

**Aaron B. Ezekiel  
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July 13, 2023

**By electronic mail on July 13, 2023**

NMDDC OOG  
625 Silver Avenue SW  
Suite 100  
Albuquerque, NM 87102-3185  
[DDC.OOG-Rulemaking@ddc.nm.gov](mailto:DDC.OOG-Rulemaking@ddc.nm.gov)

RE: Initial comments on proposed replacement of 9.4.21 NMAC GUARDIANSHIP SERVICES

Dear colleagues:

I am writing to respond to the published proposed revision of the NMAC section noted above. Since this is based on my initial review of the document, I reserve the right to provide additional comments either in writing or verbally at the hearing on July 31, 20213.

Thanks in advance for your attention to the comments that follow,

Best regards,

Aaron B. Ezekiel, Esq.  
Ezekiel Law Office LLC

Cc: [Holly.Gonzales@ddc.nm.gov](mailto:Holly.Gonzales@ddc.nm.gov)

A. DEFINITIONS:

I. Item 9.4.21.7 DEFINITIONS A. COMPLAINT uses an undefined and vague term “*person-centered approach*” when describing the type of reports that will be accepted as complaints. I suggest that this term, if it is retained, is deserving of a definition.

II. a. Item 9.4.21.8 ELIGIBILITY B uses the term “*director*” when stating who may authorize exceptions to the agency’s eligibility requirements for provision of services. NMDDC’s full staff listing (at <https://www.nmddpc.com/contact>) does not contain any individual identified as *director*. Reviewing that staff listing it appears that any one of three named positions could be the intended recipient of this authority: the NMDDC **Executive Director**, the NMDDC Office of Guardianship **Legal Director** or the NMDDC Office of Guardianship **Program Manager**. I suggest that this be clarified, either by a) adding a definition of the term *director* presently used in the proposed revision or b) substituting a term that refers to an existing staff title and adding that term to the definitions section of the proposed revision.

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b. Additionally, the potential for this authority to be vested in the agency's *Executive Director* raises the question of whether this authority can be delegated since the agency head can reasonably be expected to have numerous other duties. If so, perhaps that delegation authority should be stated in the proposed revision.

III. Item 9.4.21.9 PRIORITIZATION OF SERVICES B (1) states that "agency referrals" from either federal or state agencies will receive priority attention. It goes on to name three specific state agencies apparently as examples. Based on several years of experience as an attorney service provider for the NMDDC Office of Guardianship I am aware that UNM Hospital, which is generally defined as a quasi-state entity, is one of the entities that seeks services quite often. I suggest that it is important to define more clearly which agencies qualify for this priority attention, either by adding a definition or by a more complete statement in this section.

#### B. PRIORITIZATION OF SERVICES:

I. Subsection 9.4.21.9 B (2) *Veterans* states that veterans who are alleged incapacitated persons will receive priority services. There are numerous instances in our society and in governmental agencies in which statutes require certain advantages for veterans. Is this a case where a veteran's priority is required by statute? If not, is there a justification for this priority, as compared, for example, to unhoused persons, persons with significant physical disabilities or retired law enforcement officers? I do not provide these examples to suggest additional priority population groups, rather to ask for a statutory or policy justification for this regulatory proposal.

II. Subsection 9.4.21.9 B (5) *Emergency applications* provides for a priority for emergency application. The 2022 revisions to the statute regarding temporary emergency guardianship (45-5-310 NMSA 1978) created hurdles to implementation that resulted in many attorneys being unwilling to participate in an emergency process. I question whether it is practical to prioritize emergency guardianships at present. At minimum, I suggest polling your attorney service providers to determine if you have adequate resources to implement this subsection **AND** reporting the results of that poll at the July 31, 2023 hearing.

C. 9.4.21.14 COMPLAINTS AGAINST A SERVICE PROVIDER B. (1) (b) allows the service provider 30 days to report its finding related to a complaint. The underlying statute, in 28-16B-6. C. NMSA 1978, **Resolution of complaints** allows the NMDDC Office of Guardianship a total of "60 working days," which is a minimum of 12 weeks (94 days ignoring official holidays) to render a decision on a complaint except under certain circumstances relating to the interests of the protected person. Is it the intent of the regulation to allow 30 *calendar* days or 30 *working* days for service providers to respond to a complaint? Does the NMDDC Office of Guardianship intend to routinely respond within 30 *calendar* days or 30 working days?

D. 9.4.21.19 COMPREHENSIVE SERVICE REVIEWS A. states "*The NMDDC office of guardianship shall designate an attorney licensed in New Mexico....*"

I. Does the agency consider attorneys currently employed by NMDDC or attorneys contracted for services to NMDDC via Falling Colors to be conflicted out of assignment to Comprehensive Service Reviews? If so, the proposed rule should so state. If not, the proposed rule should perhaps state the circumstances in which an attorney in either situation **WOULD** be

considered to have a conflict of interest that would remove the attorney from consideration for such an assignment.

II. If NMDDC considers all its employed attorneys and/or all its attorney service providers to be conflicted out of participation in these reviews perhaps it should state as much in the regulation or, at minimum at the public hearing. If so, some indication as to how NMDDC will obtain the services of appropriately experienced attorneys would be most welcome.

III. There is no provision for appeal of either the results of a Comprehensive Service Review or a resulting Corrective Action Plan in either 9.4.21.19 or 9.4.21.20. Is it intentional that no appeal is possible? Or, alternatively, any appeal is informal and outside the scope of the regulation?