NEW MEXICO
Department of Health
Office of General Counsel

MICHELLE LUJAN GRISHAM
Governor

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

September 20, 2022

Via email: craig@uttonkery.com

RE: Response to comments for proposed rule 7.4.6

Dear Mr. Erickson,

Thank you for the opportunity to respond to the comments presented at the rulemaking hearing for the adoption of the proposed rule 7.4.6 Requirements Governing the Harm Reduction/Syringe Exchange Program. We are grateful for all the responses at the rulemaking hearing and for the opportunity to hear the community feedback and concerns. Based on the comments, we made changes to some areas of the proposed regulations. Those changes are addressed below. Additionally, for ease of viewing, a full redline draft of the changes to the proposed rules is also attached to this response. We were not able to accommodate all requests however and we have responded to those the comments and concerns below as well.

The Harm Reduction Act (the Act) at NMSA 1978, Sections 24-2C-1 to 24-2C-6 obligates the department to administer the harm reduction program for the purpose of reducing overdose mortality and other negative health outcomes associated with drug use. To do so the department is obligated to establish rules for providing participants with access to supplies, devices, or services provided by the program. NMSA 24-2C-4(A)(2).

The department is further obligated to develop criteria for all supplies and devices provided under the Act and the standards for the distribution of all the types of supplies and devices provided. The standards to be determined by the department must be developed to provide supplies and devices to reduce cases of negative health outcomes, reduce use of non-sterile items and improve participant engagement in harm reduction services. NMSA 1978, Section 24-2C-4(E).

Later the Act at NMSA 24-2C-5 states that the harm reduction program, as regulated by the department, 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 substances 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

Part D of the section above covers supplies and devices determined by the department to meet the standards of reducing negative health outcomes and promoting reduced use of non-sterile items and improving participant engagement. All other sections are still covered under the overarching

obligation of the department to establish which supplies and devices may be distributed to its program participants and the obligation of the department to administer the program.

If part B of Section NMSA 24-2C-5, including other objects used to prepare or consume controlled substances, were to be read as separate from the supplies and devices as regulated by the department, those supplies would be excluded from the possession of drug paraphernalia exemptions at NMSA 1978, Section 30-31-25.1 which exempt from criminal liability needles and syringes obtained through the harm reduction act, "supplies and devices obtained pursuant to the harm reduction act in accordance with rules established by the department of health for the harm reduction program" or testing supplies whether or not obtained through the harm reduction program. There is no separate protection for objects used to prepare or consume controlled substances as there are for testing devices and for needles and syringes. Therefore, any object provided to a harm reduction participant to prepare or consume controlled substances must be provided as part of the supplies or devices as regulated by the department for the criminal liability exemption to apply.

Additionally, the Act requires that supplies and devices distributed to harm reduction participants must meet the department designated standards of reducing cases of negative health outcomes and reducing use of non-sterile items and improving participant engagement in harm reduction services which would include objects used to prepare or consume controlled substances. However, the Act does not require the department to provide access to every single item that any person or group asserts may meet those qualifications. Otherwise, there would be no need for the department to develop standards or rules for the supplies and objects provided.

No comments were presented that suggest that the items as defined by the proposed rules fail to meet the requirements as set out in the harm reduction act, only that the items listed do not include their ideas of what other items may also meet those criteria.

However, there are a few additions that the department agrees are important and we have included them in draft proposed changes to the rules based on those comments. Uncoated/cured foil is added to the list of supplies that may be distributed by the harm reduction programs. Additionally, the staff member and volunteer issue brought up in comments has been addressed, along with the confusion about the limited HRP status for distribution of drug testing devices. The edits also include a clarification that an individual does not need to be a participant to receive drug testing devices.

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

Sincerely,

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

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M. Shelley Strong

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