

TITLE 9: HUMAN RIGHTS

CHAPTER 1: HUMAN RIGHTS GENERAL PROVISIONS

PART 1: ADMINISTRATIVE PROCEDURES FOR THE HUMAN RIGHTS DIVISION/COMMISSION

9.1.1.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division, Human Rights Bureau.

[9.1.1.1 NMAC - Rp, 9.1.1.1 NMAC, 1/1/2020]

9.1.1.2 SCOPE:

A. These rules apply to the general public and contain specific limitations from applicability, as noted.

B. Application of rules of civil procedure: In the absence of a specific provision governing an action in the Human Rights Act or in these rules, the human rights bureau and the human rights commission may look for guidance to the New Mexico Rules of Civil Procedure for the District Courts, Rules 1-001 to 1-102 NMRA 1998 and as may be revised.

[9.1.1.2 NMAC - Rp, 9.1.1.2 NMAC, 1/1/2020]

9.1.1.3 STATUTORY AUTHORITY:

These rules and regulations are adopted by the secretary of the New Mexico department of workforce solutions to carry out the provisions of the Human Rights Act, Sections 28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978 and 28-23-1 to 28-23-6 NMSA 1978, as amended, or as such provisions may be amended by law.

[9.1.1.3 NMAC - Rp, 9.1.1.3 NMAC, 1/1/2020]

9.1.1.4 DURATION:

Permanent.

[9.1.1.4 NMAC - Rp, 9.1.1.4 NMAC, 1/1/2020]

9.1.1.5 EFFECTIVE DATE:

January 1, 2020 unless a later date is cited at the end of a section.

[9.1.1.5 NMAC - Rp, 9.1.1.5 NMAC, 1/1/2020]

9.1.1.6 OBJECTIVE:

These rules and regulations govern procedure for complaints with the human rights bureau, and the subsequent investigation and administrative hearing process.

[9.1.1.6 NMAC - Rp, 9.1.1.6 NMAC, 1/1/2020]

9.1.1.7 DEFINITIONS:

As used in these rules incorporates the definitions of 28-1-2 NMSA 1978 and:

A. "Act or Acts" means the Human Rights Act, Sections 28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978, The Criminal Offender Employment Act, 28-2-1 to 28-2-6 NMSA 1978, The Fair Pay for Women Act 28-23-1 to 28-23-6, 50-16-1 to 50-16-4 NMSA 1978, The Lynn and Erin Compassionate Use Act, 26-2B-9 NMSA 1978 and all subsequent amendments and provisions.

B. "Applicant for employment" means a person applying or attempting to apply for a position as an employee.

C. "Bureau" means the human rights bureau of the labor relations division of the New Mexico department of workforce solutions.

D. "Chairperson" and "vice chairperson":

(1) **"Chairperson"** means a member of the commission designated by the governor to serve as chair.

(2) **"Vice chairperson"** means a member of the commission designated by the commission to preside in the absence or incapacity of the chairperson.

E. "Commission" means the New Mexico human rights commission.

F. "Commissioner" means one of the members appointed by the governor to serve on the New Mexico human rights commission.

G. "Complainant" or "claimant" means any person who claims to be aggrieved by an unlawful discriminatory practice and who has filed a complaint with the human rights bureau within 300 calendar days after the alleged unlawful discriminatory act was committed.

H. "Complaint" or "charge" means a charge of discrimination signed by the complainant on a human rights bureau charge of discrimination form, on an equal employment opportunity commission (EEOC) form 5 or on such other form as may be deemed acceptable to the human rights bureau.

I. "Determination" means a formal decision made by the division director, relating to a complaint filed with the human rights bureau of the labor relations division of the New Mexico department of workforce solutions.

J. "Disabled person" means any person who has a physical or mental disability as defined in these rules as "physical or mental disability" as used in Subsection O of Section 28-1-2 NMSA 1978, as amended.

K. "Division" means the labor relations division of the New Mexico department of workforce solutions.

L. "Director" means the director of the human rights bureau of the labor relations division, or other bureau leadership designated by the director to carry out the mission of the bureau.

M. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. The bureau may consider any relevant factors to determine if good cause exists.

N. "Hearing clerk" means the person designated by the bureau to maintain the official record of the hearing proceedings.

O. "Hearing officer" means the person conducting a hearing of a matter brought before the bureau; a hearing officer may be:

(1) a member of the commission designated by the chairperson to act as the hearing officer;

(2) a hearing officer employed by the human rights bureau of the New Mexico department of workforce solutions. The hearing officer may also be referred to as an Administrative Law Judge (ALJ); or

(3) an employee of the labor relations division or workforce solutions department designated by the director to act as the hearing officer.

P. "Labor organization" means any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

Q. "Major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working, as provided in Subsection P of Section 28-1-2 NMSA 1978, as amended, or as currently defined by regulations governing interpretation of the Americans with Disabilities Act of 1990, as amended.

R. "Physical or mental disability" means a physical or mental impairment that substantially limits one or more of an individual's major life activities.

(1) An individual is also considered to be physically or mentally disabled, if the individual:

(a) has a record of a physical or mental disability; or

(b) is regarded as having a physical or mental disability.

(2) **"Has a record of such a disability"** means has a history or recorded classification of having a mental or physical impairment that substantially limits one or more major life activities.

(3) **"Is regarded as having a disability"** means:

(a) having a physical or mental impairment that does not substantially limit major life activities, but being treated by a respondent as having such a limitation;

(b) having a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or

(c) having none of the impairments described above, but being treated by a respondent as having such an impairment.

S. "Physical or mental impairment" is defined to include, but is not limited to, any physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; endocrine; or any mental or psychological disorder, such as development disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

T. "Probable cause" and "no probable cause":

(1) **"Probable cause"** means that the allegations in the complaint are supported by evidence providing reasonable grounds to believe an unlawful discriminatory practice occurred, pursuant to the act.

(2) **"No probable cause"** means that the allegations in the complaint are not supported by evidence providing reasonable grounds to believe an unlawful discriminatory practice occurred, pursuant to the act.

U. "Protected groups" for complaint purposes are all of the groups identified under the Acts as defined in Subsection A of this section.

V. "Qualified disabled person with respect to employment" means a disabled person who, with reasonable accommodation, can perform the essential functions of the job in question and shall not, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination in employment under any program or activity.

W. "Qualified disabled person with respect to housing, accommodation, credit and acquisition or maintenance of particular real property" means a disabled person whose disability does not limit that person's ability to fulfill the obligations of occupancy, tenancy, ownership or credit responsibilities.

X. "Reasonable accommodation" means, for employment purposes, such modifications or adaptations of the work environment, work schedule, work rules or job responsibilities, and reached through good faith efforts to explore less restrictive or less expensive alternatives to enable an employee to perform the essential functions of the job and which do not impose an undue hardship on the employer.

Y. "Respondent" means the person, company, union, association, organization, agency or any other enterprise named in a complaint as having allegedly engaged in an unlawful discriminatory practice.

Z. "Serious medical condition" means a serious health-related impairment other than a disability, which substantially limits one or more of an individual's major life activities, as "major life activities" is defined within these rules, and which is verifiable by medical diagnosis.

(1) An individual is also considered to have a serious medical condition, if that individual:

(a) has a record of a serious health-related impairment; or

(b) is regarded as having a serious health-related impairment.

(2) **"Has a record of serious health-related impairment"** means has a history or recorded classification of having a serious medical condition that substantially limits one or more major life activities.

(3) **"Is regarded as having a serious health-related impairment"** means:

(a) having a serious medical condition that does not substantially limit major life activities, but being treated by a respondent as having such a limitation;

(b) having a serious medical condition that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or

(c) having none of the impairments described above, but being treated by a respondent as having such an impairment.

(4) The term "**serious medical condition**" is intended to apply to a serious health-related impairment that requires protection against discrimination due to the severity and duration of the impairment or due to having a record of such impairment.

AA. "**Sex discrimination**" is defined to include, but is not limited to, the following:

(1) "**Sexual harassment**" means unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal or physical conduct of a sexual nature, that can include offensive remarks about a person's sex, gender, gender identity or sexual orientation.

(2) "**Pregnancy, childbirth, or related medical condition**" means, for example, current, past, potential or intended pregnancy issues related to reproductive risk, choosing to have or not have an abortion, use of contraception, fertility treatment, or medical conditions related to pregnancy or childbirth including chestfeeding or lactation.

BB. "**Unlawful discriminatory practices**" means those unlawful practices and conduct specified under the Acts as defined in Subsection A of this section.

[9.1.1.7 NMAC - Rp, 9.1.1.7 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.8 FILING A COMPLAINT:

A. Persons who may file a complaint:

(1) any person claiming to be aggrieved by an unlawful discriminatory practice under the New Mexico Humans Rights Act as provided in Section 28-1-1 NMSA 1978 et seq. or federal anti-discrimination laws enforced by the Equal Employment Opportunity Commission (EEOC);

(2) any person claimant to be aggrieved by an employer in violation of the Criminal Offender Employment Act as provided in Section 28-2-3 and 28-2-3.1 NMSA 1978;

(3) any person claiming to be aggrieved by an employer in violation of the Lynn and Erin Compassionate Use Act as provided in Section 26-2B-9 NMSA 1978; or

(4) any person claiming to be aggrieved by an employer in violation of the Fair Pay for Women Act as provided in Section 28-23-3 or 28-23-5 NMSA 1978.

B. Time limit for filing: All complaints shall be filed with the bureau within 300 calendar days after the last alleged act of unlawful discrimination was committed. The bureau does not have jurisdiction over complaints that are filed more than 300 calendar days after the last alleged act of discrimination.

C. Form of complaint:

(1) Complainants may make, sign, and file a written complaint with the bureau individually or through a legally authorized representative.

(2) The complaint of any person claiming to be aggrieved under Paragraph (1) of Subsection A of this section shall be in writing on a human rights bureau charge of discrimination form, on an EEOC form 5, or on such other form as the human rights bureau deems acceptable.

(3) The complaint of any person claiming to be aggrieved under Paragraphs (2), (3), or (4) of Subsection A of this section may only be submitted on a human rights bureau charge form or other such form as the human rights bureau deems acceptable.

(4) The complainant may be assisted by the staff of the human rights bureau in preparing a complaint, unless the complainant is represented by legal counsel, in which case complainant's counsel will be required to prepare and file the complaint on behalf of the complainant.

D. Contents of the written complaint. Each complaint shall contain:

(1) the name and current mailing address of the complainant;

(2) the name and mailing address of the respondent;

(3) a statement describing the occurrence of an unlawful discriminatory practice that the complainant alleges. This description shall include:

(a) a statement of the general nature of complainant's claim; and

(b) an identification of the particular provisions of the state or federal statutes or of the specific regulations upon which the complainant bases the claim; and

(c) the time, date, place and nature of the occurrences alleged to be an unlawful discriminatory practice;

(4) the factual basis or grounds supporting complainant's allegation of unlawful discriminatory practice;

(5) the first alleged date and the most recent alleged date an unlawful discriminatory practice occurred; and

(6) the signature of the complainant and the date of signing.

E. Manner of filing the complaint:

(1) The complaint shall be deemed filed as of the date the perfected complaint is received by the bureau office. A perfected complaint contains all the information required in Subsection D of this section. If the complaint is missing any of the listed requirements, it shall be returned to the complainant or their legal representative for completion before the complaint will be deemed perfected.

(2) For the purpose of complying with the filing time limit of 300 calendar days, as provided in Subsection A of Section 28-1-10 NMSA 1978, as amended, a complaint which is first filed with any duly authorized civil rights agency holding a work sharing agreement or memorandum of understanding with the bureau shall be deemed to have been filed with the bureau as of the date on which the perfected complaint was first filed with any of these agencies.

(3) When the perfected complaint is received at the bureau office, the person accepting the perfected complaint shall stamp the complaint with the date it is received. An electronically delivered copy of the perfected complaint will be stamped and accepted as filed on the date it is received electronically.

F. Jurisdiction:

(1) At the time of filing, the bureau shall determine initially whether the allegations in the complaint sufficiently state a claim under the act in order to proceed with the investigation. During the investigation, the bureau may also determine, based upon the facts established, whether the bureau has jurisdiction over the complaint.

(2) If at the time of filing or at any subsequent time it is determined that there is a lack of jurisdiction, the complaint shall be dismissed, without prejudice. The complainant shall be promptly notified of the dismissal by certified mail or electronic mail, if elected. The respondent shall be notified of the dismissal by regular mail or electronic mail, if elected.

(3) When a disability or serious medical condition is alleged in the complaint, the complainant must offer evidence of the disability or serious medical condition during the course of the investigation. Evidence documenting a disability or serious medical condition may be provided by the written certification of a physician or other appropriate

medical authority unless the existence of the disability or serious medical condition is not a matter in dispute.

G. Notice to respondent: Upon the filing of a perfected complaint, the bureau shall, within 10 calendar days, furnish the respondent with a copy thereof by certified mail or electronic mail, if elected.

H. Electronic Correspondence.

(1) A party can agree, in writing, to receive all correspondence and documents from the bureau through electronic mail, in which case the recipient will not receive any correspondence by US mail. A person communicating with the bureau electronically bears the responsibility of ensuring that the information submitted and the methods by which the person can be contacted are accurate. It is the recipient's obligation to exercise due diligence in checking the email address of record and to notify the bureau of any change in contact information.

(2) A party may rescind the election to receive electronic correspondence at any time by submitting a written request stating that intention to the bureau.

(3) Use of electronic notification, correspondence, and document transmission constitutes reasonable and proper notice for all purposes, laws, rules, and regulations.

I. Withdrawal or dismissal of the complaint and requests to reopen the case.

(1) The complainant may withdraw the complaint by submitting a written request or by completing the form for withdrawal provided by the bureau at any time prior to the issuance of a determination. The complainant may refile a complaint by submitting a new complaint in accordance with Subsection A of 9.1.1.8 through Subsection D of 9.1.1.8 NMAC 1978.

(2) In the event that the complainant cannot be contacted for a 30-day period at the last known address or a forwarding address, or if the complainant refuses to cooperate with the bureau, the complaint may be dismissed without prejudice and the bureau may administratively close the case.

(3) If the bureau administratively closes a case, notice of case closure shall be sent to all parties to their preferred mailing or electronic address of record.

(4) Requests for reopening a case may be submitted to the bureau by sending a written request to include the reason for the request. The complainant must establish good cause to reopen the case. The director shall consider all circumstances relative to the request and determine whether the request is jurisdictional and timely made and whether good cause has been established for reopening the case. The

complainant and the respondent will be notified in writing when the director decides whether the case will be reopened.

(5) In the event of a withdrawal or closure of a complaint, the bureau shall promptly notify the respondent of such action, provided that the respondent has been notified of the complaint.

J. Request for director's order of nondetermination:

(1) After the bureau's receipt of a complaint, a complainant who seeks to remove the complaint from the bureau and pursue the complaint in district court may submit a written request, to the director, any time prior to issuance of a determination and shall receive an order of nondetermination. The director may consider requests for orders of nondetermination after the closure of a case if it is determined good cause for the request exists.

(2) The director's order of nondetermination shall be deemed a final order of the bureau for purposes of exhausting administrative remedy, affording the complainant the opportunity to proceed in district court, pursuant to Section 28-1-13 NMSA 1978.

[9.1.1.8 NMAC - Rp, 9.1.1.8 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.9 INVESTIGATIONS AND ALTERNATIVE DISPUTE RESOLUTION (ADR):

A. Investigation deadlines:

(1) The bureau shall send the respondent a request for information and the respondent will be required to answer and submit documents within 30 calendar days from the date of the request. The deadline may be extended by the investigator for up to 20 calendar days. Any requests for additional time beyond that must be made in writing, to the director, detailing the reason for the request, and may only be granted for good cause.

(2) When the respondent answers the complaint, the bureau shall provide the response without the exhibits to the complainant. The complainant will be required to provide a rebuttal to the response within 30 calendar days of the bureau's correspondence. The deadline may be extended by the investigator for up to 20 calendar days. Any requests for additional time beyond that must be made in writing, to the director, detailing the reason for the request, and may only be granted for good cause. If no position statement is submitted by the respondent, the complainant may submit additional evidence to the bureau within 30 calendar days of notice.

(3) The complainant may file an amendment to the complaint at any time prior to the bureau's receipt of the respondent's position statement. If the complainant wishes to amend the complaint after that time, the complainant must submit a request

for withdrawal of the original complaint and file a new complaint. The new filing must be filed within 300 calendar days of the most recent alleged act of discrimination to be considered timely.

(4) If either party does not provide a response by the deadline, the bureau may conduct the investigation with the information available at the time and issue a final decision based on that evidence.

(5) If a complainant files multiple cases against the same respondent, the bureau may, in its discretion, consolidate the cases for purposes of investigation and determination any time after noticing the new charge to the respondent.

B. The bureau's authority to investigate a complaint is not limited to the procedure outlined in Subsection A of this section.

C. Mediation: Throughout the investigation, the bureau may provide opportunity for the parties to engage in mediation discussions. Should an agreement resolving the complaint be reached through mediation, the terms shall be reduced to writing in a settlement agreement and will be signed by the parties. If a settlement agreement is signed, no determination will be issued by the director. The bureau shall close the complaint upon receipt of the fully-executed settlement agreement.

D. Failure of the respondent or the complainant to abide by a fully-executed settlement agreement will require the aggrieved party to seek enforcement of the agreement in court.

[9.1.1.9 NMAC - Rp, 9.1.1.9 NMAC, 1/1/2020; A, 12/29/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.10 DIRECTOR'S DETERMINATION OF PROBABLE CAUSE OR NO PROBABLE CAUSE AND NOTICE OF HEARING:

A. After an investigation is completed, the director will issue a determination of probable or no probable cause.

B. If the director determines that no probable cause exists, the director shall dismiss the complaint and notify the parties of the dismissal. The complainant will be notified by certified mail or electronic mail, if elected, and the respondent will be notified by regular mail or electronic mail, if elected. Upon dismissing the complaint, the director will advise the complainant of the right to appeal the determination in district court within 90 calendar days after receipt of the determination.

C. If the director determines that probable cause exists, both parties will be notified of the determination by certified mail or electronic mail, if elected. Such determination will also notify the parties of the date, time, and location of the hearing, and advise the

parties that failure to appear may result in the entry of a judgment or order against the party that failed to appear.

D. Conciliation: The bureau will attempt to conciliate the matter. If conciliation attempts fail, the matter will be set for hearing before the commission or hearing officer, provided that the complainant has not requested a waiver of right to hearing pursuant to Subsection J of Section 28-1-10 NMSA 1978.

[9.1.1.10 NMAC - Rp, 9.1.1.10 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.11 WAIVER OF COMPLAINANT'S RIGHT TO HEARING:

A. Within 60 calendar days of service of the director's determination of probable cause, the complainant may make a written request to the director for a waiver of complainant's right to a commission hearing and seek a trial de novo in district court, pursuant to Subsection J of Section 28-1-10 NMSA 1978, as amended.

B. The director shall approve a waiver request which is timely made and shall serve notice of the waiver upon the complainant and the respondent. The director's issuance of a waiver notice shall be deemed a final order of the commission for the purpose of appeal, pursuant to Section 28-1-13 NMSA 1978, as amended.

C. Within 90 calendar days from the date of service of the waiver notice, the complainant may request a trial de novo, pursuant to Section 28-1-13 NMSA 1978, as amended.

D. After 60 calendar days from the date of service of the director's determination of probable cause and any time prior to final adjournment of the hearing, the complainant may file a "motion for dismissal with leave to file in district court". The motion will be deliberated and decided upon at a commission review panel.

[9.1.1.11 NMAC - Rp, 9.1.1.11 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.12 MEDIATION AND CONCILIATION PROCESSES:

A. Mediation prior to issuance of commission complaint:

(1) The bureau may attempt to achieve a satisfactory adjustment of the complaint by means of mediation with the complainant and the respondent.

(2) If mediation attempts are successful, the parties shall prepare and sign a written settlement agreement. If the complainant and the respondent execute a written and signed settlement agreement, they shall provide the bureau with written notification that a settlement agreement between the parties has been executed.

(3) If a settlement agreement is reached between the complainant and the respondent through bureau mediation, the executed settlement agreement shall be forwarded to the director and will serve as the parties' written notification to the director of the executed settlement agreement.

(4) Once the director has received the parties' written notification that a settlement agreement has been executed, the complaint will be administratively closed. The parties will be provided with notice of case closure.

(5) Failure by the respondent or the complainant to abide by a fully-executed settlement agreement will require the aggrieved party to seek enforcement of the agreement in court.

B. Conciliation process after issuance of commission complaint:

(1) If a settlement agreement is reached between the complainant and the respondent through private mediation or the conciliation process after issuance of the commission complaint, the complainant will be required to submit a motion to dismiss pursuant to this rule.

(2) The motion to dismiss will be deliberated and decided upon at a commission review panel.

(3) Following its deliberation, the commission will issue an order on the matter and notify the parties pursuant to Subsection E of Section 28-1-11 NMSA 1978.

[9.1.1.12 NMAC - Rp, 9.1.1.11 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.13 HEARING PREPARATION:

A. Issuance of commission complaint:

(1) If, after a probable cause determination, efforts at conciliation have failed, the commission shall issue a written complaint in its own name, on behalf of the complainant, against the respondent. The commission shall set forth the alleged discriminatory practice, the section of the Acts alleged to have been violated and the relief requested.

(2) The commission complaint shall require the respondent to answer the allegations of the commission complaint by appearing at a hearing before the commission on the date, time and place specified in the commission complaint. The respondent may also file a written answer to the commission complaint.

(3) The commission complaint shall be served on the complainant and the respondent or their legal representatives by certified mail, return receipt requested.

Such complaint shall advise the parties that failure to appear at the hearing may result in the entry of a judgment or order against the party that fails to appear.

(4) The complainant shall review the commission complaint and verify that the complaint sets forth the discriminatory practice that is alleged to have occurred. Any motion by the complainant to amend the commission complaint should be made as soon as possible and in advance of the hearing. If a motion to amend the complaint is made on the day the hearing is set to commence, the commission may allow the respondent additional time to prepare. The commission will not allow an amendment to the complaint which alleges a discriminatory practice that was not raised and investigated at the bureau level or that was dismissed at the bureau level.

B. Scheduling the hearing:

(1) Hearing date: The hearing clerk, in coordination with the commission and the hearing officer, shall schedule a hearing date which shall not be more than 15 calendar days nor less than 10 calendar days after service of the complaint.

(2) Location of hearing: Hearings shall be conducted virtually by video or telephone conference. Any party may object to a virtual hearing by submitting their objection in writing to the commission at least 30 calendar days prior to the hearing. In the event a hearing is held in-person, it will take place in the county where the respondent is doing business or where the alleged discriminatory practice occurred.

(3) Hearing mode: A hearing may be scheduled to be heard by a three-member panel of commissioners or a single hearing officer.

(4) Notice of hearing: The hearing clerk shall:

(a) serve a copy of the written commission complaint and notice of hearing upon each party;

(b) post the notice on the department of workforce solutions website; and

(c) file the following documents in the official case file: a copy of the commission complaint; a copy of the notice of hearing with affidavits of publication attached; and documentation of how and when the commission complaint and the notice of hearing was served on the parties.

C. Case preparation for hearing:

(1) Case presentation: Each party is responsible for preparing its case for presentation to the commission or hearing officer. Each party may self-represent at the hearing or may be represented by an attorney or another qualified representative. If represented by an attorney or other qualified representative, the party must notify the

bureau of such representation no less than 10 calendar days prior to the hearing by submitting an Entry of Appearance.

(2) Evidence:

(a) Each party, either in person or through its attorney or other representative, may present evidence in support of its case at hearing, by calling witnesses to testify and introducing exhibits. Each party, either in person or through its attorney or other representative, may examine and cross-examine witnesses.

(b) Any materials or information contained in the bureau investigative files are not before the commission or the hearing officer at hearing, unless a party has obtained these materials before the time of hearing and seeks to introduce them as evidence at the hearing. Once a commission complaint is issued and the matter is set for hearing, the materials generally before the commission or the hearing officer are the commission complaint, the notice of hearing, and the statement of intent to present evidence.

(c) A party's preparation for hearing should include, but is not limited to: determining what evidence a party intends to present at hearing; identifying the witnesses whom a party wishes to call at hearing; verifying the witnesses' availability to appear at hearing; determining whether subpoenas will be needed to secure the witnesses' appearance at hearing, requesting issuance of subpoenas and subpoenas duces tecum, if needed; arranging for service of subpoenas; identifying materials to be introduced as exhibits through witness testimony; obtaining the materials to be introduced as exhibits; and preparing exhibits for presentation at hearing.

D. Exhibit requirements:

(1) Marking to identify exhibits: Each party shall have its exhibits marked for identification before the hearing. Complainant's exhibits shall be marked with numbers, for example: EXHIBIT 1, EXHIBIT 2, etc. Respondent's exhibits shall be marked with alphabetical letters, for example: EXHIBIT A, EXHIBIT B, etc. Identification of an exhibit is to be placed on the lower right corner of the first page of each exhibit, if there is space available. If space is not available on the lower right corner, identification should be placed on the first page of the exhibit, at the top or bottom of the page where space is available. The identification number or letter of an exhibit shall remain the same, whether the exhibit is accepted or rejected. Separate documents, photographs, papers and other written or printed instruments shall each be given a separate exhibit number or exhibit letter. An exhibit consisting of more than one page shall be fastened, and each page shall be numbered.

(2) Exhibits shall be filed with the hearing officer either electronically or by US mail and shall be provided to the opposing party at least 48 hours prior to the hearing. The commissioners or hearing officer shall not have access to the exhibits prior to the commencement of the hearing. Originals will be retained by the commission for commission purposes.

(3) Large exhibits: Exhibits offered in evidence should be limited to 8.5 x 11 inches, or capable of being folded and placed in 8.5 x 11 inch envelopes, unless otherwise necessary for adequate presentation of evidence or illustrative purposes.

E. Witness identification:

(1) Request for identity of witnesses: Prior to the hearing any party is entitled to obtain and may request from another party witness information, to the extent that it is known, unless a protective order is issued to protect such information from disclosure. The following information may be requested:

(a) the names and addresses of witnesses whom a party anticipates may be called to testify at the hearing;

(b) the relationship, if any, of each witness to the party intending to call the witness; and

(c) a brief description of the general subject matter about which the witness is anticipated to testify.

(2) The witness information specified above need not be provided as to any officer, employee or agent of the party from whom the witness information is requested, unless the party responding to the request intends to call the officer, employee or agent to testify at the hearing.

(3) Response to request for identity of witnesses: A party's request for the identity of witnesses shall be answered within 10 calendar days of service or no later than three calendar days prior to the hearing, whichever is sooner, unless otherwise ordered by the commission or the hearing officer, upon a motion for a protective order and a showing of good cause.

(4) Protective order: Upon a motion for a protective order and upon a showing of good cause, the commission or the hearing officer may grant a motion for a protective order and issue an order to protect such witness information from disclosure. If the motion for a protective order is denied, the requested information shall be disclosed.

F. Subpoenas and subpoenas duces tecum:

(1) Upon application of a party showing the general relevance and reasonableness of the scope of the testimony or other evidence sought, the commission or hearing officer may issue subpoenas and subpoenas duces tecum commanding the appearance of witnesses and their production of certain specific documents or other physical evidence at the hearing upon request of a party to the proceedings.

(2) Any subpoena must name the individual or document requested with sufficient specificity to identify who or what is being subpoenaed.

(3) Service of the subpoenas and subpoenas duces tecum shall be made by the requesting party, in the same manner as prescribed by law for civil actions in the district courts of the state of New Mexico.

(4) The cost of service and witness and mileage fees for all hearings shall be borne by the party at whose request the subpoenas and the subpoenas duces tecum are issued. The fees paid shall be the same as those paid by the district courts of the state of New Mexico.

(5) Requests for subpoenas or subpoenas duces tecum will be submitted to the commission or hearing officer through the hearing clerk no later than 21 calendar days prior to the hearing date. Requests must be made in writing to include the name and last known address for each person for whom a subpoena is requested and shall command each person to whom it is directed to attend and give testimony or to produce enumerated documentation at the time and place of the administrative hearing or at another date as ordered by the commission or hearing officer. Requests for subpoenas duces tecum must include a separate list of documents for attachment to the subpoena.

(6) Subpoenas must be served no later than seven calendar days prior to the hearing.

(7) Objections to the subpoenas or motions concerning the subpoenas must be filed in district court as prescribed by law for civil actions in district courts in the state of New Mexico.

G. Filing, service and form of documents submitted by parties:

(1) Filing of documents: Except as otherwise provided, a party shall file the originals of all documents served in the proceeding with the hearing clerk at the human rights bureau. A party shall also serve copies thereof upon all other parties. Service shall be attested by a certificate of service, indicating the date of service, the means of service, who was served and by whom service was made.

(2) Service of documents: Except as otherwise provided, all documents shall be served in person or by mail. If service is by mail, three calendar days shall be added to time allowed by these rules for filing of a responsive document.

(3) Form of motions, responses and other documents submitted to the commission: Unless otherwise provided by these rules or by order of the commission or hearing officer, all documents, except exhibits, shall comply with the following requirements:

(a) documents shall be prepared on 8.5 x 11-inch white paper;

(b) the first page of each document shall contain a centered heading, a caption beginning at the left margin which designates the parties and the case number, and a descriptive title identifying the nature and purpose of the document, as follows:

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF NEW MEXICO

(Name of Complainant),
Complainant,

v.

HRB No. _____

(Name of Respondent),
Respondent,

[DESCRIPTIVE TITLE OF THE DOCUMENT]

H. Motions:

(1) General matters: All motions shall be submitted in writing prior to the hearing, except those made orally during the hearing and shall specify the relief sought. The commission or the hearing officer may direct that an oral motion made at hearing shall be made in writing, stating the grounds for the motion and specifying the relief sought. If the motion relies upon facts which are not in the hearing records, each motion shall be accompanied by an affidavit, certificate or other evidence relied upon. Motions shall be filed and served, as provided in these rules for the filing and service of documents.

(2) Unopposed motions: An unopposed motion shall state that the concurrence of all other parties was sought and granted. With an unopposed motion, the moving party shall also submit a proposed order, approved by all parties, for the commission's or the hearing officer's consideration.

(3) Opposed motions: Any opposed motion shall state that concurrence was sought and denied, or shall state why concurrence was not sought. An opposed motion may be accompanied by a memorandum brief in support of the motion.

(4) Response to motions: Any party upon whom an opposed motion is served shall have 10 calendar days after service of the motion to file a response unless the commission or the hearing officer directs otherwise. A non-moving party who fails to file a response within that period or within any extension of time granted by the commission or hearing officer shall be deemed to have waived any objection to the granting of that motion.

(5) Decisions: All motions shall be decided by the chairperson or the hearing officer without a hearing, unless the commission or the hearing officer orders otherwise. Any party may submit a written request for an order granting a hearing on a motion.

I. Issuance of documents by the commission or the hearing officer: All documents issued by the commission or the hearing officer shall be filed with the hearing clerk. As soon as is practicable or otherwise provided by law, the hearing clerk shall serve copies of the documents upon all the parties electronically or by first-class mail.

J. Statement of intent to present evidence at hearing:

(1) Filing requirement: No later than five calendar days prior to the hearing, each party shall file with the hearing clerk a copy of the party's statement of intent to present evidence at the hearing. Each party shall also serve a copy of this statement on all parties of record.

(2) Content of statement: The statement of intent to present evidence shall include:

(a) the name of the party filing the statement;

(b) a witness list, including the name of each witness who will testify at hearing and an estimate of the length of time required for the direct testimony of each witness named; and

(c) the exhibits, if any, to be offered into evidence at the hearing.

(3) Any modifications to the witness list or exhibits may not be considered at the hearing by the commission or hearing officer.

[9.1.1.13 NMAC - Rp, 9.1.1.12 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.14 HEARING PROCEDURES:

A. Appearance and representation:

(1) The complainant shall be present at the hearing, may present testimony or evidence and may be represented by an attorney or other representative. The complainant or complainant's representative shall present the case supporting the complaint at hearing.

(2) If the complainant does not appear at the hearing after proper notice has been served, the complaint may be dismissed for failure of the complainant to appear and present the complainant's case at hearing as required in Subsections A and C of Section 28-1-11 NMSA 1978, as amended.

(3) The respondent to a complaint shall file a written answer to the complaint appear at the hearing, may present testimony or evidence and may be represented by an attorney or other representative. If the respondent is an entity, the respondent may designate a person to serve as its representative at the hearing. The respondent,

respondent's representative or respondent's counsel may present the case responding to the complaint at hearing.

(4) Commission counsel, or an attorney representative from the Office of the Attorney General, may advise the commission during the hearing on legal matters and will assist in the preparation of the findings of fact, the conclusions of law and the order.

B. Sequence of the proceeding:

(1) introduction to the proceeding by the presiding commissioner or the hearing officer;

(2) invitation to the parties to attempt a settlement resolution prior to commencing the hearing;

(3) consideration of any preliminary matters or motions;

(4) administration of oath of the parties and the witnesses by presiding commissioner or hearing officer;

(5) opening statement by the complainant or the complainant's attorney or other representative;

(6) opening statement by the respondent or the respondent's attorney or other representative;

(7) presentation of the complainant's case;

(8) presentation of the respondent's case;

(9) closing argument by the complainant or the complainant's attorney or other representative;

(10) closing argument by the respondent or the respondent's attorney or other representative;

(11) instructions to the parties as to the schedule for filing findings of fact, conclusions of law, briefs or other documents with the commission following the hearing; and

(12) final adjournment of the hearing.

C. Sequestering witnesses: The commission shall sequester the witnesses from the hearing until the time of their testimony. A complainant or the designated representative for respondent will be allowed to be present throughout the hearing, even though the complainant or the designated representative for respondent may be called to testify.

D. Custody of evidence: Evidence introduced as exhibits at the hearing will be retained in the custody of the hearing clerk at the bureau for commission purposes.

E. Matters of proof:

(1) Burden of proof: complainant has the burden of proof.

(2) Standard of proof: The complainant must prove the case by a preponderance of the evidence.

F. Evidentiary matters at hearing:

(1) Formal rules of evidence not binding on the commission or hearing officer: The formal rules of evidence governing the courts of law or equity shall not bind the commission or the hearing officer in hearing the evidence, as provided in Subsection D of Section 28-1-11 NMSA 1978, as amended.

(2) Objections to evidence offered: A party who has an objection to the evidence offered or to procedural matters in the proceeding must raise the objection orally during the hearing. The party raising the objection must state the grounds for the objection. The ruling on the objection, made by the presiding commissioner or hearing officer, shall be made a part of the record. A party's exception to each overruled objection shall be automatic and is not waived by the party's further participation in the hearing.

(3) Offers of proof: Whenever there is a ruling to exclude the evidence offered, the party offering the evidence may make an offer of proof, which shall be included in the record. An offer of proof for excluded evidence consists of a brief description of the nature of the evidence excluded, the purpose for which it is offered and its relevance to the issues before the commission or hearing officer. An offer of proof for excluded documents or exhibits shall additionally include the insertion into the record of the excluded documents or exhibits. If the commission decides that a hearing officer's ruling to exclude evidence was both erroneous and prejudicial, the commission may consider the excluded evidence and may reopen the proceedings to take such evidence.

G. Continuation and adjournment: The presiding commissioner or the hearing officer may continue a hearing from day to day or adjourn it to a later date.

H. Improper conduct: The commission or hearing officer may exclude from the hearing room any person who engages in improper conduct.

I. Closing arguments, briefs and findings of fact and conclusions of law:

(1) Closing arguments: At the hearing, a party or the party's attorney or representative may present an oral closing argument in support of the party's position.

The commission or hearing officer may elect to allow the parties to present a written closing argument in addition to or in place of an oral closing argument. Written closing arguments, where applicable, shall be filed with the commission and served on all parties of record within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

(2) Findings of fact and conclusions of law: Each party may submit proposed findings of fact and conclusions of law to the commission within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

(3) Briefs and answer briefs:

(a) Briefs: Each party may submit a brief in support of its position, including an argument of how the law applies to the facts in the case. If a party elects to submit a brief, it shall be filed with the commission and a copy served on all parties of record within 10 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise.

(b) Answer briefs: When a party has filed a brief, the opposing party may submit an answer brief to the commission or hearing officer and serve a copy on all parties of record within five calendar days of the filing of the brief, unless the commission or the hearing officer directs otherwise.

(4) Attorney fees:

(a) If the complainant is represented by private legal counsel and seeks to recover attorney fees from the respondent, complainant's counsel is required to submit an affidavit setting forth the attorney fees. The attorney affidavit shall be submitted to the commission and a copy served on the respondent within 15 calendar days after the final adjournment of the hearing, unless the commission or the hearing officer directs otherwise. The attorney affidavit shall include an itemization of fees, be signed by the attorney and be notarized.

(b) The respondent may submit a written objection, if any, to the attorney fees requested by the complainant. The objection to attorney fees shall be submitted to the commission and a copy served on the complainant within five calendar days after the submission of the attorney affidavit setting forth fees, unless the commission or the hearing officer directs otherwise.

J. Close of the hearing record: The hearing record closes following the final adjournment of the hearing, when the last time set for the submission of all documents to the commission has expired.

[9.1.1.14 NMAC - Rp, 9.1.1.12 NMAC, 1/1/2020; A, 1/12/2021; A, 10/10/2023]

9.1.1.15 RULING AND FINAL ORDER:

A. The final decision and ruling on the merits in each case is reserved to the commission or hearing officer.

B. Where a hearing is before a three-member panel of commissioners, the commission will announce its decision and final order orally at a public meeting within 90 calendar days, for which notice will be given. Within five business days thereafter, the commission shall cause a written copy of the decision and final order to be sent by certified mail, return receipt requested, to each party or to the party's attorney, if any, at the attorney's address of record.

C. Where a hearing is conducted by a hearing officer, the hearing officer shall prepare a written report, setting forth proposed findings of fact, proposed conclusions of law and a recommended action to be taken by the commission, after the last time set for the submission of all documents following the final adjournment of a hearing, or at such other time as the commission may direct. The hearing officer's report shall be submitted for consideration by a review panel, consisting of no more than three commissioners designated by the chairperson. The commission may adopt, modify or reject the findings of fact, the conclusions of law and the recommended action proposed by the hearing officer. The commission's decision and final order will be announced orally at a public meeting, for which notice will be given. Within five business days thereafter, the commission shall cause a written copy of the decision and final order to be sent by certified mail, return receipt requested, to each party or to the party's attorney, if any, at the attorney's address of record.

[9.1.1.15 NMAC - Rp, 9.1.1.13 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.16 TRANSCRIPTS:

A. Upon receipt of a notice of appeal, if the hearing was transcribed, the bureau will supply as much of the transcript of the as is requested by the parties or the district court, pursuant to Subsection B of Section 28-1-13 NMSA 1978.

B. All costs of providing the transcript of record on appeal will be paid by the party requesting the transcript. However, nothing in these rules will be deemed as prohibiting an agreement between a complainant and a respondent concerning the cost of providing the transcript on appeal.

[9.1.1.16 NMAC - Rp, 9.1.1.14 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.17 CONFIDENTIALITY AND PUBLIC RECORDS:

A. The commission complaint, decision and orders will be considered public records. Any other information contained within a division investigation file or bureau records related to the case will not be considered public records, except as determined

by law, and therefore is not available for inspection under the Inspection of Public Records Act until a determination is issued or the case is closed, at which point the entire investigation file will be considered public record. The deliberations of the commission or hearing officer are not part of an open public meeting and are not considered to be public records.

B. These provisions will not be applicable to the request for information about a pending case by the complainant, the respondent or their respective attorneys in that particular pending case prior to hearing. Nor do they apply to the disclosure of necessary information by the bureau to a representative of any duly authorized civil rights agency holding a work sharing agreement or memorandum of understanding with the bureau.

C. Requests for records under the Inspection of Public Records Act (NMSA 1978 Chapter 14, Article 2) should be submitted in writing to the record custodian of the department of workforce solutions. Documents that are part of complaints dually filed with the EEOC are not available from the department of workforce solutions pursuant to Subsection 8 of Section 14-2-1 NMSA 1978.

[9.1.1.17 NMAC - Rp, 9.1.1.15 NMAC, 1/1/2020; A, 10/10/2023]

9.1.1.18 [RESERVED]

CHAPTER 2: AGE

PART 1: GENERAL PROVISIONS

9.2.1.1 ISSUING AGENCY:

New Mexico Aging & Long Term Services Department (NMALTSB).

[9.2.1.1 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.1.2 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.1.3 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.4 DURATION:

Permanent.

[9.2.1.4 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.1.5 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long-term services department.

[9.2.1.6 NMAC - Rp, SAA Rule No. 95-1, 06/30/2015]

9.2.1.7 DEFINITIONS:

The following words and terms, when used in these rules, shall have the following meanings unless the context clearly indicates otherwise or a different definition has been provided:

A. "Abuse" is the willful infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm or pain or mental anguish or the deprivation by a person, including a caregiver, of goods or services which are necessary to avoid physical harm, mental anguish, or mental illness.

B. The "administration on aging" is the federal agency, which is a part of the U.S. department of health and human services, charged with the responsibility of implementing the Older Americans Act.

C. "Advocacy" is defined as non-lobbying activities designed to create change in legislation and policies which benefit both individuals and groups of individuals.

D. "Aging and disability resource center" (ADRC) means an entity established as part of the state system of long-term care to provide comprehensive information on public and private long-term care programs, options, providers and resources; personal counseling to assist individuals in assessing existing or anticipated long-term care needs, and developing and implementing plans to meet their specific needs and circumstances; and access to the range of publicly-supported long-term care programs

for which consumers may be eligible, by serving as a convenient point-of-entry for such programs.

E. "Aging network" means programs and services for older adults throughout New Mexico that receive federal or state funds under contract with the department or area agencies on aging. The aging network includes, but is not limited to, programs sponsored by tribal governments, local governments and private, non-profit organizations.

F. An "area agency on aging" (AAA) is an organization designated by the department to develop and administer a comprehensive and coordinated system of services for older persons within one or more planning and service areas.

G. "Area plan" is a document submitted by an area agency on aging to the department which provides for the provision of services and centers to meet the needs of older individuals in the planning and service area(s) administered.

H. "Assistant secretary" is the assistant secretary of aging of the administration on aging, U.S. department of health and human services.

I. "Civic engagement" means an individual or collective action designed to address a public concern or an unmet human, educational, health care, environmental, or public safety need.

J. The "corporation for National and community service" (CNCS) is the federal agency that administers federal domestic volunteer programs.

K. "Department" means the New Mexico aging and long-term services department (ALTSD).

L. "Disability" means (except when such term is used in the phrases "severe disability," "developmental disability," and "physical disability") a mental or physical impairment or a combination of the two, resulting in a functional limitation in one or more of the following activities of daily living: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, economic self-sufficiency, cognitive functioning and emotional adjustment. The term "severe disability" means a severe, chronic mental or physical impairment, or a combination of mental or physical impairments, that is likely to continue indefinitely and results in substantial functional limitation in three or more activities of daily living.

M. "Exploitation" is the illegal or improper act or process of an individual, including a caregiver or fiduciary, using the resources of another person for monetary or personal benefit, profit or gain.

N. A "focal point" means a facility established to encourage the maximum co-location and coordination of services for older individuals.

O. "Greatest economic need" is need resulting from an income level at or below the federal poverty level.

P. "Greatest social need" is need caused by noneconomic factors which include physical and mental disabilities; language barriers; and cultural, social or geographical isolation, including isolation caused by racial or ethnic status, that restricts an individual's ability to perform normal daily tasks or which threatens an individual's capacity to live independently.

Q. "In-home services" includes: homemaker and home health aides; visiting; telephone reassurance; chore maintenance; in-home respite care for families; adult day care as a respite service for families; minor modification of homes that is necessary to facilitate the ability of older individuals to remain at home, and that is not available under other programs; and personal care services and other services necessary to facilitate the ability of older individuals to remain at home, as may be defined in the State Plan or in an approved Area Plan.

R. "Indian tribal organization" is the recognized governing body of any Indian tribe or any legally established organization of Indians which is controlled, sanctioned, or chartered by the governing body.

S. "Indian tribe" means any tribe, band, nation or other organized group or community of Indians, which is either:

(1) Recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(2) Located on, or in proximity to, a federal or state reservation.

T. "Long-term care" means any service, care, or item intended to assist individuals in coping with, or compensating for, a functional impairment in carrying out activities of daily living; furnished at home, in a community care setting, or in a long term care facility; and not furnished to prevent, diagnose, treat, or cure a medical disease or condition.

U. "Long-term care ombudsman" (LTCO) means an individual trained and certified to act as a representative of the office of the state long-term care ombudsman.

V. "Low income" is defined as having an annual family income at or below one hundred twenty five percent (125%) of the federal poverty level.

W. "Minorities" are individuals who are of Hispanic, Native American Indian (including Hawaiian and Eskimo), African-American or Asian heritage.

X. "Neglect" is the failure to provide for oneself the goods or services which are necessary to avoid physical harm, mental anguish or mental illness or the failure of a

caregiver or fiduciary to provide the goods or services that are necessary to maintain the health or safety of an individual.

Y. "Older Americans Act" means the Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

Z. "Older individual" means an individual who is at least fifty (50) years of age or older, unless otherwise specified in these rules.

AA. "Participants" are individuals who are eligible to receive services or to participate in particular programs administered by the department or its designees.

BB. "Planning and service area" (PSA) is a portion or portions of the state designated by the department for purposes of planning, development, delivery and overall administration of services for older individuals.

CC. "Poverty level" is the official poverty level as defined by the United States office of management and budget, and adjusted by the secretary of the U.S. department of health and human services in accordance with the community services Block Grant Act, 42 U.S.C. Sections 9901 to 9926.

DD. "Provider" means an entity that is awarded a grant or contract from an area agency on aging or the department to provide services.

EE. "Reservation" means any federally or state recognized Indian tribe's reservation or pueblo.

FF. "Right of first refusal" is a provision in the Older Americans Act which requires the department to give priority to public agencies or units of general purpose local government when designating area agencies on aging.

GG. "Self-directed care" means an approach to providing services intended to assist an individual with activities of daily living, in which services are planned, budgeted, and purchased under the direction and control of such individual; and such individual is provided with information and assistance as necessary and appropriate to enable him or her to make informed decisions about care options.

HH. "Senior center" is a community focal point where older adults come together for services and activities. A center may include multi-generational programs and serve as a resource for the entire community for information on aging, support for family caregivers, and training.

II. "State ombudsman" means an individual with expertise and experience in the fields of long-term care advocacy, designated by the department secretary to fulfill the duties defined in the Long-Term Care Ombudsman Act, Sections 28-17-1 to 28-17-19 NMSA 1978.

JJ. "State Plan on Aging" or "State Plan" is a document submitted by the state in order to receive grants from its allotments under the Older Americans Act.

KK. "Unit of general purpose local government" means a political subdivision of the state whose authority is general and not limited to one function or combination of related functions, or an Indian tribal organization.

