian nation, tribe or pueblo medical cannabis program may participate as a reciprocal participant provided that the individual has proof of authorization to participate in the New Mexico Indian nation, tribe, or pueblo's medical cannabis program.

The Department states that the proposed amendment to 7.34.4.28(A)(3)(a) NMAC is necessary to address a "concerning trend" in which persons who have been allowed to participate reciprocally in the program actually reside in the same state as their enrollment in another medical cannabis program. The Department asserts that it was not the intention of the New Mexico Legislature to permit an individual to participate in the New Mexico Cannabis Program as a reciprocal participant on the basis of an authorization issued by a jurisdiction other than the person's place of residence. The Department further asserts that the purpose of reciprocity was to allow a person who travels to New Mexico from their home state to obtain medicine during their visit, based upon the authorization of their home state.

The Department states that the proposed amendment to 7.34.4.28(A)(3)(b) NMAC is proposed to address another trend in New Mexico in which New Mexico residents have utilized authorizations to participate in medical cannabis program of other states to participate reciprocally, effectively bypassing the current enrollment requirements that would otherwise apply to them. The Department argues that reciprocity was not created in the statute to enable New Mexico residents to circumvent the enrollment criteria established in the Lynn and Erin Compassionate Use Act, and this amendment ensures that this will not happen in the future.

Ultra Health argues vigorously that Judge Wilson determined in his Writ of Mandamus in the Ultra Health litigation against the Department that the substance of the requirements set forth in the October 8 emergency rule, which was largely the same as the substance of the proposed rules that are the subject of this rulemaking proceeding, were in violation of the statue. That argument is not supported by Judge Wilson's order from the bench denying Ultra Health's Motion

for an Order to Show Cause and Application for Temporary Injunctive Order when he stated that "the Writ does not say that the requirements for reciprocal participation imposed by the emergency rule and the mandate were incompatible with the [statute] or go beyond the creation or promulgation of a regulation through the normal rulemaking process, and the Court did not previously decide that the emergency rule conflicted with the Act."

Recommendation: The Hearing Officer recommends that that Secretary-Designate find that the proposed amendments are not prohibited by the statue and are made pursuant to the authority vested in the Department by NMSA 1978, § 26-2B-7(I) which requires the Department to adopt rules concerning MCP reciprocity and authorizes the Secretary to "identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program." The Hearing Officer recommends that the Secretary-Designate adopt the proposed rule.

7.34.4.28(B) NMAC – Reciprocal Limit

The Department originally recommended that this rule be amended to revise the requirement that a reciprocal participant may collectively possess within any three-month period 230 total units of usable cannabis to a limit of 230 total units within one year. Ultra Health opposed the proposal revision. The MCAB proposed language that would allow a reciprocal participant to possess within any six-month period a quantity of usable cannabis that is consistent with the limits allowed to qualified patients.

In response to the forgoing issues, the Department proposed to rescind the proposed modification to the current reciprocal limit, and no longer recommends an amendment to this rule. Thus, the Department recommends that no change be made to the rule, which states: "A reciprocal patient may collectively possess within any three-month period a quantity of usable cannabis not greater than 230 units."

Recommendation:

The Hearing Officer recommends that no change be made to the existing 7.34.4.28(B) NMAC.

7.34.4.28(C) – Registration; verification; tracking and 7.34.4.28(D) – Proof of Authorization

The Department proposes the following amendments to this rule:

7.34.4.28(C) NMAC

. . .

(C)(2) A licensed non-profit producer that registers a reciprocal participant or that sells or transfers cannabis or a cannabis product to a reciprocal participant shall first verify the reciprocal participant's identity by ~~viewing~~ comparing the individual's proof of authorization from the other state, territory or tribe, [~~and also viewing~~] to

the reciprocal participant's government-issued photo identification card, and verifying that the information, including but not limited to place of residence, is consistent.

. . .

(C)(4) A licensed non-profit producer shall not register an employee or board member of the producer as a reciprocal patient.

(C)(5) At the time of registration, a licensed non-profit producer shall electronically upload a copy of the reciprocal participant's proof of authorization, and a copy of the reciprocal participant's government-issued photo identification which indicates the person's place of residence, into the electronic tracking system specified by the department.

(C)(6) A licensed non-profit producer shall ensure that the individual registering as a reciprocal participant is not already registered as a reciprocal participant or a qualified patient in the New Mexico medical cannabis program, before entering registration information for the individual. Registration of a reciprocal participant who was previously registered may result in disciplinary action in accordance with this rule.

(C)(7) At the time of registration, a licensed non-profit producer shall ensure that the reciprocal participant signs the participant's registration in the electronic tracking system specified by the department and acknowledges that they understand the requirements of participation in the program, including but not limited to acknowledging the time and quantity limits for reciprocal participation under thus rule, as well as the notice concerning state and federal prohibitions against the transport of cannabis across state and international boundaries. A licensed non-profit producer shall ensure that the acknowledgment is signed by the reciprocal participant and is not substituted by the signature of another person. A licensed non-profit producer that fails to comply with these requirements may be subject to disciplinary action in accordance with this rule.

