

**From:** [Corey Davis](#)  
**To:** [Apodaca, Sheila, DOH](#)  
**Subject:** [EXTERNAL] Comments on proposed repeal and replacement of N.M.A.C. 7.4.6  
**Date:** Tuesday, August 16, 2022 4:37:57 PM  
**Attachments:** [HRLP comments on proposed NM 746.pdf](#)

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Dear Ms. Apodaca,

Please find attached comments regarding the proposed repeal and replacement of N.M.A.C. 7.4.6. Please don't hesitate to reach out to me with any questions.

Thanks,  
Corey Davis

Corey Davis, JD, MSPH  
Director, Harm Reduction Legal Project  
Deputy Director, Southeast Region  
Network for Public Health Law

August 16, 2022

Sheila Apodaca  
Office of General Counsel  
New Mexico Department of Health  
1190 St. Francis Drive, Suite N-4095  
Santa Fe, NM 87505

RE: Comments on proposed repeal and replacement of N.M.A.C. 7.4.6

Dear Ms. Apodaca,

On behalf of the Harm Reduction Legal Project, I appreciate the opportunity to submit brief comments regarding proposed changes to New Mexico Admin. Code 7.4.6. The Harm Reduction Legal Project is an initiative of the Network for Public Health Law, and provides actionable information, guidance, and support to policymakers, health agencies, providers, and advocates working to create more just, equitable, and health-focused drug policy in the United States.

While we generally support the proposed changes, we have several concerns regarding specific proposed amendments. As outlined below, we believe that these regulations create unnecessary barriers to the provision of harm reduction supplies and services, which, if enacted as proposed, will result in preventable harm and expense to the people of New Mexico. Further, we believe that some proposed regulations are not consistent with the New Mexico Harm Reduction Act (N.M.S. A.1978, § 24-2C-1 *et seq.*) and therefore impermissible. Specific comments and suggestions are below.

#### **7.4.6.7 Definitions**

As noted below, we are concerned that the term “staff” as used in proposed N.M.A.C. 7.4.6.7, 7.4.6.9, and 7.4.6.12 may be interpreted to include only paid employees of a Harm Reduction Provider (HRP). We therefore recommend that “staff” be added to 7.4.6.7 and defined to include both paid employees and volunteers of an HRP.

#### **7.4.6.9 Harm Reduction Provider Requirements**

We are concerned that N.M.A.C. 7.4.6.9 paragraph E. will unnecessarily limit the operation of harm reduction programs. Per this requirement, “The HRP must have at least two staff present, or within voice or a direct line-of-sight visual signal range, at all times during harm reduction sessions.” This paragraph is concerning for two reasons. First, as “staff” is not defined, it is possible that this requirement may be interpreted to require that each HRP have a minimum of two paid employees within a relatively small area during harm reduction sessions. Second, even if “staff” is defined to include volunteers, requiring two individuals to be present in a small area may limit the ability of some HRPs, especially those that wish to serve rural areas, to operate to the extent necessary to reach all individuals who can benefit from HRP services. In some cases, it may limit the ability of HRPs, many of which operate on very small budgets and some of which



may be operated entirely by volunteers, to provide services at all. We therefore recommend that this provision be eliminated entirely. If it must be included, we recommend that it be modified as follows:

E. The HRP must have at least two staff **members or volunteers** present, or **able to communicate in real-time via telephone, radio, internet, or other means** ~~within voice, direct line-of-sight visual signal range,~~ at all times during harm reduction sessions. Staff members may not be impaired during harm reduction sessions.

#### 7.4.6.10 Supplies Provided

We are very concerned that proposed section 7.4.6.10 impermissibly restricts the type of supplies that may be distributed by HRPs, and that they will result in preventable harm to HRP Participants as well as the broader public. Per the proposed regulations, items provided by HRPs “shall include:”

- A. Safer smoking supplies *limited to* screens, pipe covers, wooden pushers, copper scrub pads, aluminum foil and straws designed to inhale substances.
- B. Safer snorting supplies *limited to* clean spoons for measurement, clean plastic razors, clean flat surfaces.
- C. Safer injecting supplies *limited to* syringes and needles, metal containers for cooking substances, cotton pellets or other filtration devices, twist ties, tourniquets, sterile water and saline, ascorbic acid, and biohazard containers for disposal of used syringes and needles. (emphasis added)

While this language is somewhat ambiguous, we are concerned that it may be interpreted as a limitation on the types of supplies that HRPs may distribute. In particular, we are concerned that paragraph A may be interpreted to prohibit the distribution of pipes and other devices used to inhale substances, as they are not “screens, pipe covers, wooden pushers, copper scrub pads, aluminum foil and straws designed to inhale substances”.

Such an interpretation would be in violation of the enabling statute, and therefore invalid. As you know, N.M.S. A.1978, § 24-2C-5 requires that each HRP “shall provide participants with:”

- A. sterile hypodermic syringes and needles in exchange for used hypodermic syringes, needles or other objects used to inject controlled substances or controlled substance analogs into the human body;
- B. other objects used to prepare or consume controlled substances or controlled substance analogs;
- C. supplies or devices used for testing controlled substances or controlled substance analogs for potentially dangerous adulterants;
- D. supplies or devices approved by the department for distribution in accordance with rules established pursuant to Subsection E of Section 24-2C-4 NMSA 1978;
- E. education on the prevention of:
  - (1) the transmission of the human immunodeficiency virus and hepatitis B and C; and
  - (2) drug overdose mortality and other negative health outcomes; and
- F. referral to substance abuse treatment services.



