



DISABILITY RIGHTS NEW MEXICO

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Gary Housepian, Chief Executive Officer

Promoting and Protecting the Rights of Persons with Disabilities

30 July 2023

NMDDC OOG

625 Silver Ave. SW, Suite 100

Albuquerque, NM 87102-3185

Submitted as a PDF attachment by e-mail to DDC.OOG-Rulemaking@ddc.nm.gov

Re: Proposed amendments to 9.4.21 NMAC Guardianship Services

DDC-OOG:

Please accept these brief comments from Disability Rights New Mexico (DRNM), our state's Protection & Advocacy System, a federally-authorized nonprofit organization serving to protect, promote, and expand the legal rights of people with disabilities. We offer these thoughts regarding the proposed amendments to 9.4.21. We appreciate your consideration of our input. As we hope you are already well aware, DRNM values our ongoing partnership with DDC and OOG to benefit our shared constituencies.

9.4.21.3

This is substantively insignificant, but you probably want to change the "6" to "7" given the addition of NMSA 28-16B-7 to state statutes.

9.4.21.7

DRNM doesn't believe that NMSA 43-1-15 belongs in this list. This citation is probably a holdover in NMAC from some previous version of the referenced statute? If indeed you intend to cite to the Mental Health and Developmental Disabilities Code, and it is not clear why you would when that Code has such a radically different purpose, perhaps you meant to cite to that Code's definitions at NMSA 43-1-3?

9.4.21.8

DDC-OOG proposes to remove all references to the proposed protected person's "net liquid assets" before qualifying the person. DRNM certainly supports OOG guardianships over the private corporate guardianship system that is seemingly set up to drain and redistribute a protected person's estate. But this proposed change might unintentionally but significantly expand the reach of OOG, in a time when you already have a waitlist, and could leave vulnerable people with no other access to the protection of a guardianship stuck in line behind wealthy people who happen to currently have an income below the 200% qualification level.

What is the public cost when someone who has retired with substantial wealth to sustain them financially, but a low annual income, qualifies for an OOG guardianship? You propose removal of all references to conservatorship except in the 9.4.21.7(E) definition. How does OOG intend to merge guardianships for people with low income but qualifying for a conservatorship?

9.4.21.8(A)(1)

DRNM might be satisfied with a strict reading of the "must be 18 years old" requirement, but for the sake of clarity, it might be worth adding "at least" before the number 18.

9.4.21.8(C)

Please excuse our ignorance, but DRNM is not clear on what this proposed addition means or what exactly a "legal sufficiency evaluation" is. Obviously NMSA Chapter 45 covers a lot. DRNM certainly believes it would be worth the effort to specify what you are talking about here.

9.4.21.9(B)(5)

DRNM is greatly concerned about this proposal. We are strongly opposed to its inclusion, and we believe that this would create many more problems than it would solve. This proposed 9.4.21.9(B)(5) as drafted runs counter to the national and statewide recognition that emergency temporary guardianships are overused and abused, and this language runs counter to recent statutory improvements to limit emergency temporary guardianships.

The language in the draft proposal encourages applicants to submit an "affidavit for emergency prioritization" with allegations that would satisfy the OOG in its extrajudicial determination of what could be an *ex parte* procedure anyway. This is wrong and dangerous. This creates far too easy a path to skip the necessary waitlist OOG must maintain at times, and it promotes further abuses of the emergency guardianship system.

Proposed Repeal of 9.4.21.11 & 9.4.21.12

DRNM fails to understand the value of these proposed repeals. What is the benefit of removing these sections? In the current moment of increased scrutiny of guardianship services providers, making the roles of the OOG and contracted guardians more opaque and even shrouded in secrecy seems to be a step in the wrong direction.