The Department states that the proposed amendment to Subsection (C)(2), which appears to simply clean up the language of an existing rule, would require licensed non-profit producers to compare a person's proof of authorization to participate in the medical cannabis program of another jurisdiction with their government-issued photo ID card, and verify that information, including but not limited to place of residence, is consistent.

The Department states that the proposed amendment to Subsection (C)(4), which prohibits LNPPs from registering an employee or board member of the producer as a reciprocal participant, is proposed to avoid conflicts of interest for LNPPs in registering reciprocal participants.

The Department states that the proposed amendment to Subsection (C)(5), which requires that LNPPs electronically upload copies of the reciprocal participant's registration materials, is

intended to ensure that appropriate documentation concerning a reciprocal participant is kept on file.

The Department states that the proposed amendment to Subsection (C)(6), which requires that LNPPs ensure that individuals registering as reciprocal participants are not already registered as reciprocal participants or qualified patients in the NM MCP before registering that individual, and provides for possible disciplinary action, is intended to ensure that reciprocal participants are not registered multiple times or permitted to purchase medical cannabis under duplicate registrations.

The Department states that the proposed amendment to Subsection (C)(7), which requires that LNPPs ensure, when registering a reciprocal participant, that that individual signs their registration in the electronic tracking system and acknowledges that they understand the participation requirements in the Program, and which also expressly prohibits LNPPs from substituting any signature for the reciprocal patient, subject to disciplinary action, is intended to ensure that reciprocal participants acknowledge their understanding of the requirements of the Program, and to ensure that understanding is appropriately documented.

The Department proposes to add the following rule regarding the requirement for proof of authorization for participation for participation as a reciprocal participant:

> D. Proof of authorization to participate in the medical cannabis program of another jurisdiction (an "originating jurisdiction") shall consist of a card or other physical document issued by governmental entity authorized by law to enroll the applicant in the medical cannabis program in the originating jurisdiction. For purposes of reciprocal participation in the New Mexico medical cannabis program, permission from a medical practitioner shall not in itself be deemed proof of authorization to participate in the medical cannabis program of another jurisdiction but shall be accompanied by a card or other proof of enrollment issued by an authorized governmental entity of the origination jurisdiction. (For example, a written letter from a physician authorizing the individual to participate in the California medical cannabis program shall not be deemed proof of authorization for the purpose of participating in the New Mexico medical cannabis program.)

The Department states the proposed amendment to add a new 7.34.4.28(D) to provide the criteria for proof of authorization is intended to confirm that a letter from a medical practitioner, taken alone, is not sufficient to demonstrably prove that an individual has been authorized to participate in the medical cannabis program of another jurisdiction. The Department's concern is that a letter from a medical practitioner can be easily falsified and does not provide the same degree of proof as an ID card or other legal document issued by the originating jurisdiction. Further, a letter from a medical practitioner does not provide any verification that the practitioner is in good standing with their licensing body. The Department asserts that a card or other authorization from a governmental entity provides greater assurance that the reciprocal participation has met the eligibility requirements of the originating jurisdiction.

Finally, the Department asserts that it interprets the phrase "proof of authorization" in NMSA 1978, § 26-2B-7(J) to refer to a card or other physical document issued by a governmental entity authorized by law to enroll an applicant in the medical cannabis program of that jurisdiction. It further asserts that it has the authority to modify this rule to reflect this understanding pursuant to its statutory authority to establish "requirements for the granting of reciprocity" under NMSA 1978, § 26-2B-7(I).

Ultra Health argues that the proposed rule establishing the requirements for "proof of authorization" is unlawful. It asserts that this proposed rule (as an emergency rule) was determined to be unlawful by Judge Wilson in the Ultra Health litigation. As discussed above, Judge Wilson has stated that his Writ of Mandamus did not make that determination.

Ultra Health also argues that California law does not require that an identification card be issued in California in order to participate in the California medical cannabis program. It states that California law makes the issuance of ID cards voluntary, not mandatory. It further argues that California retailers can sell medical cannabis to individuals who possess a physician's recommendation and are not required to see an ID or enrollment card.

Ultra Health further argues that neither the New Mexico Legislature, nor the DOH, required that a government-issued ID and medical cannabis proof of authorization be issued where the participant lives, or that a reciprocal participant must produce a medical cannabis card as the only acceptable proof of authorization in order to obtain admission into the NM MCP.

The bases provided by the Department for the proposed amendments found in Subsections (C) and (D) of the reciprocity rule are reasonable, common sense amendments which are consistent with the statutory mandates found in the Lynn and Erin Compassionate Use Act.

Recommendation:

The Hearing Officer recommends that the Secretary-Designate find that the proposed amendments to Subsections (C) and (D) of the reciprocity rule, as well as the other proposed amendments discussed above, are in harmony with the agency's express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n,* 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

Craig T. Erickson

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1/28/21

Date