We believe this statute requires that HRP provide participants with *all* of the supplies, devices and objects articulated in A-D, as well as the education detailed in E and the referrals noted in F. Therefore, the supplies or devices “approved by the department for distribution in accordance with rules established pursuant to Subsection E of Section 24-2C-4 NMSA 1978” must be *in addition to* those listed in N.M.S. A.1978, § 24-2C-5.A through N.M.S. A.1978, § 24-2C-5.C.

NMSA 23-23-5(B) requires that HRP provide participants with “other objects used to prepare or consume controlled substances or controlled substance analogs,” without limitation. It is therefore impermissible for the Department to limit these objects as proposed paragraphs A, B, and C of proposed NMAC 7.4.6.10 purports to do.

Even if the Department believes that it does have the ability to limit the types of supplies distributed by HRP, such ability is not without restriction. Rather, any regulations must comply with delegation contained in the enabling statute. The legislature clearly spelled out the purpose of regulations promulgated under the Harm Reduction Act. Per N.M.S.A. 1978, § 24-2C-4.E,

The criteria and standards [for the types of supplies or devices provided pursuant to the harm reduction program and standards for the distribution of those supplies or devices through that program] shall be developed to provide supplies and devices in order to reduce:

- (1) cases of negative health outcomes associated with drug use, such as overdoses or the spread of infectious disease; and
- (2) harm by promoting reduced use of non-sterile items and improving participant engagement in harm reduction services and prevention education.

No evidence supports the conclusion that the limitations in proposed NMAC 7.4.6.10 comply with this statutory mandate. In particular, to our knowledge there is no evidence suggesting that restricting the types of safer smoking and safer snorting supplies that can be distributed to HRP participants will reduce either cases of negative health outcomes associated with drug use, nor harm by promoting reduce use of non-sterile items, as required by the law.

Rather, limiting the types of supplies that HRP can distribute would almost certainly *increase* negative health outcomes associated with drug use, including but not limited to the spread of infectious disease. It is possible for hepatitis C to be spread by pipe sharing,<sup>1</sup> and the provision of glass pipes to syringe services program participants has been shown to encourage people who inject drugs to shift to smoking them, which reduces bloodborne disease risk associated with injection.<sup>2</sup> Further, the provision of pipes and other safer smoking supplies can be a highly effective way of engaging with people who smoke but do not inject drugs, including methamphetamine. This engagement increases delivery of and linkage to care, treatment, and support services, including substance use disorder treatment.

The exclusion of pipes and other supplies from proposed 7.4.6.10 also increases potential economic harm to individuals who inhale drugs because it leaves individuals who consume drugs

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<sup>1</sup> Fischer B, Powis J, Cruz MF, Rudzinski K, Rehm J. Hepatitis C virus transmission among oral crack users: viral detection on crack paraphernalia. *European Journal of Gastroenterology & Hepatology* 2008;20:29-32.

<sup>2</sup> Leonard L, DeRubeis E, Pelude L, Medd E, Birkett N, Seto J. "I inject less as I have easier access to pipes": injecting, and sharing of crack-smoking materials, decline as safer crack-smoking resources are distributed. *Int J Drug Policy* 2008;19:255-64.



via smoking subject to a civil fine. The provisions of state law that prohibit the use or possession of drug paraphernalia do not apply to “supplies or devices obtained pursuant to the Harm Reduction Act in accordance with rules established by the department of health for the harm reduction program...”<sup>3</sup> If pipes used to smoke methamphetamine and other drugs are prohibited by rule from being distributed by HRP, those who use those devices to inhale controlled substances are subject to being fined under the state paraphernalia law.<sup>4</sup> Further, if the proposed regulations were to be adopted as written, staff of HRP that were to distribute pipes and other smoking supplies not listed in 7.4.6.10.A would be subject to conviction of a misdemeanor, with penalties of up to one year incarceration.<sup>5</sup> Such a result appears absurd in light of the stated intention of the legislature in updating and expanding the Harm Reduction Act.

We thank you for the opportunity to submit these public comments regarding the proposed repeal and replacement of N.M.A.C. 7.4.6. If you have any questions regarding these comments, please contact me at [cdavis@networkforphl.org](mailto:cdavis@networkforphl.org).

Sincerely,

Corey S. Davis  
Director, Harm Reduction Legal Project  
Network for Public Health Law

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<sup>3</sup> N.M. Stat. Ann. § 30-31-25.1.C.

<sup>4</sup> “A person who violates the provisions of Subsection A of this section [use or possession with intent to use drug paraphernalia] shall be issued a penalty assessment pursuant to Section 3 [31-19A-1 NMSA 1978] of this 2019 act and is subject to a fine of fifty dollars (\$50.00).” N.M. Stat. Ann. § 30-31-25.1.C.

<sup>5</sup> “A person who violates the provisions of Subsection B of this section [delivery of drug paraphernalia] is guilty of a misdemeanor.” N.M. Stat. Ann. § 30-31-25.1.C. “Where the defendant has been convicted of a crime constituting a misdemeanor, the judge shall sentence the person to be imprisoned in the county jail for a definite term less than one year or to the payment of a fine of not more than one thousand dollars (\$1,000) or to both such imprisonment and fine in the discretion of the judge.” N.M. Stat. Ann. § 31-19-1(A).