9.4.21.14(B)(1)

Regarding the clause requiring that “the complainant must attempt to resolve the issue through the guardian’s internal complaint procedures”, does this suggest that the OOG will not consider the complaint until that guardian’s internal system is complete? Even, for example, for a protected person who does not know of this requirement or of the mere existence of an internal complaint system? Even when the guardian’s internal complaint system is used as a tool to delay or sabotage the complaint?

This section is not as clear as DRNM would hope. Is the only way to submit a complaint by giving it to the accused guardian? Proposed 9.4.21.14(B)(1)(a) suggests this, since the guardian “must notify” OOG of the complaint. But this appears to contradict proposed 9.4.21.14(A), giving any interested party to right to file the complaint “with the [OOG]”. Does that right to file the complaint with the OOG necessary go through the entity accused of wrongdoing? If OOG is truly committed to holding its contracted guardians accountable when appropriate, this is not the best system to effectively achieve that goal.

9.4.21.14(D)

Wait; what?!? In proposed 9.4.21.13(C) and (C)(1), the OOG “must ... investigate complaints”. Then in proposed 9.4.21.14(D) there is an apparently limitless opportunity to decline to investigate; the declination burden is met by simply giving notice. If OOG intends to only decline to investigate when the matter is referred to law enforcement, that could be made much clearer.

Proposed Repeal of 9.4.21.15

As we mentioned regarding sections 11 and 12, DRNM doesn’t understand why this is proposed for removal. Is there to be no recourse if someone has a complaint about the agency? What if some future OOG leadership decides to simply decline to investigate all complaints under the broad language in the proposed 9.4.21.14(D)? In this world after the clean-up of Ayudando and other scandals, please explain why OOG feels shielding itself from even a complaint is the best path to ensuring public confidence in the guardianship system.

Proposed Repeal of 9.4.21.16

Sorry to be so repetitive, but once more DRNM misses the value in the proposed removal of this section. These transfers can be an important aspect of the OOG's role on behalf of the constituency it serves. How is the system improved with this proposed repeal?

Proposed Repeal of 9.4.21.18(A)

We'll try to be a bit more specific here, because DRNM never really observed the comprehensive evaluation system's benefits. But 9.4.21.18(A) provided a specific path to trigger a review of a protected person who has made "gains in [their] capacity". Clearly this was an underutilized path. But soon it apparently will be gone entirely. OOG specifically and the entire guardianship system generally will benefit from increased opportunities to encourage consideration of restoration of capacity. DDC and OOG leadership have been at the forefront of this movement, and DRNM believes that this consideration should be incorporated more in OOG program rules rather than be written out of them.

9.4.21.19

Please specify whom is to be covered by these Comprehensive Service Reviews. Every person under an OOG guardianship? Family guardian placements through OOG legal services? Proposed protected people on the presumed path to being placed under a guardianship? We hope and expect that DRNM will enthusiastically support and appreciate the Comprehensive Service Reviews, but we need to better understand them than the proposed language allows.

9.4.21.20

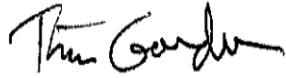
The proposal here gives the sole authority for the development of a corrective action plan to the service provider which has failed to fulfill its responsibilities. Is this really the right way to go? DRNM isn't convinced. This is certainly a step back from the current "imposition of a corrective action plan" language – proposed for removal – in 9.4.21.14(J)(4)(a).

Conclusion

DDC and OOG leadership knows how much DRNM believes in your intentions to create a more responsive public guardianship system. Please accept our comments in the spirit of encouraging movement toward that end. In finalizing the NMAC rules, we hope you will give thought to how to leave language that would withstand other future leadership that may not have your level of commitment to protected people and their autonomy and freedoms.

Thank you in advance for consideration of these comments. Please don't hesitate to contact me with any questions or other feedback. We look forward to our continued partnership with DDC and OOG to best improve New Mexico's guardianship system.

Sincerely,

A handwritten signature in black ink that reads "Tim Gardner". The signature is written in a cursive, flowing style.

Tim Gardner
Legal Director