[9.2.1.7 NMAC - Rp, SAA Rule No. 95-1.7, 06/30/2015]

9.2.1.8 BASIC REQUIREMENTS:

A. These rules apply to all functions and responsibilities required under the State plan on aging, in carrying out Older Americans Act programs.

B. The department, all area agencies on aging, grantees and subgrantees, contractors and subcontractors of funds administered by the department shall adhere to these rules. Additional terms and requirements not contained in these rules may be identified in contracts or grant awards.

C. Amendments to the Older Americans Act, any regulations promulgated thereunder, and state statutes may override these rules pending adoption of revised or new rules.

D. In the absence of department rules, federal laws, rules and regulations shall apply, as appropriate, to federal funds or to state funds used to match or supplement federal funds. In a like manner state statutes shall apply to state funds not governed by federal requirements.

E. The department, all area agencies on aging, grantees and subgrantees, contractors and subcontractors of funds administered by the department shall, where applicable, comply with the Civil Rights Act of 1964, 42 U.S.C. Section 2000e; the Americans with Disabilities Act of 1990, 42 U.S.C. Sections 12101 to 12103; Nondiscrimination Under Programs Receiving Federal Assistance Through the Department of Health and Human Services, 45 C.F.R. Section 80; and Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance, 45 C.F.R. Section 84.

[9.2.1.8 NMAC - Rp, SAA Rule No. 95-1.8, 06/30/2015]

PART 2: FEDERAL AND STATE LAW

9.2.2.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.2.1 NMAC - Rp, SAA Rule No. 95-2.1, 06/30/2015]

9.2.2.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.2.2 NMAC - Rp, SAA Rule No. 95-2.2, 06/30/2015]

9.2.2.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.2.3 NMAC - Rp, SAA Rule No. 95-2.3, 06/30/2015]

9.2.2.4 DURATION:

Permanent.

[9.2.2.4 NMAC - Rp, SAA Rule No. 95-2.4, 06/30/2015]

9.2.2.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.2.5 NMAC - Rp, SAA Rule No. 95-2.5, 06/30/2015]

9.2.2.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long term services department.

[9.2.2.6 NMAC - Rp, SAA Rule No. 95-2.6, 06/30/2015]

9.2.2.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.2.7 NMAC - Rp, SAA Rule No. 95-2.7, 06/30/2015]

9.2.2.8 LEGAL REFERENCES:

[RESERVED]

[9.2.2.8 NMAC - Rp, SAA Rule No. 95-2.8, 06/30/2015]

9.2.2.9 FEDERAL LAW:

[RESERVED]

[9.2.2.9 NMAC - Rp, SAA Rule No. 95-2.9, 06/30/2015]

9.2.2.10 STATE LAW:

[RESERVED]

[9.2.2.10 NMAC - Rp, SAA Rule No. 95-2.10, 06/30/2015]

9.2.2.11 OLDER AMERICANS ACT:

The department incorporates by reference the provisions of the Older Americans Act of 1965, as amended, and related implementing regulations for all programs funded by such act.

[9.2.2.11 NMAC - Rp, SAA Rule No. 95-2.11, 06/30/2015]

9.2.2.12 STATE PROVISIONS:

A. State funds used to match federal Older Americans Act funds must be administered in accordance with the related federal and state rules and regulations.

B. State funds used in conjunction with federal CNCS funds must be administered in accordance with the related federal and state rules and regulations.

C. State funds that exceed required match must address eligibility criteria in accordance with 9.2.3 NMAC, unless a waiver is granted by the department pursuant to 9.2.3 NMAC.

[9.2.2.12 NMAC - Rp, SAA Rule No. 95-2.12, 06/30/2015]

**PART 3: ELIGIBILITY FOR AGENCY AND LONG-TERM SERVICES
DEPARTMENT SERVICES**

9.2.3.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.3.1 NMAC - Rp, SAA Rule No. 95-3.1, 6/30/2015]

9.2.3.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.3.2 NMAC - Rp, SAA Rule No. 95-3.2, 6/30/2015]

9.2.3.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.3.3 NMAC - Rp, SAA Rule No. 95-3.3, 6/30/2015]

9.2.3.4 DURATION:

Permanent.

[9.2.3.4 NMAC - Rp, SAA Rule No. 95-3.4, 6/30/2015]

9.2.3.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.3.5 NMAC - Rp, SAA Rule No. 95-3.5, 6/30/2015]

9.2.3.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long term services department.

[9.2.3.6 NMAC - Rp, SAA Rule No. 95-3.6, 6 /30/2015]

9.2.3.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.3.7 NMAC - Rp, SAA Rule No. 95-3.7, 6/30/2015]

9.2.3.8 OLDER AMERICANS ACT SERVICES:

Except as otherwise provided, eligibility for federally-funded supportive services, nutrition services, caregiver services, legal services, long-term care ombudsman services, employment services, and other services funded by the Older Americans Act shall be pursuant to the Older Americans Act and Provisions Governing the Senior Community Service Employment Program, 20 C.F.R. Section 641, and is incorporated by reference into this part.

- A. Criteria for employment services is set forth in 9.2.13 NMAC.
- B. Criteria for legal services is set forth in 9.2.17 NMAC.
- C. Criteria for nutrition services is set forth in 9.2.18 NMAC.
- D. Criteria for long-term care ombudsman services is set forth in 9.2.19 NMAC.

[9.2.3.8 NMAC - Rp, SAA Rule No. 95-3.8, 6/30/2015]

9.2.3.9 CORPORATION FOR NATIONAL SERVICE VOLUNTEER PROGRAMS:

Except as otherwise provided, eligibility for federally-funded foster grandparent, senior companion, and retired senior volunteer programs shall be pursuant to Title II, Part B, of the Domestic Volunteer Service Act of 1973, 42 U.S.C. Sections 4950 to 5028; 45 C.F.R. Sections 2551 to 2553. The corporation for national and community service (CNCS) handbooks are incorporated by reference into this part.

- A. Criteria for the foster grandparent program is further set forth in 9.2.14 NMAC.
- B. Criteria for the senior companion program is further set forth in 9.2.15 NMAC.
- C. Criteria for the retired senior volunteer program is further set forth in 9.2.16 NMAC.

[9.2.3.9 NMAC - Rp, SAA Rule No. 95-3.9, 6/30/2015]

9.2.3.10 STATE-FUNDED SERVICES:

Eligibility for programs funded solely with state funds are as follows:

A. Except where otherwise noted, the following may be deemed eligible for state-funded services provided under contract with the department:

- (1) Persons age fifty (50) or older;
- (2) Spouses (of any age) of persons age fifty (50) or older;
- (3) Persons with disabilities age eighteen (18) or older.

B. Criteria for adult protective services is set forth in 8.11.4 NMAC.

C. Area agencies on aging and other contract providers may elect to serve subsets of the populations specified in Subsection D of 9.2.3.10 NMAC, which shall be defined in their area plans and contract documents.

D. Area agencies on aging and other contract providers may request waivers from the department to serve additional populations other than those specified in Subsection A of 9.2.3.10 NMAC, based upon community need. Application for such a waiver shall include a description of:

- (1) The population(s) to be served;
- (2) The need for the proposed service(s) by the proposed population(s); and
- (3) A budget for the proposed service(s).

Approval of any such waiver will be made by the department contingent upon documented need and availability of funding. Final or conditional written approval will be provided by the department.

[9.2.3.10 NMAC - Rp, SAA Rule No. 95-3.10, 6/30/2015]

9.2.3.11 VOLUNTARY CONTRIBUTIONS:

A. The Older Americans Act establishes requirements for voluntary contributions. Each older person who receives Older Americans Act-funded services shall be provided an opportunity to voluntarily contribute to the cost of services rendered.

B. Area agencies on aging and other programs are allowed to, and may solicit, voluntary contributions for all Older Americans Act-funded services, provided that the method of solicitation is non-coercive. Each service provider may develop a suggested contribution schedule for services provided with Older Americans Act funds. In developing such a schedule, the provider shall consider the income ranges of older persons in the provider's community, as well as the provider's other sources of income.

C. Area agencies on aging and providers shall not means test for any service for which contributions are accepted, or deny services to any individual who does not contribute.

D. Each area agency on aging shall consult with its relevant service providers and older individuals in its planning and service area(s) to determine the best method(s) for accepting voluntary contributions.

E. Area agencies on aging and programs shall:

(1) Establish policies and procedures for soliciting, safeguarding, and accounting for contributions;

(2) Protect the privacy of each person with respect to his/her contribution, or lack of contribution;

(3) Clearly inform each person that there is no obligation to contribute, and that contribution is voluntary;

(4) Fully describe the contribution policy in the area plan or in a provider's program plan;

(5) Use any collected contributions to expand the service(s) for which the contributions were given; and

(6) Post information regarding any suggested contributions at the service premises in a location convenient to the participants.

[9.2.3.11 NMAC - Rp, SAA Rule No. 95-3.11, 6/30/2015]

9.2.3.12 COST SHARING AND SLIDING FEE SCALES:

A. In making application to apply cost sharing to services, area agencies on aging and providers must consider the intent of the Older Americans Act to serve targeted populations and must ensure that the application of cost sharing will not prevent the provision of services to low-income, minority, socially isolated, or rural populations. Cost sharing is a process which enables clients to contribute monetarily to the cost of the services they receive. Cost sharing may include the implementation of a sliding fee scale.

B. A fee is defined as a charge allowed by law for a service. A sliding fee scale is a graduated series of fees to be paid based on amount of income. If a sliding fee scale is implemented, area agencies on aging and providers must protect the privacy and confidentiality of older individuals. The individuals to be served must be informed that the service is provided on a fee-for-service basis and be notified of the sliding fee scale.

C. Area agencies on aging shall solicit the views of older individuals, providers, and other stakeholders prior to implementation of cost sharing in each respective service area of the state.

D. Area agencies on aging may contract to purchase services that charge a sliding fee based on income and the cost of delivering services. Such services may include, and, if Older Americans Act funds are used, are limited to:

(1) Transportation/assisted transportation;

(2) Shopping assistance;

(3) Homemaker/housekeeping;

(4) Adult day care/day health care;

- (5) Personal care;
- (6) Home health;
- (7) Respite care;
- (8) Home repair;
- (9) Chores;
- (10) Escort;
- (11) Recreation;
- (12) Physical fitness/exercise;
- (13) Education/training;
- (14) Home safety/accident prevention.

E. If Older Americans Act funds are used, such services may *not* include:

- (1) Information and assistance;
- (2) Outreach;
- (3) Benefits counseling;
- (4) Case management;
- (5) Ombudsman services;
- (6) Consumer protection services;
- (7) Congregate meals;
- (8) Home delivered meals;
- (9) Legal assistance;
- (10) Elder abuse prevention;
- (11) Any services delivered through tribal organizations.

F. With regard to any fees charged for Older Americans Act services, determination of a client's fee for a service shall be based on a client's confidential self-declaration of

income, and spouse's income (if applicable), without verification. Older Americans Act services may not be denied due to the income of an individual or an individual's failure to make a cost sharing payment.

G. If a sliding fee scale is to be used, a description of the scale - its criteria, policies and payments must be written in language(s) reflecting the reading abilities of older individuals served and posted in high visibility areas. Such posting must include a statement that no services will be denied for failure to pay any fee. Assets, savings, or other property owned may not be considered in determining the fee for a service.

H. Revenues generated by a fee-for-service program must be spent on the same program that generates the funds in order to enhance the program.

I. Appropriate procedures to safeguard and account for cost sharing payments must be established.

J. The basis for a sliding fee scale is to be the U.S. administration on aging's annual issuance of "estimated poverty and near poverty thresholds." "near poverty" is defined as one hundred twenty five percent (125%) of the poverty level. Individuals and families whose income is at or below the near poverty threshold shall not be charged for services.

K. Each and any specific sliding fee scale must be:

- (1) Reviewed and approved by the department;
- (2) Reviewed in a public hearing prior to implementation. The department may grant short-term approval prior to a public hearing to test the concept;
- (3) Fully described by an area agency on aging in its area plan;
- (4) Implemented based on established policies and procedures. These policies and procedures must address the circumstances that allow the provider to waive the fee-for-service and also address when an individual's or family's net income may be considered rather than gross income.

L. Fees:

- (1) Are to be based on the actual cost of providing a service (as determined by a program, submitted to an area agency on aging and approved by the department).
- (2) Cannot exceed the actual cost of providing a service.

[9.2.3.12 NMAC - Rp, SAA Rule No. 95-3.12, 6/30/2015]

PART 4: DESIGNATION OF PLANNING AND SERVICE AREAS

9.2.4.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.4.1 NMAC - Rp, SAA Rule No. 95-4.1, 6/30/2015]

9.2.4.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.4.2 NMAC - Rp, SAA Rule No. 95-4.2, 6/30/2015]

9.2.4.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.4.3 NMAC - Rp, SAA Rule No. 95-4.3, 6/30/2015]

9.2.4.4 DURATION:

Permanent.

[9.2.4.4 NMAC - Rp, SAA Rule No. 95-4.4 6/30/2015]

9.2.4.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.4.5 NMAC - Rp, SAA Rule No. 95-4.5, 6/30/2015]

9.2.4.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long-term services department.

[9.2.4.6 NMAC - Rp, SAA Rule No. 95-4.6, 6/30/2015]

9.2.4.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.4.7 NMAC - Rp, SAA Rule No. 95-4.7, 6/30/2015]

9.2.4.8 LEGAL REFERENCES:

[RESERVED]

[9.2.4.8 NMAC - Rp, SAA Rule No. 95-4.8, 6/30/2015]

9.2.4.9 DESIGNATION OF PLANNING AND SERVICE AREAS (PSAs):

Existing intrastate planning and service areas (PSAs) shall continue to be designated unless:

A. There is demonstrated evidence that designation of an existing PSA is inconsistent with the purpose of the rules and regulations issued pursuant to the Older Americans Act; or

B. The designation of another PSA is necessary for the assurance of the efficient and effective administration of programs authorized by the Older Americans Act and operating in the state.

[9.2.4.9 NMAC - Rp, SAA Rule No. 95-4.9, 6/30/2015]

9.2.4.10 TYPE OF DESIGNATION:

The department may designate "federally recognized" planning and service areas under the auspices of the Older Americans Act and may designate "non-federally recognized" planning and service areas under state authority. Non-federally recognized planning and service areas may duplicate or overlap with federally recognized planning and service areas and shall be established in order to address special service needs or target populations and to facilitate the distribution of state funds.

[9.2.4.10 NMAC - Rp, SAA Rule No. 95-4.10, 6/30/2015]

9.2.4.11 CRITERIA FOR PSA DESIGNATION:

The department shall divide the state into distinct planning and service areas, considering the following criteria:

A. Geographical distribution of older individuals in the state;

B. Incidence of the need for supportive services, nutrition services, multipurpose senior centers, legal assistance, and other services;

C. Distribution of older individuals who have greatest economic need, particularly those with low-incomes;

D. Distribution of older individuals residing in rural areas;

E. Distribution of minority older individuals;

F. Distribution of older individuals with limited English proficiency;

G. Distribution of older individuals who have greatest social need;

H. Distribution of Native American Indian elders;

I. Distribution of resources available to provide services;

J. Boundaries of existing areas within the state which were drawn for the planning or administration of supportive services programs; and

K. Location of units of general purpose local government within the state.

[9.2.4.11 NMAC - Rp, SAA Rule No. 95-4.12, 6/30/2015]

9.2.4.12 PROCEDURE FOR PSA DESIGNATION:

A. Non-department initiated:

(1) Any unit of general purpose local government, region within a state recognized for area wide planning, metropolitan area, or Indian tribe may make application to the department to be designated as a planning and service area.

(2) The aging network division director, as the department secretary's designee, shall approve or disapprove any such application submitted under paragraph (1) of this Section.

(3) Any applicant under paragraph (1) of this section whose application for designation as a planning and service area is denied by the department may appeal the denial in writing to the department secretary within thirty (30) days of such denial.

(4) If the department denies an applicant for designation as a planning and service area under paragraph (1) of this section, the department shall provide a hearing on the denial of the application, in accordance with 9.2.11 NMAC if requested by the applicant, as well as issue a written decision on the denial within sixty (60) days following the hearing.

B. Department initiated: The department may designate additional planning and service areas or redefine existing planning and service areas based upon changes in the criteria for PSA designation in accordance with 9.2.4.11 NMAC.

C. The department shall solicit public input with regard to any proposed changes or additions to PSA designation.

(1) At least one (1) public hearing shall be held in each county and Indian tribe proposed to be affected.

(2) Thirty (30) day notice of such hearing(s) shall be provided to all area agencies on aging, aging network providers, tribes, and units of general purpose government where each entity will be provided the opportunity to provide oral or written comment.

(3) Entities will also be provided with the opportunity to submit written comments to the aging network division director, if they are unable to attend a public hearing.

[9.2.4.12 NMAC - Rp, SAA Rule No. 95-4.11, 6/30/2015]

9.2.4.13 APPLICATION DENIAL OR APPROVAL:

The secretary of the aging and long-term services department shall approve or disapprove any application.

[9.2.4.13 NMAC - Rp, SAA Rule No. 95-4.13, 6/30/2015]

9.2.4.14 APPROVAL OF PSA DESIGNATION:

All PSA designations for purposes of distribution of federal funds must be further approved by the U.S. administration on aging.

[9.2.4.14 NMAC - Rp, SAA Rule No. 95-4.13, 6/30/2015]

9.2.4.15 APPEAL OF PSA DESIGNATION OR REVOCATION OF DESIGNATION:

A. An applicant for PSA designation whose application the department has denied or a PSA whose designation the department has decided to revoke may appeal pursuant to the procedures set forth in 9.2.11 NMAC.

B. Any applicant for "federally recognized" PSA designation whose application the department denies and who has been provided an appeal hearing and written decision by the department may appeal to the assistant secretary of the United States health and human services department administration on aging in writing within thirty (30) days of receipt of the department's written decision, pursuant to 45 C.F.R Section 1321.31 (2015).

[9.2.4.15 NMAC - Rp, SAA Rule No. 95-4.14, 6/30/2015]

9.2.4.16 DESIGNATED PSAs:

A. The designated PSAs are posted to the department's website.

B. All designation approvals shall be maintained in the appropriate department records.

[9.2.4.16 NMAC – Rp, SAA Rule No. 95-4.15, 6/30/2015]

PART 5: AREA AGENCY DESIGNATION

9.2.5.1 ISSUING AGENCY:

New Mexico Aging & Long Term Services Department (NMALTSB).

[9.2.5.1 NMAC - Rp, SAA Rule No. 95-5.1, 6/30/2015]

9.2.5.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.5.2 NMAC - Rp, SAA Rule No. 95-5.2, 6/30/2015]

9.2.5.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.5.3 NMAC - Rp, SAA Rule No. 95-5.3, 6/30/2015]

9.2.5.4 DURATION:

Permanent.

[9.2.5.4 NMAC - Rp, SAA Rule No. 95-5.4, 6/30/2015]

9.2.5.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.5.5 NMAC - Rp, SAA Rule No. 95-5.5, 6/30/2015]

9.2.5.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state funded programs administered by the aging and long-term services department.

[9.2.5.6 NMAC - Rp, SAA Rule No. 95-5.6, 6/30/2015]

9.2.5.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.5.7 NMAC - Rp, SAA Rule No. 95-5.7, 6/30/2015]

9.2.5.8 LEGAL REFERENCES:

[RESERVED]

[9.2.5.8 NMAC - Rp, SAA Rule No. 95-5.8, 6/30/2015]

9.2.5.9 NEED FOR DESIGNATION:

Applications for designation as an area agency on aging (AAA), under the Older Americans Act, must be solicited by the department when a new planning and service area (PSA) has been designated, or when an existing AAA has been de-designated, or when an existing AAA has voluntarily withdrawn its designation.

[9.2.5.9 NMAC - Rp, SAA Rule No. 95-5.9, 6/30/2015]

9.2.5.10 TYPE OF DESIGNATION:

The department may designate federally recognized AAAs under the auspices of the Older Americans Act, or may designate non-federally recognized AAAs under state authority. Non-federally recognized AAAs shall be established and shall operate under the same rules as federally recognized AAAs unless otherwise negotiated with the designated organization.

[9.2.5.10 NMAC - Rp, SAA Rule No. 95-5.10, 6/30/2015]

9.2.5.11 ELIGIBILITY AND PREFERENCE FOR DESIGNATION:

A. An AAA may be any of the following:

- (1)** An established aging organization which operates in a PSA;
- (2)** Any office or agency designated by the chief elected officials of a unit of general purpose local government to function only as an AAA;
- (3)** Any office or agency designated by the chief elected officials of any combination of units of general purpose local government to act on behalf of the combination for such purpose; or

(4) Any public or private non-profit organization in a PSA, or any separate unit within such organization, which can and will engage in the functions of an AAA;

B. No regional or local office of state government may be designated as an AAA.

[9.2.5.11 NMAC - Rp, SAA Rule No. 95-5.11, 6/30/2015]

9.2.5.12 APPLICATION PROCESS AND PROCEDURE:

A. When it is necessary to solicit applications for area agency on aging designation pursuant to 9.2.5.9 NMAC, the department shall provide public notice of the need to solicit applications for designation and the process by which an entity can apply for such designation.

B. The department shall provide public notice as follows:

(1) In newspapers of general circulation in the planning and service area for which AAA applications are being solicited;

(2) On the department website;

(3) Via electronic dissemination to New Mexico's aging network; and

(4) In written notification to units of general purpose local government in the planning and service area.

[9.2.5.12 NMAC - Rp, SAA Rule No. 95-5.14, 6/30/2015]

9.2.5.13 AREA AGENCY ON AGING REPLACEMENT REQUIREMENTS:

Any unsolicited application for AAA designation which, if approved, would result in the replacement of a formally designated area agency on aging or substantially impact the aging network within the PSA involved, must include:

A. Written indication of support, by resolution, of seventy-five percent (75%) of the governing bodies of municipalities and counties within the PSA boundaries;

B. Documentation that existing services can be substantially improved through the proposed change in designation; and

C. Assurance that no staff or board member of the applicant has served on the staff or board of the existing area agency on aging within the affected PSA, the department, or the U.S. administration on aging for a period of not less than two (2) years prior to the date of notification of application.

D. Other criteria deemed relevant by the department to the applicant's ability to carry out the duties of an AAA.

[9.2.5.13 NMAC - Rp, SAA Rule No. 95-5.12, 6/30/2015]

9.2.5.14 REVIEW AND ASSESSMENT:

The department shall review each application for completeness and ability to meet the necessary requirements of designation. The entity being considered for AAA designation shall provide an opportunity for on-site review and assessment by the department to ensure that said entity has the capacity to perform the functions of an AAA, including the requirements set forth in 9.2.6 NMAC.

[9.2.5.14 NMAC - Rp, SAA Rule No. 95-5.13, 6/30/2015]

9.2.5.15 DESIGNATION REQUIREMENT:

The department will designate an AAA to administer each PSA for which the department allocates funds under Title III of the Older Americans Act, supplemental state funds, or both. When designating a new AAA, the department shall give right of first refusal to unit(s) of general purpose local government if such unit can meet the requirements of 9.2.5.13 NMAC and the boundaries of the PSA are reasonably contiguous. If any unit of general purpose local government chooses not to exercise right of first refusal, the department shall then give preference to an established AAA or aging organization which operates in the PSA, and shall take into consideration the historical experience applicants have had in coordination, planning, and delivery of services for older adults. The department secretary shall approve or disapprove any applications for designation in writing.

[9.2.5.15 NMAC - Rp, SAA Rule No. 95-5.15, 6/30/2015]

9.2.5.16 RIGHT TO APPEAL:

Applicants who have been denied designation may appeal as provided in 9.2.11 NMAC.

[9.2.5.16 NMAC - Rp, SAA Rule No. 95-5.18, 6/30/2015]

9.2.5.17 DESIGNATED AAAs:

A. The designated AAAs are posted to the department's web site.

B. All designation approvals shall be maintained in the appropriate department records.

[9.2.5.17 NMAC - Rp, SAA Rule No. 95-5.19, 6/30/2015]

PART 6: AREA AGENCY ON AGING REQUIREMENTS

9.2.6.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.6.1 NMAC - Rp, SAA Rule No. 95-6.1, 6/30/2015]

9.2.6.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.6.2 NMAC - Rp, SAA Rule No. 95-6.2 6/30/2015]

9.2.6.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.6.3 NMAC - Rp, SAA Rule No. 95-6.3, 6/30/2015]

9.2.6.4 DURATION:

Permanent.

[9.2.6.4 NMAC - Rp, SAA Rule No. 95-6.4, 6/30/2015]

9.2.6.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.6.5 NMAC - Rp, SAA Rule No. 95-6.5, 6/30/2015]

9.2.6.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state funded programs administered by the aging and long term services department.

[9.2.6.6 NMAC - Rp, SAA Rule No. 95-6.6, 6/30/2015]

9.2.6.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.6.7 NMAC - Rp, SAA Rule No. 95-6.7, 6/30/2015]

9.2.6.8 LEGAL REFERENCES:

[RESERVED]

[9.2.6.8 NMAC - Rp, SAA Rule No. 95-6.8, 6/30/2015]

9.2.6.9 AREA AGENCY ON AGING STRUCTURE:

An area agency on aging must:

- A.** Administer Older Americans Act and state programs within one (1) or more designated planning and service area;
- B.** Have a full-time, qualified director and adequate qualified staff; and
- C.** Receive approval from the department regarding the selection of its director.

[9.2.6.9 NMAC - Rp, SAA Rule No. 95-6.9, 6/30/2015]

9.2.6.10 AREA AGENCY ON AGING RESPONSIBILITIES:

A designated area agency on aging shall:

- A.** Comply, as applicable, with all federal and state statutes, rules and policies.
- B.** Coordinate services for older persons in its planning and service area(s) and serve as an advocate and focal point for older individuals within the area.
- C.** Plan and develop collaborative linkages; share information; monitor and evaluate services; and lead the development of comprehensive and coordinated community-based systems.
- D.** Conduct periodic public hearings on the effectiveness of services and the needs of older adults in the area.
- E.** Furnish appropriate training and technical assistance to providers of services in the area.
- F.** Develop and submit an area plan to the department, according to guidelines issued by the department, for the department's approval, covering each planning and service area administered.
- G.** Establish and support an advisory council.

(1) The advisory council membership shall include individuals and representatives of community organizations who will help to enhance the leadership role of the area agency on aging in developing community-based systems of services. The advisory committee shall be made up of;

(a) persons sixty (60) years of age or older, including minority individuals and those with greatest economic or social needs, and clients of services funded by the area agency on aging (this group shall comprise more than fifty percent (50%) of the advisory council);

(b) representatives of older persons;

(c) representatives of health care provider organizations, including providers of veterans' health care (if appropriate);

(d) representatives of supportive services provider organizations;

(e) persons with leadership experience in the private and voluntary sectors;

(f) local elected officials;

(g) the general public; and

(h) additional membership as determined by the area agency on aging.

(2) The advisory council responsibilities shall include advising the area agency on aging relative to:

(a) all matters relating to the development and administration of the area plan;

(b) conducting public hearings;

(c) representing the interest of older persons;

(d) community policies, programs and actions affecting older persons with the intent of assuring maximum coordination and responsiveness to older persons;

(e) service provision and assisting in evaluation of such;

(f) policies, programs and actions representing the interests of older persons and encouraging the involvement of older persons.

(3) The advisory council shall develop, implement and make public bylaws governing at least the following:

(a) the role and functions of the advisory council;

- (b)** the number and characteristics of membership;
- (c)** the procedures for membership selection; and
- (d)** the procedures for the conduct of the advisory council's business and activities, including preventing conflicts of interest.

(4) The advisory council shall review and comment upon the area plan and amendments before transmittal to the department for approval.

H. Determine the extent of need for supportive services, nutrition services and multipurpose senior centers, evaluate the effectiveness of resources to meet such need and enter into agreements with providers of services to meet the need.

I. Collaborate with public and private entities, including adult protective services, involved in the prevention, identification and treatment of abuse, neglect and exploitation of older adults.

J. Comply with the requirements of its contract with the department.

K. Set objectives for providing services to older adults with the greatest economic or social needs, including minority adults with low-incomes, and older adults residing in rural and frontier areas.

L. Set objectives for providing services to caregivers of older adults and older adult caregivers.

M. Identify and reach populations in need and inform them of the availability of assistance.

N. If there is a population of older Native American Indians in the service area, conduct outreach activities to identify those individuals and inform them of the availability of assistance.

O. Establish a grievance procedure for persons who are dissatisfied with or denied services.

P. List the telephone number of the area agency on aging in each telephone directory published in its service area(s).

Q. Coordinate planning and delivery of transportation services (including the purchase of vehicles) to assist older adults in the service area(s).

R. Operate in an ethical and professional manner at all times, including in the development of policies and procedures.

S. Establish financial management systems in accordance with federal and state requirements.

T. Implement a budget and systematic contracting process.

U. Respond, within established deadlines, to requests by the department to implement specific corrective action as may be required; and.

V. Collaborate with the foster grandparent, senior companion, and retired senior volunteer programs; the State health insurance program (SHIP); long-term care ombudsmen; and the aging and disability resource center.

[9.2.6.10 NMAC - Rp, SAA Rule No. 95-6.10, 6/30/2015]

9.2.6.11 WITHDRAWAL OF AREA AGENCY ON AGING DESIGNATION:

If the department determines that an area agency on aging has not made progress to correct any identified deficiency(ies), the department may initiate the withdrawal of designation process, pursuant to 9.2.7 NMAC and 45 C.F.R. Section 1321.35.

[9.2.6.11 NMAC - Rp, SAA Rule No. 95-6.11, 6/30/2015]

PART 7: WITHDRAWAL OF AREA AGENCY DESIGNATION

9.2.7.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSB).

[9.2.7.1 NMAC - Rp, SAA Rule No. 95-7.1, 6/30/2015]

9.2.7.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.7.2 NMAC - Rp, SAA Rule No. 95-7.2, 6/30/2015]

9.2.7.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.7.3 NMAC - Rp, SAA Rule No. 95-7.3, 6/30/2015]

9.2.7.4 DURATION:

Permanent.

[9.2.7.4 NMAC - Rp, SAA Rule No. 95-7.4, 6/30/2015]

9.2.7.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.7.5 NMAC - Rp, SAA Rule No. 95-7.5, 6/30/2015]

9.2.7.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state funded programs administered by the aging and long term services department.

[9.2.7.6 NMAC - Rp, SAA Rule No. 95-7.6, 6/30/2015]

9.2.7.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.7.7 NMAC - Rp, SAA Rule No. 95-7.7, 6/30/2015]

9.2.7.8 LEGAL REFERENCES:

[RESERVED]

[9.2.7.8 NMAC - Rp, SAA Rule No. 95-7.8, 6/30/2015]

9.2.7.9 BACKGROUND:

When an area agency on aging fails to comply with applicable federal or state rules, statutes or codes, or terms of a contract, the department may take action as may be legally available and appropriate to the circumstance.

[9.2.7.9 NMAC - Rp, SAA Rule No. 95-7.9, 6/30/2015]

9.2.7.10 DEPARTMENT RESPONSIBILITIES:

Prior to any de-designation effort the department must provide the area agency on aging with the opportunity to correct any deficiency which may be cause for de-designation.

[9.2.7.10 NMAC - Rp, SAA Rule No. 95-7.10, 6/30/2015]

9.2.7.11 DE-DESIGNATION:

The department shall withdraw an area agency on aging designation whenever the department, for specific documented reasons and after reasonable notice and opportunity for a hearing, as provided in 9.2.11 NMAC, finds that:

A. The area agency on aging does not meet the requirements of federal or state regulations, as specified in 9.2.6 NMAC and 45 C.F.R. Section 1321; or

B. The area plan or area plan amendment is not approved in the current funding period; or

C. There is substantial failure to properly administer the approved area plan or to comply with any provision of the Older Americans Act, 45 C.F.R. Section 1321, or the department's rules or published policies and procedures; or

D. Activities of the area agency on aging are inconsistent with the statutory mission prescribed in the Older Americans Act or in conflict with the requirement of the Act that it function only as an area agency on aging; or

E. The area agency on aging does not perform its responsibilities as required by its contract with the department.

[9.2.7.11 NMAC - Rp, SAA Rule No. 95-7.11, 6/30/2015]

9.2.7.12 NOTIFICATION OF CONTEMPLATION OF WITHDRAWAL OF AREA AGENCY ON AGING DESIGNATION:

If the department contemplates withdrawal of designation of an area agency on aging, the department will notify appropriate individuals and organizations in advance of the contemplated withdrawal and of the reasons which make it necessary. This notification shall be sent by certified mail, return receipt requested, to:

A. The governor of New Mexico;

B. The New Mexico congressional delegation;

C. State senators and representatives of the districts in which the area agency on aging provides services;

D. The department policy advisory committee;

E. County commission chairpersons and mayors of cities, towns and villages in the affected planning and service area(s);

F. Governors or presidents of Indian pueblos or tribes in the affected planning and service area(s);

- G. The governing body of the area agency on aging;
- H. Service providers that have current contracts with the area agency; and
- I. The area agency on aging advisory council.

[9.2.7.12 NMAC - Rp, SAA Rule No. 95-7.12, 6/30/2015]

9.2.7.13 NOTIFICATION OF WITHDRAWAL OF AREA AGENCY ON AGING DESIGNATION:

An area agency on aging shall be notified, by certified mail, return receipt requested, at least ten (10) working days prior to the effective date of its de-designation as an area agency on aging. Such notification shall explain the right of the area agency on aging to appeal such decision as outlined in 9.2.11 NMAC.

A. If, in the department's judgment, an egregious situation exists that seriously threatens the health and welfare of a significant segment of the older adult population within the affected planning and service area(s), the de-designation may be made effective immediately, and so stated in the letter of notification. Immediate de-designation does not preclude processing appeals under 9.2.11 NMAC.

B. If an area agency on aging is de-designated, the department may, if necessary to ensure continuity of services in a planning and service area, assume the role of the area agency on aging for a period of up to one hundred eighty (180) days following its final decision to withdraw designation of the area agency on aging; this period may be extended by the head of the U.S. administration on aging pursuant to 45 C.F.R. Section 1321.35.

C. If an area agency on aging is de-designated, the department may alternatively, if necessary to ensure continuity of services in a planning and service area, assign the responsibilities of the area agency on aging to another agency in the planning and service area for a period of up to hundred eighty (180) days. This period may be extended by the head of the U.S. Administration on Aging pursuant to 45 C.F.R. Section 1321.35.

[9.2.7.13 NMAC - Rp, SAA Rule No. 95-7.13, 6/30/2015]

9.2.7.14 PROCEDURES FOLLOWING WITHDRAWAL OF DESIGNATION:

If the department de-designates an area agency on aging, the department shall take the following action:

A. The department will notify, by certified mail, return receipt requested, the head of the U.S. Administration on Aging and others as specified in 9.2.7.12 NMAC or as required by federal regulation;

B. The department will provide a plan for continuity of services in the affected planning and service area(s) and will:

(1) Discontinue reimbursement to the former area agency on aging except for outstanding obligations;

(2) Notify area agency on aging contractors regarding where to submit requests for reimbursement;

(3) Terminate any contracts with the former area agency on aging; and

(4) Designate an interim or new area agency on aging to administer the planning and service area(s) in a timely manner.

[9.2.7.14 NMAC - Rp, SAA Rule No. 95-7.14, 6/30/2015]

PART 8: ADEQUATE PROPORTION OF PRIORITY SERVICES

9.2.8.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.8.1 NMAC - Rp, SAA Rule No. 95-8.1, 6/30/2015]

9.2.8.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.8.2 NMAC - Rp, SAA Rule No. 95-8.2, 6/30/2015]

9.2.8.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.8.3 NMAC - Rp, SAA Rule No. 95-8.3, 6/30/2015]

9.2.8.4 DURATION:

Permanent.

[9.2.8.4 NMAC - Rp, SAA Rule No. 95-8.4, 6/30/2015]

9.2.8.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.8.5 NMAC - Rp, SAA Rule No. 95-8.5, 6/30/2015]

9.2.8.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long term services department.

[9.2.8.6 NMAC - Rp, SAA Rule No. 95-8.6, 6/30/2015]

9.2.8.7 DEFINITIONS:

See 9.2.1.7 NMAC for definitions.

[9.2.8.7 NMAC - Rp, SAA Rule No. 95-8.7, 6/30/2015]

9.2.8.8 LEGAL REFERENCES:

[RESERVED]

[9.2.8.8 NMAC - Rp, SAA Rule No. 95-8.8, 6/30/2015]

9.2.8.9 ADEQUATE PROPORTION SERVICES:

The adequate proportion services authorized under Title III of the Older Americans Act consist of:

A. Services associated with access, including transportation, health/mental health services, outreach, case management, and information and assistance on the availability of services and how to receive public benefits;

B. In-home services, including supportive services for families of older individuals with alzheimer's disease and related disorders with neurological and organic brain dysfunction; and

C. Legal assistance.

[9.2.8.9 NMAC - Rp, SAA Rule No. 95-8.9, 6/30/2015]

9.2.8.10 ADEQUATE PROPORTION FUNDING PERCENTAGES:

Area agencies on aging that receive federal funding through the department are required to expend an adequate proportion of Older Americans Act Title III, Part B, allotments for each of three categories of services: access services, in-home services, and legal assistance.

9.2.8.11 WAIVER OF THE REQUIREMENT:

A. The department may waive the requirement if:

(1) An approved plan is in place to ensure that access services, in-home services, and legal assistance are available throughout the planning and service area(s); or

(2) An area agency on aging requests a waiver and documents that access services, in-home services, and legal assistance are being furnished and are sufficient to meet the need in the planning and service area(s) administered.

B. Waiver requests may be included as part of an area plan or area plan amendment. After the initial approval of a waiver, renewal requests must be submitted to the department as part of an area plan.

C. To support an initial request for a waiver, an area agency on aging must provide the following information and documentation for each category of service for which a waiver is desired:

(1) A description of the needs assessment conducted by the area agency on aging to determine the service needs of older persons in the planning and service area(s), including a description of the identified needs;

(2) A list of service providers in the planning and service area(s) that are providing the adequate proportion services for which a waiver is being requested, including the following:

(a) service(s) being provided by each service provider;

(b) eligibility criteria for each service;

(c) level and sources of funding;

(d) number of units of service and unduplicated number of older individuals receiving service for the current fiscal year; and

(e) number of projected units of service and unduplicated number of older individuals projected to receive service during the fiscal year for which the waiver is being requested;

(3) Documentation of public hearing(s) including, but not limited to the following:

- (a) public announcement of the public hearing(s);
- (b) specific notification sent to all interested parties;
- (c) list of the interested parties sent the notification;
- (d) record of the proceedings of the public hearing(s); and
- (e) attendance roster(s) from the public hearing(s).

D. The department will review all requests for waivers based on the following:

- (1) The submission of all the required information and documentation;
- (2) Documentation of needs assessment findings which resulted in the decision to request a waiver, to include the following:
 - (a) needs assessment methodology;
 - (b) source of data, including any secondary sources; and
 - (c) summary of statistical data indicating needs, to include target populations;
- (3) Documentation of the adequacy of the service delivery system in the planning and service area, to include:
 - (a) documented level of need for the service for which a waiver is being requested;
 - (b) service level being provided by area agency on aging service providers, including units of service, unduplicated number of persons being served, and level of funding; and
 - (c) any documented unmet need for the service.

[9.2.8.11 NMAC - Rp, SAA Rule No. 95-8.11, 6/30/2015]

PART 9: DIRECT SERVICES

9.2.9.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSB).

[9.2.9.1 NMAC - Rp, SAA Rule No. 95-9.1, 6/30/2015]

9.2.9.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability population.

[9.2.9.2 NMAC - Rp, SAA Rule No. 95-9.2, 6/30/2015]

9.2.9.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.9.3 NMAC - Rp, SAA Rule No. 95-9.3, 6/30/2015]

9.2.9.4 DURATION:

Permanent.

[9.2.9.4 NMAC - Rp, SAA Rule No. 95-9.4, 6/30/2015]

9.2.9.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.9.5 NMAC - Rp, SAA Rule No. 95-9.5, 6/30/2015]

9.2.9.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state funded programs administered by the aging and long term services department.

[9.2.9.6 NMAC - Rp, SAA Rule No. 95-9.6, 6/30/2015]

9.2.9.7 DEFINITIONS:

See Section 9.2.1.7 NMAC for definitions.

[9.2.9.7 NMAC - Rp, SAA Rule No. 95-9.7, 6/30/2015]

9.2.9.8 LEGAL REFERENCES:

[RESERVED]

[9.2.9.8 NMAC - Rp, SAA Rule No. 95-9.8, 6/30/2015]

9.2.9.9 GENERAL PROVISIONS:

Area agencies on aging must develop a service delivery system by contracting with other organizations to provide services to older individuals. The role of an area agency on aging is to engage in area-wide planning and development and to purchase needed services. An area agency on aging shall not provide direct services to older individuals, except where, in the judgment of the department, the area agency on aging has demonstrated that:

A. The provision of such services by an area agency on aging is necessary to assure an adequate supply of such services; or

B. Such services are directly related to the area agency on aging's administrative function(s); or

C. Such services of comparable or higher quality can be provided more economically by the area agency on aging.

[9.2.9.9 NMAC - Rp, SAA Rule No. 95-9.9, 6/30/2015]

9.2.9.10 TEST STANDARDS:

The department shall determine whether an area agency on aging shall be granted a direct service waiver based on the ability of the area agency on aging to document or demonstrate that, at a minimum, one (1) of the following test standards has been met.

A. Adequate supply test standard: this test standard requires the area agency on aging to demonstrate that service(s) are either not offered or are only partially available in the planning and service area. The adequate supply test is met when the area agency on aging provides documentation that it has not received any proposals to deliver the service(s) after the area agency on aging has:

(1) advertised the availability of funds;

(2) Written to bona fide service providers, inviting them to submit proposals;
and

(3) Documented that attempts have been made to develop and encourage the establishment of service providers.

B. Administrative function test standard: this test standard requires the area agency on aging to identify the current specific administrative function(s) that relate to the service(s). The administrative function test is met when the area agency on aging provides documentation that:

(1) The proposed service(s) can be integrated into its administrative function(s);

(2) Such service delivery will not compete with or eliminate local efforts to provide the same service(s) in the area; and

(3) There is no conflict of interest in the provision of direct services by the area agency on aging.

C. More economic test standard: This test standard requires an area agency on aging to demonstrate that a service of comparable or higher quality will be provided by the area agency on aging at a unit rate at least ten percent (10%) lower than the lowest responsive applicant's proposed unit rate, or the amount of area agency on aging resources invested would be diminished or removed should another provider be designated, resulting in a greater demand for federal or state funds to maintain the current level of services. The more economic test standard is met when the area agency on aging provides documentation that:

(1) It can deliver the service(s) at a unit rate at least ten percent (10%) lower than the lowest responsive applicant's proposed unit rate, or its significant matching resources will be diminished or removed;

(2) It has implemented a method for open competitive bidding for selecting a service provider; and

(3) It has the ability to deliver services in a manner comparable in quality to the lowest responsive applicant's proposal.

[9.2.9.10 NMAC - Rp, SAA Rule No. 95-9.10, 6/30/2015]

9.2.9.11 WAIVER REQUEST PROCESS:

An area agency on aging shall submit a written request for a waiver as part of its area plan or area plan amendment or as a separate request. An area agency on aging may request a multi-year or a single year waiver. The initial request shall include:

A. Identification of the specific test under which the waiver is being requested;

B. Specific documentation required for the test;

C. Documentation of review and support by the area agency on aging advisory council and governing body;

D. A general description of the proposed administrative structure for administering the service; and

E. A description of the impact on the area agency on aging's role and staffing and its ability to accomplish the area agency on aging roles and responsibilities.

[9.2.9.11 NMAC - Rp, SAA Rule No. 95-9.11, 6/30/2015]

9.2.9.12 DEPARTMENT REVIEW AND DISPOSITION PROCESS:

A. Upon receipt of a request, the department shall review the request and obtain clarification or documentation from the area agency on aging if necessary.

B. The department secretary shall notify the applicant of the approval or disapproval of the waiver.

C. In cases where a request is submitted separate from an area plan or area plan amendment and approval is granted, the department shall notify the area agency on aging of documentation necessary to include the waiver in the current area plan.

[9.2.9.12 NMAC - Rp, SAA Rule No. 95-9.12, 6/30/2015]

9.2.9.13 EMERGENCY SITUATIONS:

If an area agency on aging service provider abruptly ceases services, the department may grant a temporary direct service waiver up to one hundred eighty (180) days to the area agency on aging, pending the implementation of a process to identify a new service provider. In such situations the area agency on aging shall immediately provide the following information to the department:

A. A description of the situation that has resulted in the direct service waiver request;

B. A plan for seeking a new service provider;

C. Documentation of review and support by the area agency on aging advisory council and governing body;

D. A general description of the proposed administrative structure contemplated by the area agency on aging for administering the service; and

E. A description of the impact on the area agency on aging's role and staffing.

[9.2.9.13 NMAC - Rp, SAA Rule No. 95-9.13, 6/30/2015]

PART 10: MULTIPURPOSE SENIOR CENTERS ACQUIRED, CONSTRUCTED, ALTERED OR RENOVATED WITH OLDER AMERICANS ACT TITLE III FUNDS [REPEALED]

[This part was repealed, effective 6/30/2015.]

PART 11: APPEAL/HEARING PROCEDURES

9.2.11.1 ISSUING AGENCY:

New Mexico Aging and Long-Term Services Department (NMALTSO).

[9.2.11.1 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability population.

[9.2.11.2 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.11.3 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.4 DURATION:

Permanent.

[9.2.11.4 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.11.5 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.6 OBJECTIVE:

The objective of this rule is to establish appeal procedures for decisions made by the aging and long term services department.

[9.2.11.6 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.7 DEFINITIONS:

The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

A. "Hearing" is an administrative review of documentation and evidence and an opportunity for oral testimony at the discretion of a hearing officer.

B. "Hearing officer" means an impartial person selected by the department secretary to conduct a hearing and render a proposed final decision.

C. "Party" means any petitioner and all interested persons affected by the outcome of a decision under this rule.

D. "Petitioner" means any person or organization who has a right to a hearing under these rules and has filed a written request for a hearing.

[9.2.11.7 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.8 LEGAL REFERENCES:

[RESERVED]

[9.2.11.8 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.9 PERSONS OR ORGANIZATIONS ENTITLED TO APPEAL:

The following persons or organizations ("petitioners") have a right to a hearing:

A. Any applicant for designation as a PSA, whose application is denied by the department, according to 9.2.4.15 NMAC;

B. Any affected party when the department initiates an action or a proceeding to designate an additional PSA, divide the state into different PSAs, or otherwise affect the boundaries of PSAs, according to 9.2.4.12(C) NMAC;

C. An area agency on aging when the department proposes to:

(1) Disapprove an area plan or plan amendment, according to Section F of 9.2.6.10 NMAC; or

(2) Withdraw an area agency on aging designation, according to 9.2.7.13 NMAC.

