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NMAC

Transmittal Form



Volume: Issue: Publication date: Number of pages: (ALD Use Only) Sequence No.

Issuing agency name and address: Agency DFA code:

Contact person's name: Phone number: E-mail address:

Type of rule action: New Amendment Repeal Emergency Renumber (ALD Use) Recent filing date:

Title number: Title name:

Chapter number: Chapter name:

Part number: Part name:

Amendment description (If filing an amendment): Amendment's NMAC citation (If filing an amendment):

Are there any materials incorporated by reference? Yes No Please list attachments or Internet sites if applicable.

If materials are attached, has copyright permission been received? Yes No Public domain

Specific statutory or other authority authorizing rulemaking:

The regulation set forth herein is promulgated by the acting secretary of the New Mexico department of health, pursuant to the authority under Subsection E of Section 9-7-6 NMSA 1978, Subsection V of 24-1-3 NMSA 1978, and Section 24-1-21 NMSA 1978.

Notice date(s): Hearing date(s): Rule adoption date: Rule effective date:

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Concise Explanatory Statement For Rulemaking Adoption:

Findings required for rulemaking adoption:

Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

Please see the attached Statement of Reasons for Adoption of Proposed Repeal/Replacement of Licensed Midwives, Rule 16.11.3 NMAC.

Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Billy J. Jimenez

Check if authority has been delegated

Title:

General Counsel

Signature: (BLACK ink only OR Digital Signature)



Date signed:

12/10/2021

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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF HEALTH**

**IN THE MATTER OF PROPOSED
ADOPTION OF REPEAL AND
REPLACEMENT OF DEPARTMENT
RULE PART 16.11.3 NMAC**

**STATEMENT OF REASONS
FOR ADOPTION OF PROPOSED
REPEAL/REPLACEMENT OF LICENSED MIDWIVES**

David R. Scrase, M.D., Acting Cabinet Secretary for the New Mexico Department of Health, following a public hearing conducted on November 4, 2021, on the proposed repeal and replacement of the Licensed Midwives rule, part 16.11.3 NMAC, hereby adopts the proposed repeal and replacement rule. This decision is based on the entire record in this matter, which includes a recording of the hearing and the Report and Recommendation of the Hearing Officer, Craig T. Erickson, Esq., dated November 19, 2021.

In further support of this action the Secretary finds the following:

1. The Department of Health is authorized to repeal promulgated regulations and to promulgate regulations as may be necessary to carry out the duties of the Department and its divisions, NMSA 1978, Section 9-7-6(E), and to enact this rule pursuant Subsection V of 24-1-3 NMSA 1978, and Section 24-1-21 NMSA 1978.
2. In accordance with NMSA 1978, Section 14-4-5.2, notice of the public hearing for the proposed rule adoption was published in the New Mexico Register, the official publication for notices of all rulemaking in New Mexico, on September 28, 2021.

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3. In accordance with NMSA 1978, Section 9-7-6(E), notice of the public hearing for the proposed rule changes was also published in the Albuquerque Journal newspaper on September 28, 2021.
4. In accordance with NMSA 1978, Section 14-4-5.2, prior to the date of the rule hearing, notice of the public hearing for the proposed rule changes was also posted to the agency website at <http://www.nmhealth.org>, as well as to the NM Sunshine Portal at <http://www.newmexico.gov>.
5. By a letter dated September 17, 2021, Acting Cabinet Secretary David R. Scrase, M.D. designated Mr. Erickson to serve as hearing officer for the purpose of conducting the hearing and submitting a recommendation regarding the proposed repeal and replacement rule.
6. A public rule hearing was held in Albuquerque, New Mexico via the Internet-based video conference platform Cisco WebEx and by telephone on November 4, 2021 pursuant to NMSA 1978, Section 9-7-6(E).
7. Members of the public were afforded an opportunity to comment orally on the proposed rules at the hearing, and in writing prior to the hearing and through the close of business on November 4, 2021.
8. The purpose of the proposed repeal and replacement rule is to adopt a replacement to 16.11.3 NMAC which provides changes and amendments to various sections of the current rule, concerning the licensing, scope of practice and disciplining of licensed midwives, that has not been updated since 2001. The purpose of the replacement rule is to incorporate nine amendments made to 16.11.3. NMAC.

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9. The purpose of the first amendment to the definitions of the regulation is to clarify existing definitions and add definitions providing a detailed description to the licensed midwife of the processes within the regulation that will impact the licensee through the licensing process, in their daily professional work, and in obtaining the required education credits.

10. The purpose of the second amendment is to provide licensed midwives with references to the current guidelines, standards and core competencies to which they are required to practice pursuant to this regulation.

11. The purpose of the third amendment on permits is to set forth the clear distinction of procedural requirements for one of three processes for an apprentice or student midwife to care for New Mexico residents, to obtain renewal of permits and the process by which student midwives may obtain modified permits.

12. The purpose of the fourth amendment on licensure is to provide a more detailed explanation of the process of obtaining licensure, along with renewal, reactivation and reinstatement processes, and to provide a detailed explanation of the contact hours for continuing education required for renewal of a license.