D. Any applicant for area agency on aging designation denied designation, according to 9.2.5.17 NMAC.

[9.2.11.9 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

9.2.11.10 HEARING PROCEDURES FOR PETITIONERS:

A. Request for a hearing:

(1) A request for a hearing must be submitted in writing to the secretary of the department, within ten (10) working days of the receipt of the notice of action, and must state with specificity the grounds upon which the proposed action is appealed or contested, and the grounds upon which the petitioner refutes the basis of the proposed action. The request must include;

(a) A copy of the department's action letter;

(b) The dates of all relevant actions;

(c) The names of individuals or organizations involved in the proposed action being appealed;

(d) A specific statement of any section of the Older Americans Act or state or federal rules or regulations believed to have been violated by the department; and

(e) For organizations, a copy of the minutes or resolution in which the petitioner's governing body requests a hearing, and which authorizes a person(s) to act on behalf of the organization; the minutes or resolution shall indicate adoption by a majority of the quorum of the governing body of the organization.

(2) The petitioner may submit written amendments to the request for hearing which must be received by the secretary of the department or designee not less than ten (10) working days prior to the date set for hearing;

(3) The secretary of the department or designee may require additional information at any time prior to the hearing. The secretary or designee will provide a reasonable amount of time for the petitioner to respond to any such request;

(4) Failure to submit all the information required in the request within the required time period will result in the forfeiture of the petitioner's right to a hearing.

B. Notice of hearing:

(1) Within twenty (20) calendar days of receipt of a request for a hearing, the secretary of the department or designee shall acknowledge in writing the receipt of the request for a hearing, and shall determine if the petitioner is entitled to a hearing. If so, the hearing date and notice of the hearing shall be provided to the petitioner(s). The hearing date shall not be later than one hundred twenty (120) calendar days from the receipt of the request for a hearing;

(2) The secretary of the department or designee shall provide written notice of any hearing to the petitioner, which shall include:

(a) A statement of the time, date, location, and nature of the hearing;

(b) A statement of the legal authority and jurisdiction under which the hearing is to be held; and

(c) A reference to the particular section of statutes, regulations and rules involved.

(3) The secretary of the department or designee shall, after the initial notice, issue a written statement of the issues involved in the appeal. Thereafter a more definite and detailed statement may be furnished not less than ten (10) calendar days prior to the date set for the hearing.

C. The secretary shall appoint an impartial hearing officer to preside at the hearing. The hearing officer may be an employee of the department. The hearing officer shall have authority to administer oaths, rule on the parties' motions, determine the admissibility of evidence, recess any hearing, and rule on such other procedural motions as may be presented by any of the parties.

D. Conduct of the hearing:

(1) Documentary evidence may be received by the hearing officer in the form of a copy or excerpt if the original is not readily available. On request, either party shall be given an opportunity to compare the copy with the original;

(2) Parties may submit documents to the hearing officer and other parties in written form prior to the hearing. Parties may also stipulate as to facts or circumstances;

(3) Either party may cross-examine witnesses to obtain a full and true disclosure of the facts;

(4) The hearing officer may take official notice of generally recognized facts within the area of the department's specialized knowledge. The hearing officer shall inform the parties of the facts officially noticed either before or during the hearing, and shall afford the parties an opportunity to contest the facts officially noticed. The special skills or knowledge of the department and its staff may be used in evaluating the evidence;

(5) The parties need not make formal exceptions to the hearing officer's rulings during a hearing. It shall be sufficient that the party informs the hearing officer of any objection to any ruling at the time it is made.

E. During the hearing, the petitioner shall present evidence first. Other parties shall follow and present their evidence. The petitioner may thereafter present rebuttal evidence only. Rebuttal evidence must be confined to the issues raised in any other party's presentation of evidence. The petitioner shall be given the opportunity to offer a

final argument without additional presentation of evidence. In addition, the other party may present a final argument without additional presentation of evidence;

F. The hearing shall be completed within one hundred twenty (120) days of the date the request for hearing was received by the department.

G. An oral hearing shall be electronically recorded. Upon request of any party to the hearing, a copy of this recording shall be made available to the requesting party at cost. In addition, any party may request that a court reporter record the hearing at the requestor's expense. Any transcript must be certified by the hearing officer.

H. Record: The record in a hearing under this section consists exclusively of:

- (1) A copy of the notice of proposed action that generated the appeal;
- (2) The request for hearing, including all amendments;
- (3) The notice of hearing;
- (4) Written information supporting the appeal, which was submitted to the department;
- (5) The department's written statement of the issues involved in the appeal;
- (6) All motions and rulings made before the hearing;
- (7) All evidence received or considered;
- (8) A statement of facts officially noticed;
- (9) Any decision, opinion or report by the hearing officer;
- (10) All staff memoranda or data submitted to and considered by the hearing officer;
- (11) The recording and transcription, if any, of the hearing;
- (12) The hearing officer's recommended decision; and
- (13) The final decision.

I. Final decision:

- (1) The hearing officer shall base his/her recommended decision solely on the record;

(2) The hearing officer shall present to the secretary a recommended decision, including proposed findings of fact and conclusions of law, within ten (10) working days after the close of the hearing. The recommendation must be in writing and signed by the hearing officer;

(3) The secretary shall issue a final decision, based on the hearing officer's recommendation, for the record, within five (5) working days of the receipt of the hearing officer's recommendation. The secretary shall affirm the action heard, unless it is unlawful, arbitrary or not reasonably supported by substantial evidence in the record;

(4) The secretary shall send a copy of the final decision to all parties by registered or certified mail, return receipt requested, within five (5) working days after it is rendered.

J. Appeal to the assistant secretary of the U.S. administration on aging: Only an applicant for designation as a federally recognized planning and service area whose application is denied by the department and whose appeal to the department has been denied may appeal the denial to the assistant secretary of the U.S. Administration on Aging under the procedures specified in the Older Americans Act, 42 U.S.C. Section 3025(b)(5)(C) and 45 C.F.R. Section 1321.31. In all other cases, the secretary's decision, based on the hearing officer's recommendation, shall be final.

[9.2.11.10 NMAC - Rp, SAA Rule No. 95-11, 6/30/2015]

PART 12: CORPORATE ELDERCARE [REPEALED]

[This part was repealed, effective 6/30/2015.]

PART 13: EMPLOYMENT PROGRAMS FOR OLDER WORKERS

9.2.13.1 ISSUING AGENCY:

New Mexico Aging and Long-Term Services Department.

[9.2.13.1 NMAC - Rp, SAA Rule No. 95-13, 02/12/2010]

9.2.13.2 SCOPE:

These rules apply to members of the public and organizations that apply to participate in one or more of the programs created in this part.

[9.2.13.2 NMAC - N, 02/12/2010]

9.2.13.3 STATUTORY AUTHORITY:

NMSA 1978, Sections 9-23-1 et seq. and 28-4-1 et seq.

[9.2.13.3 NMAC - Rp, SAA Rule No. 95-13.1, 02/12/2010]

9.2.13.4 DURATION:

Permanent.

[9.2.13.4 NMAC - N, 02/12/2010]

9.2.13.5 EFFECTIVE DATE:

02/12/2010, unless a later date is cited in the history note at the end of a section.

[9.2.13.5 NMAC - N, 02/12/2010]

9.2.13.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state funded programs administered by the employment programs bureau of the aging network division of the aging and long-term services department and to comply with Older Americans Act Sections 501 through 518, (codified as amended at 42 U.S.C. Section 3056); and implementing regulations, 20 CFR Part 641 (as amended).

[9.2.13.6 NMAC - N, 02/12/2010]

9.2.13.7 DEFINITIONS:

The following words and terms, when used in this section, shall have the following meanings unless the context clearly indicates otherwise.

A. "Aging network" means programs and services for older adults throughout New Mexico that receive federal or state funds under contract with the department or area agencies on aging. The aging network includes, but is not limited to, programs sponsored by tribal governments, local governments and private, non-profit organizations.

B. "Applicant" means a member of the public who completes an application to become a participant in one of the programs created in this part.

C. "Community service" means social, health, welfare and educational services; legal and other counseling services and assistance; library, recreational services, conservation, maintenance or restoration of natural resources, community betterment or beautification, pollution control or environmental quality efforts, economic development or other types of service, which the department approves, excluding building and construction, except that which is normally performed by the department, or work which primarily benefits private profit-making organizations.

D. "Department" means the New Mexico aging and long-term services department (ALTSD).

E. "Equitable distribution plan" means the process of allocating positions based on age and income census data as required pursuant to 20 CFR Sections 641.140, 641.360, 641.365 and 641.879 (Older Americans Act regulations as amended).

F. "Golden opportunities for life-long development (GOLD) mentor program" means a program administered by the department to provide civic engagement through community service and training opportunities for participants.

G. "Gold mentors" are participants in the gold mentor program; they provide life skills and employment assistance to clients working to overcome barriers.

H. "Host agency" is an agency or organization selected by the department where an eligible employment program participant is placed in a subsidized position for work experience and training.

I. "New Mexico senior employment program" means the state funded employment and training program designed to provide community service employment opportunities for older adults that enable them to remain actively engaged in their communities.

J. "Older Americans Act of 1965" (Older Americans Act) means Sections 501 through 518, title V, "The Older American Community Service Employment Act", Pub. L. 89-73, as amended by Pub. L. 109-363, enacted Oct. 16, 2006, (codified as amended at 42 U.S.C. Section 3056), and implementing regulations, 20 CFR Part 641 (as amended).

K. "Participants" are applicants who:

(1) have been deemed eligible for training under the programs set forth in this part and have been placed in subsidized on-the-job training; or

(2) have been hired and placed in community service and training opportunities.

L. "Pay period" means the two-week period as established and published by the New Mexico department of finance and administration.

M. "Position" is an on-the-job training or community service opportunity created by one of the programs set forth in this part.

N. "Poverty level" is the level established and periodically updated by the United States department of health and human services.

O. "Program year" is the period of July 1 through June 30.

P. "Senior community service employment program" (SCSEP) means the federal employment and training program funded pursuant to the provisions of Title V of the Older Americans Act, sections 501 through 518.

Q. "Subsidized on-the-job training" is participation in the programs set forth in this part that fund wages for hours worked using federal or state monies.

R. "Supervisor" is the individual designated by the host agency or the department to oversee the work of a participant.

S. "Transition" is the movement of a participant from on-the-job training to unsubsidized employment.

T. "Unsubsidized employment" is work in the public or private sector not funded from one of the programs set forth in this part.

[9.2.13.7 NMAC - Rp, SAA Rule No. 95-13.2, 02/12/2010]

9.2.13.8 SENIOR COMMUNITY SERVICE EMPLOYMENT PROGRAM (SCSEP):

A. Position allocation.

(1) The department will follow an equitable distribution plan pursuant to Section 507 of the Older Americans Act and 20 CFR Sections 641.140, 641.360, 641.365 and 641.879 (as amended) and endeavor to allocate positions to each county in New Mexico based on the projected percentage of individuals meeting the eligibility requirements of this section.

(2) When allocating positions, the equitable distribution of all senior community service employment program resources available through federal contractors operating in New Mexico will be considered.

(3) When a participant exits subsidized on-the-job training and a vacancy occurs, the vacant position is removed from the host agency and will be placed in a statewide pool and reassigned as follows:

(a) any inequities in the equitable distribution plan will be noted and the most under-served counties will have priority to receive the position;

(b) applicants will be sought or taken from a waiting list, if one exists;

(c) federally-mandated priorities and preferences will be implemented in accordance with Section 518 of the OLDER AMERICANS ACT and 20 CFR Sections 641.515 through 641.530 (as amended);

(d) chosen applicants will be assessed for their employment goals;

(e) host agencies that provide training which matches applicant goals will be chosen;

(f) in the event of more than one host agency that matches applicant goals, priority will be given to the host agency that demonstrates ability to provide training resulting in the unsubsidized employment of participants.

B. Eligibility requirements are:

(1) an applicant shall be 55 years of age or older in order to be determined eligible, no applicant may be determined ineligible because of advanced age, and no upper age limitation may be used;

(2) an applicant's income shall meet the eligibility requirements specified in the Older Americans Act in order to be determined eligible;

(3) an applicant shall be a resident of New Mexico, unless a cross-border agreement with a neighboring state exists, in order to be determined eligible;

(4) any additional requirements of the Older Americans Act, such as that an applicant be unemployed, will be implemented; and

(5) after completing an application, an applicant may need to disclose additional information or submit to additional screening in order to qualify for a specific placement at the discretion of the department and the host agency, including, but not limited to: background checks or proof of applicable licensure; (for example, work with young children or vulnerable adults may require a criminal background check, large vehicle operation may require a special driver's license, operation of heavy equipment or lifting heavy loads may require additional medical disclosure) failure to fully disclose information relevant to meeting the qualifications for a position may result in termination, change, or lack of placement.

C. An eligible applicant who has been accepted as a participant shall be offered a physical examination at the time of enrollment and annually thereafter. The participant may waive this benefit and shall do so in writing.

D. Senior community service employment program trainee participants are excluded from membership in the public employees retirement association.

E. Eligible participants shall be placed in on-the-job training positions that provide community service. Participants may not engage in political activities pursuant to Older Americans Act Section 502 (b)(1)(P) implemented at 20 CFR Section 641.836 (as amended).

F. Wages shall be at least the prevailing federal, state or local minimum wage, whichever is higher.

G. In compliance with the Fair Labor Standards Act of 1938, 29 U.S.C. Chapter 8 Section 201 et seq. (as amended), participants are not allowed to donate extra volunteer hours at work sites unless the volunteer work is substantially different than that required by their subsidized positions.

H. The department may transfer a participant from one host agency to another.

I. The department shall determine whether an agency or organization is eligible to be designated a host agency, pursuant to Older Americans Act Section 502(b)(1)(D) implemented at 20 CFR Sections 641.140 and 641.844 (as amended). Before a position can be assigned to the host agency, a proper agreement shall be executed.

J. The department shall develop and maintain policy and procedure manuals. Such manuals will designate participant benefits and other policies and procedures to enable the smooth operation of the program.

K. Participants shall be reimbursed mileage, per diem and other expenses only in accordance with policies and procedures developed by the department.

L. No waivers of the eligibility requirement under the senior community service employment program may be granted by the department.

[9.2.13.8 NMAC - Rp, SAA Rule No. 95-13.3, 02/12/2010]

9.2.13.9 NEW MEXICO SENIOR EMPLOYMENT PROGRAM:

A. The department will work in collaboration with area agencies on aging and other aging network providers to allocate positions within each planning and service area.

B. Eligibility requirements are:

(1) an applicant shall be 55 years of age or older in order to be determined eligible, no applicant may be determined ineligible because of advanced age, and no upper age limitation may be used; and

(2) an applicant's income shall meet the income eligibility requirements specified in the Older Americans Act Section 518 Paragraphs (3) and (4) as implemented at 20 CFR Part 641 (as amended) in order to be determined eligible; and

(3) an applicant shall be a resident of New Mexico in order to be determined eligible;

(4) after completing an application, an applicant may need to disclose additional information or submit to additional screening in order to qualify for a specific placement at the discretion of the department and the host agency, including, but not limited to: background checks or proof of applicable licensure; (for example, work with

young children or vulnerable adults may require a criminal background check, large vehicle operation may require a special driver's license, operation of heavy equipment or lifting heavy loads may require additional medical disclosure) failure to fully disclose information relevant to meeting the qualifications for a position may result in termination, change, or lack of placement.

C. An eligible applicant who has been accepted as a participant shall be offered a physical examination at the time of enrollment and annually thereafter. The participant may waive this benefit and shall do so in writing.

D. New Mexico senior employment program trainee participants are excluded from membership in the public employees retirement association.

E. Eligible participants shall not be placed in on-the-job training positions in which they engage in political or religious activities.

F. Wages shall be at least the prevailing federal, state or local minimum wage, -- whichever is higher.

G. In compliance with the Fair Labor Standards Act of 1938, 29 U.S.C. Chapter 8 Section 201 et seq. (as amended), participants are not allowed to donate extra volunteer hours at work sites unless the volunteer work is substantially different than that required by their subsidized positions.

H. The department may transfer a participant from one host agency to another.

I. The department shall determine whether an agency or organization is eligible to be designated a host agency. Before a position can be assigned to the host agency, a proper agreement shall be executed.

J. The department shall develop and maintain policy and procedure manuals. Such manuals will designate participant benefits and other policies and procedures to enable the smooth operation of the program.

K. Participants shall be reimbursed mileage, per diem and other expenses only in accordance with policies and procedures developed by the department.

L. Waivers of age and income eligibility requirements may be granted by the department on a case-by-case basis.

[9.2.13.9 NMAC - Rp, SAA Rule No. 95-13.4, 02/12/2010]

9.2.13.10 GOLD MENTOR PROGRAM:

A. GOLD mentor positions are created as funding is available. Allocation of positions under this program is developed in consultation with funding entities.

Considerations for allocation of positions may include the number of clients available for mentors to serve in a particular region and the availability of suitable office space.

B. Eligibility requirements are:

- (1) GOLD mentors shall be 50 years of age or older in order to be deemed eligible;
- (2) mentors shall be residents of New Mexico to be deemed eligible;
- (3) there are no income eligibility criteria;
- (4) after completing an application, an applicant may need to disclose additional information or submit to additional screening in order to qualify for a specific placement at the discretion of the department and the host agency, including, but not limited to: background checks or proof of applicable licensure; (for example, work with young children or vulnerable adults may require a criminal background check, large vehicle operation may require a special driver's license, operation of heavy equipment or lifting heavy loads may require additional medical disclosure) failure to fully disclose information relevant to meeting the qualifications for a position may result in termination, change, or lack of placement.

C. GOLD mentor trainee participants are excluded from membership in the public employees retirement association.

D. The department shall develop and maintain policy and procedure manuals. Such manuals will designate mentor benefits and other policies and procedures to enable the smooth operation of the program.

E. The GOLD mentors shall be reimbursed mileage, per diem and other expenses only in accordance with policies and procedures developed by the department.

F. Waivers of age eligibility requirements may be granted by the department on a case-by-case basis.

[9.2.13.10 NMAC - N, 02/12/2010]

9.2.13.11 GRIEVANCE PROCEDURE:

A. An applicant who has been determined ineligible for enrollment or placement in the programs created under this part may:

- (1) request a reconsideration regarding ineligibility from the employment programs bureau chief, either in person, by telephone, or in writing, within five calendar days of receipt of the notice of ineligibility determination;

(2) the bureau chief shall have ten calendar days from receipt of the request for reconsideration to review the documentation and make a second determination of eligibility;

(3) if the applicant still believes that the determination is incorrect, the applicant's next step is to contact the aging network division director in writing within ten calendar days of receipt of the bureau chief's ineligibility determination, challenging the reasons given for ineligibility, and providing accompanying documentation;

(4) after reviewing the challenge and accompanying documentation, the division director shall make a determination affirming or reversing the determination of eligibility by the bureau chief within ten calendar days of receiving the challenge; the division director's determination shall be final.

B. Any participant who believes that he or she has been subject to unfair treatment, discrimination, or harassment by a supervisor, manager, co-worker or a host agency may proceed as follows.

(1) Step 1: The participant may discuss a problem or grievance with the participant's supervisor, either in person, by telephone, or in writing, within five calendar days of the occurrence of the problem. The supervisor shall then work with the participant to provide a solution or an explanation within ten additional calendar days. If more time is required for the supervisor to provide a meaningful response, the participant will be notified of this fact and advised of the anticipated response date. In no event shall the supervisor extend the response date by more than 30 days from receipt of first notice. However, if the participant finds it difficult to discuss the problem with the supervisor, the participant may proceed directly to step 2.

(2) Step 2: If the problem or grievance remains unresolved to the participant's satisfaction after following Step 1, or if the participant found it difficult to discuss the problem with the supervisor, the participant may proceed to the host agency's next level of authority. The participant may discuss the problem with this level of authority, either in person, by telephone, or in writing, within five calendar days of the event giving rise to the grievance or the response of the supervisor in step 1. This level of authority shall then work with the participant to provide a solution and/or explanation within ten additional calendar days. If the participant feels that the problem continues to remain unresolved, the participant may proceed to step 3.

(3) Step 3: If the participant is unable to receive a satisfactory answer or resolution to the problem from the host agency in step 2, the participant may then submit a written grievance to the employment programs bureau chief within five days after the participant receives the response from the host agency in step 2. This written grievance shall include the following: the nature of the grievance, relevant facts and specific actions, and the requested relief or course of action. The bureau chief shall contact the participant within ten calendar days after receiving the written grievance, to obtain additional information relevant to the grievance. The bureau chief may

investigate the grievance and shall provide a written determination. This shall be mailed to the participant within 20 calendar days after the bureau chief's receipt of the grievance unless additional time is required for investigation. If additional time is required, the participant will be notified of that fact and advised of the response date. In no event shall the bureau chief extend the response date by more than 30 days from receipt of first notice.

(4) If the problem or grievance remains unresolved to the participant's satisfaction following step 3, the participant may follow the appeal procedure outlined 9.2.13.12 NMAC.

[9.2.13.11 NMAC - N, 02/12/2010]

9.2.13.12 RIGHT OF APPEAL OF PARTICIPANTS:

A. Participants in programs created under this part have a right of appeal in the following circumstances:

(1) when participation has been involuntarily terminated by written notification from the department; or

(2) when deemed ineligible for continued enrollment by written notification from the department; or

(3) when, after following the grievance procedure outlined in Subsection B of 9.2.13.11 NMAC, the problem or grievance remains unresolved.

B. Appeal procedures for program participants who meet the criteria set forth in Subsection A of this section:

(1) an appeal, pursuant to Subsection A of this section, shall be submitted in writing to the director of the aging network division within five working days following receipt of the notice of action;

(2) the aging network division director shall contact the participant within ten calendar days after receiving the written appeal to confirm receipt of the appeal and provide an opportunity to obtain additional information relevant to the appeal;

(3) after affording the applicant the opportunity to produce additional relevant information, the aging network division director shall provide a written decision in response to the appeal within 25 calendar days following contact with the participant;

(4) the aging network division director's decision shall be final and binding;

(5) complaints of violations of federal law that cannot be resolved within 60 days as a result of this appeal procedure may be filed with the employment and training administration of the United States department of labor or other appropriate entities.

[9.2.13.12 NMAC - N, 02/12/2010]

PART 14: STATE FUNDED FOSTER GRANDPARENT PROGRAM

9.2.14.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO).

[9.2.14.1 NMAC - Rp, SAA Rule No. 95-14.1, 6/30/2015]

9.2.14.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability population.

[9.2.14.2 NMAC - Rp, SAA Rule No. 95-14.2, 6/30/2015]

9.2.14.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.14.3 NMAC - Rp, SAA Rule No. 95-14.3, 6/30/2015]

9.2.14.4 DURATION:

Permanent.

[9.2.14.4 NMAC - Rp, SAA Rule No. 95-14.4, 6/30/2015]

9.2.14.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.14.5 NMAC - Rp, SAA Rule No. 95-14.5, 6/30/2015]

9.2.14.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the state-funded foster grandparent programs administered by the aging and long-term services department.

[9.2.14.6 NMAC - Rp, SAA Rule No. 95-14.6, 6/30/2015]

9.2.14.7 DEFINITIONS:

The Foster Grandparent Program provides contracts to qualified organizations for the dual purposes of engaging persons 55 and older, particularly those with limited incomes, in volunteer service to meet critical community needs and of providing high-quality experiences that will enrich the lives of the volunteers. Foster grandparents provide supportive, person-to-person services to children who have exceptional needs, or who are in circumstances that limit their academic, social, or emotional development. State-funded foster grandparents may receive stipends to support their volunteer work.

[9.2.14.7 NMAC - Rp, SAA Rule No. 95-14.7, 6/30/15]

9.2.14.8 LEGAL REFERENCES:

Domestic Volunteer Service Act of 1973, 42 U.S.C. Sections 4950 to 5085; 42 U.S.C. Section 12651; Foster Grandparent Program, 45 C.F.R Section 2552.

[9.2.14.8 NMAC - Rp, SAA Rule No. 95-14.8, 6/30/2015]

9.2.14.9 CORPORATION FOR NATIONAL AND COMMUNITY SERVICE HANDBOOK:

A. The department adopts the most current corporation for national and community service (CNCS) foster grandparent program handbook as the operating rules and procedures with which state-funded foster grandparent programs must comply.

B. Eligibility for state-funded foster grandparent programs is the same as for the CNCS program. However, the department secretary may waive any provisions of the CNCS handbook except those which will jeopardize a program's continued federal sponsorship.

[9.2.14.9 NMAC - Rp, SAA Rule No. 95-14.9, 6/30/2015]

9.2.14.10 DEPARTMENT RESPONSIBILITIES:

The department shall:

A. Allocate funds appropriated by the state legislature:

- (1)** To current contractors to maintain or enhance levels of operation; and
- (2)** Expand services based on determined need;

B. Contract with new organizations to the extent that funds are available;

C. Conduct at least one assessment of each contractor every two years; and

D. Provide training and technical assistance to volunteers and employees of contract organizations.

[9.2.14.10 NMAC - Rp, SAA Rule No. 95-14.10, 6/30/2015]

9.2.14.11 CONTRACTOR RESPONSIBILITIES:

Contractors shall:

A. Comply with federal and state regulations and policies, except to the extent that the department has granted a waiver of any federal policies.

B. Submit an annual budget proposal and work plan in the format established by the department.

C. Submit monthly financial expenditure reports and requests for reimbursement to the department, as requested.

D. Submit reports to the department in the form and manner required and specified by the department in the contract scope of work.

E. Submit an annual financial audit as requested by the department.

F. Coordinate with other aging network providers, particularly in the areas of transportation, outreach, and supportive services.

G. Attend required meetings and training sessions; and.

H. Budget sufficient state funds to allow at least one (1) representative to attend the annual New Mexico conference on aging and one (1) state aging network training session.

[9.2.14.11 NMAC - Rp, SAA Rule No. 95-14.11, 6/30/2015]

PART 15 STATE-FUNDED SENIOR COMPANION PROGRAM

9.2.15.1 ISSUING AGENCY:

New Mexico Aging and Long-Term Services Department (NMALTSO).

[9.2.15.1 NMAC - Rp, SAA Rule No. 95-15.1, 6/30/2015]

9.2.15.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.15.2 NMAC - Rp, SAA Rule No. 95-15.2, 6/30/2015]

9.2.15.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.15.3 NMAC - Rp, SAA Rule No. 95-15.3, 6/30/2015]

9.2.15.4 DURATION:

Permanent.

[9.2.15.4 NMAC - Rp, SAA Rule No. 95-15.4, 6/30/2015]

9.2.15.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.15.5 NMAC - Rp, SAA Rule No. 95-15.5, 6/30/2015]

9.2.15.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the state-funded senior companion programs administered by the aging and long term services department.

[9.2.15.6 NMAC - Rp, SAA Rule No. 95-15.6, 6/30/2015]

9.2.15.7 DEFINITIONS:

The senior companion program (SCP) provides contracts to qualified organizations for the dual purposes of engaging persons fifty-five (55) and older, particularly those with limited incomes, in volunteer service to meet critical community needs and of providing high quality experiences that will enrich the lives of the volunteers. Senior companions provide supportive, individualized services to help older adults with special needs maintain their dignity and independence. State-funded senior companions may receive stipends to support their volunteer work.

[9.2.15.7 NMAC - Rp, SAA Rule No. 95-15.7, 6/30/2015]

9.2.15.8 LEGAL REFERENCES:

Domestic Volunteer Service Act of 1973, 42 U.S.C. Sections 4950 to 5085; 42 U.S.C. Section 12651; Senior Companion Program, 45 C.F.R. Section 2551.

[9.2.15.8 NMAC - Rp, SAA Rule No. 95-15.8, 6/30/2015]

9.2.15.9 CORPORATION FOR NATIONAL AND COMMUNITY SERVICE HANDBOOK:

A. The department adopts the most current corporation for national and community service (CNCS) Senior Companion Program handbook as the operating rules and procedures with which state-funded senior companion programs must comply.

B. Eligibility for state-funded senior companion programs is the same as for the CNCS program. However, the department secretary may waive any provisions of the CNCS handbook except those which will jeopardize a program's continued federal sponsorship.

[9.2.15.9 NMAC - Rp, SAA Rule No. 95-15.9, 6/30/2015]

9.2.15.10 DEPARTMENT RESPONSIBILITIES:

The department shall:

A. Allocate funds appropriated by the state legislature:

- (1) To current contractors to maintain or enhance levels of operation; and
- (2) To expand services based on determined need.

B. Contract with new organizations to the extent that funds are available;

C. Conduct at least one (1) assessment of each contractor every two (2) years; and

D. Provide training and technical assistance to volunteers and staff of contract organizations.

[9.2.15.10 NMAC - Rp, SAA Rule No. 95-15.10, 6/30/2015]

9.2.15.11 CONTRACTOR RESPONSIBILITIES:

Contractors shall:

A. Comply with federal and state regulations and policies, except to the extent that the department has granted a waiver of any federal policies.

B. Submit an annual budget proposal and work plan in the format established by the department.

C. Submit monthly financial expenditure reports and requests for reimbursement to the department, as requested.

D. Submit reports to the department in the form and manner required and specified by the department in the contract scope of work.

E. Submit an annual financial audit as requested by the department.

F. Coordinate with other aging network providers, particularly in the areas of transportation, outreach, and supportive services.

G. Attend required meetings and training sessions; and.

H. Budget sufficient state funds to allow at least one (1) representative to attend the annual New Mexico conference on aging and one (1) state aging network training session.

[9.2.15.11 NMAC - Rp, SAA Rule No. 95-15.11, 6/30/2015]

PART 16: STATE FUNDED RETIRED SENIOR VOLUNTEER PROGRAM

9.2.16.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSB)

[9.2.16.1 NMAC - Rp, SAA Rule No. 95-16.1, 6/30/2015]

9.2.16.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.16.2 NMAC - Rp, SAA Rule No. 95-16.2, 6/30/2015]

9.2.16.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.16.3 NMAC - Rp, SAA Rule No. 95-16.3, 6/30/2015]

9.2.16.4 DURATION:

Permanent.

[9.2.16.4 NMAC - Rp, SAA Rule No. 95-16.4, 6/30/2015]

9.2.16.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.16.5 NMAC - Rp, SAA Rule No. 95-16.5, 6/30/2015]

9.2.16.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the state-funded retired senior volunteer programs administered by the aging and long term services department.

[9.2.16.6 NMAC - Rp, SAA Rule No. 95-16.6, 6/30/2015]

9.2.16.7 DEFINITIONS:

The retired senior volunteer program (RSVP) provides contracts to qualified organizations and local and tribal governments for the dual purposes of engaging older individuals in volunteer service to meet critical community needs and of providing high quality experiences that will enrich the lives of the volunteers. RSVP matches older individuals with community projects and organizations needing volunteer talent, abilities and skills.

[9.2.16.7 NMAC - Rp, SAA Rule No. 95-16.7, 6/30/2015]

9.2.16.8 LEGAL REFERENCES:

Domestic Volunteer Service Act of 1973, 42 U.S.C. Sections 4950 to 5085; 42 U.S.C. Section 12651; Retired Senior Volunteer Program, 45 C.F.R. Section 2553.

[9.2.16.8 NMAC - Rp, SAA Rule No. 95-16.8, 6/30/2015]

9.2.16.9 CORPORATION FOR NATIONAL AND COMMUNITY SERVICE HANDBOOK:

A. The department adopts the most current corporation for national and community service (CNCS) retired senior volunteer program handbook as the operating rules and procedures with which state-funded retired senior volunteer programs must comply.

B. Eligibility for state-funded retired senior volunteer programs is the same as for the CNCS program. However, the department secretary may waive any provisions of

the CNCS handbook except those which will jeopardize a program's continued federal sponsorship.

[9.2.16.9 NMAC - Rp, SAA Rule No. 95-16.9, 6/30/2015]

9.2.16.10 DEPARTMENT RESPONSIBILITIES:

The department shall:

- A.** Allocate funds appropriated by the state legislature.
 - (1)** To current contractors to maintain or enhance levels of operation; and
 - (2)** To expand services based on determined need.
- B.** Contract with new organizations to the extent that funds are available.
- C.** Conduct at least one (1) assessment of each contractor every two (2) years; and.
- D.** Provide training and technical assistance to volunteers and employees of contract organizations.

[9.2.16.10 NMAC - Rp, SAA Rule No. 95-16.10, 6/30/2015]

9.2.16.11 CONTRACTOR RESPONSIBILITIES:

Contractors shall:

- A.** Comply with federal and state regulations and policies, except to the extent that the department has granted a waiver of any federal policies.
- B.** Submit an annual budget proposal and work plan in the format established by the department.
- C.** Submit monthly financial expenditure reports and requests for reimbursement to the department as requested.
- D.** Submit reports to the department in the form and manner required and specified by the department in the contract scope of work.
- E.** Submit an annual financial audit as requested by the department.
- F.** Coordinate with other aging network providers, particularly in the areas of transportation, outreach and supportive services.
- G.** Attend required meetings and training sessions; and.

H. Budget sufficient state funds to allow at least one representative to attend the annual New Mexico conference on aging and one (1) state aging network training session.

[9.2.16.11 NMAC - Rp, SAA Rule No. 95-16.11, 6/30/2015]

PART 17: LEGAL ASSISTANCE SERVICES

9.2.17.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO)

[9.2.17.1 NMAC - Rp, SAA Rule No. 95-17.1, 6/30/2015]

9.2.17.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.17.2 NMAC - Rp, SAA Rule No. 95-17.2, 6/30/2015]

9.2.17.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.17.3 NMAC - Rp, SAA Rule No. 95-17.3, 6/30/2015]

9.2.17.4 DURATION:

Permanent.

[9.2.17.4 NMAC - Rp, SAA Rule No. 95-17.4, 6/30/2015]

9.2.17.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.17.5 NMAC - Rp, SAA Rule No. 95-17.5, 6/30/2015]

9.2.17.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long term services department.

[9.2.17.6 NMAC - Rp, SAA Rule No. 95-17.6, 6/30/2015]

9.2.17.7 DEFINITIONS:

A. A "fee generating case" includes any matter which, if undertaken by a private legal practitioner on behalf of a client, could reasonably be expected to result in an awarded legal fee directly payable out of the amount awarded the client from the opposing parties, or from public funds.

B. "Legal assistance" means legal advice, education and representation provided by an attorney to older individuals with economic or social needs; and includes, to the extent feasible, counseling or other appropriate assistance provided by a paralegal or law student under the direct supervision of a licensed attorney; and counseling and representation provided by a non-lawyer where permitted by law.

C. "Legal assistance providers" are those who, pursuant to the Older Americans Act, Title III B, provide services, legal assistance and other counseling services and assistance.

D. "Means test" is defined as the use of an older individual's income or resources to deny or limit that individual's receipt of services.

[9.2.17.7 NMAC - Rp, SAA Rule No. 95-17.7, 6/30/2015]

9.2.17.8 LEGAL REFERENCES:

[RESERVED]

[9.2.17.8 NMAC - Rp, SAA Rule No. 95-17.8, 6/30/2015]

9.2.17.9 ALLOWABLE SERVICES:

A. Providers of legal assistance, funded by the department, must provide such services to New Mexicans age sixty (60) or older and others as described in contracts supported by state funds. Allowable services include, but are not limited to:

(1) Direct service delivery programs using staff attorneys, paralegals, law students and/or other non-lawyers under the direct supervision of an attorney;

(2) Legal clinics which combine education addressing specific legal issues or topics of concern to older individuals, outreach and intake efforts that target those in greatest social and economic need, and the direct provision of legal advice, representation, and follow-up services to individuals in attendance;

(3) Interactive workshops at which the individuals in attendance are counseled and provided with direct legal assistance with regard to legal and elder rights issues;

(4) Referral programs enlisting the services of a panel of volunteer attorneys to provide direct *pro bono* legal assistance;

(5) Impact case work, for example, lawsuits that benefit entire classes of clients, nursing home reform efforts, and Medicaid advocacy;

(6) The production and provision of educational materials and other legal resources for the benefit of New Mexicans age sixty (60) or older and others as described in contracts supported by state funds; and

(7) Any programs using any combinations of the activities described above.

B. Legal assistance services cannot include legal representation in any fee generating case, unless other adequate representation is unavailable or there is an emergency requiring immediate legal action.

[9.2.17.9 NMAC - Rp, SAA Rule No. 95-17.9, 6/30/2015]

9.2.17.10 SELECTION OF PROVIDERS:

The department or an area agency on aging shall consider the following factors when awarding funds to legal assistance providers:

A. Staff with expertise in those specific areas of law affecting older individuals in greatest economic and greatest social need, such as income, public benefits, institutionalization and alternatives to institutionalization, defense of guardianships, protective services, age discrimination, health care, long-term care, nutrition, housing, utilities and abuse and neglect.

B. The ability to develop and implement outreach efforts designed to identify and serve targeted populations.

C. The ability to provide administrative and judicial representation in the specific areas of law affecting older individuals in greatest economic and greatest social need.

D. The ability to provide legal services to institutionalized, isolated and homebound older individuals.

E. The ability to provide legal assistance in the principal language spoken by clients in those areas of the state where a significant number of clients do not speak English as their principal language.

F. The ability to provide support and advice to the long-term care ombudsman program.

G. The ability to provide support to aging network elder rights initiatives.

H. The ability to provide support to other advocacy efforts, adult protective services, and protection and advocacy and public guardianship programs; and.

I. A commitment to the statewide aging network, including participation in aging network training sessions; coordination with, and referrals to and from, other service providers; involvement in local and statewide publicity efforts to identify the availability of legal assistance services; and training local service providers, site managers, staff, and the like as to the availability and extent of legal assistance services.

[9.2.17.10 NMAC - Rp, SAA Rule No. 95-17.10, 6/30/2015]

9.2.17.11 EVALUATING PROVIDERS:

The department or area agencies on aging should evaluate providers at least annually using procedures and instruments developed by such groups as the National senior citizens law center, the center for social gerontology, or other similar groups with proven experience in the evaluation of Older Americans Act, Title III(B), legal assistance providers. If applicable, random tests of client services should be administered in the evaluation process. Copies of written evaluations conducted by area agencies on aging must be provided to the department when they are released to the providers.

[9.2.17.11 NMAC - Rp, SAA Rule No. 95-17.11, 6/30/2015]

9.2.17.12 MEANS TEST AND TARGETING:

A. Legal assistance providers may not use a means test as a criterion for determining whether an individual is entitled to legal assistance services. Legal assistance providers may question an older individual about his/her financial circumstances as part of the process of providing legal advice, counseling and representation, or for the purpose of identifying additional resources and benefits for which an older individual may be eligible.

B. The Older Americans Act requires that providers target minority older individuals with low incomes, older individuals residing in rural areas, and older individuals with the greatest economic and social needs.

[9.2.17.12 NMAC - Rp, SAA Rule No. 95-17.12, 6/30/2015]

9.2.17.13 CONFIDENTIALITY:

Legal assistance providers shall not be required to reveal any information that is protected by the attorney-client privilege. The fiduciary relationship between lawyer and client and the proper functioning of the legal system require the lawyer to preserve client confidences and secrets. Legal assistance providers must comply with client confidentiality requirements, as defined in the Older Americans Act, and all federal and state financial management requirements, including the collection, documentation and use of program income.

[9.2.17.13 NMAC - Rp, SAA Rule No. 95-17.13, 6/30/2015]

9.2.17.14 COORDINATION WITH LEGAL SERVICES CORPORATION AND OTHER SEPARATELY FUNDED LEGAL ASSISTANCE PROGRAMS:

Legal assistance providers must coordinate with legal services corporation (LSC) providers and any other providers of legal assistance to older individuals to supplement current service levels. Area agencies on aging and providers must also attempt to involve the private bar on a reduced fee and *pro bono* basis.

[9.2.17.14 NMAC - Rp, SAA Rule No. 95-17.14, 6/30/2015]

PART 18: NUTRITION SERVICES

9.2.18.1 ISSUING AGENCY:

New Mexico Aging and Long-Term Services Department (NMALTSO)

[9.2.18.1 NMAC - Rp, 9.2.18.1 NMAC, 6/30/2015]

9.2.18.2 SCOPE:

These rules apply to members of the public and organizations that participate in the delivery of services to New Mexico's aging and disability populations.

[9.2.18.2 NMAC - Rp, 9.2.18.2 NMAC, 6/30/2015]

9.2.18.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.18.3 NMAC - Rp, 9.2.18.3 NMAC, 6/30/2015]

9.2.18.4 DURATION:

Permanent.

[9.2.18.4 NMAC - Rp, 9.2.18.4 NMAC, 6/30/2015]

9.2.18.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.18.5 NMAC - Rp, 9.2.18.5 NMAC, 6/30/2015]

9.2.18.6 OBJECTIVE:

The objective of this rule is to establish standards and procedures for the federal and state-funded programs administered by the aging and long term services department.

[9.2.18.6 NMAC - Rp, 9.2.18.6 NMAC, 6/30/2015]

9.2.18.7 DEFINITIONS:

The following words and terms, when used in this part, shall have the following meanings:

A. "Congregate meals" are meals provided to eligible individuals in a group setting and which must meet recommended dietary allowance requirements and comply with dietary reference intake standards.

B. "Dessert" includes, but is not limited to, pudding, custard, plain or fruited gelatin, baked goods, ice cream, ice milk, yogurt, sherbet, other frozen desserts and ethnic desserts. If gelatin or other desserts contain at least half (½) cup serving of fruit, they also meet the fruit requirement.

C. "Dietary Reference Intake Standards" are a set of guidelines for the daily intake of vitamins, minerals, protein, fats, fiber and other nutrients and food components that include recommended daily allowances, adequate daily intake values, and tolerable upper level values of daily intake.

D. "Guest" is an individual under the age of sixty (60) who is not eligible for meals funded by the Older Americans Act.

E. "Fats" include, but are not limited to, fortified margarine, gravy, mayonnaise, or salad dressing necessary to increase palatability and acceptability of a meal. Low fat or fat-free varieties are recommended.

F. "Homebound" means an individual who has difficulty leaving home without assistance because of a disabling physical, emotional or cognitive impairment.

G. "Home delivered meals" are meals delivered to the homes of eligible homebound individuals which must meet recommended dietary allowance requirements, and comply with dietary reference intake standards.

H. "Meat" includes, but is not limited to, poultry, fish, game, red or white meat; it shall not include cured or processed meat high in fat or sodium more than two (2) times per month.

I. "Meat alternates" includes, but is not limited to, eggs, cheese, soy and legumes (cooked dried beans and peas, lentils). One (1/2)-half cup cooked legumes is equivalent to one ounce of meat. Legumes may be counted as either a meat or a vegetable.

J. "Milk" includes, but is not limited to, skim milk, two percent (2%) milk, whole milk, low fat chocolate milk and buttermilk fortified with vitamins A and D.

K. "Nutrition professional" includes home economists, nutritionists and registered dietitians.

L. "Nutrition service provider" is a contractor selected by an area agency on aging to provide congregate or home-delivered meals in a specified geographical location(s).

M. "Recommended dietary allowance" or "RDA" is the average dietary intake level that is sufficient to meet the nutrient requirements of ninety-eight percent (98%) of healthy individuals in the U.S. The RDA as referenced in this section is for older adults.

N. "Staff" may include employees, volunteers, and others engaged in work related to the operation of nutrition programs.

O. "Standard breakfast meal pattern" (when served in combination with a lunch) includes two (2) servings of bread or cereal, one (1) half cup serving of fruit or fruit juice, and eight (8) ounces low fat milk; and may include one (1) teaspoon of fats. When served without a lunch, the breakfast shall include one (1) ounce of cooked edible portion of meat or meat alternates.

P. "Standard lunch meal pattern" includes three (3) ounces meat or meat alternates, two (2) half cup servings of vegetable(s), one (1) half cup serving of fruit (a minimum of three (3) times per week), one (1) or more serving(s) of whole grain or enriched bread, eight (8) ounces of low fat milk, one (1)-half cup of dessert (optional if fruit is served), and may include one (1) teaspoon of fats.

Q. "Therapeutic diet" is a diet prescribed by a physician or other primary care practitioner, as part of treatment for a disease, clinical condition or metabolic disorder, to eliminate, decrease or increase specific nutrients. Liquid formula meals are considered therapeutic diets and must meet therapeutic diet requirements. A "no sugar added" or "no sodium added" meal is not bound by therapeutic diet requirements.

R. "Variance" is the difference between the number of meals prepared and the number of meals served, expressed in a percent.

S. "Vegetables" include, but are not limited to, red or green chile. Rice or pasta may not be counted as a vegetable.

T. "Whole grain or enriched bread or bread alternate" means biscuits, muffins, rolls, sandwich buns, corn bread, tortillas, wheat breads and ethnic breads. The use of whole grain products is strongly encouraged. Alternates include, but are not limited to, rice, barley, bulgur, pasta, dumplings, pancakes, waffles, and high fiber/vitamin fortified cereals with no added sugar. Starchy vegetables such as potatoes, yams, sweet potatoes, green peas, corn or legumes may not be counted as bread.

[9.2.18.7 NMAC - Rp, 9.2.18.7 NMAC, 6/30/2015]

9.2.18.8 DEPARTMENT RESPONSIBILITIES:

The department shall:

A. Review and approve area plans, which contain plans for providing nutrition services.

B. Monitor and assess area agencies on aging for compliance with these rules.

C. Provide technical assistance in the areas of nutrition, meal preparation, menu planning, and meal delivery.

D. Conduct or coordinate training.

E. Develop eligibility criteria for home-delivered meals; and.

F. Review and grant or deny any waivers to this rule as requested by area agencies on aging. Such waivers shall not override applicable regulations issued by other state or local agencies that regulate food service and sanitation.

[9.2.18.8 NMAC - Rp, 9.2.18.8 NMAC, 6/30/2015]

9.2.18.9 AREA AGENCY ON AGING RESPONSIBILITIES:

Area agencies on aging shall:

A. Assess the need for nutrition services and further develop eligibility criteria in the planning and service area(s) administered.

B. Select nutrition service providers through a competitive bid process, which may include a multi-year request for proposals.

C. Monitor the performance of nutrition services, including conducting at least one annual assessment of each provider.

D. Approve the menu used each month for each provider which must be:

- (1)** Evaluated with a computer software program; or
- (2)** Evaluated and signed by a nutrition professional; or
- (3)** Approved by the department.

E. Provide monthly meal counts to the department by the deadline established.

F. Ensure that providers develop and maintain policies for cancellation of services due to inclement weather.

G. Implement criteria developed by the department and area agency on aging to be used by providers to determine eligibility for home-delivered meals.

H. Designate an individual with overall responsibility to plan, develop, coordinate and administer the nutrition program.

I. Ensure that service providers develop and maintain inventory control systems to account for food and supplies purchased and used. Evaluate meal cost and variance at least annually.