13. The purpose of the fifth amendment on disciplinary action is to amend and clarify certain existing grounds for disciplinary action and to add as grounds for possible disciplinary action the failure to care for a non-adherent client as required by department of health practice guidelines for New Mexico Licensed Midwives; the failure to report in writing to the division any complaint or claim made against the licensed midwife's practice in any jurisdiction in which they practice as a registered, certified or licensed health care provider; verbally or physically abusing a client; conviction for misdemeanor

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offenses related to the practice of midwifery; and, practicing midwifery without a valid “modified permit”. Additionally, the rule will now provide that consideration of criminal convictions in disciplinary actions shall comply with Section 28-2-4 NMSA 1978. The purpose of amending the disciplinary proceedings sections is to provide a hearing opportunity for non-disciplinary license proceedings, to provide additional information to the licensee of the disciplinary process and on the hearing procedure to be followed under the Uniform Licensing Act, to make it clear that final administrative decisions are reported to the National Practitioner Data Bank (NPDB), and to allow for reinstatement of a license revoked for non-compliance with the Parental Responsibility Act, Section 40-5A-1 to 13 NMSA 1978 upon presentation of a subsequent statement of compliance.

14. The purpose of the sixth amendment on course of education is to clarify what entry level skills, knowledge, and abilities are necessary to practice competently and to set forth with specificity the skills, knowledge, and clinical experiences needed.

15. The purpose of the seventh amendment on examination is to shorten the time to retake an examination after initial failure of the exam and increase the number of times per year that the division will administer the licensure examination.

16. The purpose of the eighth amendment on scope of practice is to provide the licensed midwife with a more definitive scope of practice in a gender neutral manner, to increase the type of licensed professionals with whom consultation may be made to include certified nurse-midwives, to provide clarity on what content an informed consent should contain and the responsibility to maintain a copy in the client records, to change the terminology of the admission criteria section to the gender-neutral term “client”, to add “stillbirths” as a reportable neonatal or maternal mortality incident for a client for

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whom the licensed midwife has provided care in the perinatal period, and to set new informational and reporting obligations on licensees.

17. The purpose of the ninth amendment related to the advisory board is to clarify the definition of and increase the number of the general public members, and to allow the Board to recommend changes to the department's practice guidelines for New Mexico Licensed Midwives.

18. The purpose of the repeal of 16.11.3 NMAC is necessary because the New Mexico Commission of Public Records has stated in its Guide that a repeal and replacement of an existing rule is very helpful when a rule has been substantially rewritten and restructured such that a detailed section by section comparison is not possible and may be confusing to the public.

19. Written comments from members of the public were received prior to the rule hearing and oral comments from the public were received during the rule hearing. No additional written comments were received from the public after the close of business on November 4, 2021.

20. The Department also made certain clerical, clarifying and formatting changes to be consistent throughout the rule. These facts are described in the November 19, 2021 Report and Recommendation from the Hearing Officer to the Acting Cabinet Secretary David R. Scrase, M.D.

21. Changes between the rule draft that was offered at the rule hearing and the final rule are as stated in the record of the hearing and as described in the Hearing Officer's Report and Recommendation, the recommendations of which are adopted herein by the Acting Cabinet Secretary David R. Scrase, M.D.

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22. The Secretary finds that the revisions to the proposed rule text that have been made after the hearing are consistent with the response of the Division of Health Improvement and the Hearing Officer's recommendations and are appropriate, and do not require further notice, public comment or hearing. *See* Small Refiner Lead Phase-Down Task Force v. U.S. Env'tl. Protection Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (Federal Admin. Procedures Act) (The notice requirement should not force an agency endlessly to re-propose a rule because of minor changes, nor should a court vacate and remand an otherwise reasonable rule because of a minor procedural flaw).

23. The Secretary further finds that the proposed rule, including the revisions made after the hearing, are a logical outgrowth of the notice given and comment received, and that commenters were afforded a fair opportunity to present their views on the contents of the rule. *See* N.M. Att'y Gen. Op. 87-59 (1987) (*citing* BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979)); *see also* Wylie Bros. Contracting Co. v. Albuquerque-Bernalillo Cty. Air Quality Control Bd., 1969-NMCA-089, ¶ 39, 80 N.M. 633, 642.

24. Certain text that was originally proposed as the 16.11.3 NMAC has been revised in the final version of the rule, based in part on concerns provided by members of the public.

25. The Secretary further finds that all written and oral public comments were reviewed and considered, and that some comments were not accepted due to the fact that those matters were already addressed in separate sections of the regulation. (A more detailed rationale for accepting or not accepting suggestions made in the comment process, along with answers to comments consisting of questions, is contained in the record in the

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November 17, 2021 letter from Ann H. Washburn, Esq. responding to public comments addressed to the Hearing Officer and marked DOH Exhibit 9, which is hereby incorporated by reference as if set forth in full).

26. The Acting Cabinet Secretary has familiarized himself with the rulemaking record, including the Report and Recommendation of the Hearing Officer, and finds that the Hearing Officer has appropriately considered the entire record and substantive comments made through public comments, and finds that the recommendations of the Hearing Officer are appropriate.

27. The Acting Cabinet Secretary hereby adopts the Hearing Officer's recommendations concerning the proposed repeal and replacement to the rule.

28. The Acting Cabinet Secretary finds that the rule promulgation process met the requirements of the State Rules Act and the New Mexico Attorney General's Default Procedural Rule for Rulemaking at 1.24.25 NMAC. The effective date of the rule will be December 28, 2021.

29. The Acting Cabinet Secretary finds that the proposed repeal and replacement of 16.11.3 NMAC, as recommended by the Hearing Officer, is appropriate and consistent with the authorizing law, and accordingly, the proposed repeal and replacement of 16.11.3 NMAC is hereby adopted.

NEW MEXICO DEPARTMENT OF HEALTH



David R. Scrase, M.D., Acting Cabinet Secretary

December 10, 2021
Date

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The New Mexico Department of Health has approved the repeal of its rule 16.11.3 NMAC -Licensed Midwives (recompiled 12/31/01) and replaced it with 16.11.3 NMAC – Licensed Midwives (adopted on 12/10/2021), and effective 12/28/2021.