J. Ensure that service providers develop and coordinate nutrition education activities for participants at congregate meal sites and for those receiving home delivered meals.

K. Provide technical assistance and ongoing training to staff and service providers in the areas of nutrition, purchasing, sanitation, safety, inventory, portion control, meal preparation, meal planning, and other relevant topics.

L. Ensure that all participants receive nutritional screening upon entry into the program and at least annually thereafter. Those participants evaluated at high risk may be screened more frequently as circumstances dictate.

M. Develop, approve, and ensure compliance of service providers with regard to measuring, maintaining, and documenting adequate temperature controls for home delivered meals. If the method utilized relies on test meals, such tests shall be conducted no less than monthly and the test meal temperature recorded at the beginning and end of each home delivery route; and.

N. Ensure that service providers solicit the advice of nutrition professionals, participants, and others knowledgeable about the needs of older individuals in planning nutrition services.

[9.2.18.9 NMAC - Rp, 9.2.18.9 NMAC, 6/30/2015]

9.2.18.10 NUTRITION SERVICE PROVIDER RESPONSIBILITIES:

Nutrition service providers shall:

A. Establish and administer nutrition program(s) with the advice of nutrition professionals, participants, and others knowledgeable about the needs of older individuals.

B. Provide eight (8) hours per year of food service training to nutrition staff.

C. Provide congregate, home-delivered meals, or both, on a regularly scheduled basis.

D. Assess the need for home-delivered meals based on established criteria.

E. Have a disaster plan in place to address the availability of meals in emergencies.

F. Maintain required food services licensure or certification.

G. Prepare, publicize, and adhere to a monthly menu that meets the dietary needs and ethnic and cultural preferences of participants.

H. Conduct and document testing and temperature control procedures to ensure that meals are served or delivered at appropriate temperatures.

I. Conduct outreach at least annually to ensure that the maximum number of eligible persons have the opportunity to participate in the program.

J. Provide nutrition education for participants at each congregate meal site at least every three (3) months for fifteen (15) minutes or more and provide nutrition education for home-delivered meal recipients through materials sent to the home, home visits, or telephone contact at least twice annually.

K. Report cases of suspected abuse, neglect, and exploitation to adult protective services; report to designated authorities any conditions or circumstances which place participants in imminent danger.

L. Obtain prior written approval of the area agency on aging that funds the program prior to cancelling services, closing a site or reducing days of operation, except in the case of inclement weather per area agency on aging policy.

M. Maintain, at a minimum, the following:

- (1) Documentation identifying participants, guests, and staff;
- (2) Monthly menus verified for nutritional requirements as specified in this rule;
- (3) Documentation of nutrition education provided to participants;
- (4) Documentation of food service training provided to nutrition program staff; and
- (5) Daily temperature logs for freezers, refrigerators, and food.

N. Persons under the age of eligibility may consume a meal when it will not deprive an eligible individual of a meal. These persons must pay the full cost of the meal.

[9.2.17.10 NMAC - Rp, 9.2.18.10 NMAC, 6/30/2015]

9.2.18.11 MENU REQUIREMENTS:

All meals served must:

A. Meet recommended dietary allowance requirements, or dietary reference intake standards.

B. Provide for no more than thirty percent (30%) of total calories from fat.

C. Follow the U.S. dietary guidelines; and.

D. Comply with the standard breakfast meal and standard lunch meal patterns as defined in 9.2.18.7 NMAC.

[9.2.18.11 NMAC - Rp, 9.2.18.11 NMAC, 6/30/2015]

9.2.18.12 FOOD PREPARATION AND SERVICE REQUIREMENTS:

Providers must:

A. Comply with all state and local health laws and ordinances governing procurement, preparation, handling and serving of food.

B. Keep a copy of current state and local food service regulations; and review these annually with staff.

C. Submit to inspections by state and local authorities and promptly correct any deficiencies.

D. Serve food within thirty (30) minutes after preparation or refrigerate food until ready for use or maintain food at an appropriate temperature as described in 9.2.18.16 NMAC.

E. Bring the internal temperature of food served hot to a temperature of at least one hundred sixty-five (165) degrees Fahrenheit (F) during cooking or reheating.

F. Maintain hot foods at one hundred forty (140) degrees F or higher and maintain cold foods at forty (40) degrees F or lower, until served.

G. Not use steam tables or hot food tables to reheat prepared foods.

H. Provide meals that are reflective of participant choice, religion, ethnicity, and culture, and are attractive, palatable and appealing, and contain a variety of color and texture.

I. Minimize leftover food by developing accurate production forecasting. A maximum ten percent (10%) variance between the number of leftover meals and the number of meals served is the target. Leftover food may be served to participants within forty-eight (48) hours of preparation if proper food handling and storage techniques have been implemented.

J. Exercise discretion as to whether to permit leftover food from a meal to be taken from the site by a participant; and.

K. Obtain all commercial foods from vendors that comply with all laws relating to food and food labeling. Commercially packaged food must arrive in containers with labels, and, must have been stored at all times at appropriate temperatures. Fresh or frozen meat, poultry or fish must be processed to comply with all safety requirements. Fresh produce-must be in good condition, free from spoilage, filth or other contamination, and safe for human consumption. Use of home prepared or home canned food is prohibited.

[9.2.18.12 NMAC - Rp, 9.2.18.13 NMAC, 6/30/2015]

9.2.18.13 THERAPEUTIC DIETS:

Therapeutic diets may be provided when:

A. A sufficient number of persons require therapeutic diets and the program determines it has the ability to prepare them.

B. The food and skills necessary to prepare therapeutic diets are available to the program, including the supervision of a registered dietitian; or the meals are purchased from a hospital or similar facility at which meal preparation is supervised by a registered dietitian.

C. A written diet order, signed by a physician, is on file; and.

D. The need of each individual is reassessed as determined by the physician.

[9.2.18.13 NMAC - Rp, 9.2.18.14 NMAC, 6/30/2015]

9.2.18.14 CONGREGATE MEAL SITE REQUIREMENTS:

A. Meal sites shall be located as close as possible to the residences of the majority of eligible individuals with the greatest economic and social needs.

B. Meal sites must not restrict participation or illegally discriminate in any way.

C. Meal sites must comply with all applicable federal, state and local health, fire, safety, building, accessibility, zoning and sanitation laws, ordinances, or codes, and, at a minimum, each meal site must:

(1) Conduct evacuation drills twice per year;

(2) Maintain a basic first aid kit on the premises at all times;

(3) Maintain a fire extinguisher on the premises at all times with a current inspection tag; and

(4) Meet Americans with Disabilities Act access guidelines;

D. Meal sites must post, in a conspicuous location, the following information:

(1) The rights of eligible individuals to equal opportunity and access to services;

(2) Policy for serving guests and staff;

(3) The full cost of the meal;

(4) The recommended amount for contributions from participants and how contributions are used;

(5) Menus for a minimum of one week in advance;

(6) Grievance procedures for participants; and

(7) An evacuation plan;

E. Meal sites shall conform to state and local no smoking ordinances, but at a minimum:

(1) Smoking shall not be permitted in food preparation and food serving areas;

(2) Smoking in dining rooms shall not be permitted during meal times; and

(3) Signs shall be posted in all non-smoking areas;

[9.2.18.14 NMAC - Rp, 9.2.18.15 NMAC, 6/30/2015]

9.2.18.15 HOME-DELIVERED MEAL SERVICE REQUIREMENTS:

A. Providers must implement procedures for determining participant eligibility and assessing the need for service. This includes, at a minimum:

(1) An initial home visit to assess need within fifteen (15) working days of beginning service; and

(2) Six (6)-month reassessment of individuals whose eligibility is subject to change.

B. Providers must implement procedures for addressing other participant needs identified during assessment or in the process of serving participants.

C. Only trained nutrition program meal delivery staff may deliver meals.

D. Supplies, carriers and vehicles that maintain appropriate temperatures must be used to transport hot and cold foods; hot foods must be packaged and transported in separate carriers from cold foods.

E. Potentially hazardous foods (such as eggs or milk or foods prepared with eggs or milk) must be pre-chilled and kept at forty (40) degrees F or below.

F. Hot foods must be kept at one hundred forty (140) degrees F or above, except during periods of preparation.

G. Meal carriers must be cleaned and sanitized daily or have a sanitized inner liner.

H. Meals must be packed and sealed to provide easy access for participants while minimizing food spillage and damage.

I. Dried foods or shelf-stable meals must be packaged and transported in covered containers and instructions for rehydration or heating provided with each meal.

J. Frozen or chilled meals may only be used if:

(1) The provider and the participant are able to provide safe conditions for storage, thawing and reheating;

(2) The frozen food is appropriately packaged and kept at thirty two (32) degrees F or below until it is thawed for use;

(3) Instructions for proper storage and heating are provided to each participant by methods determined by an area agency on aging to be effective; and

(4) Providers have developed procedures for delivering other supportive services to participants to prevent isolation.

[9.2.18.15 NMAC - Rp, 9.2.18.16 NMAC, 6/30/2015]

9.2.18.16 NUTRITION SERVICES INCENTIVE PROGRAM (NSIP):

A. The Older Americans Act, Section 311, rewards federally funded nutrition programs.

B. Any meal served by a provider to eligible individuals which meets RDA requirements, regardless of funding source, shall be reported for NSIP assistance. However, only programs funded with Title III federal funds are eligible to receive assistance.

C. NSIP funding must only be used to purchase food which is grown or processed in the United States. Coffee, tea, cocoa, decaffeinated beverages, fruits, and vegetables grown outside of the U.S. are not reimbursable.

[9.2.18.16 NMAC - Rp, 9.2.18.17 NMAC, 6/30/2015]

PART 19: LONG TERM CARE OMBUDSMAN

9.2.19.1 ISSUING AGENCY:

New Mexico Aging and Long-Term Services Department.

[9.2.19.1 NMAC - Rp, 9.2.19.1 NMAC, 12/29/2017]

9.2.19.2 SCOPE:

These rules apply to the department, its office of the state-term care ombudsman (office

ombudsmen), ombudsmen, including the state long-term care ombudsman (state ombudsman) certified staff and volunteers, provider agencies, private nonprofit organizations and area agencies on aging.

[9.2.19.2 NMAC - Rp, 9.2.19.2 NMAC, 12/29/2017]

9.2.19.3 STATUTORY AUTHORITY:

Older Americans Act of 1965 (OAA), 42 USC 3001, *et seq.*, as amended; New Mexico Long-Term Care Ombudsman Act, New Mexico Statutes Annotated 28-17-1 *et seq.*

[9.2.19.3 NMAC - Rp, 9.2.19.3 NMAC, 12/29/2017]

9.2.19.4 DURATION:

Permanent.

[9.2.19.4 NMAC - Rp, 9.2.19.4 NMAC, 12/29/2017]

9.2.19.5 EFFECTIVE DATE:

December 29, 2017 unless a later date is stated at the end of a section.

[9.2.19.5 NMAC - Rp, 9.2.19.5 NMAC, 12/29/2017]

9.2.19.6 OBJECTIVE:

These rules govern the conduct of the office in fulfilling its duties under the OAA and the New Mexico Long-Term Care Ombudsman Act by protecting the health, safety, welfare and rights of residents of long-term care facilities in this state, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities. The department shall establish and operate the office either directly or by contract or other arrangement with a public agency or non-profit private organization. The office is a distinct entity, separately identifiable, located within or connected to the department, and, in the event the department enters into contract or other arrangement with a public agency or non-profit organization, that agency or organization shall establish a separately identifiable, distinct entity as the office.

[9.2.19.6 NMAC - Rp, 9.2.19.6 NMAC, 12/29/2017]

9.2.19.7 DEFINITIONS:

A. "Area agency on aging" (AAA) means an agency designated by the department to arrange for the provision of aging services in its planning and service area pursuant to an area plan.

B. "Certification" means the designation provided by the state ombudsman to an individual who meets minimum qualifications, is free of conflicts of interest, and has successfully completed training and other criteria stipulated in Section 9.2.19.13 NMAC hereof, which authorizes such individual to act as a representative of the long-term care ombudsman program (program) in the capacity for which he or she is certified.

C. "Complaint" means information regarding action, inaction, or decisions that may adversely affect the health, safety, welfare, or rights of residents which is raised by or brought to the attention of an ombudsman.

D. "Guardian" means the person or entity appointed by a court to exercise the legal rights and powers of another individual.

E. "Immediate family" means those persons related to an individual as a spouse, child, sibling, or parent.

F. "Informed consent" means an agreement by a resident or a resident's surrogate decision-maker to allow a disclosure of information, made with full knowledge of the risks involved and the available alternatives, that is made in writing or through the use of auxiliary aids and services or communicated by a resident or a resident's surrogate decision-maker orally, visually or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the office.

G. "Long term care facility" means any residential facility that provides care services to one or more persons unrelated to the owner or operator of the facility, including, but not limited to, those facilities enumerated in Subsection F of Section 28-17-3 NMSA 1978.

H. "Long-term care ombudsman program (LTCO)" means the program through which functions and duties of the office are carried out, consisting of the state ombudsman, the office headed by the state ombudsman and the representatives of the office.

I. "Provider agency" means the entity designated by the state ombudsman to provide ombudsman services in a particular service area.

J. "Representatives" means the employees or volunteers designated by the state ombudsman to fulfill the duties set forth in 45 CFR 1324.19(a), whether personnel supervision is provided by the state ombudsman or his or her designee.

K. "Resident" means any patient, client or person residing in and receiving care in a facility.

L. "State long-term care ombudsman" means the individual who heads the office and is responsible to personally, or through representatives of the office, fulfill the functions, responsibilities and duties as set forth in 45 CFR 1324.13 and 1324.19.

M. "Surrogate decision maker" means a legally appointed agent, guardian or surrogate who is authorized to act on behalf of a resident to include the duties enumerated in Subsection O of Section 28-17-3 NMSA 1978.

[9.2.19.7 NMAC - Rp, 9.2.19.7 NMAC, 12/29/2017]

9.2.19.8 PHILOSOPHY:

The program is a resident-centered advocacy program. The long-term care facility resident or applicant for residency is the client, regardless of the source of the complaint or request for service. The office shall assist residents by protecting their health, safety, welfare and rights, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities.

[9.2.19.8 NMAC - Rp, 9.2.19.8 NMAC, 12/29/2017]

9.2.19.9 OFFICE RULE:

The state ombudsman shall assure that all residents of long-term care facilities in the state have access to program services. The state ombudsman may fulfill its responsibilities through the department either directly or by a department contract or other arrangement with a public agency or non-profit private organization. Any such agency or non-profit entity that contracts with the department to provide ombudsman services must employ a full-time state ombudsman.

[9.2.19.9 NMAC - Rp, 9.2.19.9 NMAC, 12/29/2017]

9.2.19.10 [RESERVED]

9.2.19.11 [RESERVED]

9.2.19.12 QUALIFICATION AND CERTIFICATION OF LONG-TERM CARE OMBUDSMAN:

A. Under the OAA, the department's cabinet secretary is mandated to select the state ombudsman. In upholding this responsibility, he or she shall ensure that the state ombudsman meets minimum qualifications, which shall include, but not be limited to, demonstrated expertise in:

- (1) long-term services and supports or other direct services for older adults or individuals with disabilities;
- (2) consumer-oriented public policy advocacy;
- (3) satisfactorily complete the applicable training requirements set forth below.

B. To be qualified to act as a facility ombudsman, an individual must:

- (1)** demonstrate the capability to carry out the responsibilities of a facility ombudsman;
- (2)** participate in and complete all sections of the standard new volunteer training, as prescribed by the SLTCO; and
- (3)** leadership and program management skills;
- (4)** Negotiation and problem resolution skills; and
- (5)** any other qualifications that the department's cabinet secretary deems necessary for the state ombudsman to fulfill his or her responsibility to assist residents of long-term care facilities in the assertion of their civil and human rights, including, but not limited to, supervisory and budget experience.

C. The state ombudsman certifies an individual as an ombudsman to participate in the program, to represent the office, and for other purposes in support of the program. An individual may be certified as an ombudsman for limited purposes, depending on the degree of certification given and the role such individual assumes. The state ombudsman or his or her designee may undertake such investigations and require from the applicant such references as he or she reasonably deems necessary.

[9.2.19.12 NMAC - Rp, 9.2.19.12 NMAC, 12/29/2017]

9.2.19.13 ADDITIONAL REQUIREMENTS:

In order to be certified as a facility ombudsman, an individual must (in addition to meeting the qualifications set forth in Section 9.2.19.12 NMAC) complete an evaluation period of between three and six months after placement in a facility, during which the individual:

- A.** visits an assigned facility or facilities regularly;
- B.** submits regular monthly reports;
- C.** submits appropriately written complaints, or successfully completes part II of the ombudsman certification exam;
- D.** is responsive to the needs and concerns of long term care facility residents; and
- E.** is evaluated in the field by the supervising regional coordinator;
- F.** a new facility ombudsman who has met the qualifications for facility ombudsman set forth in Section 9.2.19.12 NMAC may be provisionally certified as a facility

ombudsman for and during the three to six month evaluation period. A provisionally certified facility ombudsman enjoys all of the duties and protections of a long-term care ombudsman under the New Mexico Long Term Care Ombudsman Act;

G. any person certified as a regional coordinator or other SLTCOP staff with programmatic responsibilities will be deemed certified as a facility ombudsman as well, with all the privileges and protections of a facility ombudsman under these regulations and the New Mexico Long Term Care Ombudsman Act. SLTCOP staff with programmatic responsibilities may be provisionally certified during the first year of employment;

H. the director of the SAOA and deputy directors of the SAOA shall each be certified to act with the authority of a regional coordinator upon completion of the standard new volunteer training program.

[9.2.19.13 NMAC - Rp, 9.2.19.13 NMAC, 12/29/2017]

9.2.19.14 ADDITIONAL CERTIFICATIONS:

The state ombudsman may create such other categories of ombudsmen and the requirements for certification thereof as he or she may decide, by filing a written procedure describing the duties and certification requirements of such ombudsmen with the department's cabinet secretary.

[9.2.19.14 NMAC - Rp, 9.2.19.14 NMAC, 12/29/2017]

9.2.19.15 NOTIFICATION OF CERTIFICATION:

The state ombudsman shall send written notification of an individual's certification as an ombudsman to the individual being certified, the area agency on aging (AAA), applicable provider agency or the private non-profit organization, within 30 days of the determination.

[9.2.19.15 NMAC - Rp, 9.2.19.15 NMAC, 12/29/2017]

9.2.19.16 RECERTIFICATION:

Ombudsmen must be recertified each calendar year. The state ombudsman shall determine recertification requirements. As part of the recertification, the state ombudsman shall verify that the ombudsman seeking recertification has successfully:

- A.** visited his or her assigned facility or facilities regularly;
- B.** submitted regular monthly reports;
- C.** submitted appropriately written complaints;

D. demonstrated responsiveness to the needs and concerns of long-term care facility residents; and

E. demonstrated evidence of receiving appropriate continuing education.

[9.2.19.16 NMAC - Rp, 9.2.19.16 NMAC, 12/29/2017]

9.2.19.17 NON-CERTIFICATION AND DECERTIFICATION:

The state ombudsman may refuse to certify or may de-certify an individual as an ombudsman, for any of the following reasons:

A. failure of the individual to meet or maintain the criteria for certification set forth in Section 9.2.19.12 NMAC;

B. existence of an un-remedied conflict of interest;

C. deliberate failure of the individual to disclose any conflict of interest;

D. of the confidentiality requirements of these regulations, the OAA, or the act;

E. failure to provide adequate and appropriate services to long-term care residents;

F. falsifying records;

G. change in employment duties which is incompatible with those of an ombudsman;

H. separation from the program, to include, for example, removal from employment by the department or other provider agency or an extended absence not protected by state or federal law that prevents the ombudsman from fulfilling his or her job responsibilities;

I. failure to act in accordance with applicable federal and state laws, rules, regulations, and policies; or

J. such other cause that the state ombudsman may determine would render the individual unsuitable for service as an ombudsman.

[9.2.19.17 NMAC - Rp, 9.2.19.17 NMAC, 12/29/2017]

9.2.19.18 NEW MEXICO AGING AND LONG TERM SERVICES DEPARTMENT RESPONSIBILITIES:

A. Establish and operate the office either directly or by contract or other arrangement with a public agency or non-profit private organization, consistent with the options provided under state and federal law.

B. The cabinet secretary of the department shall designate who shall serve as the full-time state ombudsman.

C. Provide for adequate legal counsel for the office (which may be through the office of the New Mexico attorney general) on behalf of the office or any representative of the office against whom suit or other legal action is brought or threatened to be brought in connection with the performance of the official duties of the office or of such representative.

D. Provide support to the state ombudsman to enable him or her to fulfill responsibilities consistent with all applicable federal and state laws, regulations, and policies.

E. Administer any program service contracts between the department, AAAs, provider agencies or private non-profit organizations.

F. Administer the program in accordance with all applicable federal and state laws, regulations, and policies.

G. Pursuant to 45 CFR 1324.13, determine the use of fiscal resources appropriated or otherwise available for the operation of the office. The state ombudsman shall determine that program budgets and expenditures of the office and local ombudsman entities are consistent with laws, policies and procedures governing the program.

H. Develop and provide final approval of an annual report as set forth in Section 712(h)(1) of the OAA. Such report shall:

(1) describe the activities carried out by the office in the year for which the report is prepared;

(2) contain analysis of program data;

(3) describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;

(4) contain policy, regulatory and legislative recommendations for improving the quality of care and life of the residents; protecting the health, safety, welfare and rights of the residents; and resolving resident complaints and identified problems or barriers;

(5) contain analysis of the success of the program, including success in providing services to residents of assisted living, board and care facilities and other similar adult care facilities; and

(6) describe barriers that prevent the optimal operation of the program.

I. Establish mechanisms to ensure the program is performing all of the functions, responsibilities and duties set forth in Section 9.2.19.22 NMAC, as well as action steps as required in the event these functions are not performed. Although the program is both independent and autonomous, 45 CFR 1324.15 specifically grants the department the responsibility to monitor the performance of all programs and activities of the office for quality and effectiveness.

J. Pursuant to 45 CFR 1324.15, provide personnel supervision and management for the state ombudsman and representatives of the office who are employees of the department. Such management shall include an assessment of whether the office is performing all of its functions under the OAA and the act.

K. Provide monitoring, as required by 45 CFR 1324.15(b), including but not limited to fiscal monitoring, where the office or local ombudsman entity is located within an agency or private non-profit organization with the department. Such monitoring shall include an assessment of whether the program is performing all of the functions, responsibilities and duties set forth in 45 CFR 1324.13 and 1324.19. Further, the department shall make reasonable requests of reports, including aggregated data regarding program activities, to meet the requirements of these provisions.

L. Ensure that any review of files, records or other information maintained by the program is consistent with the disclosure limitations set forth in 45 CFR 1324.11(e)(3) and 45 CFR 1324.13(e) as well as state law.

[9.2.19.18 NMAC - Rp, 9.2.19.18 NMAC, 12/29/2017]

9.2.19.19-21 [RESERVED]

9.2.19.22 STATE LONG-TERM CARE OMBUDSMAN RESPONSIBILITIES:

A. Adhere to the rules of confidentiality and propriety set forth in these regulations and in the resource manual for new volunteer training, if applicable.

B. Protect access to ombudsman records, in accordance with Sections 9.2.19.36 NMAC through 9.2.19.38 NMAC of this rule.

C. Carry out other activities that the state ombudsman reasonably deems appropriate to the certification of ombudsmen.

D. Perform each responsibility in accordance with all applicable federal and state law, rules, regulations, and policies.

E. Analyze, comment on, and monitor the development and implementation of federal, state and local laws, regulations and other governmental policies and actions that pertain to the health, safety, welfare and rights of residents with respect to the adequacy of long-term care facilities and seniors in the state.

F. Recommend any changes in such laws, regulations, policies, and actions as the office determines to be appropriate.

G. Facilitate public comment on the laws, regulations, policies, and actions.

H. Provide leadership to statewide systems advocacy efforts of the office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the office.

I. Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

J. Establish policies and procedures for the office, in consultation with the department, to carry out the program in accordance with the OAA. In accordance with 45 CFR 1324.11 (e), such policies and procedures regarding program administration must include, but not be limited to:

(1) A requirement that the department or any agency or private non-profit organization provide specific exemptions to ombudsmen, staff and volunteers from any requirements that prohibit ombudsmen from performing functions and responsibilities of the ombudsmen, as set forth in 45 CFR 1324.13 or from adhering to the requirements of Section 712 of the OAA, including that:

(a) the department or any agency or non-profit organization provide exemptions to its internal policies and procedures which prohibit any ombudsman from performing the functions and responsibilities of an ombudsman; provided, however, that nothing in this provision shall prohibit the department from requiring that the state ombudsman, or other employees or volunteers of the office, adhere to all other policies and procedures of the department;

(b) the state ombudsman monitor the performance of local ombudsman entities which the state ombudsman has designated to carry out the duties of the office; and

(c) the process by which the agencies hosting local ombudsman entities will coordinate with the state ombudsman in the employment or appointment of representatives of the office.

(2) Standards to assure prompt response to complaints by the office which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through the provision of program services.

(3) Procedures for access to facilities, residents, and appropriate records, to include:

(a) access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(b) access to all residents to perform the functions and duties set forth in 45 CFR 1324.13 and 1324.19;

(c) access to the name and contact information of the surrogate decision maker, if any, where needed to perform the functions and duties as set forth in 45 CFR 1324.13 and 1324.19;

(d) access to review resident records provided:

(i) the resident or surrogate decision maker communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(ii) the resident or surrogate decision maker communicates informed consent orally, visually or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the office in accordance with program procedures; and

(iii) access is necessary in order to investigate a complaint, including one of abuse, neglect or exploitation, the surrogate decision maker refuses to consent to the access, a representative of the office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the office obtains approval of the state ombudsman; and

(e) access to the administrative records, policies and documents, to which the residents have, or the general public has access, of long-term care facilities;

(f) access of the state ombudsman to, upon request, copies of all licensing and certification records maintained by the state with respect to long-term care facilities.

(4) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 Privacy Rule, 45 CFR 160 and 45 CFR 164, Subparts A and E, does not preclude release by long-term care facilities of resident private health information or

other resident identifying information to the office or any representative of the office, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a state or federal survey or inspection process.

(5) Policies and procedures regarding disclosure of files, records and other information maintained by the program must include, but not be limited to:

(a) provision that the files, records and information maintained by the program may be disclosed only at the discretion of the state ombudsman or designee for such purpose and in accordance with the criteria developed by the program, as required by 45 CFR 1324.13(e);

(b) prohibition of the disclosure of identifying information of any resident with respect to whom the program maintains files, records or information except as otherwise provided by CFR 1324.19(b)(5) through (8), unless:

(i) the resident or surrogate decision maker communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aides and services;

(ii) the resident or surrogate decision maker communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the office in accordance with such procedures; or

(iii) the disclosure is required by court order.

(c) prohibition of the disclosure of identifying information of any complainant with respect to whom the program maintains files, records or information, unless:

(i) the complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(ii) the complainant communicates informed consent orally, visually or through the use of auxiliary aides and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(iii) the disclosure is required by court order.

(d) exclusion of the ombudsman and representatives of the office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in 45 CFR 1324.19(b)(5) through (8);

(e) policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in 45 CFR 1324.21;

(f) requiring that other agencies in which the office or local ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an ombudsman or representatives of the office with a conflict that cannot be adequately removed or remedied;

(i) requiring that the state ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;

(ii) establishing the methods by which the office and the department periodically review and identify conflicts of the state ombudsman and representatives of the office; and

(iii) establishing the actions the office and state agency will require the ombudsman or representatives of the office to take in order to remedy or remove such conflicts;

(iv) ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the state ombudsman is subject to a conflict of interest;

(v) policies and procedures related to systems advocacy must assure that the office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of federal, state, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the office determines to be appropriate;

(vi) such procedures must exclude the state ombudsman and representatives of the office from any state lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the OAA;

(vii) nothing in this section shall prohibit the state ombudsman or the department or other agency or private non-profit organization in which the office is organizationally located from establishing policies which promote consultation regarding the determinations of the office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the office. That being said, such communication is strongly encouraged as per the OAA;

(viii) policies and procedures related to designation must establish the criteria and process by which the state ombudsman shall designate and refuse, suspend or remove designation of local ombudsman entities and representatives of the office;

(ix) such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation of a local ombudsman entity or representative of the office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in 45 CFR 1324.21;

(x) policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the state ombudsman and representatives of the office. Such process shall include an opportunity for reconsideration of the state ombudsman decision to refuse, suspend, or remove designation of a local ombudsman entity or representative of the office. Notwithstanding the grievance process, the state ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local ombudsman entity or representative of the office;

(xi) policies and procedures related to the determinations of the office must ensure that the state ombudsman, as head of the office, shall be able to independently make determinations and establish positions of the office, without necessarily representing the determinations or positions of the department or other agency or private non-profit organization in which the office is organizationally located;

(xii) disclosure of information maintained by the program within the limitations set forth in Section 712(d) of the OAA;

(xiii) recommendations to changes in federal, state and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(xiv) provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

K. Pursuant 45 CFR 1324.13(h), through the adoption of memoranda of understanding and other means, the state ombudsman shall lead state-level coordination and support appropriate local ombudsman entity coordination, between the program and other entities with responsibilities relevant to the health, safety, well-being or rights of residents of long-term care facilities including, but not limited to:

- (1)** AAA programs;
- (2)** aging and disability resource centers;

- (3) adult protective services programs;
- (4) protection and advocacy systems, as designated by the state, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 USC 15001 et seq.);
- (5) facility and long-term care licensure and certification programs;
- (6) the state medicaid fraud control unit, as defined in Section 1903(q) of the Social Security Act (42 USC 1396b(q));
- (7) victim assistance programs;
- (8) state and local law enforcement agencies;
- (9) courts of competent jurisdiction; and
- (10) the state legal assistance developer and legal assistance programs, including those provided under Section 306(a)(2)(C) of the OAA.

L. The state ombudsman and representatives of the office assist residents in seeking administrative, legal and other appropriate remedies. In so doing, the state ombudsman shall coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents.

[9.2.19.22 NMAC - Rp, 9.2.19.22 NMAC, 12/29/2017]

9.2.19.23 FACILITY OMBUDSMAN RESPONSIBILITIES:

In addition to the responsibilities set forth in Section 9.2.19.22 NMAC, each facility ombudsman shall be responsible for:

- A. providing LTCO services to assist in the protection of the health, safety, welfare and rights of residents in accordance with the provisions of the federal and state laws governing the LTCO and consistent with their respective certifications and duties for which they are responsible for thereby, as set forth in this part;
- B. documenting LTCO activities and case work, if any, as required by the SLTCO;
- C. visiting his or her assigned facility or facilities regularly;
- D. submitting regular monthly reports;
- E. submitting appropriately written complaints;

F. being responsive to the needs and concerns of long term care facility residents;
and

G. participating in appropriate continuing education.

[9.2.19.23 NMAC - Rp, 9.2.19.23 NMAC, 12/29/2017]

9.2.19.24 RESOURCE OMBUDSMAN RESPONSIBILITIES:

In addition to the responsibilities set forth in Section 9.2.19.22 NMAC, a resource ombudsman shall be authorized and responsible only for complaint intake and processing, research, specialized training, or such other responsibility or responsibilities (not including, however, the taking and on-site investigation of complaints from residents) as the SLTCO may authorize and direct. A resource ombudsman may visit long-term care facilities as ombudsman under the direction of a certified facility ombudsman.

[9.2.19.24 NMAC - Rp, 9.2.19.24 NMAC, 12/29/2017]

9.2.19.25 RESPONSIBILITIES OF STAFF AND VOLUNTEERS NOT CERTIFIED AS OMBUDSMAN:

Persons who are employed by or volunteering at the SAOA or the office of the SLTCO, or who have volunteered as LTCOs but who have not completed the new volunteer training program may assist in the provision of LTCO services, other than complaint processing, under the direct supervision of a certified LTCO, but they may not have sole responsibility for the provision of any LTCO service.

[9.2.19.25 NMAC - Rp, 9.2.19.25 NMAC, 12/29/2017]

9.2.19.26 CONFLICTS OF INTEREST POLICY:

The organizational placement of the program and the individuals who carry out the duties of the program must be free from conflicts of interest.

[9.2.19.26 NMAC - Rp, 9.2.19.26 NMAC, 12/29/2017]

9.2.19.27 CONFLICT OF INTEREST IDENTIFICATION:

A conflict of interest exists in the program or with respect to an individual providing program services when other interests intrude upon, interfere with, or threaten to negate the ability of the program to advocate without compromise on behalf of long-term care facility residents. Types of conflict of interest include: conflicts of loyalty where incentives, often related to financial or employment considerations, shape one's judgment or behavior in ways that are contrary to the interest of residents; conflicts of commitment where goals or obligations that direct one's time or attention away from the

interest of residents; and conflicts of control where limitations or restrictions are imposed that effectively foreclose one's ability to take actions to advocate for the interest of residents.

[9.2.19.27 NMAC - Rp, 9.2.19.27 NMAC, 12/29/2017]

9.2.19.28 ORGANIZATIONAL CONFLICTS:

An organizational conflict may arise when program placement is made in an agency which has not identified and taken steps to remove or remedy conflicts of interest between the office and the state agency and notified the assistant secretary of the federal health and human services department of its plan for removing the conflict, pursuant to 45 CFR 1324.21(b)(1). An organizational conflict of interest exists where the office:

A. has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility or a long-term care service;

B. provides long-term care services, including the provision of personnel for long-term care facilities or the operation of programs that control services for or residents' access to long-term care facilities;

C. has governing board members with ownership, investment or employment interest in long-term care facilities; or

D. has direct involvement in the licensing or certification of a long-term care facility or long-term care services.

[9.2.19.28 NMAC - Rp, 9.2.19.28 NMAC, 12/29/2017]

9.2.19.29 INDIVIDUAL OMBUDSMAN CONFLICTS:

Conflicts for any ombudsman, including the state ombudsman, staff and volunteers, include, but are not limited to, the following:

A. employment of the individual by a long-term care facility in the state or by the owner or operator of any long-term care facility in the state within one year before the date the determination is being made;

B. participation in the management of a long-term care facility by the individual or a member of his or her immediate family or household within one year before the date the determination is being made. For purposes of this paragraph, "household" means all persons residing at a single dwelling and contributing to the household income;

C. ownership or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility or long-term care service by the individual or a member of his or her immediate family;

D. involvement in the licensing or certification of a long-term care facility or provision of a long-term care service by the individual or a member of his or her immediate family;

E. receipt of remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility by the individual or to the individual through a member of his or her immediate family;

F. accepting any gifts or gratuities from a long-term care facility or resident or resident representative; an ombudsman must adequately compensate a facility for food provided by the facility with the exception of courtesy beverages and sample portions of food tested as part of an investigative process;

G. accepting money or any other consideration from anyone other than the provider agency or other entity designated by the office for the performance of an act in the regular course of an ombudsman's duties;

H. having management responsibility for, or operating under the supervision of an individual with management responsibility for, adult protective services;

I. serving as a surrogate decision maker or in another fiduciary capacity for residents of long-term care facilities in an official capacity (as opposed to serving as a guardian or fiduciary for a family member, in a personal capacity);

J. provision of services with conflicting responsibilities while serving as an ombudsman; or

K. otherwise participating in activities which negatively impact on the ability of the ombudsman to serve residents, or are likely to create a perception that the ombudsman's primary interest is other than as a resident advocate.

[9.2.19.29 NMAC - Rp, 9.2.19.29 NMAC, 12/29/2017]

9.2.19.30 EXCEPTION FOR PUBLICLY TRADED POOLED INVESTMENTS:

Notwithstanding the foregoing provisions of Section 9.2.19.31 NMAC, ownership of shares in a mutual fund or other publicly traded pooled investment fund whose assets may include publicly traded securities of long-term care facilities or service organizations shall not generally constitute a conflict of interest, unless the investments of such fund is limited to such facilities or service organizations, or such investments normally form a large percentage of such fund.

[9.2.19.30 NMAC - Rp, 9.2.19.30 NMAC, 12/29/2017]

9.2.19.31 REPORTING POTENTIAL CONFLICT:

A. All ombudsmen and agents of the AAAs, provider agencies and private non-profit organizations shall notify the department's cabinet secretary of any actual or potential conflict of interest within the program of which they have knowledge.

B. The state ombudsman shall determine whether the situation rises to the level of a conflict and, if so, whether appropriate actions must be taken to sufficiently remedy the conflict. A conflict can be sufficiently remedied only where the existence of the conflict does not interfere with any duties of the program, and where the conflict is not likely to alter the perception of the program as an independent advocate for residents.

[9.2.19.31 NMAC - Rp, 9.2.19.31 NMAC, 12/29/2017]

9.2.19.32 REMEDYING ORGANIZATIONAL CONFLICT:

A. An organization (with the exception of the department, which steps for remedying any perceived conflict are set forth in Section 9.2.19.28 NMAC) within which the conflict has been identified shall submit to the state ombudsman a written remedial plan within 30 calendar days of identification of the conflict to the office. The remedial plan must identify the conflict and provide assurances that minimize to the greatest extent possible the negative impact of the conflict on the program. Examples of such assurances may include:

(1) the program will investigate complaints in an unbiased manner and independently determine actions to be taken in their resolution; or

(2) no provider agency employee or governing board member with a conflict of interest will be involved with or influence any decision to hire or terminate the employment of an ombudsman;

(3) governing board members of the provider agency, AAA or private non-profit entity who have a conflict of interest:

(a) must disclose the conflict to the governing board and to the state ombudsman;

(b) May have no involvement with ombudsman activities concerning the entity which is the source of the conflict; and

(c) must abstain from voting on issues related to the operation of the program.

(4) the provider agency's policies and procedures adequately set forth procedures to remedy conflicts of interest and ensure that the ombudsmen fulfill their duties without interference;

(5) a memorandum of agreement exists between the program and another program which provides services with conflicting responsibilities. Such a memorandum must adequately set forth the roles, responsibilities, and appropriate working relationships of the respective programs.

[9.2.19.32 NMAC - Rp, 9.2.19.32 NMAC, 12/29/2017]

9.2.19.33 REMEDYING INDIVIDUAL OMBUDSMAN CONFLICTS:

Where individual conflicts have been identified, the following steps shall be taken where the conflict may be sufficiently remedied:

A. Where the individual is an applicant for certification as an ombudsman, a written plan shall be developed, submitted to the state ombudsman and agreed upon before the individual takes any actions on behalf of the program.

B. Where the individual is already an ombudsman, a written plan shall be developed, submitted to the state ombudsman and agreed upon within 30 calendar days of identification of the conflict to the state ombudsman.

C. The remedial plan must identify the conflict and provide assurances to minimize to the greatest extent possible the negative impact of the conflict on the program, which may include a prohibition of the ombudsman with a conflict of interest from serving the residents of the facility with which he or she has a conflict and arranging for another ombudsman to serve those residents. Where appropriate, this arrangement may be time-limited.

D. The remedial plan must be mutually agreed upon and signed by the ombudsman or applicant with the conflict of interest, and the state ombudsman.

[9.2.19.33 NMAC - Rp, 9.2.19.3 NMAC, 12/29/2017]

9.2.19.34 PROCEDURES TO AVOID CONFLICTS OF INTEREST:

A. All persons seeking certification as ombudsman shall disclose to state ombudsman all information relevant to past employment, membership, or interests that may affect, or could reasonably be expected to affect, that individual's ability to carry out duties of an ombudsman without conflicting interest.

B. In order to avoid confusion and possible conflicts between the program and other department personnel in communicating with the press, broadcast media and other public media, the state ombudsman or his or her representative are encouraged to apprise and summarize the intended communication for the cabinet secretary or public information officer prior to any such communication or other dissemination or release of public information from or concerning the program, provided that neither the cabinet secretary nor public information officer has an individual conflict, as set forth, above.

[9.2.19.34 NMAC - Rp, 9.2.19.34 NMAC, 12/29/2017]

9.2.19.35 FAILURE TO IDENTIFY OR REMEDY A CONFLICT OF INTEREST:

A. Failure on the part of an ombudsman or provider agency to identify and report to the state ombudsman a known conflict of interest shall be sufficient grounds for refusal to designate or for de-designation of the provider agency or for refusal to certify or for de-certification of the ombudsman.

B. Existence of an un-remedied conflict of interest shall be sufficient grounds for the de-designation of a provider agency or de-certification of an ombudsman.

C. Failure on the part of an ombudsman to identify and report to the state ombudsman a known conflict of interest shall be sufficient grounds for the de-certification of the ombudsman.

[9.2.19.35 NMAC - Rp, 9.2.19.35 NMAC, 12/29/2017]

9.2.19.36 LONG-TERM CARE OMBUDSMAN RECORDS POLICY:

Records of the program shall be confidential and may be disclosed only in limited circumstances specifically provided by applicable law and these regulations.

[9.2.19.36 NMAC - Rp, 9.2.19.36 NMAC, 12/29/2017]

9.2.19.37 ACCESS TO LONG-TERM CARE OMBUDSMAN RECORDS:

A. All program client records are the property of the office. The state ombudsman or designee shall have access to all program records at all times for any lawful purpose.

B. Ombudsmen are permitted access to such records as may be necessary to discharge their responsibilities in complaint processing or other responsibilities under these regulations.

C. All records of another agency participating in the joint protocol established under the provisions of Subsection L of Section 24-1-5 NMSA 1978 that may come into the possession of the program and that include identifying or otherwise confidential resident or complainant information shall be held and disclosed in the same manner as program records hereunder, except to the extent that such other agency imposes stricter requirements or restrictions for disclosure, to which extent the rules of such other agency shall be observed to the extent permitted by law.

D. All information concerning residents or complainants shall be handled with the utmost care and discretion. No ombudsman shall disclose any information or record that includes, implies or describes the identity of any complainant or resident about whom the office maintains files or records unless:

(1) the complainant or resident or his or her surrogate decision maker consent in writing to the disclosure;

(2) the complainant or resident gives informed consent, which is documented immediately in writing by an ombudsman;

(3) disclosure is necessary for the provision of services to the resident or the resident is unable to provide informed consent; or

(4) disclosure is ordered by a court of competent jurisdiction.

[9.2.19.37 NMAC - Rp, 9.2.19.37 NMAC, 12/29/2017]

9.2.19.38 PROCEDURE FOR RELEASE:

A. Records maintained by the program may not be released, disclosed, duplicated, or removed to anyone who is not an ombudsman without the written permission of the state ombudsman. All requests made for ombudsman records shall be referred to the state ombudsman or designee.

B. The state ombudsman or designee shall determine whether to disclose all or part of the records as follows:

(1) The state ombudsman shall require that the request be made in writing and may require a copy of the request before determining the appropriate response. Where the request is made orally by a resident, complainant, or surrogate decision maker of the resident or complainant, the request must be documented immediately and filed as an ombudsman record by the ombudsman to whom informed consent was communicated in order to meet this requirement.

(2) The state ombudsman shall review the request to determine whether the release of all or part of the records would be consistent with the wishes or interest of the relevant resident(s).

(3) The state ombudsman shall notify the department's cabinet secretary and the state ombudsman's immediate supervisor (if the immediate supervisor is someone other than the cabinet secretary) of any public media request for records within 24 hours of the request.

(4) The state ombudsman or designee shall refer any request made by formal legal process to the program's legal counsel. The state ombudsman shall be responsible to ensure that a response is timely filed and endeavor to prevent any release that would be inconsistent with the interests of the resident(s).

(5) Any request for information made under the state Inspection of Public Records Act (IPRA) directly to the program shall be forwarded to the department's

records custodian within 24 hours. The department's records custodian shall respond in writing within 15 days to the requestor after consulting with the state ombudsman and the department's general counsel or designee. The ombudsman shall make the final decision whether to disclose records in response to an IPRA request, keeping in mind that program records are not public records and are therefore exempt from IPRA. Notwithstanding the foregoing, the state ombudsman may release records provided they do not name or provide personally identifying information of residents or complainants as it deems appropriate, provided such disclosure is not made pursuant to an IPRA request.

[9.2.19.38 NMAC - Rp, 9.2.19.38 NMAC, 12/29/2017]

9.2.19.39 [RESERVED]

9.2.19.40 LEGAL COUNSEL:

A. Pursuant to 45 CFR 1324.15 (j), the department shall ensure that:

(1) legal counsel for the program is adequate, available, has competencies relevant to the legal needs of the program and of the residents, and is without conflict of interest, in order to:

(a) provide consultation and representation as needed in order for the program to protect the health, safety, welfare and rights of residents; and

(b) provide consultation or representation as needed to assist the state ombudsman and representatives of the office in the performance of their official functions, responsibilities and duties, including complaint resolution and advocacy; and

(2) legal representation, arranged by or with the approval of the state ombudsman, is provided to the state ombudsman or any representative of the office against whom suit or other legal action is brought or threatened to be brought in connect with the performance of the official duties;

(3) legal representation of the program by the state ombudsman or representative of the office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel;

(4) the communications between the state ombudsman and legal counsel are subject to attorney-client privilege.

[9.2.19.40 NMAC - Rp, 9.2.19.40 NMAC, 12/29/2017]

9.2.19.41 ANONYMOUS EVALUATIONS:

A. Chapter 28, Articles 7 and 17 of the NMSA 1978 authorize and direct the department and the office to protect the health, safety, welfare and rights of the aged and other residents of long-term care facilities in this state, to investigate and resolve complaints of such residents, and to report on conditions of long-term care facilities. Subsection C of Section 28-4-6 [NMSA 1978](#) specifically provides that the department may conduct unannounced evaluations of long-term care facilities by the use of undercover residents or employees. Pursuant to its authority as the parent agency of the office, the department may carry out such evaluations by and through the office; however, under no circumstances shall federal funding be used for such anonymous evaluations.

B. The department shall conduct all undercover evaluations authorized by Subsection C of 28-4-6 [NMSA 1978](#) in accordance with its procedures for the conduct of anonymous evaluations of long-term care facilities adopted pursuant to such authority and in consultation with the department's cabinet secretary.

[9.2.19.41 NMAC - Rp, 9.2.19.41 NMAC, 12/29/2017]

PART 20: CAPS ON REIMBURSEMENT FOR INDIRECT COSTS TO INDIAN TRIBAL ORGANIZATIONS IN INTERGOVERNMENTAL AGREEMENTS

9.2.20.1 ISSUING AGENCY:

New Mexico Aging and Long Term Services Department (NMALTSO)

[9.2.20.1 NMAC - Rp, 9.2.20.1 NMAC, 6/30/2015]

9.2.20.2 SCOPE:

This part applies only to intergovernmental agreements with Indian tribal organizations.

[9.2.20.2 NMAC -Rp, 9.2.20.2 NMAC, 6/30/2015]

9.2.20.3 STATUTORY AUTHORITY:

Aging and Long-Term Services Department Act, Sections 9-23-1 to 9-23-12 NMSA 1978; Older Americans Act of 1965, 42 U.S.C. Sections 3001 to 3058, and implementing regulations.

[9.2.20.3 NMAC -Rp, 9.2.20.3 NMAC, 6/30/2015]

9.2.20.4 DURATION:

Permanent.

[9.2.20.4 NMAC -Rp, 9.2.20.4 NMAC, 6/30/2015]

9.2.20.5 EFFECTIVE DATE:

June 30, 2015, unless a later date is cited at the end of a section.

[9.2.20.5 NMAC -Rp, 9.2.20.5 NMAC, 6/30/2015]

9.2.20.6 OBJECTIVE:

The purpose of this rule is to establish the extent to which the department will reimburse Indian tribal organizations for indirect costs incurred in the performance of intergovernmental agreements.

[9.2.20.6 NMAC -Rp, 9.2.20.6 NMAC, 6/30/2015]

9.2.20.7 DEFINITIONS:

As used in this part, "indirect cost" means a cost that has been incurred for common or joint purposes and benefits more than one (1) activity, such as an intergovernmental agreement or grant. Indirect costs cannot be readily identified with a particular activity without effort disproportionate to the results achieved.

[9.2.20.7 NMAC -Rp, 9.2.20.7 NMAC, 6/30/2015]

9.2.20.8 INDIRECT COSTS:

The department shall allow for indirect costs in intergovernmental agreements for services with any Indian tribal organization of up to ten percent (10%) of the total agreement amount, as requested and as determined on a specific basis, provided that the Indian tribal organization has a federally approved indirect cost rate. No indirect costs shall be allowed for capital projects.

[9.2.20.6 NMAC -Rp, 9.2.20.8 NMAC, 6/30/2015]

PART 21: CIVIL PENALTY ASSESSMENTS BY THE STATE LONG-TERM CARE OMBUDSMAN

9.2.21.1 ISSUING AGENCY:

Aging and Long-Term Services Department.

[9.2.21.1 NMAC - N, 4/1/2004]

9.2.21.2 SCOPE:

This rule applies to the general public.

[9.2.21.2 NMAC - N, 4/1/2004]

9.2.21.3 STATUTORY AUTHORITY:

This rule is adopted pursuant to the terms of 42 U.S.C. Section 3058g(j), Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978 and Laws 2004, Ch. 23, Sec. 6(E).

[9.2.21.3 NMAC - N, 4/1/2004]

9.2.21.4 DURATION:

Permanent.

[9.2.21.4 NMAC - N, 4/1/2004]

9.2.21.5 EFFECTIVE DATE:

April 1, 2004, unless a later date is cited in the history note at the end of a section.

[9.2.21.5 NMAC - N, 4/1/2004]

9.2.21.6 OBJECTIVE:

This rule establishes a schedule of civil penalties that will be imposed on persons or entities that violate Section 28-17-19 NMSA 1978.

[9.2.21.6 NMAC - N, 4/1/2004]

9.2.21.7 DEFINITIONS:

The following terms are used in this rule:

A. "civil penalty assessment" means a civil monetary penalty imposed on a person or entity by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and this rule;

B. "department" means the aging and long-term services department. It is the state department charged, among other things, with implementing the requirements of the federal Older Americans Act of 1965, as amended (42 U.S.C. Section 3001, et seq.);

C. "long-term care ombudsman program" means the program administered by the state long-term care ombudsman; and

D. "state long-term care ombudsman" means the office established pursuant to the terms of 42 U.S.C. Section 3058g and Section 28-17-4 NMSA 1978 to, among other things, identify, investigate and resolve complaints that are made by, or on behalf of, residents of long-term care facilities and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents.

[9.2.21.7 NMAC - N, 4/1/2004]

9.2.21.8 WILLFUL INTERFERENCE WITH LONG-TERM CARE OMBUDSMAN PROGRAM:

A. Any person or entity that willfully interferes with the lawful actions of the long-term care ombudsman program shall be subjected to civil penalties up to a maximum of \$5,000 per occurrence as follows:

(1) failing to allow an ombudsman immediate entry into a long-term care facility: \$500 minimum per occurrence;

(2) imposing unreasonable time limits or constraints on visiting a long-term care facility or its residents or employees: \$500 minimum per occurrence;

(3) failing to provide an ombudsman, upon proper written request, immediate access to readily available medical, personal, financial or other nonmedical records, including administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare, but not including internal quality assurance or risk management reports: \$500 minimum per occurrence;

(4) failing to provide an ombudsman, upon proper written request, access within twenty-four hours to nonreadily available medical, personal, financial or other nonmedical records, including administrative records, policies, procedures or documents that concern, involve or pertain to a resident's diet, comfort, health, safety or welfare, but not including internal quality assurance or risk management reports: \$500 minimum per occurrence;

(5) failing to honor a legally-executed HIPAA-compliant authorization form from a resident or a resident's surrogate decision maker for release of records, or failing to honor a written authorization form signed by the state long-term care ombudsman or an ombudsman coordinator in accordance with Section 28-17-13(B) NMSA 1978, or requiring redundant or legally-unnecessary forms to be completed: \$500 minimum per occurrence;

(6) eavesdropping on any private conversation between an ombudsman and a resident or any other person: \$500 minimum per occurrence;

(7) failing to provide a quiet private place for an ombudsman to meet with a resident or any other person: \$500 minimum per occurrence;

(8) instructing a resident, employee or any other person not to file a complaint with the long-term care ombudsman program, or not to provide information to, or otherwise cooperate with, the long-term care ombudsman program: \$2,500 minimum per occurrence;

(9) willfully concealing facts from, or misrepresenting facts to, an ombudsman: \$2,500 minimum per occurrence;

(10) failing to acknowledge and act timely upon communications with an ombudsman relating to an investigation: \$500 minimum per occurrence; and

(11) any other willful action that interferes with the lawful actions of the long-term care ombudsman program: \$250 minimum per occurrence.

B. Factors that will be considered in imposing civil penalties greater than the minimum amounts include, but are not limited to, the following:

(1) whether the interference with the long-term care ombudsman program caused actual harm to any resident of the facility;

(2) the number and amounts of civil penalties that have been assessed against a facility or its owners previously; and

(3) whether the interference with the long-term care ombudsman program was based on a facility policy or a policy of its owners (as opposed, for example, to an isolated incident caused by a lower-level employee).

[9.2.21.8 NMAC - N, 4/1/2004]

9.2.21.9 RETALIATION:

A. Any person or entity that discriminates against, disciplines, or retaliates against any resident, employee, or other person for filing a complaint with the long-term care ombudsman program, or for providing information to, or otherwise cooperating with, the long-term care ombudsman program shall be subjected to civil penalties up to a maximum of \$10,000 per occurrence as follows:

(1) discharging a resident: \$10,000 per occurrence;

(2) withholding treatment to, or medication from, a resident: \$2,500 minimum per occurrence;

(3) isolating a resident or changing a resident's room: \$1,000 minimum per occurrence;

(4) restricting a resident's ability to communicate with others: \$1,000 minimum per occurrence;

(5) ignoring a resident's request for assistance or delaying response to a request: \$1,000 minimum per occurrence;

(6) taking a resident's property, even if the property has no value: \$1,000 minimum per occurrence;

(7) terminating an employee of a long-term care facility: \$10,000 per occurrence;

(8) suspending, demoting or taking any other action with monetary consequences against an employee of a long-term care facility: \$2,500 minimum per occurrence;

(9) barring a person from a facility: \$1,000 minimum per occurrence; and

(10) instituting any other discriminatory, disciplinary or retaliatory action against a resident, a resident's family member or other representative, an employee, or any other person: \$500 minimum per occurrence.

B. Factors that will be considered in imposing civil penalties greater than the minimum amounts include, but are not limited to, the following:

(1) whether the discrimination, discipline or retaliation caused actual harm to any resident of the facility;

(2) the number and amounts of civil penalties that have been assessed against a facility or its owners previously; and

(3) whether the discrimination, discipline or retaliation was based on a facility policy or a policy of its owners (as opposed, for example, to an isolated incident caused by a lower-level employee).

[9.2.21.9 NMAC - N, 4/1/2004]

9.2.21.10 CIVIL PENALTY ASSESSMENT:

A. Upon determining that there has been a violation of Section 28-17-19 NMSA 1978 and this rule, the state long-term care ombudsman may deliver to the person or entity charged with the violation a notice of civil penalty assessment. The notice shall be delivered in person or by certified mail, return receipt requested. The notice shall include:

(1) the name and address of the person or entity to whom the civil penalty assessment is directed;

(2) the date of the civil penalty assessment;

(3) the basis for the civil penalty assessment;

(4) the amount of the civil penalty assessment;

(5) the date the civil penalty assessment is due for payment; and

(6) notice of the right to request a hearing before the department to challenge the civil penalty assessment.

B. Unless a hearing is requested, the civil penalty assessment shall be paid to the department within thirty (30) calendar days from the date of the assessment. Payment shall be in the form of cash, cashier's check or money order.

[9.2.21.10 NMAC - N, 4/1/2004]

9.2.21.11 RECOVERY PROHIBITED:

No person or entity that has been issued a civil penalty assessment shall recover or attempt to recover the assessment or any portion of it, directly or indirectly, from any resident of a long-term care facility or from any person, insurer, governmental agency or other entity that may be responsible for paying for the services rendered to a resident of a facility.

[9.2.21.11 NMAC - N, 4/1/2004]

PART 22: HEARINGS TO CHALLENGE CIVIL PENALTY ASSESSMENTS BY THE STATE LONG-TERM CARE OMBUDSMAN

9.2.22.1 ISSUING AGENCY:

Aging and Long-Term Services Department.

[9.2.22.1 NMAC - N, 4/1/2004]

9.2.22.2 SCOPE:

This rule applies to the general public and governs the hearings conducted by the aging and long-term services department to address civil penalties that have been assessed on persons or entities by the state long-term care ombudsman. It does not govern other hearings conducted by the department.

[9.2.22.2 NMAC - N, 4/1/2004]

9.2.22.3 STATUTORY AUTHORITY:

This rule is adopted pursuant to the terms of 42 U.S.C. Section 3058g(j), Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978 and Laws 2004, Ch. 23, Sec. 6(E).

[9.2.22.3 NMAC - N, 4/1/2004]

9.2.22.4 DURATION:

Permanent.

[9.2.22.4 NMAC - N, 4/1/2004]

9.2.22.5 EFFECTIVE DATE:

April 1, 2004, unless a later date is cited in the history note at the end of a section.

[9.2.22.5 NMAC - N, 4/1/2004]

9.2.22.6 OBJECTIVE:

This rule establishes a hearing procedure for a person or entity to challenge a civil penalty assessment that has been issued to it by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and applicable department regulations.

[9.2.22.6 NMAC - N, 4/1/2004]

9.2.22.7 DEFINITIONS:

The following terms are used in this rule:

A. "assessed party" means a person or entity that has been issued a civil penalty assessment by the state long-term care ombudsman;

B. "civil penalty assessment" means a civil monetary penalty imposed on a person or entity by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and applicable department regulations;

C. "department" means the aging and long-term services department. It is the state department charged, among other things, with implementing the requirements of the federal Older Americans Act of 1965, as amended (42 U.S.C. Section 3001, et seq.);

D. "hearing officer" means an impartial person designated by the secretary to preside over proceedings under this rule. A hearing officer may be an employee of the department (except for an employee of the long-term care ombudsman program), a policy advisory committee member, or any other impartial person. A hearing officer may be, but is not required to be, an attorney at law;

E. "long-term care ombudsman program" means the program administered by the state long-term care ombudsman;

F. "parties" mean the assessed party and the state long-term care ombudsman;

G. "secretary" means the secretary of the department; and

H. "state long-term care ombudsman" means the office established pursuant to the terms of 42 U.S.C. Section 3058g and Section 28-17-4 NMSA 1978 to, among other things, identify, investigate and resolve complaints that are made by, or on behalf of, residents of long-term care facilities and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents.

[9.2.22.7 NMAC - N, 4/1/2004]

9.2.22.8 REPRESENTATION:

A. A natural person may appear as a party on his or her own behalf or by an attorney licensed to practice law in New Mexico.

B. The state long-term care ombudsman, corporations and other legal entities may be represented by a duly authorized officer or employee of the entity or by an attorney licensed to practice law in New Mexico.

C. An attorney for a party must file an entry of appearance at least ten (10) working days before the commencement of any hearing. The attorney of record for a party shall be deemed to continue to be the attorney of record until written notice of withdrawal of representation is provided to the hearing officer and the parties.

[9.9.22.8 NMAC - N, 4/1/2004]

9.2.22.9 REQUEST FOR HEARING:

A. An assessed party may request a hearing before the department. The request for hearing shall be in writing and received by the secretary no later than ten (10) working days from the date that the assessed party receives the civil penalty assessment. The request for hearing shall include:

- (1)** the name and address of the assessed party;

- (2) a copy of the civil penalty assessment;
- (3) a brief statement of the factual or legal bases upon which the assessed party challenges the civil penalty assessment; and
- (4) a statement of the relief requested.

B. The assessed party shall send a copy of the request for hearing to the state long-term care ombudsman.

C. The department shall dismiss any request for hearing that is untimely or fails to substantially comply with the terms of this rule.

[9.2.22.9 NMAC - N, 4/1/2004]

9.2.22.10 APPOINTMENT OF HEARING OFFICER:

Within five (5) working days of receipt of a timely request for hearing, the secretary will appoint a hearing officer and will send written notice of the appointment to the parties.

[9.2.22.10 NMAC - N, 4/1/2004]

9.2.22.11 NOTICE OF HEARING AND TIME LIMITS FOR HOLDING HEARING:

A. Within ten (10) working days of appointment, the hearing officer will establish the date, time and place of the hearing. The hearing will be no more than one hundred twenty (120) calendar days from the date of the civil penalty assessment unless the parties agree otherwise.

B. The hearing officer will issue a notice of hearing at least thirty (30) calendar days before the hearing date, unless the parties agree to a shorter timeframe. The notice will be served on the parties by certified mail, return receipt requested. At the discretion of the hearing officer, the notice may be served by regular mail or other appropriate means on any other persons or entities that may have an interest in the proceedings.

C. The notice of hearing shall include:

- (1) the name of the assessed party;
- (2) the name and address of the state long-term care ombudsman;
- (3) the time, date, place, and nature of the hearing; and
- (4) a statement of the legal authority under which the hearing is to be held.

[9.2.22.11 NMAC - N, 4/1/2004]

9.2.22.12 VENUE:

Unless the parties agree otherwise, the hearing will be held in the county where the events allegedly occurred that gave rise to the civil penalty assessment or where the long-term care facility in question is located.

[9.2.22.12 NMAC - N, 4/1/2004]

9.2.22.13 POWERS AND DUTIES OF THE HEARING OFFICER:

The hearing officer shall have the authority to:

- A.** preside over hearings;
- B.** assure that hearings are properly recorded;
- C.** administer oaths and affirmations to the witnesses;
- D.** issue subpoenas and subpoenas *duces tecum*;
- E.** establish procedural schedules;
- F.** rule on motions and procedural requests;
- G.** require parties to attend hearings, pre-hearing conferences and settlement conferences;
- H.** require parties to produce for examination information or witnesses under their control;
- I.** require parties to express their positions on any issues in the proceedings;
- J.** require parties to submit legal briefs on any issues in the proceedings;
- K.** examine witnesses, and permit parties to examine witnesses;
- L.** determine the admissibility of evidence;
- M.** take official notice of any matter that is among the traditional matters of official or administrative notice in accordance with the terms of this rule;
- N.** recess any hearing from time to time;
- O.** regulate the course of the proceedings and the conduct of any participants;

P. take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses;

Q. issue a recommended decision on the merits of a case, including findings of fact and conclusions of law;

R. approve settlements or other pre-hearing or post-hearing dispositions of cases by the parties, subject to final approval by the secretary; and

S. take any other action reasonably necessary to conclude the proceedings in a timely and fair manner.

[9.2.22.13 NMAC - N, 4/1/2004]

9.2.22.14 APPLICABILITY OF RULES OF CIVIL PROCEDURE AND RULES OF EVIDENCE:

Although formal rules of civil procedure and evidence do not apply, the hearing officer may look to the New Mexico rules of civil procedure and the New Mexico rules of evidence for guidance during the course of the proceedings. In addition, the hearing officer's recommended decision and the secretary's final decision must be supported by a residuum of legally competent evidence as would support a verdict in a court of law.

[9.2.22.14 NMAC - N, 4/1/2004]

9.2.22.15 COMMUNICATIONS WITH SECRETARY AND HEARING OFFICER:

A. No party, representative of a party, or other person shall communicate off the record about the merits of a case with the secretary or the hearing officer unless the communication is in writing and a copy is provided to all parties to the proceedings.

B. The secretary and the hearing officer shall not communicate off the record about the merits of a case with any party, representative of a party, or other person unless the communication is in writing and a copy is sent to all parties to the proceedings.

[9.2.22.15 NMAC - N, 4/1/2004]

9.2.22.16 PRE-HEARING DISCLOSURES AND DISCOVERY:

A. Upon written request of any party, the hearing officer may require parties to comply with reasonable discovery requests. Oral and written depositions are prohibited except to preserve the testimony of persons who are sick or elderly, or persons who will not be able to attend the hearing.

B. At least fifteen (15) calendar days before the hearing, each party shall file the following information with the hearing officer and send copies to the other parties:

- (1) the name of each witness that the party will or may call at the hearing;
 - (2) a summary of the anticipated direct testimony of each witness and, if the testimony includes expert opinions, a list of documents or other information that provides the bases for those opinions;
 - (3) an estimate of the length of time for the direct testimony of each witness;
- and
- (4) a list of exhibits that will or may be offered into evidence at the hearing. In addition, each party shall provide the other parties, but not the hearing officer, with copies of all exhibits that are identified on the exhibit list but have not been provided previously.

C. Parties are encouraged to enter into stipulations of fact to expedite the hearing process. Any stipulations must be filed jointly with the hearing officer at least ten (10) working days before the hearing.

[9.2.22.16 NMAC - N, 4/1/2004]

9.2.22.17 SUBPOENAS:

A. Pursuant to Section 28-17-19(C) NMSA 1978, upon the written request of a party, the hearing officer may issue subpoenas to compel attendance of witnesses or production of records in connection with proceedings before the department.

B. In order to subpoena a person who is not a party to the proceedings, or an agent or representative of a party, the party requesting the subpoena shall tender witness fees and mileage to the person subpoenaed in accordance with the terms of Rule 1-045 NMRA.

C. The hearing officer may condition a subpoena to permit the inspection and copying of records upon the party requesting the subpoena paying the person subpoenaed the reasonable cost of inspection and copying in advance.

[9.2.22.17 NMAC - N, 4/1/2004]

9.2.22.18 EVIDENCE AND CONDUCT OF HEARING:

A. Hearings will be conducted as follows:

- (1) all hearings will be open to the public, unless closing a hearing is necessary to protect the privacy of any person who is entitled to privacy protection under federal or state law;

(2) only relevant and material evidence is admissible at hearings. Evidence will be allowed if it is of a type commonly relied upon by reasonably prudent persons in the conduct of serious affairs;

(3) redundant evidence will be excluded;

(4) witnesses shall be examined orally, under oath or affirmation. The parties and the hearing officer shall have the right to cross-examine witnesses; and

(5) the hearing officer may take official notice of any matter that is among the traditional matters of official or administrative notice, and may take official notice of any matter that is within the department's specialized knowledge. The hearing officer shall inform the parties of any matters officially noticed, and shall afford the parties an opportunity to contest any such matters.

B. The burden of persuasion at the hearing shall be on the state long-term care ombudsman, which must prove its case by a preponderance of the evidence unless the case involves allegations of fraud. In cases involving allegations of fraud, the state long-term care ombudsman must prove its case by clear and convincing evidence.

C. At the hearing, the state long-term care ombudsman shall present its evidence first. If the assessed party wishes to present evidence, it shall proceed second. Thereafter, only the state long-term care ombudsman may present rebuttal evidence. Rebuttal evidence shall be confined to the issues raised in the assessed party's presentation of evidence. Each party will be given an opportunity to offer a final oral or written argument without additional presentation of evidence.

[9.2.22.18 NMAC - N, 4/1/2004]

9.2.22.19 RECORD OF HEARING:

A. Unless a hearing is stenographically recorded and the hearing officer orders otherwise, all hearings shall be recorded electronically by audio or audio-video. Any party desiring a copy of the audio or audio-video shall make a written request to the hearing officer and shall pay the cost of preparing a copy.

B. No later than five (5) working days before a hearing, a party may request that the hearing be stenographically recorded at the cost of the requesting party. The request shall be in writing to the hearing officer and shall certify that the party has hired a certified court reporter and made all necessary arrangements for the court reporter to perform his or her job. In addition, the requesting party shall arrange for the court reporter to deliver two (2) copies of the completed hearing transcript to the hearing officer. A court reporter's transcription becomes official when certified by the hearing officer. The requesting party shall pay the court reporter's fees, including any costs associated with providing the copies of the completed hearing transcript to the hearing officer.

C. Record. The record in a hearing shall consist of the following:

- (1) the civil penalty assessment;
- (2) the assessed party's request for hearing;
- (3) the notice of appointment of the hearing officer;
- (4) the notice of hearing;
- (5) all pleadings and orders;
- (6) any written information requested by the hearing officer and provided to him or her by the parties before the hearing;
- (7) all exhibits;
- (8) all stipulations;
- (9) all statement of matters officially noticed by the hearing officer;
- (10) the electronic audio or audio-video recording, or the court reporter's written transcription of the hearing prepared in accordance with this rule;
- (11) the hearing officer's recommended decision;
- (12) any motions for reconsideration and rulings thereon; and
- (13) the secretary's final decision.

[9.2.22.19 NMAC - N, 4/1/2004]

9.2.22.20 HEARING OFFICER'S RECOMMENDED DECISION:

A. The hearing officer shall present a written recommended decision to the secretary after the close of the hearing, and shall send copies to the parties. The recommended decision shall be based solely on the record and shall include proposed findings of fact and conclusions of law.

B. Any motions for reconsideration shall be submitted to the hearing officer within five (5) working days from the date of service of the hearing officer's recommended decision. Such motions shall be decided without a hearing unless the hearing officer orders otherwise.

[9.2.22.20 NMAC - N, 4/1/2004]

9.2.22.21 SECRETARY'S FINAL DECISION:

A. The secretary shall issue a final written decision within ten (10) working days of the receipt of the hearing officer's recommended decision or ruling on a motion for reconsideration. Based upon the evidence in the record, the secretary may affirm, reverse or modify the hearing officer's recommended decision as modified by any subsequent rulings of the hearing officer. The secretary's final decision shall inform the parties of their right to seek judicial review.

B. The secretary shall send copies of the final decision to the parties by certified mail, return receipt requested.

C. When the secretary's final decision affirms a civil penalty assessment by the state long-term care ombudsman, the assessed party shall pay the civil penalty to the department within thirty (30) calendar days from the date of the decision. Payment shall be in the form of cash, cashier's check or money order.

[9.2.22.21 NMAC - N, 4/1/2004]

9.2.22.22 APPEAL:

A person who is aggrieved by the secretary's final decision may appeal to the district court in accordance with the provisions of Section 39-3-1.1 NMSA 1978 and Rule 1-074 NMRA. The date of filing of the secretary's final decision starts the time limit for appeal.

[9.2.22.22 NMAC - N, 4/1/2004]

9.2.22.23 NO AUTOMATIC STAY PENDING JUDICIAL REVIEW:

The filing of a notice of appeal shall not stay the enforcement of the secretary's final decision. Upon a showing of substantial hardship and irreparable harm, the secretary may grant a stay of the final decision pending appeal. The district court may also grant a stay in accordance with the provisions of Rule 1-074 NMRA.

[9.2.22.23 NMAC - N, 4/1/2004]

9.2.22.24 ENFORCEMENT OF ORDERS AND PAYMENT IN DEFAULT:

Whenever an assessed party is in default of a civil penalty assessment, the state long-term care ombudsman may file an action in district court solely for the purpose of entry of judgment and enforcement of the civil penalty. The district court shall accept the civil penalty assessment without reviewing the basis for it and shall enter an appropriate judgment or order to enforce the civil penalty assessment.

[9.2.22.24 NMAC - N, 4/1/2004]

PART 23: PATIENT CARE MONITORING IN LONG TERM CARE FACILITIES

9.2.23.1 ISSUING AGENCY:

Aging and Long-Term Services Department.

[9.2.23.1 NMAC - N, 7/15/04]

9.2.23.2 SCOPE:

This rule applies to the general public.

[9.2.23.2 NMAC - N, 7/15/04]

9.2.23.3 STATUTORY AUTHORITY:

This rule is adopted pursuant to the terms of Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978, Law 2004, Ch. 23, Sec. 6(E) and Laws 2004, Ch. 53, Sec. 10.

[9.2.23.3 NMAC - N, 7/15/04]

9.2.23.4 DURATION:

Permanent.

[9.2.23.4 NMAC - N, 7/15/04]

9.2.23.5 EFFECTIVE DATE:

July 15, 2004, unless a later date is cited in the history note at the end of a section.

[9.2.23.5 NMAC - N, 7/15/04]

9.2.23.6 OBJECTIVE:

This rule implements the provisions of the Patient Care Monitoring Act, Laws 2004, Ch. 53.

[9.2.23.6 NMAC - N, 7/15/04]

9.2.23.7 DEFINITIONS:

The following terms are used in this rule:

- A. "department"** means the aging and long-term services department;

B. "facility" means a long-term care facility licensed pursuant to the provisions of Section 24-1-5 NMSA 1978, other than an intermediate care facility for the mentally retarded, and may also include:

- (1) a skilled nursing facility;
- (2) an intermediate care nursing facility;
- (3) a nursing facility;
- (4) an adult residential shelter care home;
- (5) a boarding home;
- (6) any adult care home or adult residential care facility; and
- (7) any swing bed in an acute care facility or extended care facility;

C. "monitoring device" means a surveillance instrument that broadcasts or records activity, but does not include a still camera;

D. "patient" means a person who is a resident of a facility;

E. "program" means the New Mexico long-term care ombudsman program;

F. "roommate" means a patient who shares a room in a facility with a patient who has chosen, or whose surrogate has chosen, to install and use a monitoring device; and

G. "surrogate" means a legal guardian or a legally appointed substitute decision-maker who is authorized to act on behalf of a patient.

[9.2.23.7 NMAC - N, 7/15/04]

9.2.23.8 AUTHORIZATION AND USE OF A MONITORING DEVICE:

A. A patient or surrogate may authorize installation and use of a monitoring device in a facility provided that:

(1) the facility is given notice of the installation on a form prescribed by the department;

(2) if the monitoring device records activity visually, such recording shall include a record of the date and time;

(3) the monitoring device and all installation and maintenance costs are paid for by the patient or surrogate;

(4) written consent is given by each roommate or each roommate's surrogate on a form prescribed by the department;

(5) the monitoring is conducted in accordance with any limitation placed on it as a condition of consent by a roommate or the roommate's surrogate; and

(6) if a roommate or the roommate's surrogate also wishes to install and use a monitoring device, the patient or surrogate consents to the installation and use on terms that are no more restrictive than any that have been placed on the patient's or surrogate's installation and use.

B. A patient or surrogate may establish and a facility shall accommodate limits on the use, including the time of operation, direction, focus or volume, of a monitoring device.

[9.2.23.8 NMAC - N, 7/15/04]

9.2.23.9 INSTALLATION AND USE OF A MONITORING DEVICE:

A. At the time of admission to a facility, a patient shall be offered the option to have a monitoring device, and a record of the patient's authorization or choice not to have a monitoring device shall be kept by the facility and shall be made accessible to the program.

B. After authorization, consent and notice, a patient or surrogate may install, operate and maintain a monitoring device in the patient's room at the patient's or surrogate's expense. The patient or surrogate is responsible for all costs associated with installing, operating and maintaining the monitoring device, except the cost of electricity.

C. A patient or surrogate is responsible for selecting the type of monitoring device that will be used in the patient's room. If the patient or surrogate chooses to install a monitoring device that uses Internet technology, the monitoring device must have at least 128-bit encryption and enable a secure socket layer ("SSL").

[9.2.23.9 NMAC - N, 7/15/04]

9.2.23.10 ACCOMMODATION BY FACILITY:

A facility shall cooperate to accommodate the installation of a monitoring device, provided the installation does not place undue burden on the facility.

A. Reasonable accommodation includes, but is not limited to, the following:

(1) providing a reasonably secure place to mount a monitoring device;

- (2) providing access to power sources, if feasible;
- (3) rearranging a room, if feasible;
- (4) accommodating the limits a patient or roommate, or a surrogate of either, may place on the use of a monitoring device, if feasible;
- (5) referring a patient or surrogate to potential roommates or surrogates of roommates who have indicated on a current patient authorization form that they would consent to monitoring if a current roommate or surrogate of a roommate withholds consent; and
- (6) allowing patients, roommates and potential roommates to change rooms, when feasible, in those cases where consent is an issue.

B. Undue burden includes, but is not limited to, making structural changes to a room by anyone other than a licensed contractor, or a non-licensed person approved by the facility.

C. If a patient or surrogate chooses to install a monitoring device that uses Internet technology for visual monitoring, a facility shall allow the patient or surrogate to install any necessary Internet access line(s), if feasible. This may require access to the facility's telecommunications or equipment room, and the facility shall provide such access. In addition:

- (1) a patient or surrogate is responsible for contracting with an Internet provider and for any expense for activation, installation and on-going service; and
- (2) the facility is not required to allow Internet access through facility or corporate networks that also maintain confidential patient, medical, financial or personnel records.

D. A facility has the burden of proving that a requested accommodation is not feasible or constitutes an undue burden.

E. A facility may impose a refundable damage deposit of up to \$150 to cover the cost of repairing any damages to the facility caused by the installation or removal of a monitoring device. Within thirty days after the removal of a monitoring device, the facility shall deliver to the patient or surrogate a written statement itemizing any deductions from the deposit together with the balance of the deposit. The facility has the burden of proving that any deductions from the deposit are reasonable.

[9.2.23.10 NMAC - N, 7/15/04]

9.2.23.11 CONSENT OF PATIENT:

A. Consent to the authorization for the installation and use of a monitoring device may be given only by a patient or surrogate.

(1) If a patient has capacity to consent, only the patient may do so, notwithstanding the terms of any durable power of attorney, advance health-care directive, or similar instrument.

(2) If a patient does not have capacity to consent, only the patient's surrogate may give consent. If there is a dispute among surrogates within the same priority class under the Uniform Health-Care Decisions Act, none of them can give consent.

(3) A patient is presumed to have capacity to consent unless the patient has been determined to be incapacitated by a court of competent jurisdiction or by two qualified health-care professionals, one of whom shall be the primary physician, in accordance with the terms of the Uniform Health-Care Decisions Act.

B. Consent to the authorization for the installation and use of a monitoring device shall include a release of liability for the facility for a violation of the patient's right to privacy insofar as the use of the monitoring device is concerned.

C. A patient or surrogate may reverse a choice to have or not have a monitoring device installed and used at any time, after notice to the facility on a form prescribed by the department.

[9.2.23.11 NMAC - N, 7/15/04]

9.2.23.12 CONSENT OF ROOMMATES:

A. Consent of a roommate to the installation and use of a monitoring device by a patient or surrogate may be given only by the roommate or the roommate's surrogate.

(1) If a roommate has capacity to consent, only the roommate may do so, notwithstanding the terms of any durable power of attorney, advance health-care directive, or similar instrument.

(2) If a roommate does not have capacity to consent, only the roommate's surrogate may give consent. If there is a dispute among surrogates within the same priority class under the Uniform Health-Care Decisions Act, none of them can give consent.

(3) A roommate is presumed to have capacity to consent unless the roommate has been determined to be incapacitated by a court of competent jurisdiction or by two qualified health-care professionals, one of whom shall be the primary physician, in accordance with the terms of the Uniform Health-Care Decisions Act.

B. Consent to the authorization for the installation and use of a monitoring device shall include a release of liability for the facility for a violation of the roommate's right to privacy insofar as the use of the monitoring device is concerned.

C. A roommate or the roommate's surrogate may condition or limit consent on the use, including the time of operation, direction, focus or volume, of a monitoring device.

D. A roommate or the roommate's surrogate may reverse a choice to give, not give, or limit consent at any time, after notice to the facility on a form prescribed by the department.

E. If a monitoring device is being used in the room of a patient and a new roommate, who has not yet consented to the use of the monitoring device, moves into the room, monitoring shall cease until the new roommate, or the new roommate's surrogate, has consented in accordance with this section.

[9.2.23.12 NMAC - N, 7/15/04]

9.2.23.13 FORMS:

A. The department shall prescribe forms for implementing the Patient Care Monitoring Act and this rule. No facility shall use any forms other than those prescribed by the department.

B. A facility shall maintain the original copies of all completed forms relating to a patient for at least three years from the date of the patient's discharge from the facility. The forms shall be accessible to the program at all times.

[9.2.23.13 NMAC - N, 7/15/04]

9.2.23.14 AUTHORIZATION FORM:

The form for the authorization of installation and use of a monitoring device shall provide for:

A. consent of the patient or surrogate authorizing the installation and use of the monitoring device;

B. notice to the facility of the patient's installation of a monitoring device and specifics as to its type, function and use;

C. consent of any roommate, or that roommate's surrogate;

D. notice of release from liability for privacy violation through the use of the monitoring device; and

E. waiver of the patient's right to privacy in conjunction with the use of the monitoring device.

[9.2.23.14 NMAC - N, 7/15/04]

9.2.23.15 UNAUTHORIZED USE:

In any civil action against the facility, material obtained through the use of a monitoring device may not be used if the monitoring device was installed or used without the knowledge of the facility or without the prescribed form.

[9.2.23.15 NMAC - N, 7/15/04]

9.2.23.16 IMMUNITY:

Compliance with the provisions of the Patient Care Monitoring Act shall be a complete defense against any civil or criminal action brought against the patient, surrogate or facility for the use or presence of a monitoring device.

[9.2.23.16 NMAC - N, 7/15/04]

9.2.23.17 NOTICE TO CURRENT PATIENTS:

Within six months of the effective date of the Patient Care Monitoring Act, all facilities shall provide to each patient or surrogate a form prescribed by the department explaining the provisions of the Patient Care Monitoring Act and giving each patient or surrogate a choice to have a monitoring device installed in the patient's room. Copies of the completed form shall be kept by the facility and shall be made accessible to the program.

[9.2.23.17 NMAC - N, 7/15/04]

9.2.23.18 NOTICE OF MONITORING DEVICE:

The facility shall post a notice in a conspicuous place at the entrance to a room with a monitoring device that a monitoring device is in use in that room of the facility. The notice shall be posted at the facility's expense and shall state in English and Spanish: "WARNING: THIS ROOM IS MONITORED ELECTRONICALLY."

[9.2.23.18 NMAC - N, 7/15/04]

9.2.23.19 PROHIBITED ACTS:

No person or patient shall be denied admission to or discharged from a facility or be otherwise discriminated against or retaliated against because of a choice to authorize

installation and use of a monitoring device. Any person who violates this section shall be subject to the provisions of Section 28-17-19 NMSA 1978 and Rule 9.2.21 NMAC.

A. The civil penalty for denying a person admission to a facility or for discharging a patient from a facility in violation of this section shall be \$10,000 per occurrence.

B. The minimum civil penalty for failing to accommodate the installation of a monitoring device, in violation of Section 9.2.23.10 of this rule, shall be \$1,000.

C. The minimum civil penalty for any person other than a patient or surrogate interfering with the use of a monitoring device or destroying a recording made by a monitoring device shall be \$1,000.

D. The minimum civil penalty for failing to refund a damage deposit in accordance with the terms of Section 9.2.23.10 of this rule shall be \$500.

E. The civil penalties for other forms of discrimination or retaliation that violate this section shall be determined in a manner consistent with Rule 9.2.21 NMAC.

F. Except for violations of Subsections B, C and D of this section, it is irrelevant whether the installation or use of a monitoring device was authorized in accordance with the terms of the Patient Care Monitoring Act and this rule.

[9.2.23.19 NMAC - N, 7/15/04]

9.2.23.20 CRIMINAL ACTS:

Any person other than a patient or surrogate found guilty of intentionally hampering, obstructing, tampering with or destroying a monitoring device or a recording made by a monitoring device installed in a facility pursuant to the Patient Care Monitoring Act is guilty of a fourth degree felony and shall be sentenced pursuant to Section 31-18-15 NMSA 1978.

[9.2.23.20 NMAC - N, 7/15/04]

PART 24: THE ADMINISTRATION OF THE CONTINUING CARE ACT

9.2.24.1 ISSUING AGENCY:

Aging and Long-Term Services Department.

[9.2.24.1 NMAC - Rp, 9.2.24.1 NMAC, 07/26/2022]

9.2.24.2 SCOPE:

This rule applies to for-profit and nonprofit continuing care communities, and the general public.

[9.2.24.2 NMAC - Rp, 9.2.24.2 NMAC, 07/26/2022]

9.2.24.3 STATUTORY AUTHORITY:

This rule is adopted by authority of the secretary pursuant to Subsection E of Section 9-23-6 NMSA 1978, by authority of the Continuing Care Act, Sections 24-17-1 through 24-17-18 NMSA 1978, and by authority of the department pursuant to Subsection B of Section 28-4-6 NMSA 1978.

[9.2.24.3 NMAC - Rp, 9.2.24.3 NMAC, 07/26/2022]

9.2.24.4 DURATION:

Permanent.

[9.2.24.4 NMAC - Rp, 9.2.24.4 NMAC, 07/26/2022]

9.2.24.5 EFFECTIVE DATE:

July 26, 2022, unless a later date is cited in the history note at the end of a section.

[9.2.24.5 NMAC - Rp, 9.2.24.5 NMAC, 07/26/2022]

9.2.24.6 OBJECTIVE:

This rule is promulgated for the purpose of administering certain provisions of the Continuing Care Act, Sections 24-17-1 through 24-17-18 NMSA 1978, and for establishing the terms and conditions under which continuing care communities may increase the rates and fees they charge residents pursuant to Paragraph (11) of Subsection B of Section 24-17-5 NMSA 1978.

[9.2.24.6 NMAC - Rp, 9.2.24.6 NMAC, 07/26/2022]

9.2.24.7 DEFINITIONS:

The following terms are used in this rule:

A. "affiliate" means a person (which is defined by the Continuing Care Act as an individual, corporation, partnership, trust, association or other legal entity) having a five percent or greater interest in a provider;

B. "ALTSD" means the aging and long-term services department;

C. "community" means a retirement home, retirement community, home for the aged or other place that undertakes to provide continuing care, such as a life plan community;

D. "continuing care" means furnishing, pursuant to a contract that requires entrance or advance fees and service or periodic fees, independent-living and health or health-related services. Entrance or advanced fees do not include security or damage deposit fees that amount to less than three months' service or periodic fees. These services may be provided in the community, in the resident's independent living unit or in another setting, designated by the continuing care contract, to an individual not related by consanguinity or affinity to the provider furnishing the care. The services include, at a minimum, priority access to a nursing facility or hospital either on site or at a site designated by the continuing care contract;

E. "cost of care" means the direct cost of providing medical care or health-related supportive services to residents;

F. "cost of operating the continuing care community" means the indirect cost of providing care to residents; it includes administrative costs, depreciation expenses, recurring and nonrecurring costs, ordinary and extraordinary costs, capital improvement and replacement costs, and all other costs associated with running a continuing care community, other than cost of care;

G. "economic necessity" means insolvency or circumstances where funds are lacking to maintain a reasonable level of service and care for residents, including the inability to meet loan or bond requirements, or having insufficient funds to comply with master trust indenture or a future service obligation, where, under GAAP accounting, the expenses are greater than future revenue;

H. "expenses" mean cost of care plus cost of operating the continuing care community;

I. "fees" or "assessments" mean entrance fees, deposits, monthly service fees and any other sum of money which a resident must pay to a provider;

J. "GAAP" means generally accepted accounting principles; it refers to a set of widely accepted accounting standards, set by the financial accounting standards board, and used to standardize financial accounting of public companies;

K. "gift income" means income from any gift or grant, or portion thereof, that is used to pay for or offset an expense;

L. "income" means all income received by a continuing care community during a reporting period; income includes operating income, investment income, gift income, and all other forms of income;

M. "investment income" means income received by a continuing care community on investments. Investment income does not include income on resident trust accounts;

N. "liquid reserves" means cash or other assets that are available within 60 days to satisfy a community's expenses and that do not include real property or interests in real property;

O. "net income" means income minus expenses;

P. "net operating expenses" means the total costs of operating a community, including taxes and insurance but not including amortization, depreciation or long-term debt service;

Q. "person" means an individual, corporation, partnership, trust, association or other legal entity;

R. "policy" is a deliberate system of guidelines to guide decisions and achieve rational outcomes. It is a statement of intent and is implemented as a procedure or protocol;

S. "provider" means the owner or manager of a community that provides, or offers to provide, continuing care;

T. "reserves" means capital set aside for future expenses and includes liquid reserves and other reserves;

U. "resident" means an actual or prospective purchaser of, nominee of or subscriber to a continuing care contract;

V. "return on investment" for a for-profit corporation means net income divided by the sum of common stock equity, preferred stock equity and long-term debt; for any other form of business enterprise, it means a ratio that is statistically equivalent to the return on investment for a for-profit corporation;

W. "type A agreement" means, as defined in Subsection K of Section 24-17-3 NMSA 1978, an extensive entrance-fee contract that includes housing, residential services, amenities and unlimited specific health-related services with little or no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments; and

X. "type B agreement" means, as defined in Subsection L of Section 24-17-3 NMSA 1978, a modified entrance-fee contract that includes housing, residential services, amenities and a specific amount of health care with no substantial increase in monthly payments, except to cover normal operating costs and inflation adjustments. After the specified amount of health care is used, persons served pay either a discounted rate or the full per diem rates for required health care services.

[9.2.24.7 NMAC - Rp, 9.2.24.7 NMAC, 07/26/2022]

9.2.24.8 RATE AND FEE INCREASES:

A. A continuing care contract shall state, in clear and understandable language, when rates and fees will be subject to periodic increases and what the policy for increases will be. The contract shall include the policy for increases and shall clearly indicate which of the four factors referenced in Subsection C of 9.2.24.8 NMAC it will utilize for rate and fee increases.

B. A continuing care community shall give residents at least 30 days advance written notice of any rate or fee increase.

C. A continuing care community shall base rate and fee increases on one or more of the following four factors referenced in its contract and policy, and no others:

- (1) economic necessity as defined in Subsection G of 9.2.24.7 NMAC;
- (2) the reasonable cost of operating the continuing care community as referenced in 9.2.24.9 NMAC;
- (3) the cost of care as referenced in 9.2.24.10 NMAC; and
- (4) a reasonable return on investment as referenced in 9.2.24.12 NMAC.

D. Any publicly available documentation used by a continuing care community to support a rate or fee increase shall conform to applicable GAAP standards and shall be included in the notice provided to residents referenced in Subsection B of 9.2.24.8 NMAC. Additionally, the community shall supply the mathematical calculations used to support a rate or fee increase to at least two decimal places. Any non-public documentation shall be aggregated into summarized budgets or pro forma financials.

E. A continuing care community may contractually base rate and fee increases on published federal economic data used for the purpose of cost of living and inflation adjustments provided that such increases do not exceed what would otherwise be allowable under this rule.

[9.2.24.8 NMAC - Rp, 9.2.24.8 NMAC, 07/26/2022]

9.2.24.9 COST OF OPERATING THE CONTINUING CARE COMMUNITY:

A. A continuing care community shall identify with reasonable specificity all costs of operating the continuing care community, including any fees paid to affiliated persons or entities.

B. Any unreasonable cost of operating the continuing care community shall be charged against the common stock equity of a for-profit corporation, or against a comparable measure of the assets less liabilities for any other type of business enterprise.

[9.2.24.9 NMAC - Rp, 9.2.24.9 NMAC, 07/26/2022]

9.2.24.10 COST OF CARE INCREASES:

A. Rate and fee increases based on cost of care increases for providing medical care or health-related supportive services to an individual resident shall be governed by any applicable terms of the continuing care contract. If there are no applicable terms, such rate and fee increases shall be considered general cost of care increases.

B. General cost of care increases shall be treated as an expense item by a continuing care community.

[9.2.24.10 NMAC - Rp, 9.2.24.10 NMAC, 07/26/2022]

9.2.24.11 HISTORICAL AND CURRENT DATA:

A. A continuing care community shall base rate or fee increases on four years of historical data plus current fiscal year projections. However, the community may consider a deviation from historical data when exigent circumstances exist making the historical data inapplicable to the circumstances surrounding the need for the present increase.

B. A continuing care community that has been in operation for less than four years shall base rate or fee increases on historical data for the entire period it has been in operation plus current fiscal year projections.

C. A continuing care community shall make available to residents copies of any publicly available data used to support a rate or fee increase. Non-public data will be aggregated when permissible. The data shall be made available at the time the continuing care community gives notice of a rate or fee increase, and it shall be made available at no cost to the residents.

[9.2.24.11 NMAC - Rp, 9.2.24.12 NMAC, 07/26/2022]

9.2.24.12 REASONABLE RETURN ON INVESTMENT AS IT PERTAINS TO RATE AND FEE INCREASES:

A. A reasonable return on investment shall be determined by comparing the continuing care community's historical and current return on investment data to secondary market interest rate data published by the federal reserve board for 90-day United States treasury bills.

B. A return on investment consistently greater than six percentage points higher than the annual average secondary market interest rate on 90-day United States treasury bills shall be presumed to be unreasonable. The presumption is rebuttable.

[9.2.24.12 NMAC - Rp, 9.2.24.13 NMAC, 07/26/2022]

9.2.24.13 ACCOUNTING DATA FOR RATE AND FEE INCREASES SHALL BE SPECIFIC TO THE CONTINUING CARE COMMUNITY:

A continuing care community shall base rate or fee increases on accounting data that is specific to the community. A continuing care community shall not base rate or fee increases on companywide data, statewide data, nationwide data, or any other accounting data that is not community specific.

[9.2.24.13 NMAC - Rp, 9.2.24.14 NMAC, 07/26/2022]

9.2.24.14 EXISTING CONTRACTUAL PROVISIONS NOT ABROGATED:

This rule shall not abrogate any provision relating to rate and fee increases in a continuing care contract that is entered into prior to the effective date of this rule.

[9.2.24.14 NMAC - Rp, 9.2.24.15 NMAC, 07/26/2022]

9.2.24.15 FINANCIAL RESERVES:

A. Liquid Reserves:

(1) A community must maintain liquid reserves and the provider must disclose this information to ALTSD, and actual and prospective residents in its annual disclosure statement.

(2) The liquid reserves shall be sufficient to assure payment of debt obligations and an ongoing ability to provide services to residents.

(3) A community that provides a type A agreement shall, at all times, maintain liquid reserves equal to the principal and interest payments due for a 12-month period on all accounts of any mortgage loan and other long-term debt, as well as three months' worth of net operating expenses.

B. Other Reserves:

(1) Deposits or entrance fees paid by or for a resident constitute reserves which shall be held in trust for the benefit of the resident in a federally insured New Mexico bank, separate from the community's operating accounts, until:

(a) the resident has occupied the resident's unit; or

(b) the resident's contract cancellation period has ended, whichever occurs later.

(2) A community that provides type B agreements shall calculate required reserves on a prorated basis for residents who fall under type B agreements.

C. Certification of Compliance Regarding Financial Reserves:

(1) A provider shall make available to the certified public accountant who is responsible for the community's annual audited financial statement and audit report, a copy of this rule and a copy of the Continuing Care Act, specifically the requirements for financial reserves referenced in Section 24-17-6 NMSA 1978.

(2) The certified public accountant shall certify whether, based upon the audit, the community meets the financial reserve requirements delineated in this rule and in the Continuing Care Act. If the certified public accountant finds that the community does not meet the financial reserve requirements delineated in this rule and in the Continuing Care Act, then the certified public accountant shall state the reason(s) for the community's deficiencies.

D. Corrective Action Plan: If the certified public accountant is unable to attest that the community meets the financial reserve requirements delineated in this rule and in the Continuing Care Act, then the provider shall submit a proposed Corrective Action Plan to ALTSD.

[9.2.24.15 NMAC - N, 07/26/2022]

9.2.24.16 DISCLOSURE STATEMENT AND PROVIDER CERTIFICATION:

A. Annual Disclosure Statement to ALTSD:

(1) No later than July 1, 2022, and each year thereafter, within 180 days after the end of a community's fiscal year, a provider shall submit a disclosure statement, any amendments to that statement, and any proposed corrective action plan to ALTSD. The annual disclosure statement shall include, at a minimum, all information delineated in Subsection B of Section 24-17-4 NMSA 1978 and the information delineated in Paragraphs (2) and (3) of Subsection A of 9.2.24.16 NMAC. Submittal is completed electronically to ALTSD by emailing ALTSD.CCRC@state.nm.us. In the event a fillable template is created by ALTSD for submission of disclosure statements, providers shall use the ALTSD template. ALTSD shall notify providers when a template is available for use and provide instructions for accessing it.

(2) The disclosure statement shall include the extent of any guarantee or cross collateralization if a provider guarantees the debt of another legal entity or otherwise cross collateralizes its assets for the benefit of another legal entity.

(3) Pursuant to Paragraph (13) of Subsection B of Section 24-17-4 NMSA 1978, the disclosure statement shall include a sample copy of the contract used by the provider. The sample contract shall include all the minimum requirements of a continuing care contract as prescribed by Subsection B of Section 24-17-5 NMSA 1978.

B. Provider Certification of Compliance with the Continuing Care Act:

(1) Pursuant to Section 24-17-17 NMSA 1978, in conjunction with its submission of the annual disclosure statement, the provider shall certify to ALTSD:

(a) that the disclosure was provided to each actual resident or the residents' association within 180 days after the end of the community's fiscal year;

(b) that the disclosure statement was provided to each prospective resident at least seven days before the provider entered into a continuing care contract with the prospective resident, or prior to the prospective resident's first payment, whichever occurred first;

(c) that the disclosure includes all the information delineated in Subsection B of Section 24-17-4 NMSA 1978;

(d) whether it is a community that provides type A or type B agreements;

(e) that it adopted and follows a written policy establishing the procedure and criteria that are applicable when deciding to transfer residents from one level of care to another as required by Section 24-17-12 NMSA 1978; and

(f) that it has taken appropriate steps to encourage and facilitate the establishment of a resident association in each facility, and that the provider complies with all of the requirements of Section 24-17-13 NMSA 1978.

(2) The provider shall further certify whether in the past five years:

(a) it has been issued a notice of violation by ALTSD, pursuant to Section 24-17-16 NMSA 1978;

(b) the attorney general filed an action against the provider in a court of competent jurisdiction pursuant to Section 24-17-18 NMSA 1978;

(c) the attorney general has brought a legal action in district court against the provider in order to restrain or prevent violations of the Continuing Care Act or these regulations pursuant to Section 24-17-10 NMSA 1978; and

(d) if the attorney general has filed an action against the provider pursuant to Subparagraph (b) or (c) of Paragraph (2) of Subsection B of 9.2.24.16 NMAC. If a legal action was filed then the provider shall indicate the status of that matter, as well as

whether any civil penalties or injunctive relief were imposed upon the provider. Specifically, if civil penalties or injunctive relief were imposed then the provider shall indicate the amount of the penalty, or the nature of the temporary or permanent injunctive relief. However, no confidential information that is subject to a settlement agreement with the attorney general shall be disclosed.

[9.2.24.16 NMAC - N, 07/26/2022]

9.2.24.17 ACTUARIAL STUDIES:

A. Continuing care communities that provide type A or type B agreements shall include in their annual disclosure to ALTSD, as well as to actual and prospective residents, a summary of a comprehensive actuarial analysis within the last five years and an annual future-service obligation calculation by an actuary who is a member of the American academy of actuaries and who is experienced in analyzing continuing care communities.

B. The provider shall include with the actuarial analysis and annual future-service obligation calculation, as required by Subsection A of 9.2.24.17 NMAC and the Continuing Care Act, a certification signed by the actuary that they are a member of the American academy of actuaries and that they are experienced in analyzing continuing care communities.

C. A provider shall make available to the actuary, who is responsible for the comprehensive actuarial analysis and future service obligation, a copy of this rule and a copy of the Continuing Care Act, specifically Paragraph (11) of Subsection B of Section 24-17-4 NMSA 1978.

[9.2.24.17 NMAC - N, 07/26/2022]

9.2.24.18 NOTICE OF VIOLATIONS:

A. ALTSD shall review disclosure statements and corrective action plans filed pursuant to the Continuing Care Act for compliance with the Act and with these rules. After its initial review, if ALTSD has any questions regarding the submissions, then it may contact the provider to gather clarification and informally discuss its questions.

B. If ALTSD determines that a person or an organization has engaged in, or is about to engage in, an act or practice constituting a violation of the Continuing Care Act or any rule adopted pursuant to the Act, then ALTSD shall issue a notice of violation in writing to that person or organization and send copies to the resident association of any facility affected by the notice.

C. The notice of violation shall state the following:

- (1) a description of the violation at issue;

(2) the action that, in the judgment of ALTSD, the provider should take to conform to the law or the assurances that ALTSD requires to establish that no violation is about to occur;

(3) the compliance date by which the provider shall correct any violation or submit assurances;

(4) the requirements for filing a report of compliance; and

(5) the applicable sanctions for failure to correct the violation or failure to file the report of compliance according to the terms of the notice of violation.

D. At any time after receipt of a notice of violation, the person or organization to which the notice is addressed, or ALTSD, may request a conference. ALTSD shall schedule a conference within 30 days of ALTSD's receipt of a request for a conference. Requests for a conference may be submitted to ALTSD via email at ALTSD.CCRC@state.nm.us.

E. The purpose of the conference is to discuss the contents of the notice of violation and to assist the provider in complying with the requirements of the Continuing Care Act. In certain situations, if both the provider and ALTSD concur, then ALTSD may request that the provider undergo special audit procedures by a certified public accountant to help resolve the alleged violation. A representative of the resident association at any facility affected by the notice shall have a right to attend the conference.

F. A person receiving a notice of violation shall submit a signed report of compliance as provided by the notice. ALTSD shall send a copy to the resident association of any facility affected by the notice.

G. Upon receipt of the report of compliance, ALTSD may take steps to determine that compliance has been achieved.

H. Any time after ALTSD issues a notice of violation, it may send the attorney general a written report alleging a possible violation of the Continuing Care Act or any rule adopted pursuant to the Act.

[9.2.24.18 NMAC - N, 07/26/2022]

CHAPTER 3: GENDER

PART 1: GENERAL PROVISIONS [RESERVED]

PART 2: GOVERNORS CAREER DEVELOPMENT CONFERENCE FOR WOMEN

9.3.2.1 ISSUING AGENCY:

Governors Career Development Conference for Women.

[Recompiled 10/01/01]

9.3.2.2 SCOPE:

[RESERVED]

[Recompiled 10/01/01]

9.3.2.3 STATUTORY AUTHORITY:

[RESERVED]

[Recompiled 10/01/01]

9.3.2.4 DURATION:

[RESERVED]

[Recompiled 10/01/01]

9.3.2.5 EFFECTIVE DATE:

[Filed June 8, 1988]

[Recompiled 10/01/01]

9.3.2.6 OBJECTIVE:

A. Since 1978, the governors of New Mexico have recognized the important roles served by women in state government and have actively supported the governor's career development conference for women. The purpose of the conference is to enable women to meet and exchange ideas on a broad range of subjects which will further goals of career and personal development and serve to foster career development; to help women become aware of career possibilities and define their personal interests, abilities and goals as they relate to career mobility; to assist women in finding resources to prepare themselves mentally, physically and emotionally for mobility; and to help women become a viable force in career areas and assist them in developing support systems. In addition, for the women who are members of the steering committee, the purpose is to develop leadership skills and to provide experience and confidence in their abilities.

B. The conference shall maintain a nonpartisan posture and shall provide for representation of all state agencies in the three branches of government on the steering committee.

[Recompiled 10/01/01]

9.3.2.7 DEFINITIONS:

[RESERVED]

[Recompiled 10/01/01]

9.3.2.8 ORGANIZATION:

A. The conference shall consist of:

(1) the steering committee, composed of a representative or representatives and alternates from all state agencies; provided, however, that small agencies and boards and commissions shall have one representative and alternate which represent them in the aggregate;

(2) the steering committee composition may be changed to allow for greater participation or representation among agencies;

(3) the executive committee, composed of the elected officers, secretary and treasurer of the conference and the chairwomen of the planning subcommittees; and

(4) the planning subcommittees, composed of steering committee members appointed by the chairwoman. Planning subcommittees shall be created at the discretion of the chairwoman, but shall be sufficient to assure that the basic needs of the conference are met in the areas of arrangements, registration, publicity, publications, workshops and data evaluation.

B. Pursuant to Executive Order 83-19, participation in conference planning is a designated activity of the members involved, and each is assumed to have agreed to serve as her agency's representative. They are members of the steering committee and are required to attend steering committee and appropriate subcommittee meetings. If any member is unable to balance her job and the requirements of the conference, she should request that her agency select another person. If a member misses four meetings of the steering committee, the chairwoman shall ask for her resignation and request the agency to appoint a replacement.

[Recompiled 10/01/01]

9.3.2.9 OFFICERS:

A. The chairwoman and vice chairwoman are the elected officers of the conference. The spouse of the governor shall be the honorary chairwoman.

B. The chairwoman and vice chairwoman shall serve no more than one year in the respective office and shall not again be eligible for elected office. To provide continuity, the vice chairwoman shall become the chairwoman for the succeeding year. The one-year term of office for elected officers shall be from January 1 to December 31. In addition to planning and presenting the conference, the elected officers are responsible for closing all conference business and commitments prior to the planning for the subsequent year's conference.

C. The chairwoman shall appoint a secretary and treasurer. The secretary shall be responsible for writing and mailing minutes of the executive and steering committee meetings and for performing other duties required by the chairwoman. The treasurer shall be the fiscal agent for the conference. The chairwoman or the treasurer shall have the power to enter into contracts and sign vouchers for payment through the department of finance and administration.

[Recompiled 10/01/01]

9.3.2.10 SUBCOMMITTEES:

A. Subcommittees and their chairwomen shall be appointed by the conference chairwoman.

B. A subcommittee is responsible for planning that portion of the conference assigned to it and shall have full authority to carry out its mandate with the approval of the chairwoman. The steering committee reserves the right to overturn a decision of a subcommittee by a three-fourth's vote of those present at the steering committee.

C. Subcommittee budgets shall be submitted to the chairwoman by the subcommittee chairwomen. Actions by a subcommittee which will involve expenditures of conference funds, exclusive of general expenditures which are part of the subcommittee budget, shall be approved by the conference chairwoman.

D. A subcommittee chairwoman may request that a member of a subcommittee be replaced if the member misses more than three subcommittee meetings or otherwise fails to participate in subcommittee duties.

[Recompiled 10/01/01]

9.3.2.11 VOTING AND ELECTIONS:

A. Officers, representatives and alternates are voting members of the steering committee. Representatives and alternates are appointed by their agency head at the request of the governor.

B. With the exception of extraordinary votes required on actions stated elsewhere in the rules, all votes are by simple majority. In the case of a tie vote, the motion fails.

C. At its first meeting following the conference each year, the steering committee shall elect a nominating committee of three for the purpose of selecting candidates for the position of vice chairwoman. Candidates shall provide the nominating committee with a short biography and their qualifications. These shall be immediately distributed to all members of the steering committee. At the last meeting of the year, the vice chairwoman shall be elected by secret ballot. Nominations from the floor will also be accepted at the time of the election. The chair of the nominating committee will conduct the election. If the chairwoman resigns her position, the vice chairwoman shall become chairwoman and a new vice chairwoman shall be elected. Should vacancies occur in both positions, they shall be filled in the same manner.

[Recompiled 10/01/01]

9.3.2.12 MEETINGS:

A. Meetings of the steering committee are subject to the Open Meetings Act.

B. Meetings shall be conducted pursuant to *Robert's Rules of Order*.

[Recompiled 10/01/01]

9.3.2.13 CONFERENCE PARTICIPATION:

A. While the governor's career development conference for women welcomes participation by men, that participation shall not be at the expense of women in state government who wish to attend the conference. In the event that participation must be limited, priority for conference attendance shall be in the following order:

- (1) women in state government;
- (2) men in state government;
- (3) state education institutions, public schools and political subdivisions of the state; and
- (4) other interested persons.

B. The conference shall endeavor to keep fees for conference participation low enough to allow state agencies to pay or reimburse for conference registration and so that no women in state government will be denied attendance at the conference.

C. The executive committee shall set registration fees and fees paid to presenters.

[Recompiled 10/01/01]

9.3.2.14 CONFERENCE THEME AND KEYNOTE SPEAKER:

A. Each year's theme and keynote speaker shall be approved by the steering committee.

B. The executive committee shall present recommendations for the year's theme and keynote speaker to the steering committee. Any member of the conference may make suggestions to the executive committee or to the steering committee at the time of consideration of the question.

[Recompiled 10/01/01]

9.3.2.15 AMENDMENTS TO RULE:

A. The rules of the governor's career development conference for women are subject to ratification each year by the steering committee.

B. After ratification, any amendment to the rules of the governor's career development conference for women shall be by three-fourth's vote of the members present at the meeting succeeding the meeting at which a change of the rule was proposed.

[Recompiled 10/01/01]

CHAPTER 4: PERSONS WITH DISABILITIES

PART 1: GENERAL PROVISIONS

9.4.1.1 ISSUING AGENCY:

New Mexico Commission for the Blind.

[3/30/96; Recompiled 10/01/01]

9.4.1.2 SCOPE:

Commissioners and consumers of the commission for the blind.

[3/30/96; Recompiled 10/01/01]

9.4.1.3 STATUTORY AUTHORITY:

Sections 28-7-15 to 28-7-23 NMSA 1978 create the commission for the blind.

[3/30/96; Recompiled 10/01/01]

9.4.1.4 DURATION:

Permanent.

[3/30/96; Recompiled 10/01/01]

9.4.1.5 EFFECTIVE DATE:

March 30, 1996 [unless a later date is cited at the end of a section]

[3/30/96; Recompiled 10/01/01]

9.4.1.6 OBJECTIVE:

These bylaws and rules of procedure are promulgated and adopted in accordance with the power and authority of the New Mexico commission for the blind. These bylaws and rules of procedure will serve the public, employees and the commission as a guide to the operations and policies of the New Mexico commission for the blind and accommodate the carrying out of the intent of the legislature which created the commission.

[3/20/96; Recompiled 10/01/01]

9.4.1.7 DEFINITIONS:

[RESERVED]

[3/30/96; Recompiled 10/01/01]

9.4.1.8 THE COMMISSION:

A. The name of the commission shall be the New Mexico commission for the blind. For the purpose of brevity in the succeeding rules, this organization shall be subsequently referred to as the "commission".

B. The headquarters of the commission shall be at Santa Fe, New Mexico.

C. The fiscal year of the commission shall end on June 30.

D. The commission shall provide advice and/or recommendations regarding all policies, rules and regulations to effectuate the declaration of the legislature as set forth in the statute creating the commission. Daily supervision and administrative determination will be made solely by the director in accordance with the specific delegation of authority granted to the director by the governor and the enabling legislation.

[3/30/96; Recompiled 10/01/01]

9.4.1.9 MEMBERS OF THE COMMISSION:

A. Members of the commission are those appointed by the governor with the advice and consent of the senate.

B. All members of the commission shall receive per diem and mileage at the rate specified in the Per Diem and Mileage Act (Subsection A of Section 10-8-5 and Subsection E of Section 9-6-5 NMSA 1978) for all travel connected with commission meetings and other authorized commission business.

C. Facilities of the office of the administrative staff, including the telephones and secretarial services, may be utilized by the commission members and staff for the official business of the commission.

D. The members of the commission shall provide advice and recommendations regarding objectives, policies and priorities, and applications for grants.

E. The chairman may, with majority approval of the commission, request that the governor remove a member for chronic absenteeism, or other suitable reason, and appoint another one in his/her place.

F. The commission members are required to file a financial disclosure statement which must be kept current at all times.

[3/30/96; Recompiled 10/01/01]

9.4.1.10 MEETINGS OF THE COMMISSION:

A. Regular meetings of the commission will be held quarterly with the time and place established at each previous meeting. Alterations in dates of meetings may be made by unanimous agreement of commission members. Notice of all meetings shall be made in accordance with an open meetings resolution to be adopted by majority vote of the commission.

B. Special meetings may be called by any two members of the commission so long as three days notice is given to all members and the press.

C. Emergency meetings may be called by the chairman so long as notice is given to all members and the press at least twenty-four hours in advance.

[3/30/96; Recompiled 10/01/01]

9.4.1.11 ORGANIZATION OF THE COMMISSION:

At the first meeting of the fiscal year, the commission as a whole shall organize by the nomination, election and installation of a chairman.

[3/30/96; Recompiled 10/01/01]

9.4.1.12 DUTIES OF THE CHAIRMAN:

The chairman shall preside at all meetings and perform all other duties ordinarily pertaining to the office of the chairman.

[3/30/96; Recompiled 10/01/01]

9.4.1.13 MEETING PROCEDURES:

A. All members of the New Mexico commission for the blind shall have voting rights in all matters, provided they are in attendance when the vote is taken.

B. The agenda for the commission meetings shall be prepared by the director and the chairman, and be distributed by the director. Any commissioner desiring to place an item on the agenda should inform the chairman or director three weeks in advance of the meeting.

C. The order of business at any meeting of the commission shall be:

- (1) roll call;
- (2) approval of the agenda;
- (3) approval of the minutes of past meetings;
- (4) election of officers and installation of same at annual meeting;
- (5) unfinished business;
- (6) chairman's report;
- (7) director's report;
- (8) new business;
- (9) non-action items;
- (10) observer question and answer period; and
- (11) date and place of next meeting.

D. Persons outside the commission or staff wishing to have the commission consider specific questions or to take up specific matters shall make written request to the director or chairman to have such subjects placed on the agenda. Such requests are to be made to the director or chairman at least two calendar weeks preceding any meeting. The director will notify those who make such requests as to the time of their appearance. The time allotted for the agenda item will be at the discretion of the chairman.

E. Commission meetings will be conducted in accordance with *Robert's Rules of Order Newly Revised* if not in conflict with commission bylaws or state statutes.

[3/30/96; Recompiled 10/01/01]

9.4.1.14 THE DIRECTOR:

A. The director shall be the supervisory administrative officer of the New Mexico commission for the blind. Such position shall be an exempt position under the rules of the personnel department of the state of New Mexico and shall be filled by appointment as defined in the enabling legislation. Such individual shall carry out policies of the commission and shall be solely responsible for supervision of the administrative details of the commission office. Such individual shall be professionally qualified and shall be paid a salary commensurate with his or her experience, an amount to be determined by the appropriate agency of the state of New Mexico in compliance with applicable rules of the state of New Mexico.

B. Duties:

(1) Supervise and administer all technical, administrative, and clerical matters relating to commission business, except those matters which require specific approval by the board.

(2) Conduct and care for all correspondence in the name of the commission. Prepare and mail to members, agendas of meetings and minutes of the preceding meeting, two calendar weeks before the next meeting.

(3) Set, with the advice and/or recommendation of the commission, rules and procedures necessary for the implementation of the act.

(4) Devise and implement such office procedures and policies as may be necessary for good management and administration in accordance with the policies of the governor and the State Personnel Act.

(5) Be responsible for the financial administration of the commission within the budget parameters determined by the legislature and prepare the commission's annual report.

(6) Maintain all financial accounts as required by the state of New Mexico. Sign certificates, vouchers, payroll and grants for the commission.

(7) Establish the manpower needs of the commission. Select, train, orient, supervise and evaluate staff.

(8) The director shall promptly report to the commission chairman all changes that will have a significant impact on the budget, and shall be prepared to discuss such items with the commission to obtain its recommendations related thereto.

(9) Prepare the budget for the operation of the commission. The director shall determine the requirements necessary and essential to carry out the objectives to be attained during the budgetary period. Guidance from the commission shall be obtained before and during this preparation. Prior to submitting the budget formally to the department of finance and administration or to the legislative finance committee, such budget shall have been reviewed by the commission. Any budget request amendment by the department of finance and administration, the legislative finance committee, or the legislature shall be communicated to the commission by the director, accompanied by an analysis of the significant impact of the changes. This should be done at the next meeting of the commission following the change.

(10) All actions of the director affecting matters of administration of the act shall be in strict compliance with the act and in accordance with the by-laws of the commission and the administrative procedures set forth in the laws of New Mexico.

[3/30/96; Recompiled 10/01/01]

9.4.1.15 QUORUM:

A quorum shall consist of a majority of the duly qualified commission members. If a majority of the quorum takes action, this shall be construed to be a majority of the commission.

[3/30/96; Recompiled 10/01/01]

9.4.1.16 APPROVED THIS 6TH DAY OF MARCH, 1996 MANUEL GONZALES, CHAIRMAN:

[3/30/96; Recompiled 10/01/01]

PART 2-4: [RESERVED]

PART 5: BUSINESS ENTERPRISE PROGRAM POLICIES FOR BLIND VENDORS

9.4.5.1 ISSUING AGENCY:

New Mexico Commission for the Blind.

[4/15/97; Recompiled 10/01/01]

9.4.5.2 SCOPE:

Legally blind licensed managers and applicants.

[4/15/97; Recompiled 10/01/01]

9.4.5.3 STATUTORY AUTHORITY:

Section 22-14-24 to Section 22-14-29 NMSA 1978, "Horace DeVargas Act," authorizes the New Mexico commission for the blind to establish, maintain and operate a vending stand program for legally blind persons under the auspices of the "Randolph-Sheppard Act," Public Law 74-732 as amended by Public Law 83-565, 93-516 and 95-602, 20 U.S.C. Section 107 et seq. The law locates the state licensing agency (SLA) for the program in the individual state or territorial agency that offers vocational rehabilitation services for individuals who are blind under the Rehabilitation Act of 1973, as amended.

[4/15/97; Recompiled 10/01/01]

9.4.5.4 DURATION:

Permanent.

[4/15/97; Recompiled 10/01/01]

9.4.5.5 EFFECTIVE DATE:

April 15, 1997, unless a later date is cited at the end of a section or paragraph.

[4/15/97; Recompiled 10/01/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

9.4.5.6 OBJECTIVE:

Provide uniform policies for the administration of the business enterprise program operated by the state licensing agency (SLA), including:

A. establish and equip business enterprise program facilities in a satisfactory manner to provide employment opportunities to qualified legally blind persons;

B. assure availability of qualified licensed managers through the provision of skills assessment and indicated training to ensure a career development process;

C. provide management support services to business enterprise program licensed managers.

D. develop and maintain procedures for quality customer service;

E. attain the program's financial self-sufficiency through its administration in an operationally efficient and cost-effective manner.

[4/15/97; Recompiled 10/01/01]

9.4.5.7 DEFINITIONS:

The following words or terms, when used in this document, shall have the following meaning, unless the context clearly states otherwise.

A. Definitions: "A":

(1) **"Acquired stock"** means that stock in which the licensed manager has accrued equity through personal acquisition of the inventory, and which the state licensing agency, in conjunction with the licensed manager or licensed managers involved, has determined is suitable for use. Stock in which the licensed manager(s) has not accrued equity is not acquired stock and remains the property of the state licensing agency.

(2) **"Act"** means the Randolph-Sheppard Vending Stand Act (Public Law 74-732), as amended by Public Law 83-565 and Public Law 93-516, 20 U.S.C., Chapter 6A, Section 107.

(3) **"Active participation"** means an ongoing process of negotiations between the state licensing agency and the committee of licensed managers to achieve joint planning of program standards and procedures affecting the overall operation of the business enterprise program.

(4) **"Assistant director"** means the assistant director of the New Mexico commission for the blind, who is the ultimate administrative authority for the BEP program in New Mexico.

B. Definitions: "B":

(1) **"BEP"** means the business enterprise program of the state licensing agency that provides self-employment opportunities for qualified persons who are legally blind.

(2) **"BEP business consultant"** means the individual(s) who is (are) responsible for planning, coordinating, and/or conducting the training activities for

prospective licensed managers and for in-service and career development training activities for experienced licensed managers.

(3) **"BEP manager"** means the person who has responsibility for the operation of the business enterprise program in the state.

(4) **"Blind person"** means a legally blind person who, after examination by a physician skilled in the diseases of the eye or by an optometrist, whichever the person shall select, has been determined to have:

(a) not more than 20/200 central visual acuity in the better eye with correcting lenses, or

(b) an equally disabling loss of the visual field as evidenced by a limitation to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of no greater than 20 degrees.

(5) **"Business enterprise facility"** means an automated coin or currency operated business enterprise which dispenses a variety of food and refreshment items and services. Included in this category are interstate highway locations and vending machine routes.

C. Definitions: "C":

(1) **"Cafeteria"** means a food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves him or herself from displayed selections. A cafeteria may be fully automatic or some limited waiter or waitress service may be available and provided within a cafeteria, and table or booth seating facilities are always provided.

(2) **"Commission"** means the New Mexico commission for the blind, which has final responsibility for all administrative functions and day-to-day management activities in the New Mexico business enterprise program.

(3) **"Commissioner"** means the commissioner of the rehabilitation services administration (RSA) exercising approval authority for the federal government under the Randolph-Sheppard Act.

(4) **"Committee of licensed managers"** means the committee elected biennially by licensed managers to represent all active licensed managers in the business enterprise program. The committee shall be:

(a) fully representative of all active licensed managers;

(b) elected biennially; and

(c) established, constituted and maintained in accordance with 34 CFR 395.14 and these regulations.

(5) **"Consumer"** means any person who has made application for the state licensing agency's vocational rehabilitation services and has been determined by the state licensing agency to be eligible for those services.

(6) **"Contract"** means written agreement between the state licensing agency and officials in control of federal or other property to establish a business enterprise.

(7) **"Counselor"** means rehabilitation services counselors assigned to the state licensing agency's program of vocational rehabilitation.

D. Definitions: "D":

(1) **"Direct competition"** means the presence and operation of a vending machine or vending facility on the same premises as a vending facility operated by a licensed manager, except that vending machines or vending facilities operated in areas serving employees the majority of whom normally do not have direct access (in terms of uninterrupted ease of approach and the amount of time required to patronize the vending facility) to the vending facility operated by a licensed manager, shall not be considered to be in direct competition with the vending facility operated by a licensed manager.

(2) **"Displaced licensed manager"** means a licensed manager who has been displaced from his or her business enterprise through no fault of his or her own actions; i.e., the property control manager of a building containing a BEP facility required the closure of the facility in order to expand office space to accommodate additional employees.

(3) **"Dry/wet facility"** means all facilities providing manual dispensing of prepackaged articles, refreshments and services.

E. Definitions: "E":

(1) **"Employee"** means a person who receives compensation for services rendered to a licensed manager.

(2) **"Equipment, essential"** means all necessary equipment for the satisfactory operation of a facility, as determined by the type of location, e.g., dry stand: microwaves, refrigerator, freezer, counters, cash register; snack bar and cafeteria: stove, refrigerator, freezer, counters, microwaves, 3 compartment sink; vending stand: candy/snack machines, can beverage machine (if required by permit, coffee machine and/or sandwich machine).

(3) **"Equipment, expendable"** means items having a relatively small cost per item and having a relatively short life expectancy.

(4) **"Equipment, non-essential"** means espresso machine, soft serve ice cream machine, coin counting or bill counting equipment, or any specialized equipment that is not required by the permit of that particular location.

(5) **"Equipment, non-expendable"** means all necessary equipment that requires a relatively high capital outlay and has a normal life expectancy of several years or more.

(6) **"Executive director"** means the executive director of the New Mexico commission for the blind.

F. Definitions: "F":

(1) **"Federal property"** means any building, land or other real property owned, leased or occupied by any department, agency or instrumentality of the United States (including the department of defense and the United States postal service), or any other instrumentality wholly owned by the United States, located in New Mexico.

(2) **"Federal regulations"** means the regulations issued pursuant to the Randolph-Sheppard Act.

G. Definitions: "G": **"Gross receipts"** means all revenue including sales tax.

H. Definitions: "H": **"Horace DeVargas Act"** means Section 22-14-24 to 22-14-29 NMSA 1978 which authorizes blind persons licensed in accordance with the act to operate vending stands on any state property where such vending stands may be properly and satisfactorily operated by blind persons, grants such blind persons a preference in the operation of vending stands and authorizes the New Mexico commission for the blind to establish, maintain and operate a vending stand program for the blind.

I. Definitions: "I":

(1) **"Initial stock and supplies"** means merchandise and/or cash supplies necessary for the opening and operation of a specific type of business enterprise.

(2) **"Interim licensed manager"** means a licensed manager appointed by the state licensing agency to manage a business enterprise on a temporary basis.

J. Definitions: "J". **[RESERVED]**

K. Definitions: "K" **[RESERVED]**

L. Definitions: "L".

(1) **"License"** means a written instrument issued by the state licensing agency to a qualified person who is legally blind, and who has met the qualifications and completed the required training program, authorizing such person to manage a business enterprise vending facility on federal, state or other property.

(2) **"Licensed manager"** means a licensed individual who has signed an agreement with the state licensing agency to manage a business enterprise under the supervision of the state licensing agency, or a licensed individual awaiting assignment to a business enterprise.

(3) **"Licensing agency"** means the state licensing agency that has been designated by the commissioner, in this case the New Mexico commission for the blind, pursuant to the act, to issue licenses to qualified persons who are legally blind for the management of business enterprises.

M. Definitions: "M":

(1) **"Management services"** means supervision, inspection, quality control, consultation, accounting, regulating, in-service training and other related services provided on a systematic basis to support and improve business enterprises operated by licensed managers. "Management services" does not include those services or costs which pertain to the on-going operation of an individual facility after the initial establishment period.

(2) **"Manager's agreement"** means a written instrument issued by the commission to a licensed manager, authorizing the licensee to operate a vending site at a specific location and setting forth the respective responsibilities of the parties with respect to the vending operation.

N. Definitions: "N":

(1) **"Net earnings"** or "net profits" means gross profit after deducting operating expenses and collected set-aside fees.

(2) **"Net proceeds"** means the amount remaining from the sale of articles or services of vending facilities, and any vending machine or other income accruing to licensed managers after deducting the cost of such sales and other expenses excluding set aside charges required to be paid by such licensed managers.

(3) **"Net sales"** means the sum total of sales, excluding sales tax.

(4) **"Nominee"** means a nonprofit agency or organization designated by the state licensing agency through a written agreement to act as its agent in the provision of services to licensed managers under the state's business enterprise program.

(5) **"Normal working hours"** means an eight hour work period between the approximate hours of 6:00 AM to 4:00 PM, Monday through Friday, for a typical facility in federal, state or other office buildings. For other situations, normal working hours will be determined on an individual basis by the needs of the particular facility.

O. Definitions: "O":

(1) **"Other income"** means money received by a licensed manager from sources other than over the counter and machine sales.

(2) **"Other property"** means property which is not federal property or state property and on which vending facilities are established or operated by the use of any funds derived in whole or in part, directly or indirectly, from the operation of vending facilities on any federal property.

P. Definitions: "P-Q":

(1) **"Permit"** means the official approval given to the SLA by a department, agency or instrumentality in control of the maintenance, operation, and protection of federal or state property, or person in control of other property, whereby the SLA is authorized to establish a vending facility (See Appendices C and D).

(2) **"Post employment services"** means the training program provided by the commission as necessary to facilitate career advancement training and additional training or retraining for licensed managers to assure that the maximum vocational potential of such managers is achieved and suitable employment is maintained.

(3) **"Primary location"** is the official location awarded to a licensed manager and does not come up for bid every 6 months. Benefits and seniority are based upon the manager's primary location.

(4) **"Property managing agency"** means the agency that is responsible for authorizing the establishment of a vending facility on federal, state or other property and issuing the permit.

(5) **"Purveyor"** means an approved, regulatory source of supply for food, beverages, supplies or services.

Q. Definitions: "R":

(1) **"Randolph-Sheppard Act"** means Public Law 74-732 as amended by Public Law 83-565, Public Law 93-516, and Public Law 95-602, 20 U.S.C., Chapter 6A, Section 107 et seq.

(2) **"Ready-for-assignment list"** means a roster of licensed managers awaiting initial assignment to vending facilities in the vending facility program.

(3) **"Repair of equipment"** means all repairs necessary to keep equipment operational.

(4) **"Retained vending machine income"** means vending machine income disbursed by a property managing department, agency or instrumentality of the United States, or received from vending machines on state or other property in excess of the amounts eligible to accrue to licensed managers.

(5) **"Routine/preventive maintenance"** means the regular care, upkeep and cleaning of equipment used in a business enterprise whether owned by the state licensing agency or licensed manager.

(6) **"Rules and regulations"** means the instrument written by the state licensing agency and committee of licensed managers and approved by the secretary of education, setting forth the conduct and operation of the business enterprise program.

R. Definitions: "S":

(1) **"Satellite facility"** means a secondary facility, which after receiving no bids from any licensed manager, has been determined jointly by the SLA and committee of licensed managers to be appropriate for award as a satellite facility based on such factors as gross sales.

(2) **"Satisfactory site"** means an area determined by the BEP administrator to have sufficient space, electrical and plumbing outlets, and other such accommodations as prescribed by the act, for the location and operation of a business enterprise in accordance with applicable health laws and building codes.

(3) **"Secretary"** means the United States secretary of education.

(4) **"Seniority"** means accrued time for a licensed manager counting only those days during which there is an effective operating agreement. Seniority refers exclusively to continuous service. For example, a licensed manager who has been with the program for 10 years, resigns or is terminated from the program and then returns to the program at a later time, has no seniority at the time he or she returns to the program. The 10 years worked prior to his or her resignation do not count toward accrued seniority. However, if a licensed manager is displaced due to no fault of his or her own the manager does not lose the seniority right acquired prior to displacement. During the period of displacement the manager does not gain additional time toward seniority, but can resume accruing time toward seniority at the time he or she is assigned a new facility. For example, a licensed manager who had been with the vending program for 3 years, displaced for 1 year and then assigned a new facility, has 3 years of seniority at the time he or she is assigned to the new facility.

(5) **"Set-aside funds"** means funds which accrue to the SLA from an assessment against the net proceeds of each vending facility in the vending facility

program, net income of facilities operated temporarily by the SLA, receipts of vending machines located on federal property and retained by the SLA, receipts of vending machines located on non-federal property and retained by the SLA, excess vending machine amounts determined under Chapter 6 of this manual, and interest earned on reserve funds.

(6) **"Skills of blindness"** means those skills necessary to enable a blind person to function independently in the home, community and at work. Such skills include braille, typing, handwriting, abacus, calculator, phone, cane travel, and personal and home management skills.

(7) **"SLA"** means the state licensing agency designated by the federal secretary of education to issue licenses to blind persons for the operation of vending facilities on federal, state and other property. The commission for the blind is the SLA for the state of New Mexico.

(8) **"Snack bar"** means a facility engaged in selling limited lines of refreshment and prepared food items necessary for a light meal service. Included in this group are establishments which sell food and refreshment items prepared on or off the premises and usually wrapped or placed in containers at point of sale and customers may or may not be provided with on-site seating accommodations.

(9) **"State"** means the state of New Mexico.

(10) **"State property"** means any building or land owned, leased or occupied by any department or agency of the state or any instrumentality wholly owned by the state of New Mexico or by any county or municipality or by any other local governmental entity located in the state of New Mexico.

S. Definitions: "T":

(1) **"Trainee"** means a qualified vocational rehabilitation consumer, who when referred to the business enterprise program, is placed in appropriate training to prepare for licensing under the rules and regulations of the state licensing agency. When the person has successfully completed the application, assessment and training requirements as certified by the SLA, he or she will receive a license and be placed on the ready-for-assignment list.

(2) **"Training program"** means the program of skills of blindness, technical courses and on-the-job training provided by the SLA to qualified blind persons with the capacity to operate a vending facility as prescribed through the agency's assessment procedures.

T. Definitions: "U": **[RESERVED]**

U. Definitions: "V":

(1) **"Vending facility"** means automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment which may be operated by licensed managers and which is necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws and including the sale or exchange of chances for any lottery authorized by state law and conducted by an agency of the state. [CFR 34, Part 395.1(X)].

(2) **"Vending machine"** for the purpose of assigning vending machine income, means a coin or currency operated machine which dispenses articles or services, except those machines operated by the United States postal service for the sale of postage stamps, or other postal products and services, machines providing services of a recreational nature, and telephones shall not be considered to be vending machines.

(3) **"Vending machine facility"** means an automated coin or currency operated business enterprise which dispenses a variety of food and refreshment items and services. Included in this category are interstate highway locations and vending machine routes.

(4) **"Vending machine income (commissions)"** means receipts (other than those of a licensed manager) from vending machines operated on federal, state or other property, after deducting the cost of goods sold (including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns) where the machines are operated, serviced, or maintained by, or with the approval of, a department, agency, or instrumentality of the United States, state of New Mexico or private owner; or, commissions (other than to a licensed manager) by a commercial vending concern which operates services and maintains vending machines on federal, state or other property for, or with the approval of, a department, agency or instrumentality of the United States, state of New Mexico or private owner. In other words, this is income that licensed managers receive when vending machines are being serviced by a private entity.

(5) **"Vending machine sales"** means receipts (of a licensed manager) from vending machines operated on federal, state or other property, where the machines are operated, serviced or maintained by the licensed manager.

(6) **"Vocational rehabilitation services"** means those services as defined in the Rehabilitation Act of 1973, as amended.

V. Definitions: "W", "X", "Y", "Z": **[RESERVED]**

[4/15/97; Recompiled 10/01/01]

9.4.5.8 PROMULGATION OF BUSINESS ENTERPRISE PROGRAM POLICIES:

A. Rules and procedures, that is, the policies governing the administration of the business enterprise program are developed and maintained in accordance with the Randolph-Sheppard Act [20 U.S.C. Section 107 et seq.], the Rehabilitation Act [29 U.S.C. 31-42] and the Horace DeVargas Act [Section 22-14-24 to Section 22-14-29 NMSA 1978].

B. The rulemaking authority is the SLA for rehabilitation services, hereinafter referred to as the New Mexico commission for the blind. Promulgation of rules and procedures governing the business enterprise program generally follows the process outlined in (8.2.1 through (8.2.4) of this subsection [now Paragraphs (1) through (4), Subsection B of 9.4.5.8 NMAC].

(1) Staff in the SLA, in consultation with the licensed managers committee, draft proposed policy. Draft policy should be submitted to RSA at this stage for their review and comment upon compliance with federal statute and regulation. Draft policy is presented to the SLA for it to consider the issuance of a notice of proposed rulemaking.

(2) Should the SLA issue a notice of proposed rulemaking, this notice is submitted to the proper state agency for publication in the state register. The SLA also notifies individuals and organizations that have filed a timely request to receive such notices. Upon publication of the notice in the state register, a public comment period lasting 20 calendar days commences. The SLA conducts public hearings in accordance with the schedule stated in the notice of proposed rulemaking.

(3) Following the close of the public comment period, the proposed rules, with any changes resulting from the public comment period, are submitted to the SLA for adoption.

(4) Upon approval by the RSA, the SLA declares the effective date of the rules, not to be earlier than 10 days after the publication of the rules in the state register. The rules are distributed to all appropriate parties. A rule manual will be distributed to each BEP licensed manager.

[4/15/97; Recompiled 10/01/01]

9.4.5.9 POLICY OF NON-DISCRIMINATION:

A. The state licensing agency assures that it shall not exclude from participation, deny the benefits of the program, or otherwise subject any person to discrimination because of the person's gender, age, physical or mental impairment, religion, race, creed, national origin or political affiliation in accordance with the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

B. Every licensed manager of a business enterprise program facility or route shall operate the business enterprise in such a manner that no person shall be subject to discrimination because of the person's gender, age, physical or mental impairment,

religion, race, creed, national origin or political affiliation whether that person is a present or prospective supplier, customer, employee or other individual who might come into contact with the enterprise.

[4/15/97; Recompiled 10/01/01]

9.4.5.10-9.4.5.11 [RESERVED]

9.4.5.12 STATE LICENSING AGENCY ORGANIZATION:

A. Organization and operation of the state licensing agency:

(1) The state licensing agency (SLA) shall:

(a) cooperate with the commissioner in applying the requirements of the Randolph-Sheppard Act in a uniform manner;

(b) take effective action to carry out full responsibility for the supervision and management of each vending facility in its program in accordance with the Randolph-Sheppard Act, the regulations at 34 CFR 395.1, the Horace DeVargas Act, Section 22-14-24 to Section 22-14-29, NMSA 1978, the SLA's established rules and regulations, and the terms and conditions governing the permit for establishment of a vending facility;

(c) submit promptly to the commissioner for approval a description of any changes in the legal authority of the state licensing agency, its rules and regulations, blind licensed manager agreements, schedules for the setting aside of funds, contractual arrangements for the furnishing of services by a nominee, arrangements for carrying general liability and product liability insurance, and any other matters which form a part of the application; and

(d) be reasonable, if it intends to set aside, or cause to be set aside, funds from the net proceeds of the operation of vending facilities and obtain a prior determination by the commissioner that the amount of such funds to be set aside is reasonable.

(2) The business enterprise program is a program component of the New Mexico commission for the blind.

(a) Responsibility for supervision of commission personnel engaged in the administration of the business enterprise program rests with the assistant director of the commission for the blind.

(b) Day-to-day administration of vending facilities is the responsibility of the administrator of the business enterprise program.

(c) Monthly reports received from licensed managers (see Appendix 9) are audited by the BEP manager and posted by the fiscal office. These reports must be **received by the BEP administrator by the 25th of the following month**. All monies received from licensed managers are deposited to the set-aside fund by the fiscal office of the commission for the blind.

(d) The commission for the blind provides vocational rehabilitation for eligible blind persons under an approved state plan. The vocational rehabilitation program and the business enterprise program are closely coordinated so as to assure the maximum utilization of the BEP as an employment resource for vocational rehabilitation consumers for whom such employment is considered suitable, and to assure that all persons placed in the business enterprise program will receive the vocational rehabilitation services which they may require.

(3) Central office staff: The program is administered by the BEP administrator who reports directly to the assistant director of the SLA. The manager is assisted by BEP business consultants.

(4) Field staff: The state is divided into specific geographic areas for the purpose of administering the business enterprise program. A BEP business consultant is assigned to each designated area to provide the link between the licensed managers and central office, and is authorized to provide the services and obligated to assist and support compliance with the rules and regulations of the rehabilitation services administration and the SLA relative to business enterprises established under the Randolph-Sheppard and/or Horace DeVargas Acts.

(5) Licensed managers: The individual enterprises established by the BEP are managed by licensed managers who derive their livelihood from net profits of the operations. Licensed managers are subject to instructions, policies, rules and regulations of the BEP program, but are not employees of the program, the SLA or the state of New Mexico. They do, however, have a contractual relationship with the SLA and are required to manage the facilities and/or operations in accordance with established rules and regulations. All licensed managers will be treated equally regardless of the type of property in which the facility is located; i.e., federal, state or other.

(6) Duties of the business enterprises program manager: The duties of the business enterprises program manager are:

(a) assures compliance with all applicable rules, regulations and statutory provisions;

(b) prepares program budgets and approves expenditures, maintains records for the business enterprise program;

(c) plans for the development and expansion of the program and upgrading of existing facilities;

(d) drafts program policy, operating instructions and regulation changes as needed to make the program more efficient or to conform to current legislative mandate;

(e) promotes the program to the general public;

(f) actively participates with the committee of licensed managers in accordance with 34 CFR 395.14;

(g) procures facilities through the SLA. The SLA will pursue locations in federal, state, county, municipal and private buildings whenever it appears the location will enable a blind person to make a living. The selection of suitable locations for vending facilities is made according to standards which afford the most favorable earning potential to the prospective licensed manager.

(i) Business enterprise locations are selected only after it has been determined that the establishment of a vending facility at the location will contribute to the maximum development of economic opportunities for the licensed manager and will provide for the most productive utilization of program assets.

(ii) This determination is made on the basis of a comprehensive economic survey and evaluation of the location.

(iii) The evaluation of locations for vending facilities takes into consideration such factors as building population, traffic, competition, continued availability, type of premises, potential return upon investment, and other applicable factors.

(iv) SLA resources are available to establish the facility successfully.

(v) Lastly, the plan is brought before the committee of licensed managers to notify them, and to solicit their thoughts regarding operations for a licensed manager in the facility, including equipment, set-up and efficiency;

(h) conducts public relations activities which promote a positive image of the program to existing and potential host organizations, rehabilitation staff, consumers and the general public;

(i) negotiates the terms and conditions of building permits with property control managers;

(j) negotiates and executes operating agreements with licensed managers;

(k) coordinates and supervises a training program for applicants;

(l) administers, with the participation with the committee of licensed managers, the system for initial assignment or transfer of licensed managers;

(m) in conjunction with the business consultant, completes the facility visit summary to assist in evaluation of the licensed manager's performance.

(7) Duties of the BEP business consultants: The duties of the BEP business consultants are:

(a) assist each licensed manager in operating the business enterprise within applicable rules and regulations;

(b) oversee the development of new installations;

(c) provide management services to licensed managers;

(d) collect and analyze data on the operation of each business enterprise in order to provide technical assistance and for monitoring federal and state reporting requirements;

(e) communicate with the committee of licensed managers on various operations.

(8) Guidelines for communication: Communication of information is to occur so that the best interests of the business enterprises program are served. This is best accomplished when information is shared and acted upon by those who can respond most effectively in the circumstances. The administrative staff of the SLA is responsible for assuring that active communication among SLA staff and licensed managers contributes to the effective operation of the entire business enterprises program. Management services and operational matters are best handled by first communicating with the appropriate business consultant. Paragraphs (A) through (C) of this Subsection [now Subparagraphs (a) through (c) of Paragraph 8 of Subsection A of 9.4.5.12 NMAC] describe appropriate levels to which various types of communication should be directed.

(a) Communications originated by a licensed manager: The licensed manager is to maintain appropriate and professional communication with customers and building management personnel. The point of communication for licensed managers with the SLA is the business consultant. Circumstances in which a licensed manager may contact the business enterprises program manager are:

(i) when a problem cannot be solved through normal channels;

(ii) when there is a specific complaint concerning the conduct and/or behavior of a business consultant; and/or

(iii) when an emergency develops and the business consultant is not available.

(b) Business consultant communication: A business consultant is expected to maintain open and ongoing communications with all the licensed managers in his/her area. Should a situation require immediate action beyond the business consultant's authority, he/she may contact the proper administrative official. All significant information will be communicated to the BEP administrator at the earliest opportunity.

(c) Written communications: Any communication of major consequence is to be documented in writing. Situations needing immediate action are to be addressed promptly by the appropriate official and subsequently documented in writing. Records of written documentation will be maintained in accordance with agency policy. Written requests require written responses.

B. Management services provided by the state licensing agency:

(1) Overview of management services: Management services include supervision, inspection, quality control, consultation, accounting, regulating, inservice training, and other related services provided on a systematic basis to support and improve business enterprises operated by licensed managers. "Management services" does **not** include those services or costs which pertain to the ongoing operation of an individual facility after the initial establishment period.

(2) Technical assistance services: The SLA shall provide each licensed manager with:

(a) recommendations for optimizing facility profitability;

(b) recommendations and feedback on facility operations including quality, service and cleanliness;

(c) possible solutions to problems recognized by the licensed manager or brought to the licensed manager's attention by BEP staff or the property managing agency;

(d) providing career development and inservice training;

(e) explanation of the SLA's procedures, policies and standards.

(3) Responsibilities of the business consultants (BEP staff): Business consultants are required to assist licensed managers in their district to meet business enterprise program requirements through review and consultation on:

(a) compliance with applicable laws and program regulations;

- (b) hiring employees in accordance with rules and regulations;
- (c) compliance with all conditions on the licensed manager's license;
- (d) assuring that merchandise is:
 - (i) sold in accordance with the property managing agency's agreement;
 - (ii) of high quality, adequately stocked and properly displayed.
- (e) monitoring performance to ensure:
 - (i) standards for employee personal appearance and hygiene;
 - (ii) quality customer service;
 - (iii) maintenance of sanitation and safety standards;
 - (iv) proper maintenance of equipment;
 - (v) communications and working relationships between the licensed manager and customers, suppliers, employees, property managing agency and the general public;
 - (vi) SLA and other agency requirements for record keeping; and
 - (vii) licensed manager performance evaluations.

(4) BEP staff facility visits: BEP consultants shall visit facilities as often as necessary to insure the continued success of the facility. The BEP consultants will work with licensed managers to maximize profits. Each time the consultant visits a facility, he/she will complete a facility visit summary.

(5) Assistance of vocational rehabilitation staff: At the request of the business consultants or other BEP staff, rehabilitation staff will provide necessary assistance to the program when the best interest of the licensed manager or the SLA needs such assistance.

(6) SLA provision of training: The SLA, with the active participation of the licensed managers committee, shall develop and maintain training, retraining and career development programs for all persons who are either licensed managers or applicants for licensed managers. The SLA assures that effective programs of vocational and other training services, including personal and vocational adjustment, books, tools and other training materials shall be provided to all applicants as vocational rehabilitation services. The training program shall be open to all legally blind

unemployed persons who meet the application and eligibility requirements in Subsection 15.1.2 of this rule (9 NMAC 4.5) [now Paragraph (2) of Subsection A of Section 9.4.5.15 NMAC]. Minimally, the training shall consist of the following.

(a) This training is open to all candidates for the BEP who have completed the application process, met all eligibility requirements as listed in Subsection 15.1.2 of this rule [now Paragraph (2) of Subsection A of Section 9.4.5.15 NMAC], and been accepted into the program;

(b) Assessment and provision, as necessary, of skills of blindness: Blindness skills of each applicant shall be assessed by staff during a minimum of two weeks' attendance at the New Mexico orientation center for the blind, who shall make recommendations for training based upon skills deficiencies, if any; and

(c) Completion of approved culinary arts program at any appropriate facility to be determined on a case-by-case basis (approximately 16 weeks or one trimester). Previous successful food service experience will be taken into account by the facility in assessing training needs and by the SLA for the final recommendation on granting of a license;

(d) On-the-job training with a licensed manager consisting of food purchasing, menu planning, precosting entrees, food preparation and handling; accounting procedures, inventory control, daily sales reports, monthly reports and cash register operation; and, sanitation, housekeeping and labor scheduling. On-the-job training is expected to be completed concurrently with the culinary arts program. The length of time of on-the-job training will be determined by SLA staff and may be extended by the SLA staff, if so determined by his or her counselor, the committee of licensed managers, trainer and/or SLA staff for the success of the licensed manager in his/her new facility. The average length of time for on-the-job training is six to nine months.

(7) The SLA shall certify as qualified to operate a vending facility all trainees whom the BEP manager has determined to have successfully completed the training program. Once the trainee successfully completes the training program and receives his/her license to operate a business enterprise, he/she will be placed on the ready for assignment list.

(8) Failure to complete the training: If, during the course of the training, it is the trainers' opinion that this consumer cannot satisfactorily complete the BEP training program, the BEP manager will review the case upon the written recommendation of the trainers. If the situation warrants, the BEP manager may terminate the consumer's training. The manager will immediately notify the consumer and the consumer's vocational rehabilitation counselor about the termination of the training program and the reasons for the action.

(9) Retraining and career development: Career development training including further education and additional training for improved work opportunities shall

be provided for all licensed managers. Opportunity for retraining shall be provided by the SLA, as needed, and shall be made available:

(a) upon a licensed manager's request;

(b) whenever the SLA finds that the retraining is necessary to enable the licensed manager to operate the vending facility successfully;

(c) any licensed manager undergoing retraining for any purpose including improvement of skills or for career development in the program will continue to have responsibility for the vending facility to which he/she is assigned, and the operating agreement for such manager shall remain in effect while he/she receives retraining or career development services;

(d) post employment services will be provided to licensed managers as vocational rehabilitation services as necessary to assure that the maximum vocational potential of such managers is achieved and suitable employment is maintained.

C. State licensing agency responsibilities for business enterprise operations.

(1) The SLA will provide for an annual review, including input from all vendors, of the BEP procedures manual for possible updates.

(2) Business enterprise equipment and fixtures: The SLA will ensure that each BEP facility has essential equipment so as to give reasonable assurance of satisfactory operation by the licensed manager.

(3) Additions, deletions or modifications to equipment: The licensed manager will make no additions, deletions or modifications to the facility and its operation, in the form of equipment, fixtures or facilities, without first obtaining written authorization from the SLA.

(4) Maintenance and replacement of vending facility equipment: The SLA shall maintain, or cause to be maintained, all vending facility equipment in good repair and in an attractive condition and shall replace or cause to be replaced worn-out and obsolete equipment as required to ensure the continued successful operation of the facility (34 CFR 395.10).

(5) Purchase of equipment by SLA: In order to lessen the budget impact of various requests for major equipment throughout the fiscal year, licensed managers shall make their equipment requests in writing to the licensed managers committee, which shall review the list, and organize purchases to ensure cost-effectiveness (volume buying of duplicate items) for the SLA expenditures.

(6) Initial inventory and supplies: The counselor shall provide a predetermined amount for funds for purpose of initial inventory of merchandise for resale for operating

a facility by a licensed manager. The original dollar amount of the vocational rehabilitation funds or inventory allocated by the counselor for start-up costs should remain in the facility at the time of the manager's departure. Any initial inventory needed that exceeds the predetermined amount will be provided by the set-aside fund. Additional start-up funds provided by the BEP set-aside fund will be repaid to the set-aside fund in an amount agreed to by the BEP manager and the licensed manager.

(7) Existing inventory upon transfer or dismissal: The SLA will oversee the following procedures:

(a) the outgoing licensed manager or a representative is present and is responsible for making an accurate, comprehensive listing of the inventory with prices, proof of prices (invoices) and extending the inventory;

(b) the incoming licensed manager or a representative is also present and can exercise his/her rights as described in Subsection 18.2 of this rule [now Subsection B of Section 9.4.5.18 NMAC];

(c) an SLA representative is present to oversee the process.

(8) Cleaning of facility during transfer: Upon leaving a facility, it is the responsibility of the outgoing manager to fully clean the facility and its equipment. If the outgoing manager fails to comply, the SLA will hire a cleaning company to clean the facility at the outgoing manager's expense. The cleaning cost will be deducted from the inventory being purchased by the SLA. If the amount exceeds the amount of the inventory being purchased, or if the outgoing manager takes his inventory, the balance forward must be paid prior to reinstatement in the program or before transferring to another facility.

(9) Assignment, transfer of licensed managers: The SLA will carry out assignment and transfer of licensed managers through facility vacancy announcements, eligibility verification, and the establishment and convening of an evaluation committee.

(a) Facility vacancy announcement:

(i) The SLA will develop minimum qualifications specific to the characteristics of the vacant enterprise. These minimum qualifications will establish the level of accomplishment expected of the applicant for a vacant facility in each of the areas to be considered by the evaluation committee as described in Section 36 [now 9.4.5.36 NMAC]. Priority will be given licensed managers whose business enterprise was lost due to natural disaster or other unpredictable circumstance beyond control of the licensed manager.

(ii) The SLA shall develop a vacancy announcement to be sent to all licensed managers when a facility becomes available. The vacancy announcement must include location, type of enterprise, and general description of operations;

minimum qualifications; for a new enterprise, estimates of monthly net sales based upon potential patronage, with the disclaimer this estimate is not a guarantee of sales; and application due date.

(b) Eligibility verification and referral to evaluation committee: The SLA shall provide files of all bidders to the members of the evaluation committee, that will review all applicants considering the criteria below.

(i) The files will contain information including but not limited to managerial and other skills and abilities demonstrated by the licensed managers under consideration as they fit the available facility, including handling labor needs and managing staff; complexity of financial skills needed for food production; and customer relations.

(ii) previous records of the licensed manager under consideration, including consideration of timeliness and accuracy of record keeping; customer satisfaction; improvements in profits and customer base; safety and sanitation inspections; fee, taxes, and bill payment history; initiative shown in upgrading skills; regularity of work attendance; compliance with applicable rules and laws; and past evaluations by the SLA, and/or those from previous work histories, including references. Initial assignments shall give consideration to the unemployed qualified licensed manager.

(iii) seniority of eligible licensed manager.

(iv) licensed managers on probation may not bid for another facility.

(c) Evaluation committee, recommendation for assignment: The evaluation committee, consisting of an equal number of licensed managers and SLA staff, will consider applicants for initial assignments and transfers. The committee shall make recommendation to the executive director of the SLA.

(10) Vending machine income: Vending machine income will be managed in accordance with the following Paragraphs A through F [now Subparagraphs (a) through (f) of Paragraph 10 of Subsection C of 9.4.5.12 NMAC].

(a) Vending machine income (commission) from vending machines on federal property which has been disbursed to the SLA by a property manager under the vending machine income sharing provisions of the federal regulations shall accrue to each licensed manager operating a vending facility on federal property in an amount not to exceed the average net income of the total number of licensed managers, as determined each fiscal year on the basis of each prior year's operations, except that vending machine income shall not accrue to any licensed manager in any amount exceeding the average net income of the total number of licensed managers in the United States.

(b) No licensed manager shall receive less vending machine income than he/she was receiving during the calendar year prior to January 1, 1974, as a direct result of any limitation imposed on such income under this ceiling (34 CFR 395.32).

(c) No limitation shall be imposed on income from vending machines combined to create a vending facility if such facility is maintained, serviced or operated by a licensed manager; however, the SLA will retain the vending machine commissions disbursed by a federal property manager in excess of the amounts eligible to accrue to licensed managers (34 CFR 395.32(b); 34 CFR 395.8(b)).

(d) The SLA will disburse vending machine income (royalties) to qualifying licensed managers on at least a quarterly basis (34 CFR 395.8(b)).

(e) Vending machine income retained by the SLA will be used in accordance with applicable federal regulations (34 CFR 395.8(c)).

(f) Unassigned income from non-federal property is used to develop and enhance BEP facilities as designated by state laws and regulations.

(11) Due process: The SLA provides procedures for fair hearings of licensed managers' grievances. These procedures provide each licensed manager the opportunity to seek remediation of dissatisfaction with any SLA action arising from the operation of the BEP, and are set forth in the following Subsections (A) through (D) [now Subparagraphs (a) through (d) of Paragraph 11 of Subsection C of 9.4.5.12 NMAC].

(a) Informal administrative review: It is the policy of the SLA to resolve complaints in an expeditious and facilitating manner. These resolutions shall be accomplished through the informal administrative review process whenever possible.

(i) A licensed manager who is dissatisfied with any action arising from the operation or the administration of the vending facility program may ask for an informal administrative review of the action by filing a written request with the executive director of the commission. The written request for an informal administrative review, filed by the licensed manager or his designee (who may be a member of the committee of licensed managers), must specify the action or actions with which the manager is dissatisfied, and must be received by the executive director within 15 calendar days of the occurrence of the action with which the manager is dissatisfied.

(ii) Informal administrative reviews are conducted by the SLA staff person, appointed by the executive director, who is closest to the problem but not involved in the action resulting in the complaint, and who can resolve the complaint in the most expeditious manner.

(iii) Within 15 calendar days after receipt of the written request, the executive director shall convene an administrative review conference which shall

include the licensed manager and his or her representative, if so designated, vending facility program staff, and the executive director's appointee. Written notice of the time and place of the administrative review shall be sent to the manager and his/her representative, if so designated, by the executive director.

(iv) The informal administrative review shall be held at a time and place convenient to the manager requesting such review. The administrative review shall normally be held during regular SLA working hours.

(v) The results of the informal administrative review are to be reported in writing to the BEP administrator, with a copy going to the licensed manager.

(b) Full evidentiary hearing: When a licensed manager is dissatisfied with any SLA action arising from the operation or administration of the vending facility program, such manager may file a complaint with the SLA requesting a full evidentiary hearing. Such complaint should identify all of the disputed issues of fact to be resolved in an evidentiary hearing. The following procedures have been adopted by the SLA to provide a manager with a full evidentiary hearing:

(i) Licensed managers shall be informed, in writing, of their right to and the procedures to be followed in obtaining a full evidentiary hearing at the time they are licensed to operate a facility.

(ii) The manager, or his or her chosen representative, shall request a full evidentiary hearing in writing within 15 calendar days of the receipt of the commission's determination as a result of the informal administrative review process.

(iii) The written request for a full evidentiary hearing must be transmitted to the executive director of the commission either personally or by certified mail, return receipt requested. The request may be transmitted through the committee of licensed managers in accordance with these rules and regulations.

(iv) A manager is entitled to legal counsel or other representation in a full evidentiary hearing. Such counsel shall be at the manager's own expense or he/she may obtain any legal services available in the community at little or no cost, such as legal aid society, neighborhood legal services, or any other sources able and willing to provide representation.

(v) Reader services or other communication services shall be arranged for the manager should he so request. Transportation costs and per diem shall be provided to the licensed manager during the full evidentiary hearing if the location of the hearing is in a city other than the legal residence of the manager.

(vi) The hearing will be scheduled by the SLA for a time and place convenient and accessible to the licensed manager and the SLA staff involved in the hearing. The licensed manager will be notified of the place and time of the hearing and

the right to be represented by legal or other counsel, in writing, at least 15 calendar days prior to the date set for the hearing. The licensed manager shall be provided a copy of the hearing procedures and other relevant information necessary to enable him or her to prepare his/her case for the hearing.

(vii) The hearing will be conducted by an impartial and qualified hearing officer with no involvement or vested interest in the SLA action at issue or with the operation of the affected business enterprise. The presiding officer will conduct the hearing in accordance with state and/or federal laws and rules governing the conduct of such proceedings. In any case, the hearing will be conducted in a manner that avoids delay, maintains order and provides for a full recording and reporting of the proceedings so that a full and true disclosure of the facts and issues occurs.

(viii) The overall time limit for processing a full evidentiary hearing is 90 calendar days except when a hearing is delayed for illness of the licensed manager; or delay in obtaining evidence because of circumstances beyond the control of the licensed manager or the commission. The time limit applies to the period extending from the date the original request is received by the executive director until the date of the decision.

(ix) The federal rules of evidence do not apply to full evidentiary hearings conducted pursuant to this section. Both the licensed manager and the SLA are entitled to present their case by oral or documented evidence to submit rebuttal evidence and to conduct such examination and cross-examination of witnesses that may be required for a full and true disclosure of all facts bearing on the issue. All papers and documents introduced into evidence at the hearing shall be filed with the hearing officer and provided to the other party. All such documents and other evidence submitted shall be open to examination by the parties and opportunities shall be given to refute facts and arguments advanced on either side of the issue.

(x) Transcripts shall be made of the oral evidence and shall be made available to the parties. The SLA shall pay all transcript costs and shall provide the licensed manager with at least one copy of the transcript. The transcripts of testimony, exhibits and all papers and documents filed in the hearing shall constitute the exclusive record for the decision. The decision shall also set forth any remedial action necessary to resolve the issues and dispute. The hearing officer's determination will be based upon the facts as presented by both parties and upon applicable law, and the existing rules of the SLA. The hearing officer does not have the power to rule upon the legality or construction of the rules themselves. The officer's decision will determine the relevant issues and the facts to be ruled upon.

(xi) The hearing officer shall make a written report of the evidence presented, the laws and rules used in determining a resolution, and the resolution itself. This report shall be issued to the BEP manager and the licensed manager, or his/her authorized representative, within 20 working days of the receipt of the official transcript. The decision shall be mailed promptly to the licensed manager and the SLA. If the

licensed manager is dissatisfied with the decision, he or she may request that the secretary (USDE) convene an arbitration panel.

(c) Arbitration of complaints after the evidentiary hearing: The licensed manager has the right to file a request for arbitration with the secretary (USDE) if dissatisfied with the outcome of the evidentiary hearing. By filing a complaint with the secretary, the manager consents to the release of information necessary for the conduct of an ad hoc panel.

(i) The complaint must be filed in writing and must contain a statement of grievance; the date and place of the full evidentiary hearing; a copy of the decision and what actions have been taken because of the decision; the part of the decision which is causing the dissatisfaction and reason for the dissatisfaction; and a statement as to what is required to remedy the situation.

(ii) The secretary (USDE) will convene an arbitration panel after receiving a complaint which meets the requirements in the above Paragraph 12.3.10.C.1 of this rule [now Item (i) of Subparagraph (c) of Paragraph (11) of Subsection C of 9.4.5.12 NMAC]. The decision of the panel will be final, except as provided for in 20 U.S.C. Section 107d-2. The secretary will pay the reasonable costs for the arbitration. An abstract of the arbitration decision will be published in the federal register. The panel will be convened by the secretary in accordance with (1) through (3) of this Subparagraph. (1) The SLA shall designate one member of the panel. (2) The licensed manager shall designate one member of the panel. (3) The designees of the SLA and the licensed manager shall together designate a third panel member who shall not be an employee of the SLA or its parent agency. This member shall be the chairperson of the panel.

(iii) If either the SLA or the licensed manager fails to designate a member of an arbitration panel, the secretary shall designate such member on behalf of such party.

(d) Arbitration of SLA complaints:

(i) Arbitration of SLA complaints against federal agencies. The SLA is to resolve problems related to the operation of a business enterprise with the full participation of the licensed manager and the appropriate property manager. The SLA may file a complaint with the secretary (USDE) if it determines that an agency controlling federal property is not complying with the provisions of the Randolph-Sheppard Act or United States department of education regulations. After the complaint is received, the secretary will convene an arbitration panel. If the panel finds that the federal agency is in violation of the act or USDE regulations, that federal agency will be notified that it is expected to correct the violation according to 20 U.S.C. Section 107d.

(ii) The secretary pays the reasonable costs of this arbitration. The decision resulting from the arbitration will be published in the federal register. The

arbitration panel will be convened by the secretary in accordance with (1) through (3) of this Paragraph. (1) The SLA will designate one member of the panel. (2) The agency controlling the federal property over which the dispute arose will designate one member of the panel. (3) The designees of the SLA and the agency controlling the property will designate a third member who is not an employee of the agency. This member will chair the panel.

[4/15/97; Recompiled 10/01/01]

9.4.5.13-9.4.5.14 [RESERVED]

9.4.5.15 LICENSED MANAGERS:

A. Licensing requirements for operating a business enterprise.

(1) Definition of license: A license is a written instrument issued by the SLA to a qualified licensed manager, authorizing such person to operate a vending facility on federal or other property (34 CFR 395.1).

(2) Issuance and conditions of a license: A license shall be issued by the SLA in accordance with federal regulations making the individual eligible to operate a facility. The license shall be prominently displayed in the licensed manager's facility. The license remains effective for an indefinite length of time, unless terminated or suspended by the SLA in accordance with state and federal regulations. A license issued to an individual is non-transferable (34 CFR 395.7). Preference is given to blind persons who are in need of primary employment. Requirements for the issuance of a BEP license is that the individual:

(a) must be legally blind as verified by documentation (34 CFR 395.7);

(b) must be a United States citizen residing in the state in which he/she desired to be trained and licensed. Birth certificate or other applicable documentation must be submitted with application (34 CFR 395.7);

(c) be at least 18 years of age or older;

(d) applied and been determined eligible for the NMCB vocational rehabilitation program, including completing an application form for the BEP listing relevant education, business experience and references (see Appendix T) [sic Appendix 2] [now 9.4.7.13 NMAC]; and, participating in an interview with the VR counselor, member of the committee of licensed managers and BEP staff. After the interview, the vocational rehabilitation counselor and BEP staff will discuss the checklist of prerequisites for BEP training (see Appendix 1) [now 9.4.7.12 NMAC], and discuss any items of concern with the BEP staff member;

(e) have completed all services on the IWRP which may interfere with training;

(f) have completed the proscribed training program required by the SLA (Paragraph 12.2.6 of this rule) [now Paragraph (6) of Subsection B of 9.4.5.12 NMAC].

(3) Termination of license: A license automatically expires when the licensed manager is no longer a United States citizen, no longer meets the definition of legal blindness, surrenders his/her license, resigns, retires or dies. A license may be terminated or suspended by the SLA in accordance with BEP, state or federal regulations as described below.

(4) Grounds for probation, suspension or termination of a license: A licensed manager may be put on probation, and a BEP license may be suspended or terminated for the reasons set forth in the following Paragraphs (A) through (S) [now Subparagraphs (a) through (s) of Paragraph (4) or Subsection A of 9.4.5.15 NMAC].

(a) failure to open the assigned BEP facility as stated in the agreement with the grantor agency, without prior proper approval from the SLA (abandonment of facility);

(b) defrauding any agency of government (including the SLA) or any supplier or failure to pay monies due including taxes, fees, or assessments to any governmental entity or supplier;

(c) failure to file required financial and other records with the SLA or preserve them for a specified time and failure to comply/cooperate with the audits conducted by the SLA or other state or federal agencies;

(d) the vending facility is not being operated in accordance with the rules and regulations, terms and conditions of the permit with the grantor agency, or the terms and conditions of the manager's agreement;

(e) intentional abuse, neglect, unauthorized use or removal of the BEP facility equipment; or failure to properly maintain the equipment in a clean and operating manner within the scope of the licensed manager's level of maintenance authorization;

(f) misconduct or unprofessional behavior by the licensed manager, as defined by the code of ethics or state/federal regulations. This requirement includes but is not limited to: use of profane language with the SLA, property manager, employees and/or customers; threatening, belligerent or harassing behavior; other behavior inappropriate to successful operation of a business;

(g) substance abuse (alcoholic beverages, illegal drugs, etc.) while operating the BEP facility; or substance abuse off the premises that interferes with the operation of a vending facility;

(h) operation of a BEP facility in such a way that the SLA's investment is obviously endangered, including significant loss of clientele due to actions of the licensed manager;

(i) an attempt by a licensed manager to acquire an existing or proposed BEP facility as a private operation while operating a BEP facility or awaiting assignment to a BEP facility without prior approval by SLA staff and recommendation for that action by the committee of licensed managers;

(j) failure to comply with all federal and state laws prohibiting discrimination and failure to assure services without distinction on the basis of race, gender, color, national origin, religion, age or disability;

(k) incompetence or determination by the SLA or its designee that the licensed manager no longer has the necessary skills and abilities for managing a BEP facility;

(l) use of the facility to conduct unlawful activities or activities unauthorized by the SLA or property manager's permit;

(m) failure to personally operate and manage the facility or vending route in accordance with the manager's agreement;

(n) failure to manage a facility in the business enterprise program at a reasonable profit;

(o) failure to bid on a facility for three years, with no extension, could be grounds for the termination of a license by the SLA. For example, if a manager fails to bid on one or more vacant facilities located within his/her geographic area, within a three year period, the license could be terminated. The three year provision is effective as of the date of the issuance of this manual. Licenses issued prior to the effective date of the manual are issued for an indefinite time period;

(p) extended illness with a medical leave-documented diagnosis of prolonged incapacity of the licensed manager to operate the facility or vending route in a manner consistent with the needs of the location or other available locations in the BEP;

(q) withdrawal of the manager from the program upon his/her written notification to the SLA;

(r) failure to comply with the Parental Responsibility Act (New Mexico Laws of 1995, Chapter 25), which provides for the denial, suspension or revocation of professional and occupational licenses for nonpayment of child support;

(s) failure to maintain workman's compensation insurance following the initial year of coverage provided by the SLA, should the facility and/or route have one or more employees;

(t) the SLA provides for procedures for fair hearings for licensed managers' grievances regarding termination, probation or suspension of a license; these procedures provide each licensed manager the opportunity to seek remediation of dissatisfaction with any SLA action arising from the termination, probation or suspension of a license.

(5) A licensed manager on disciplinary probation, or who has been suspended or had his/her license terminated, may not bid on another vending facility.

B. Seniority status upon termination: Upon the effective date of any termination, the terminated manager shall be removed from the seniority list. A terminated manager who returns to the program at any future date shall not be credited with any seniority from any previous period of service.

C. Probation: Managers may be placed on probation for disciplinary purposes only when the SLA determines that the vending facility is not being operated in accordance with applicable provisions of law, these rules and regulations, the terms and conditions of the permit, or the terms and conditions of the manager's agreement.

(1) Notice of probation shall be sent to the manager by certified mail, return receipt requested and the effective date of the probationary period shall be the date on which the notice was received by the manager as indicated on the signed receipt. The notice of probation shall contain the reasons for the probation, steps to be taken by the manager to be removed from probation, and the manager's right to appeal the SLA's action. The probationary period will be specified in the written notice of probation. In the event of an appeal, the probationary period shall be suspended until the appeal is resolved.

(2) Managers placed on probation pursuant to this section shall not lose seniority while on probation.

D. Grounds for reinstatement of terminated or suspended license.

(1) The manager must reapply for admittance into the program, according to the procedures outlined in Subsection 15.1.2 of this section [now Paragraph (2) of Subsection A of 9.4.5.15 NMAC].

(2) Based upon consultation with the VR counselor and the committee of licensed managers, the BEP manager will determine whether:

(a) reinstatement of the suspended license will be successfully utilized by the manager, and whether such reinstatement will benefit the BEP program;

(b) training or other related conditions should be made part of the reinstatement process; and

(c) after reinstatement, the licensed manager will be placed on probation for the first six months.

(3) Termination of a license shall occur upon the third suspension of the same license. A terminated license cannot be reinstated without approval of the SLA, the BEP manager, and consideration of the recommendation of the licensed managers committee. If so approved, the BEP manager may determine training or other conditions required for reinstatement of the terminated license.

E. Operation standards for licensed managers. The licensed manager is expected to operate in accordance with the established rules and regulations of the BEP, within the terms of the licensed manager's agreement with the SLA and the property manager's permit. The licensed manager may not act as an agent of the SLA. Specifically, the licensed manager will:

(1) work cooperatively with authorized representatives of the SLA in connection with his/her official responsibilities;

(2) operate the facility in accordance with all applicable health laws and regulations, safety regulations and other federal, state, county and municipality laws and regulations applicable to the facility;

(3) dress and maintain a level of personal hygiene that will convey a positive public image;

(4) supervise employees in an appropriate manner that promotes quality customer service and does not demean the employee;

(5) operate the BEP facility on a non-credit (cash) basis unless otherwise authorized by the SLA;

(6) arrange for continued operation of the enterprise in the case of absences;

(7) maintain daily records of gross receipts, merchandise purchased, cash on hand, and personal withdrawals from profits from the facility, etc.;

(8) complete and submit all required federal and state reports and payments for each business enterprise;

(9) comply with all regulations and laws governing the possession and/or use of firearms, weapons, alcohol and other drugs;

(10) maintain appropriate professional relationships with suppliers, customers, building officials and sla staff.

(a) Relationships with suppliers/purveyors: The licensed manager is free to choose the suppliers from whom he/she is to make purchases, provided, however, that such suppliers are established and reputable.

(b) Relationships with customers: To serve the best interest of the public, the licensed manager and his/her employees must:

(i) provide prompt, cheerful and courteous service to all customers in a professional and neat atmosphere (e.g., no non-working children on premises during normal work hours). Accommodate, within reasonable limits, such other persons who may come to the business enterprise requesting change, information or other services;

(ii) operate on a cash basis;

(iii) the licensed manager will provide refunds to customers as needed who have lost money in vending machines where commissions are assigned to that licensed manager. If warranted, it is the licensed manager's responsibility to seek reimbursement from the purveyor.

(c) Relationships with building officials: Paragraphs (1) and (2) of this Subsection [now Items (i) and (ii) of Subparagraph (c) of Paragraph (10) of Subsection E of 9.4.5.15 NMAC] provide guidance in maintaining a productive relationship with building officials.

(i) The licensed manager must comply with all reasonable requests concerning the operation of a business enterprise that may be made by officials of the building in which the enterprise is located, provided that such requests do not conflict with the agreement and the rules and regulations issued by the SLA and contained herein.

(ii) If differences should arise between the licensed manager and building management, the licensed manager shall bring the matter to the immediate attention of the business consultant for appropriate action.

F. Authority for establishing an elected committee of licensed managers is found in Section 107-B1 of Chapter 6A of Title 20 U.S., commonly referred to as the Randolph-Sheppard Act.

(1) Functions of the organization of licensed managers include:

(a) actively participate with the SLA in the major administrative policy program development decisions affecting the overall direction and administration of the vending facility program;

(b) to receive and transmit to the SLA grievances at the request of licensed managers and serve as advocates for such managers in connection with such grievances;

(c) to sponsor, with the assistance of the SLA, semi-annual instructional conferences for licensed managers, the cost of which will be borne by the SLA. All licensed managers, including those on the ready-for-assignment list shall be invited to participate in the conferences;

(d) inclusion of all licensed managers in the program. The SLA shall provide for a biennial election of an elected committee of licensed managers consisting of seven (7) members, with a goal of providing for geographic proportional representation of licensed managers in the state.

(i) Officers of the committee shall be elected by the organization. The following positions shall be filled: chairperson, vice chairperson, secretary and treasurer.

(ii) The elected committee shall assume these responsibilities in addition to the functions listed above in items 15.6.1.A through D [now Subparagraphs (a) through (d) of Paragraph (1) of Subsection F of 9.4.5.15 NMAC]: review and comment on changes to BEP manuals; review lists of proposed equipment purchases for facilities to ensure cost-effective purchases on managers' behalf by the SLA; actively participate with the SLA in the development and administration of a state system for the evaluation of qualified applicants bidding on a new facility.

(e) In accordance with the committee bylaws, organization meetings shall be held at least twice per year. Between regular meetings the committee will carry on its functions through committees or subcommittees. Meetings will be held at the SLA's Albuquerque facility unless otherwise indicated in advance. Special meetings may be called by the chairperson or by a majority of the members of the committee, provided that notice of the time and place for any special meetings shall be given to all committee members at least five (5) days in advance. The notice requirement shall not apply in emergencies where the committee, by a majority, agrees that a special meeting is necessary.

(f) Eligible voters and nominees: A person must be licensed on or before the spring biannual meeting when nominations are taken. Only licensed managers can be nominated or can vote in the election.

(g) Nomination of committee members:

(i) In the *spring* of each odd-numbered year, the chairperson of the current committee shall call a general meeting of all licensed managers for the purpose of nominating a new committee and new officers. This general meeting shall be held at the SLA's Albuquerque facility, unless otherwise indicated in advance.

(ii) The SLA shall be responsible for sending notice to all licensed managers of the general meeting described in this section. Such notice shall include the date, time and place of the meeting and shall clearly state that the purpose of the meeting shall be the nomination and election of committee members and officers.

(h) A manager may nominate him or herself or another manager.

(i) Ballot system:

(i) Nominations shall be taken for the executive positions of: (1) chairperson, (2) vice-chairperson, (3) secretary, (4) treasurer, and the remaining positions of (5) sergeant of arms, (6) first member at large and (7) second member at large. The managers nominated will be placed on a paper ballot listed under the position that they were nominated for (See Appendix 18 in procedure manual). Managers can be nominated for more than one position.

(ii) The SLA will then send a ballot to each licensed manager with a self addressed and stamped envelope, within thirty (30) days after the nominations. Sixty (60) days after the nominations the SLA will call any manager who has not returned their ballot. The SLA will make arrangements with the manager to complete and return the ballot to the SLA thirty (30) days prior to the fall meeting.

(iii) The ballots will be held by the SLA, unopened, until the next biannual meeting in the fall.

(2) Election of committee members:

(a) At the fall biannual meeting immediately after the spring meeting when nominations were made, the SLA will give a roll call of all ballots received. These should equal the number of licensed managers that were licensed by spring biannual meeting when the nominations were taken. If a ballot is not received from a manager, the SLA will give a statement of the attempts to obtain the ballot from the manager. Any manager that fails to return their ballot to the SLA thirty (30) days prior to the meeting can not participate in the elections. The unopened ballots will be opened and tallied. For confidentiality, only the licensed manager's SLA number will appear on the ballot. The voter's identity on each ballot will not be announced. The ballots will be kept on record to be viewed upon request.

(b) Election to each position requires a majority vote; if no candidate receives a majority of votes a tie breaker shall be immediately conducted between the two (2) or more candidates receiving the highest number of votes. **Tie Breaker:** Numbers 1 through 10 will be placed in a container. Each tied candidate will pull one number from the container. The highest number pulled will win the election.

(c) No manager shall hold more than one position. If a manager receives the highest number of votes for more than one position, the manager will automatically

accept the higher position and relinquish the lower position to the manager with the next highest votes in that position.

(d) Vacancies which occur on the committee between election years will be filled by selection of the remaining committee members.

G. Committee participation in SLA policy making: The SLA shall ensure that the committee has the opportunity for effective and constructive active participation in the development and administration of policy, as follows:

(1) The SLA shall provide advance written notice to the committee of policy matters within its purview that are being considered for decision.

(2) The SLA shall provide all appropriate subcommittees with requested and available information to their chairpersons as per their requests.

(3) The SLA shall provide the committee with the opportunity to initiate matters for consideration by it and the SLA, and provide the committee with the opportunity to make meaningful contributions to the vending facility program with its views and positions taken into careful and serious account by the SLA.

(4) The SLA has the ultimate responsibility for the administration of the BEP. If the SLA does not adopt the views, positions and/or initiatives of the committee, it will notify the committee in writing of the decision reached or action taken by the SLA and the reasons therefor.

[4/15/97, 4/30/99; Recompiled 10/01/01]

[Compiler's note: Item (i) of Subparagraph (i) of Paragraph (1) of Subsection F contains a reference to Appendix 18 in the procedure manual. There is no Appendix 18 in the procedure manual, now 9.4.7 NMAC.]

9.4.5.16-9.4.5.17 [RESERVED]

9.4.5.18 VENDING FACILITY EQUIPMENT AND INITIAL STOCK:

A. **Purpose:** The SLA is responsible for furnishing each vending facility with essential equipment, initial stocks of merchandise and petty cash necessary for the establishment and operation of such facility. The right, title to, and interest in the SLA furnished equipment in each vending facility used in the program will be vested in the SLA in accordance with the laws of the state.

B. **Disposal of acquired stock:** Acquired stock is that stock in which the manager has accrued equity and which the SLA, in conjunction with the manager(s) involved, has determined is suitable for use. Stock in which the manager has not accrued equity

remains the property of the SLA. When a manager leaves the program or transfers to a different vending facility he or she may:

- (1) keep acquired stock;
- (2) sell acquired stock to the SLA;
- (3) sell acquired stock to the incoming manager.

C. Maintenance and replacement of SLA furnished equipment: The SLA shall maintain (or cause to be maintained) all vending facility equipment in good repair and in an attractive condition, and shall replace (or cause to be replaced) worn-out or obsolete SLA furnished equipment as required to assure the continued successful operation of the facility. Determination of SLA equipment to be replaced under this section shall be determined by BEP staff.

(1) **Manager ownership of additional equipment:** The manager shall have the right to purchase additional equipment for his or her vending facility and to hold title in such additional equipment in his or her own name. Manager owned equipment, when reported in adequate detail to the SLA at the time of purchase, will be repaired by the licensed manager and reimbursed by the SLA. The original purchase price and repair cost (if assumed by manager) can be used as a business expense on the monthly report, with copies of the supporting invoices. This applies to equipment that is directly related to the operation of the facility.

(2) **Extended liability insurance for manager-owned equipment exceeding the standard coverage:** See Subsection 27.8 of this rule [now Subsection H of 9.4.5.27 NMAC]. The manager has the option of purchasing the additional amount of insurance needed to cover his or her equipment through the same carrier that the SLA is using or an insurance company of his/her choice.

(3) **Additional equipment purchased by the licensed manager is distinguished from the SLA furnished equipment referred to above for which title remains vested in the SLA.** Additional equipment belonging to the licensed manager shall be listed separately on the written agreement between the manager and the SLA and added to the agreement if purchased after initial start-up.

D. Manager care of equipment: Each manager shall take reasonable care of all equipment in his or her facility and carry out routine, day-to-day maintenance procedures. Upon the manager's failure to take responsibility for such maintenance procedures, the SLA may make arrangements for such day-to-day maintenance and charge the manager an equitable amount for providing such maintenance.

E. Cleaning of facility during transfer: Upon leaving a facility, it is the responsibility of the outgoing manager to fully clean the facility and its equipment. If the outgoing manager fails to comply, the SLA will hire a cleaning company to clean the

facility at the outgoing manager's expense. The cost of the cleaning will be deducted from the inventory being purchased by the SLA. If the amount exceeds the amount of the inventory being purchased or if the outgoing manager takes his inventory, the balance forward must be paid prior to reinstatement into the program or transfer to another facility.

[4/15/97; Recompiled 10/01/01]

9.4.5.19-9.4.5.20 [RESERVED]

9.4.5.21 SET-ASIDE FUNDS:

A. **Purpose:** The SLA shall set-aside funds as described in "Sources of Set-Aside Funds" for purposes described in "Uses of Set-Aside Funds." The licensed managers have recommended a set aside fee of net proceeds, as indicated on the monthly report form (see Appendix 9, BEP Procedures Manual) [now 9.4.7.20 NMAC].

B. Sources of set-aside funds:

- (1) cash from application of a set aside fee against the net proceeds of each vending facility;
- (2) cash equal to the net income of facilities operated temporarily by the SLA;
- (3) cash from receipts of vending machines located on federal property and retained by the SLA;
- (4) cash from receipts of vending machines located on nonfederal property and retained by the SLA;
- (5) excess vending machine amounts determined under Section 9 of this manual;
- (6) interest earned on reserve funds.

C. **Uses of set-aside funds:** Set-aside funds may only be used for the following purposes:

- (1) maintenance of equipment in established vending facility locations;
- (2) replacement of equipment in established vending facility locations;
- (3) purchase of new equipment for established vending facility locations;
- (4) purchase of new equipment for new vending facility locations;

- (5) management services;
- (6) assuring a fair minimum return to managers;

(7) if it is so determined by a majority vote of the managers licensed by the SLA, after the SLA provides to each manager the information on all matters relevant to the purposes below, the establishment and maintenance of:

- (a) retirement or pension funds;
- (b) health insurance contributions;
- (c) paid sick leave;
- (d) paid vacation time including displaced manager payments;
- (e) workers compensation for the first year if funding permits;

(8) initial operating costs funded only by income from vending machines located on nonfederal property and retained by the SLA and temporary operation of vending facilities on nonfederal property;

(9) reserves necessary to accomplish the above purposes on an ongoing basis.

D. Application of set-aside sources to uses:

(1) Source: set-aside fee assessed against the net proceeds of each vending facility. Uses:

- (a) maintenance and replacement of equipment;
- (b) purchase of new equipment;
- (c) management services;
- (d) assuring a fair minimum return to vendors; or

(e) establishment and maintenance of retirement or pension funds, health insurance contributions, and provisions for paid sick leave and vacation time, if it is so determined by a majority vote of licensed managers licensed by the SLA, after such agency provides to each vendor information on all matters relevant to such proposed purposes.

(2) Source: temporary operation of vending facilities on federal property. Uses:

- (a) maintenance of equipment;
- (b) replacement of equipment;
- (c) purchase of new equipment;
- (d) management services;
- (e) fair minimum return;
- (f) retirement or pension funds;
- (g) health insurance;
- (h) sick leave;
- (i) vacation leave;
- (j) reserves.

(3) Source: retained vending machine income from vending machines on federal property. Uses:

- (a) maintenance of equipment;
- (b) replacement of equipment;
- (c) purchase of new equipment;
- (d) management services;
- (e) fair minimum return;
- (f) retirement or pension funds;
- (g) health insurance;
- (h) sick leave;
- (i) vacation leave;
- (j) reserves.

(4) Source: temporary operation of vending facilities on nonfederal property.
Uses:

- (a) maintenance of equipment;
- (b) replacement of equipment;
- (c) purchase of new equipment;
- (d) management services;
- (e) fair minimum return;
- (f) retirement or pension funds;
- (g) health insurance;
- (h) sick leave;
- (i) vacation leave;
- (j) reserves;
- (k) initial operating costs;
- (l) general liability insurance.

(5) Source: retained vending machine income from vending machines on nonfederal property. Uses:

- (a) maintenance of equipment;
- (b) replacement of equipment;
- (c) purchase of new equipment;
- (d) management services;
- (e) fair minimum return;
- (f) retirement or pension funds;
- (g) health insurance;
- (h) sick leave;
- (i) vacation leave;
- (j) reserves;

- (k) initial operating costs;
- (l) general liability insurance.

E. Budgeting of set-aside funds and determination of set-aside rate:

(1) The SLA in consultation with the committee shall provide for the establishment of a set-aside schedule covering each of the purposes for which set-aside funds are intended to be used. The method of determining the set-aside rate shall be as follows.

(a) Prior to the beginning of each fiscal year, an estimate will be made of the amount and sources of funds which will be required for each of the purposes for which funds are to be set-aside during the ensuing fiscal year. The estimates of the amounts required as well as the purposes for which funds are to be set-aside during the fiscal year will be determined in consultation with the committee. The estimates will take into account expenditures made for each of the purposes during the preceding fiscal year and projections for the next fiscal year based on program needs and plans and funds available from other sources.

(b) After a determination has been made as to the amount of set-aside funds which will be required, a set aside rate to be levied against the net proceeds of each licensed manager shall be established to yield the required funds. The method of establishing the set aside rate shall be: Total budgeted uses - initial operating costs - total budgeted other resources = amount to be provided by set aside rate.

Total amount to be provided _____ = Set-Aside Rate

Total net proceeds from 12 full months prior to calculation

(c) This methodology is designed to prevent, so far as is practicable, a greater charge for any purpose than is reasonably required, with allowances for the retention of reasonable reserves necessary to assure that each such purpose can be provided on a continuing basis. This schedule of set-aside charges will be developed in consultation with the committee and shall be submitted for approval to the RSA commissioner. Any changes in the schedule of set-aside charges will likewise be submitted to the RSA commissioner for prior approval. The SLA will maintain adequate records to support the reasonableness of the charge for each purpose.

(2) Requirements for additional stock subsequent to provision of initial stock. In circumstances where additional initial stock is required for efficient operation of the facility, the set-aside fund may provide additional stock on a loan basis with an agreed upon payment schedule. The licensed manager accrues equity in this stock to the extent of his/her repayment of the advance.

9.4.5.22-9.4.5.23 [RESERVED]

9.4.5.24 LIMITATION ON AND DISTRIBUTION OF LICENSED MANAGER INCOME FROM VENDING MACHINES IN DIRECT COMPETITION:

A. Purpose - limitation on vending machine income (commissions):

(1) Vending machine income from vending machines on federal property, that has been disbursed to the SLA by a property managing department, agency or instrumentality of the United States under the vending machine income sharing provision in Section 395.32 of the federal regulations or vending machine income from vending machines on state or other property which has been disbursed to the SLA, shall accrue to each licensed manager operating a vending facility on such property in an amount not to exceed the average net income of the total number of managers within the state, as determined each fiscal year on the basis of each prior year's operation, except that vending machine income shall not accrue to any manager in any amount exceeding the average net income of the total number of managers in the United States for the most recent federal fiscal year for which such information is available.

(2) No licensed manager shall receive less vending machine income than he/she received during the calendar year prior to January 1, 1974, as a direct result of any limitation imposed on such income under this ceiling.

(3) No limitation shall be imposed on income from vending machines, combined to create a vending facility, when such facility is maintained, serviced and operated by a licensed manager.

(4) The SLA will retain vending machine income disbursed by a property managing department, agency or instrumentality of the United States or received from vending machines on state or other property in excess of the amounts eligible to accrue to licensed managers.

B. Distribution of vending machine income: The SLA will disburse vending machine income from machines in direct competition to licensed managers on at least a quarterly basis. Use of income: If it is so determined by a majority vote of the licensed managers, after each manager has been furnished information on all matters relevant to such purposes:

(1) vending machine income from federal properties retained by the SLA in excess of the amount remitted to the managers will be limited to the following uses:

(a) the establishment and maintenance of retirement or pension plans;

(b) health insurance contributions; and

(c) provision of paid sick leave and vacation time for managers, if it is so determined by a majority vote of licensed managers licensed by the SLA after such agency has provided to each licensed manager information on all matters relevant to such purpose;

(2) any vending machine income from federal properties not necessary for the purposes listed above shall be used for one or more of the following purposes:

(a) maintenance and replacement of equipment;

(b) purchase of new equipment;

(c) management services; and/or

(d) assuring a fair minimum return to licensed managers.

[4/15/97; Recompiled 10/01/01]

9.4.5.25-9.4.5.26 [RESERVED]

9.4.5.27 LICENSED MANAGER BENEFITS:

A. **Purpose:** Describe benefits available to qualified licensed managers in the state's business enterprise program. Rates for benefits described below are contained in Appendix R.

B. **Health insurance:** The SLA, in consultation with the committee of licensed managers, makes available to each manager and at the manager's option, his or her immediate family, a health insurance plan.

(1) A displaced manager remains eligible for the health insurance plan for 12 months, beginning with the month following displacement.

(2) Upon termination of a manager's agreement or a licensed manager's license, health insurance benefits will cease 30 days after the date of the termination.

Note: The COBRA plan may be available.

C. **Sick leave:** Managers with agreements effective on or before the beginning of each state fiscal year (July 1) shall accrue up to 80 hours of sick leave during that state fiscal year, at the rate of 6.666 hours per month. Sick leave balances can be carried forward to a maximum of 240 hours. Payment for sick leave will be made at a rate determined annually by joint decision of the SLA and the committee of licensed managers.

(1) Sick leave payment will be made upon receipt of a sick leave form along with proper doctor's release to return to work. Refer to procedures manual for form to be used.

(2) Sick leave balances are reduced to zero hours when the licensed manager leaves the program.

(3) A displaced licensed manager is not eligible for the sick leave benefit during the period of displacement. Sick leave balances of displaced managers are reinstated if the displaced manager enters into a new manager's agreement before the end of the displaced manager maximum period. If the displaced manager leaves the program at the end of the displacement period, the sick leave balance is reduced to zero.

(4) Sick leave may only be used due to manager illness or incapacity of the manager to operate the facility.

D. Vacation pay: Managers with agreements effective on or before the beginning of each state fiscal year (July 1) shall accrue up to 80 hours of vacation time during that state fiscal year, at the rate of 6.666 hours per month. Vacation disbursements will be made at the end of each state fiscal year. A displaced manager is not eligible for the vacation benefit during the period of displacement. Vacation leave balances of displaced managers are reinstated if the displaced manager begins a new operating agreement both before the end of the state fiscal year and before the end of the displacement period.

E. Leaves of absence: A manager may request, in writing, a leave of absence for a period not to exceed six months. A leave of absence may be taken only for the purposes of (1) training or (2) extended illness. During a leave of absence, the manager does not accrue additional seniority, however, he or she does not lose seniority acquired prior to the leave. The manager must notify the SLA 30 days in advance of returning to the program. At this time the SLA will reinstate the manager in his or her previous facility or a comparable facility. If the SLA is unable to place the manager in his or her previous facility or a comparable facility, then the manager will become a displaced manager. If the manager is offered his or her previous facility or a comparable facility and refuses it, the refusal will be considered as a resignation from the BEP.

F. Death benefit: In the event of the death of a manager, his/her family shall be permitted to operate the facility under the existing agreement until a licensed manager is appointed to the facility, provided that the family's operation of the facility is satisfactory as determined by the SLA.

G. Displaced manager benefit: A displaced manager is eligible for the displaced manager monthly benefit for 12 consecutive months beginning with the first full month that the manager is displaced. The displaced manager benefit amount is determined jointly by the SLA and the committee of licensed managers.

H. Liability insurance benefit: The SLA, in consultation with the committee of licensed managers requires each manager to maintain general liability insurance. The SLA purchases general liability insurance for each vending facility and bills each manager for the cost of insuring his/her facility. Funds permitting, premium costs for liability insurance are provided by income from vending machines on nonfederal property retained by the SLA and temporary operation of nonfederal vending facilities by the SLA.

(1) At the end of each state fiscal year, managers are notified as to whether the SLA has sufficient funds to provide general liability insurance for the next year or whether managers will be responsible for all or part of the premium costs of liability insurance.

(2) Failure of a manager to pay his or her portion of general liability insurance may result in suspension or revocation of the manager's license.

I. Fair minimum return benefit: Each manager whose monthly net proceeds are less than the fair minimum return amount determined by the SLA in consultation with the committee of licensed managers is entitled to a minimum fair return from the set-aside fund provided the manager has operated the facility with good business judgement, including controlling costs consistent with the costs of other similar facilities. The fair minimum return benefit is calculated as follows:

(1) Fair minimum return maximum benefit - Net proceeds (not less than \$0.00) = fair minimum return amount.

(2) No minimum return amount shall be disbursed until approval by the business enterprise program manager that the costs are reasonable and that the manager has conducted the operations of the facility in a business like manner.

J. Workers' compensation benefits: For licensed managers who have at least one employee, the SLA will pay workers' compensation insurance for the first year that manager is in operation. At the end of that period, it is the responsibility of the licensed manager to pay workers' compensation for the employee(s). Failure to maintain workers' compensation insurance coverage for employee(s) will be grounds for disciplinary probation or termination.

K. Funding of benefits: Funds supporting all benefits will be paid by the set-aside fund, given adequate resources in the set-aside fund.

[4/15/97; Recompiled 10/01/01]

9.4.5.28-9.4.5.29 [RESERVED]

9.4.5.30 ACCESS TO PROGRAM AND FINANCIAL INFORMATION:

A. **Purpose:** To provide reasonable access by each manager to program and financial data of the SLA relevant to the operation of the state vending facility program, including quarterly and annual financial reports, provided that such disclosure does not violate applicable federal or state laws pertaining to confidential information. In addition, the manager shall be furnished a copy of the rules and regulations, the manager's agreement, and the permit. Insofar as practicable, such data shall be made available in braille or recorded tape.

B. **Staff assistance:** At the manager's request, the SLA shall arrange for a staff member to assist the manager in the interpretation of such data at a time and place agreed upon by the SLA and the manager.

[4/15/97; Recompiled 10/01/01]

9.4.5.31-9.4.5.32 [RESERVED]

9.4.5.33 ASSIGNMENT, TRANSFER AND PROMOTION OF LICENSED MANAGERS:

A. **Purpose:** To provide guidelines for the assignment of licensed managers to specific business enterprises.

B. Ready-for-assignment list:

(1) All blind persons who have successfully completed training and other requirements as stated in Subsection 12.2.6 of this rule [now Paragraph (6) of Subsection B of Section 9.4.5.12 NMAC], as determined by the SLA and recommended by the committee of licensed managers, shall be placed on a ready-for-assignment list.

(2) Persons on the ready-for-assignment list shall receive announcements of vending facility openings distributed in accordance with this section of the rules and regulations.

C. **Priority assignment:** A manager who has been displaced from a facility through no fault of his or her own may be given priority to a new or vacant facility, if the requirements of operating the facility and its potential or actual earnings are comparable to those of the facility from which the manager was displaced. The SLA may offer a facility with comparable earnings to the displaced manager without going through the bidding process.

D. **Manager selection:** When a new facility is established or when a vacancy occurs in an existing facility to which no manager is entitled to be given a priority assignment, all managers on the ready-for-assignment list, and managers already assigned to facilities will be notified in writing of the availability of the facility, its operating requirements (including any special or unusual requirements), the current or potential earnings, and the time period in which to request assignment to it (please refer

to procedures manual). Managers who wish to be assigned, transferred or promoted to the facility shall notify the SLA in writing.

E. Criteria for assignment, transfer or promotion to a business enterprise facility: The following evaluation procedure has been developed by the SLA staff and committee of licensed managers and will be followed in completing the evaluation and selection of managers. Details on the procedure are contained in the procedures manual. Assignment, transfer or promotion of a manager to a business enterprise facility shall include consideration of seniority, provided that all of the specified criteria listed below are satisfactorily met:

(1) Ability to meet the requirements of operating the facility as specified in the Permit for the particular facility. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

(2) Satisfactory work habits including demonstrated ability to maintain required hours of work and comply with applicable health regulations. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

(3) Work attitudes including good customer relations, and cooperation with property management and SLA staff. This is demonstrated by managing previous BEP facilities and/or on-the-job training.

(4) Knowledge and application of sound business practices including: timely and accurate submission of all reports pertaining to the operation of the facility; prompt payment of set-aside fees; prompt payment of creditors and employees; control of labor and food costs to demonstrate ability to make a reasonable profit; demonstrated ability to provide good quality menu items; and demonstrated ability to supervise, schedule, hire and terminate employees. This is demonstrated by managing previous BEP facilities and/or on-the-job training.

F. Method of selection: The applicant's evaluations and contact reports prepared by the SLA staff shall be utilized to obtain information pertaining to the foregoing criteria referenced in 33.5.1.A-D [now Paragraphs (1) through (4) of Subsection E of Section 9.4.5.33 NMAC], above. All applicants for assignment, transfer or promotion, other than the applicant entitled to a priority assignment referenced above, shall be evaluated on the basis of the above criteria by members of the vending facility program staff and the evaluation committee. The evaluation committee will make its considered recommendations to the executive director, who shall make the final decision as to which applicant will be assigned, transferred or promoted to the new or vacant facility or whether it is advisable to rebid the facility. See the procedures manual for detailed instructions and forms.

G. Temporary operation of vending facilities: In some cases, the SLA may determine that it is in the best interest of the program for a facility to be operated on an

interim basis prior to bidding the facility. There are two methods by which the SLA provides for the temporary operation of vending facilities:

(1) The SLA may assign a licensed manager the operation of a vending facility for a period not to exceed six months without bidding the facility.

(2) The SLA may assign SLA staff or hire temporary staff to operate vending facilities on an interim basis.

H. Probation: All applicants chosen to be assigned, transferred or promoted to new or vacant facilities will be on probationary status for six months in order to evaluate the applicant's performance in the new facility. SLA staff will closely monitor the performance of the manager by making monthly evaluations. Staff will document any deficiencies in performance and ways to correct these deficiencies in a "Plan for Improvement" (see procedures manual). The probationary manager will be given a copy of the "Plan for Improvement" during a conference in which the SLA staff discusses the deficiencies with the manager and ways to correct the deficiencies. In addition, the licensed manager may request additional training in his or her areas of deficiencies as outlined during the probationary period. If at the end of the probationary period, deficiencies have not been corrected, the licensed manager's probationary period may be extended or the licensed manager may be removed from the facility with two weeks notice that he/she will be terminated. A manager removed for unsatisfactory performance will not be considered a displaced manager. If at the end of the six month period the manager has performed satisfactorily, he or she will be on permanent status.

I. Satellite program:

(1) If a vending facility goes out for bid and receives no satisfactory bids from any licensed manager, the facility becomes eligible for consideration as a satellite operation. The satellite facility shall be bid in the same manner as other facilities. If no bid is received from managers, the satellite may be put out to bid to any qualified blind individuals (e.g., non-licensed managers) to be operated under contract with the SLA. The facility will be rebid for period of time to be determined by the SLA as a primary facility. If the facility is not awarded as a primary facility, it will be rebid as a satellite. If no bid is received for the satellite, it will be released for bids from any member of the qualified blind community.

(2) If a licensed manager leaves the vending facility program for any reason, all claims to the satellite will be forfeited.

J. Manager rights and responsibilities.

(1) Each manager shall be provided with copies of all documents relative to the operation of the vending facility to which he or she is assigned including these rules and regulations, the operating agreement, and the contract or permit with the property managing agency. The SLA encourages vendor participation in the negotiating process

whenever possible. The BEP staff will maintain records indicating that the licensed manager acknowledges receipt of such documents.

(2) Each manager shall acknowledge in writing that a copy of the documents listed above have been received and explained to him or her by the SLA (see Appendix 15, Procedures Manual) [now 9.4.7.26 NMAC].

(3) Each licensed manager shall comply with the terms set in his or her operating agreement. See Appendix B [now 9.4.5.40 NMAC].

[4/15/97; Recompiled 10/01/01]

9.4.5.34-9.4.5.35 [RESERVED]

9.4.5.36 OPERATING AGREEMENT BETWEEN STATE LICENSING AGENCY AND LICENSED MANAGER:

A. **Purpose:** The SLA shall develop, with the active participation of the state committee of licensed managers, an operating agreement which shall be entered into between the SLA and each manager. The operating agreement (see Appendix B) [now 9.4.5.40 NMAC] shall contain the terms and conditions of the licensed manager's conduct of business in a location for which a permit or contract has been entered into by the SLA. The operating agreement at a minimum must specify:

(1) the duties of the licensed manager and the level of performance required for such duties in accordance with standards prescribed by the SLA (developed with the active participation of the committee of licensed managers), applicable health laws and regulations, and with the terms of the permit granted by, or the contract entered into with the federal, state or other agency or organization in control of the site of the vending facility; and

(2) the responsibilities of the SLA to provide management services to the licensed manager including assistance and supervision, and the ways in which such responsibilities are carried out.

B. **Frequency of use:** An operating agreement is to be used each time a manager is assigned to a facility and shall be dated and signed prior to or upon the first day of business at any facility (See Appendix B) [now 9.4.5.40 NMAC]. A complete inventory of all equipment, saleable merchandise and initial stock provided by the SLA will be furnished to the manager as part of the operating agreement within 30 calendar days of the first day of business at the facility.

For a current copy of Appendices A through D [now 9.4.5.39 through 9.4.5.42 NMAC], call the: New Mexico Commission for the Blind, PERA Building, Room #553, Santa Fe, NM 87503 (505)827-4479 Fax: (505) 827-4475

[4/15/97; Recompiled 10/01/01]

9.4.5.37-9.4.5.38 [RESERVED]

9.4.5.39 APPENDIX A: VENDING FACILITY PROGRAM LICENSE:

APPENDIX A

**STATE OF NEW MEXICO
COMMISSION FOR THE BLIND
VENDING FACILITY PROGRAM
LICENSE**

The New Mexico commission for the Blind as the State Licensing Agency for the Randolph-Sheppard Vending Facility Program hereby awards to

this license to operate a vending facility in the New Mexico commission for the Blind Vending Program, subject to the terms and conditions of an operating agreement and the rules and regulations of the New Mexico commission for the Blind Vending Facility Program.

Executive director

Date

[4/15/97; Recompiled 10/01/01]

9.4.5.40 APPENDIX B: OPERATING AGREEMENT:

APPENDIX B

OPERATING AGREEMENT

THIS AGREEMENT entered into this _____ day of _____, _____ by and between the NEW MEXICO COMMISSION FOR THE BLIND (State Licensing Agency), hereinafter referred to as the COMMISSION and _____, licensed by the commission as a licensed manager under the Randolph-Sheppard Program, hereinafter referred to as MANAGER, WITNESSETH:

WHEREAS, the commission has been granted a permit by _____ for the operation of a vending facility by a licensed blind manager under the Randolph-Sheppard Program hereinafter referred to as PERMIT on the property located at _____

_____, a copy of which permit is attached hereto and made a part hereof; and

WHEREAS, the commission has offered the Manager the opportunity to operate the vending facility under the terms and conditions hereinafter set forth; and

WHEREAS, the Manager has agreed to undertake the operation of the vending facility under the terms and conditions hereinafter set forth; and

WHEREAS, the parties do not intend to derogate in any way from responsibilities and rights imposed and granted by applicable Federal, State, or local laws or regulations by this agreement;

NOW, THEREFORE, in consideration of the premises, it is mutually agreed as follows:

A. RESPONSIBILITIES OF THE COMMISSION:

1. The commission will equip the vending facility for carrying out the business authorized by the permit.
2. The commission will furnish initial stocks of merchandise and petty cash sufficient to enable the Manager to commence operating the business authorized by the permit. The commission will also furnish the Manager with a complete inventory of all equipment, initial stock, and petty cash provided.
3. The commission will maintain the equipment at the vending facility in good repair, and will replace obsolete and worn out equipment as necessary.
4. The commission will provide for substitute operation of the vending facility as may be necessitated by the Manager's absence because of an emergency. The salary of the person who substitutes for the Manager, or that of other emergency help, shall be charged to the vending facility where the service is performed.
5. The commission will provide, or will provide for, supervisory and management services necessary for the efficient operation of the vending facility.

B. RESPONSIBILITIES OF THE LICENSED MANAGER:

1. The Manager will be responsible for having the vending facility open for business on the days and during the hours specified in the permit.

2. The Manager will operate the vending facility business on a cash basis except for such credit accounts as may be established or authorized by the commission.
3. The Manager will be accountable to the commission for the proceeds of the business of the vending facility, and will handle the proceeds, including payments to suppliers and deposits of funds, in accordance with instructions from the commission.
4. The Manager will carry on the business of the vending facility in compliance with applicable health laws and regulations.
5. The Manager will take proper care of the equipment of the vending facility, and will make alterations or changes therein only with the written approval of the commission.
6. The Manager will notify the commission a reasonable time in advance of taking any voluntary leave from the vending facility, and as soon as possible with respect to any involuntary leave.
7. The Manager will keep such records and make such reports as the SLA shall require.
8. Proper professional attire and hygiene will be evidenced at all times.
9. Appropriate professional behavior towards Property Management, employees, customers and SLA will be expected at all times.

C. GENERAL:

1. The business to be carried on at the vending facility will be limited to that specified and authorized in the permit.
2. The right, title, and interest in and to the equipment of the vending facility, the stock in trade, and funds on hand are vested in the commission, and will be left at the vending facility or turned over to the commission on the termination of this agreement for any reason by either of the parties. In such an event the fair market value of the Manager's interest will be determined by the commission and paid to the Manager or to the Manager's heirs or assignees.
3. The monthly income of the Manager shall be the net profits of the business of the vending facility for the period in question, less the funds which must be set aside, as established in writing by the commission pursuant to 34 CFR 395.9. The net profits will be augmented by an amount necessary to bring the monthly income up to the fair minimum return.
4. Rebates, commissions, vending machine income disbursed by the SLA to the Manager, or bonuses received by the Manager from suppliers are, and must be accounted for as, income of the vending facility and subject to the set-aside fee. Under no circumstances are such funds to be treated as the separate, personal funds of the Manager.

5. Merchandise taken from the stock in trade of the vending facility by the Manager for his own use shall be accounted for by the Manager and paid for at cost price.

6. The business and premises of the vending facility shall be covered by general liability insurance, fire and theft insurance and any such other insurance as will protect the Manager, anyone employed by the Manager, and the commission, against losses and claims arising out of the conduct of the business of the vending facility. Should the commission be unable to provide liability insurance through the set-aside funds, reasonable notice will be provided to the licensed managers and they will be responsible for the insurance until further notification.

7. The commission, through its personnel or agents, shall have the right to access the business records of the Manager upon reasonable notice to the Manager.

8. The commission shall have the right to observe the operation of the Manager including participation in daily cash counts for the purpose of determining the Manager's compliance with SLA rules and regulations and the accuracy of the Manager's reporting as well as to evaluate the potential of the location for future Managers.

9. This agreement may be terminated at any time by the Manager. It shall be terminated upon the revocation or termination of the permit or contract. In addition, it may be terminated by the commission if the business of the vending facility is not conducted in accordance with this agreement, the terms and conditions of the SLA Permit with the Property Managers, the BEP Rules and Regulations or with applicable Federal, State, or local laws and regulations.

10. Upon execution and dating of this agreement by the commission and the Manager, it is understood that this agreement shall supersede and nullify any prior agreement between the commission and the Manager with respect to the operation of a vending facility.

11. Other terms and conditions as listed on Attachment A.

Date: _____ by _____

Executive director

Date: _____ by _____

BEP Staff

Date: _____ by _____

Licensed Manager

Date: _____ by _____

Witness

Attachment A: Other Terms and Conditions

[4/15/97; Recompiled 10/01/01]

9.4.5.41 APPENDIX C: PERMIT FOR VENDING FACILITY ON FEDERAL PROPERTY:

APPENDIX C

PERMIT FOR THE ESTABLISHMENT OF A VENDING FACILITY ON FEDERAL PROPERTY AS AUTHORIZED BY PUBLIC LAW 74-732, AS AMENDED BY PUBLIC LAW 83-565 AND TITLE II OF PUBLIC LAW 93-516 (RANDOLPH-SHEPPARD ACT)

The New Mexico Commission for the Blind of the State of New Mexico requests approval of _____ to place a vending facility on the property located at _____

Satisfactory Site: It has been determined that this location meets the criteria of a satisfactory site as defined in 34 CFR 395.1(q). Any exceptions are documented in Attachment A.

Type, Location, and Size of Facility: Type of facility: _____
Facility location: _____ Facility
Size: _____ (floor plan, Attachment B). The type of articles to be sold and services to be offered are enumerated including the responsibility for the provision thereof, are set forth in Attachment D. The location, type, and number of vending machines which constitute all or part of this facility are noted in Attachment E. The facility will operate _____ days of the week from _____ a.m. to _____ p.m. commencing on _____.

Machine Income Sharing: The type and location of each vending machine located in this property and the specific income sharing provisions in 34 CFR 395.32 applicable to each such machine will be indicated in Attachment F. Vending machine income will be disbursed to the commission for the Blind on at least a quarterly basis, or as otherwise agreed.

Other Terms and Conditions: Both parties must comply with 34 CFR 395.35. Any additional terms and conditions applicable to this location are in Attachment G. This permit is issued for an indefinite period of time subject to suspension or termination for noncompliance by either party with any of the agreed upon terms and conditions of the permit. By mutual agreement, the commission for the Blind and the property agency/owner may terminate the permit after providing notice of the intended termination, including the reason for it and supporting documents, to the other party. Both parties must comply with all regulations issued in Title VI of the Civil Rights Act of

1964. The reason for denying the application must be sent in writing to the New Mexico Commission for the Blind.

Approving Property Official Commission for the Blind

Title	Date	Title	Date
		PERMIT FOR VENDING FACILITY	Appendix C, Page 2
<u>ATTACHMENT A</u>			
<u>SATISFACTORY SITE EXCEPTIONS</u>			Appendix C, Page 3
		PERMIT FOR VENDING FACILITY	
<u>ATTACHMENT B</u>			
<u>FLOOR PLAN OF PROPOSED VENDING FACILITY</u>			Appendix C, Page 4
		PERMIT FOR VENDING FACILITY	
<u>ATTACHEMENT C</u>			
<u>TYPES OF ARTICLES AND SERVICES TO BE OFFERED</u>			Appendix C, Page 5
		PERMIT FOR VENDING FACILITY	
<u>ATTACHMENT D</u>			
<u>FIXTURES AND EQUIPMENT</u>			Appendix C, Page 6
		PERMIT FOR VENDING FACILITY	
<u>ATTACHMENT E</u>			

VENDING MACHINES WHICH ARE PART OF THIS VENDING FACILITY

Description: Location: Number:

Appendix C, Page 7

PERMIT FOR VENDING FACILITY

ATTACHMENT F

COMPETING VENDING MACHINES - INCOME SHARING (COMMISSIONS)

Appendix C, Page 8

PERMIT FOR VENDING FACILITY

ATTACHMENT G

OTHER TERMS AND CONDITIONS

[4/15/97; Recompiled 10/01/01]

**9.4.5.42 APPENDIX D: PERMIT FOR VENDING FACILITY ON STATE
PROPERTY:**

APPENDIX D

PERMIT FOR THE ESTABLISHMENT OF A VENDING FACILITY ON STATE
PROPERTY AS AUTHORIZED BY SECTIONS 22-14-24 THROUGH 22-14-29 NMSA
1978:

This Agreement is between the commission for the Blind Vending Facility Program
(hereinafter "CB"), the Property Control Division, General Services Department
(hereinafter "PCD"), and _____ (hereinafter "User
Agency") all of which are agencies of the State of New Mexico.

WHEREAS, the State of New Mexico has determined a need for the vending sales
listed hereinafter and has determined that the space allocations described hereinafter
are appropriate, and

WHEREAS, CB has determined that a sufficient CB vending facility program exists to
fulfill the vending needs of PCD, the parties agree as follows:

Pursuant to Sections 22-14-24 to 22-14-29 NMSA 1978, PCD, which has responsibility
for the Premises listed below, hereby grants to CB a permit to operate a vending facility
on the said Premises subject to the following terms and conditions:

Name of licensed manager:

Tax ID Number:

1. In the event that the Licensed ceases operation, the Commission for the Blind will be responsible for providing PCD with the name of the new Manager and copy of the operating agreement.

2. Location of Premises (give building, street, city, and specify particular portions of the building, when appropriate):

PCD Building Number: (hereinafter the "Premises").

3. Term of Agreement:

Beginning Date:

Ending Date:

4. Hours of Operation (give days of the week and hours each day that the program will be operated):

Days of the Week:

Hours of Operation:

5. Goods Vended:

(A) PCD authorizes the sale of routine articles such as newspapers, periodicals, food, beverages and other routine and sundry items except as further required under Section 3 [5](B) of this Agreement and as required herein (list all requirements and restrictions):

Tobacco products will not be sold.

Require use of lids for coffee, soups, stews or other liquid products that may spill. Cups of ice and/or water shall be reasonably priced based upon the cost to the licensed manager.

(B) User Agency requires and/or restricts CB sales to products as follows:

6. Warranty: "CB" warrants that all goods vended shall be of marketable quality and handled, stored and sold in accordance with all applicable laws and regulations. "CB" shall notify User Agency in writing within fifteen (15) days prior to any substantial change in quantity or character of goods vended.

7. Costs: PCD and/or User Agency (as may be applicable) shall not charge any rent or other use fee to CB and shall provide CB with all appropriate utilities for operation of the vending facility pursuant to Subsection C of Section 22-14-27 NMSA 1978. CB and/or its licensees shall not be required to provide a performance bond to PCD.

8. Installation of equipment: CB shall pay for and install all fixtures and equipment needed for operation of the vending facility subject to approval of the director of PCD: List below all equipment to be installed by PCD or user Agency. List separately CB equipment specifically receiving the approval of the PCD director:

CB: see attached listing of equipment inventory

9. Competition: Check appropriate paragraph:

_____ No vendors, other than those under contract with CB, or other competing vending operations (such as employees' social funds, coffee funds, etc.) shall be allowed to operate on the Premises.

_____ There are no vending machines or other competitive vending services offered at the Premises except as follows:

_____ Competitive vending services on the Premises shall be allowed as follows: (list type of service/product, areas of location, and restrictions on proximity of sales by CB as applicable):

10. Preference to CB: PCD and User Agency agree that CB shall be given a preference in the operation of its vending facility and that the non-CB vending operations specified herein shall not adversely impact CB's ability to do business. PCD further agrees to limit non-CB vending contracts to two years in order to assure periodic review of the impact of such operations on CB sales. Should an adverse impact be established, PCD agrees to either not renew the non-CB vending contract or modify it upon renewal in a manner that is designed to eliminate the adverse impact.

11. Approval of Contracts: All non-CB vending contracts entered into by PCD shall receive the approval of CB before coming into force. Such approval shall not be withheld unreasonably and, in any event, shall not be withheld when CB cannot offer the vending sales called for in the contract.

12. Cleaning: CB shall provide routine janitorial services to all areas of the Premises (including equipment) where food preparation takes place. PCD or User Agency, as applicable, shall provide routine janitorial services to all remaining portions of the Premises, providing, however, that CB shall clean all fixtures and equipment in the serving areas, and shall clean all storage areas.

13. Permits: CB shall obtain all necessary permits required for vending facility operations and the facility shall be operated in compliance with applicable health, sanitation and building codes or ordinances.

14. Insurance: PCD, CB and User Agency are entities of the State of New Mexico and are only subject to liability insurance under the terms of the New Mexico Tort Claims Act. licensed managers are independent contractors and shall carry food purveyors and general liability insurance in an amount not less than one million dollars (\$1,000,000) to cover operations of this facility.

15. Nondiscrimination: CB shall take all actions necessary to assure that the licensed manager does not discriminate against any person or persons in the use and services of said vending facility on the basis of race, color, age, religion, gender, national origin or disability.

16. User Agency Representative: The User Agency will appoint a representative that will serve as the liaison between the User Agency and CB, in regard to matters involving the operations of the Vending Facility. The Representative will solicit input from staff of the User Agency and develop recommendations regarding the operations of the Vending Facility. The recommendations will be reviewed and approved by the User Agency administration before transmittal to CB. The User Agency Representative shall transmit such recommendations in writing directly to the commission for the Blind Vending Facility Program and shall *not* have the authority to unilaterally order any operation of the vending facility to be modified or terminated. The User Agency Representatives will focus on, but not be limited in their recommendations to, areas such as pricing of food and drink items, vending machine placement and pricing, menu items, and general operation of the vending facility.

17. Operation of Vending Facility: CB agrees to operate the vending facility through its licensees, by meeting the following minimum requirements:

(A) CB will provide a capable, licensed manager, acceptable to PCD and User Agency, and that all personnel employed will maintain good work ethics and shall maintain professional work standards.

(B) CB shall provide fixtures and equipment used in the service area (not otherwise specified in Section 8 of this Agreement) including, but not limited to, counters, display cases, refrigerators, coffee urns, steam tables, toasters, and ice cream cabinets.

(C) CB will provide all expendable items for snack bar or cafeteria operations, including, but not limited to, dishes, silverware, pots, pans, dish carts, cups, trays, and paper products such as towels and napkins.

(D) CB shall supervise and assist the Manager in management of the vending business, and in maintaining a working relationship with User Agency and PCD.

(E) CB shall provide User Agency with a price list of all items to be sold. This list shall be delivered to User Agency in writing prior to initiation of sales. CB shall not substantially change the prices or items on said list without first giving the User Agency 15 days written notice and obtaining the consent of User Agency. User Agency shall not unreasonably withhold its consent, and, in any event, consent shall not be withheld when due cause for the change is established by CB.

(F) licensed manager agrees to maintain the work area in a clean and sanitary manner per Paragraph 12.

18. Licensed managers: CB agrees to allow only properly licensed CB managers to use the Premises for sales, provided however, that CB may assign vending stand trainees to work on the Premises. It is further agreed that the Manager, duly licensed by CB, shall be entitled to hire non-licensed persons to assist him in sales operations and food preparation. It is further agreed that CB, through its licensees, may contract with private vendors and suppliers, distributors and producers of products for supplying product sales through the CB Vending Facility Program and in lieu of direct operation by a licensee, provided however, that solicitation for and selection and award of such sales shall be pursuant to a predetermined, written procedure requiring competitive proposals or sealed bids. This requirement does not apply to the purchase of goods and services used for vending facilities actually operated by a licensee on a full time basis, but rather only to vending facility operations contracted with private vendors. Proceeds of such sales shall be administered according to laws and regulations governing the CB Vending Facility Program. CB further agrees that all contracts between CB (and/or its licensees) and private vendors shall require the private vendor to provide a performance bond. CB shall thoroughly investigate any complaints regarding vending operations and revoke the license of any Manager of vending sales who fails to meet CB standards or the terms of this Agreement (permit).

19. Termination:

(A) The PCD director may terminate this Agreement with 60 days written notice to CB if any Agency space needs require the elimination of all space for all Concession Sales in the building and for other good cause shown, including but not limited to public health and safety.

(B) If partial elimination of concession sale space takes place, CB vending stand sales shall have priority for the remaining space available.

(C) Cancellation of this Agreement shall be based on certification by the User Agency or other state Agency that its space needs cannot include any type of concession sales and must be used for the operation of the Agency's business.

(D) CB may terminate this Agreement by giving the PCD director 60 days written notice in advance of the last day of operation of the vending facility which is to be closed.

20. Right of Entry and Inspection: The PCD director or his designee shall have the right to enter and inspect the Premises and equipment therein during normal business hours, as defined in Section Two of this Agreement, and at all times in the event of emergency. In the event of emergency, CB shall provide all keys necessary for entry to the Premises to the PCD director or his representative.

21. Agreement Constitutes Permit: This Agreement shall also constitute a Vending Facility Permit to CB.

22. Maintenance of Premises: It is agreed that normal maintenance of the premises will be the responsibility of the New Mexico General Services Department (User Agency). This shall include items such as lighting, doors, heating and cooling, etc. It is further agreed that maintenance of food service equipment will be the responsibility of the licensed manager and CB.

Items: a.

b.

c.

d.

23. Telephones: User agency and Property Control director shall not be required to provide a telephone to licensed manager on the premises. licensed manager agrees to the responsibility of providing telephones.

24. Indemnification: CB shall defend, indemnify and hold PCD and User Agency harmless from all actions, proceedings, claims, demands, damages, costs, including but not limited to Attorney's fees, and all other liabilities and expenses of any kind from any source which may arise out of this Agreement or any amendment thereto, if caused by the tortuous act of CB and/or its licensees, employees, officers, or servants, and/or the employees, officers or servants of CB licensees.

This Agreement is entered into the dates below:

The Commission for the Blind

By: _____

Date _____

Name:

Title: Executive Director

Property Control division, General Services Department

By: _____

Date _____

Name:

Title: director GSD/PCD

User Agency

By: _____

Date _____

Name:

Title:

Responsible for Maintenance (Per Paragraph 22)

Copy of this Permit to be given to Licensed Manager.

Attachment: Operating Agreement Between CB and Licensed Manager

By: _____

Date: _____

General Services Department

Building Services division

Contact: _____

Attachments: Operating Agreement

List of CB Equipment

Copy of Liability Insurance

[4/15/97; Recompiled 10/01/01]

PART 6: [RESERVED]

PART 7: BUSINESS ENTERPRISE PROGRAM PROCEDURES MANUAL FOR BLIND VENDORS

9.4.7.1 ISSUING AGENCY:

New Mexico Commission for the Blind.

[4/15/97; Recompiled 10/01/01]

9.4.7.2 SCOPE:

Legally blind licensed managers and applicants.

[4/15/97; Recompiled 10/01/01]

9.4.7.3 STATUTORY AUTHORITY:

Sections 22-14-24 to 22-14-29 NMSA 1978, "Horace DeVargas Act," authorizes the New Mexico commission for the blind to establish, maintain and operate a vending stand program for legally blind persons under the auspices of the "Randolph-Sheppard

Act", Public Law 74-732 as amended by Public Law 83-565, 93-516 and 95-602, 20 U.S.C. Chapter 6A, Section 107.

[4/15/97; Recompiled 10/01/01]

9.4.7.4 DURATION:

Permanent.

[4/15/97; Recompiled 10/01/01]

9.4.7.5 EFFECTIVE DATE:

April 15, 1997, unless a later date is cited at the end of a section or paragraph.

[4/15/97; Recompiled 10/01/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

9.4.7.6 OBJECTIVE:

Provide uniform procedures for the assessment, training, and selection of licensed managers in the business enterprise program. Provide uniform forms for routine business enterprise program functions.

[4/15/97; Recompiled 10/01/01]

9.4.7.7 DEFINITIONS:

Terms used in this document are defined in the Business Enterprise Program Policies for Blind Vendors. 9 NMAC 4.5.7 NMAC [now 9.4.5.7 NMAC].

[4/15/97; Recompiled 10/01/01]

9.4.7.8 PROGRAM FOR ASSESSMENT AND TRAINING:

The purpose of the skills assessment is to directly ascertain the potential to manage a vending facility and to describe, in a customized fashion, vocational training needs to enable eligible persons to become licensed managers. The assessment is not designed to provide remedial or personal adjustment training for prospective licensees. Alternative skills for dealing with blindness should have been mastered prior to the individual's referral to the vending facility program. Should it be determined that additional alternative skills to deal with blindness are necessary to accomplish a vocational training program in the BEP, the prospective trainee will be referred to his/her vocational rehabilitation counselor for additional training prior to the continuation of the BEP training.

A. The SLA and the committee of licensed managers have worked together in developing a lucid training program which will consist of the following:

- (1) food service management;
- (2) personnel management;
- (3) culinary arts;
- (4) food service math;
- (5) sanitation; and

(6) other areas that the SLA and committee of licensed managers find necessary to facilitate success in the business enterprise program.

B. Any proposed changes to the training program will be reviewed by the committee of licensed managers prior to a final decision by the SLA staff.

[4/15/97; Recompiled 10/01/01]

9.4.7.9 EVALUATION PROCESS:

A. The purpose of the evaluation process is to provide a reasonably logical and efficient way of fairly selecting an applicant from the applicant pool.

B. After the evaluation committee has been appointed, consisting of two to three licensed managers and the same number from the commission staff, an evaluation location will be selected by the committee. The location should be selected with the convenience of the majority of bidders in mind.

(1) Time: The time should be set with the majority of all involved in mind and as soon as possible. The evaluation will be conducted within a minimum of two weeks after the closing date of the bid.

(2) Files: Copies of each bidder's file will be sent to him/her, and it is each bidder's responsibility to go through these files. If there is any question on the contents or lack of contents in the file, he/she should respond in writing and include a copy of any documents or reports that he/she wants added to the file. The day of the evaluation, the evaluation commission members, managers and SLA staff alike will review the file of each bidder and make notes for the evaluation.

C. Evaluation schedule: A schedule for the day of the evaluation will be sent to the bidders two weeks before the day of the evaluation. In addition to the file reviews, each bidder will be scheduled to make up to a 20 minute presentation to the evaluators, providing any information the bidder feels necessary concerning his/her qualifications.

D. Process: The selection process consists of two phases: file reviews and evaluations.

(1) File reviews: An equal amount of time to review each file will be scheduled for all evaluation committee members. All members will review each file at the same time. If a lunch break is scheduled, it should be set between the file reviews and the evaluations.

(2) Evaluations: A period of 20 minutes will be set aside for each bidder to present him/her self to the committee, and to provide any information that he/she feels will help in their interview. The evaluators will then be allotted an additional 15 minutes to address questions to each bidder. Upon completion of the question and answer period, the bidder will leave the room and the evaluators will have 15 minutes to score the bidder. All evaluators will have read the same file, listened to the same bidder presentation and listened to the same questions and answers during the evaluation.

(3) All time limits specified above will be adhered to through being recorded by a member of the evaluation committee.

(4) If a bidder or committee member needs a reader or other accommodation, such request will be placed in writing and submitted with the bid, or to the evaluation committee/SLA staff during the scheduling of the evaluation.

(5) In the event that there is only one bidder for a facility, there will be no formal evaluation process. An assessment to determine qualifications and potential success of that manager will be conducted by the state licensing agency.

E. Scoring: Each evaluation committee member, whether manager or SLA staff, will use an individual score sheet (see Appendix 4) [now 9.4.7.15 NMAC] to evaluate each bidder. Each of the four criterion areas listed above shall be scored by each evaluator for each bidder, on a scale of 0 to 25 points. The total possible score is therefore 100. Scores will then be averaged for each of the two subgroups for each bidder. An average score below 15 represents unsatisfactory performance for the particular criterion. An average score of 15 or above represents satisfactory performance on that criterion. The applicant who has the greatest seniority who has been rated as satisfactory on each of the four criteria shall have five points added to his/her score by each of the two groups. For example, if the applicant with the greatest seniority receives an unsatisfactory average score in any of the four criteria areas for that subgroup, he/she would not receive the five additional points for seniority due to that unsatisfactory rating. However, if the applicant receives satisfactory average scores of 15 or higher on each criteria from the other subgroup, an additional 5 points would be awarded by that group. Thus, it is possible for an applicant to receive 10 additional points for seniority. The total score is then divided by 2, and that result becomes the total final score for the applicant. If the licensed manager with the most seniority is unable to receive the seniority preference due to not receiving a satisfactory average score of 15 or higher on each of the four criteria, the seniority preference will be given to the manager with the next highest

seniority, and who has received a satisfactory average score of 15 or higher on each criteria.

F. Recommendations: At the end of the evaluation, the scores will be read and placed on two summary sheets, one for the SLA and one for the licensed managers. The scores on these two sheets will then be averaged for the final score. The evaluation committee subsequently uses the winning score sheets to make its considered recommendations to the executive director (see Appendix 5) [now 9.4.7.16 NMAC], who shall make the final decision as to which applicant will be assigned, transferred or promoted to the new or vacant facility, or whether it is advisable to re-bid the facility. The evaluation committee may append other pertinent facts to its recommendations as it deems necessary. The announcement of the facility award (see Appendix 6) [now 9.4.7.17 NMAC] will be sent to the selected bidder. A selection announcement (see Appendix 7) [now 9.4.7.18 NMAC] will be sent to all bidders. For a current copy of Appendices 1-17, call the New Mexico Commission for the Blind, PERA Building, Room #553 Santa Fe, NM 87503 (505) 827-4479 Fax: (505) 827-4475

[4/15/97; Recompiled 10/01/01]

9.4.7.10-9.4.7.11 [RESERVED]

9.4.7.12 APPENDIX 1: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM; PREREQUISITES FOR BEP TRAINING PROGRAM:

- Appropriate diagnostic and evaluation reports _____
- Current general physical examination _____
- Current eye exam (must be legally blind) _____
- Current psychological evaluation, if indicated _____
- Completion of personal adjustment training, if indicated _____
- Good general health and stamina _____
- Completion of all physical restoration, if needed _____
- Functional abilities _____
- Good manual dexterity; finger, hand, arm coordination _____
- Ability to bend, stretch, lift items weighing up to 50 lbs. _____
- Ability to work at steady pace 10 hours per day, 5 days per week _____
- Mobility sufficient to travel independently and safely _____
- Personal characteristics _____
- Pleasant, mature and self-confident; well-adjusted and stable personality _____
- Clean, neat, well-groomed personality _____
- Ability to project a generally acceptable and favorable image of blindness to the public _____
- Ability and willingness to relate well and work cooperatively with others _____

Waiver of requirements.

The SLA staff, in special cases and after consultation with the committee of licensed managers, may waive any requirements except those required by statute. Waivers must be approved prior to acceptance into the training program.

[4/15/97; Recompiled 10/01/01]

9.4.7.13 APPENDIX 2: APPLICATION FOR BEP EMPLOYMENT:

NEW MEXICO COMMISSION FOR THE BLIND:

Business Enterprise Program Manager

PERA Building, Room 553

Santa Fe, NM 87503 (505) 827-4479

Notice to Applicants: Federal and State law requires that all applicants be considered without regard to race, color, gender, age, national origin, religion, physical/mental impairment or political affiliation. We believe in and fully support Equal Employment Opportunity and will fulfill our obligation to the fullest.

PERSONAL DATA

Name: _____ SSN: ____-____-____

Address: _____ Home Number: () ____-____

City: _____ Alternate #: () ____-____

State _____ Zip _____

Are you a United States Citizen? Yes _____ No _____

If a non-United States Citizen, do you have a legal right to accept permanent employment in the United States? Yes _____ No _____

Alien Registration # _____

In case of emergency, notify (name) _____

Phone #: _____ Relationship _____

Optional: Male _____ Female _____ Date of Birth: _____

Marital Status: Single: _____ Married _____ Divorced _____ Widowed _____

Number of Dependents: _____

Do you have any physical impairments? Yes _____ No _____ If yes, describe:

Have you ever been convicted of a crime? Yes _____ No _____ If yes, describe:

Do you have food service experience? Yes _____ No _____ If yes, what and where:

1. _____

2. _____

EDUCATIONAL BACKGROUND

High school graduate/GED certificate? Yes _____ No _____

If not graduate, highest grade completed: _____

Have you attended a vocational/technical school? Yes _____ No _____

Name and location: _____

Major or field: _____

Graduated/completed? Yes _____ No _____ If no, # of hours completed _____

Have you attended a business school? Yes _____ No _____

Name and location: _____

Major or field: _____

Graduated/completed? Yes _____ No _____ If no, # of hours completed _____

Have you attended a college or university? Yes _____ No _____

Name and location: _____

Major or field: _____

Graduated/completed? Yes _____ No _____ If no, # of hours completed _____

Other (non-listed) institution? Yes _____ No _____

Name and location: _____

Major or field: _____

Graduated/completed? Yes ____ No ____ If no, # of hours completed _____

WORK HISTORY

List all prior work experience, beginning with your most recent employment. If you do not have enough space, use a separate sheet for continuation. If you include a resume instead of completing the work history section, make sure that all of the requested information is included in the resume.

May we contact your current and previous employers for more information about your work history?

Yes ____ No ____

Current or most recent employer: _____

Mailing address: _____

Type of business: _____ Telephone # () ____ - _____

Your job title: _____

Length of time employed: Years _____ Pay rate: hourly, weekly, monthly

Months _____ Amount: _____

Dates employed: From: _____ To: _____

Your job duties (please be specific):

Reason for leaving: _____

PREVIOUS EMPLOYER: _____

Mailing address: _____

Type of business: _____ Telephone # () ____ - _____

Your job title: _____

Length of time employed: Years _____ Pay rate: hourly, weekly, monthly

Months _____ Amount: _____

Dates employed: From: _____ To: _____

Your job duties (please be specific):

Reason for leaving: _____

PREVIOUS EMPLOYER: _____

Mailing address: _____

Type of business: _____ Telephone # () ____ - _____

Your job title: _____

Length of time employed: Years _____ Pay rate: hourly, weekly, monthly

Months _____ Amount: _____

Dates employed: From: _____ To: _____

Your job duties (please be specific):

Reason for leaving: _____.

PERSONAL ACHIEVEMENTS AND AWARDS

List any important personal achievements, recognitions or accolades you have earned.

PERSONAL REFERENCES (not related)

Name	Address	Telephone
------	---------	-----------

Before you sign this application for employment, please check your answers to make sure that all questions have been completed properly and legibly. If you do not have enough space on this application, please use a separate sheet and make sure that the information includes that which is asked for on this application, and that your name appears on every sheet.

I, the below signed individual, hereby declare that, to the best of my knowledge and ability, the information on this application is true and factual. I understand that I will be required to provide proof of eligibility to work in the United States pursuant to the Immigration Reform and Control Act of 1986 as a condition of my employment.

I understand that false, misleading or incomplete statements could lead to rejection for consideration or possible dismissal.

Signature: _____ Date: _____

[4/15/97; Recompiled 10/01/01]

9.4.7.14 APPENDIX 3: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM MEMORANDUM:

TO: ALL LICENSED MANAGERS

FROM: Christina Nieto, BEP Manager

SUBJECT: Facility Bid Notice

DATE:

The vending facility at _____

(describe location of facility) is now available for bidding.

The operating hours of the facility will be _____

(describe days of the week and hours each day that the facility will be open).

The types of goods vended are _____

(describe whether the facility is a cafeteria, dry/wet facility, snack bar facility, etc.).

The current/potential earnings of this facility are _____ (give average of sales for past six months, or if not available, best estimate of potential earnings).

In order to be considered for this facility, you must request assignment to it, in writing, no later than _____ (state date, including month, day and year by which requests must be received). Blind licensees sending requests received after the above date will not be considered for assignment to the facility. Written requests must be sent to:

Christina Nieto, BEP Manager

Commission for the Blind

PERA Building Room # 553

Santa Fe, New Mexico 87503

If you would like more information regarding this facility, you may call me at 827-4479 or write to me at the above address.

[4/15/97; Recompiled 10/01/01]

9.4.7.15 APPENDIX 4: ASSIGNMENT, TRANSFER OR PROMOTION; EVALUATION CRITERIA:

Name of Applicant: _____ Date: _____

Seniority (state number of years and months of seniority of applicant as defined in Section 3): _____

Name of Evaluator: _____

Criteria	Points
----------	--------

1. Ability to meet the requirements of operating the facility as specified in the permit for the particular agency. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

_____ (possible 25 pts.)

2. Work habits including demonstrated ability to maintain required hours of work and comply with applicable health regulations. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

_____ (possible 25 pts.)

3. Work attitudes including good customer relations and cooperation with property management. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

_____ (possible 25 pts.)

4. Knowledge and application of sound business practices including: timely and accurate submission of all reports pertaining to the operation of the facility; prompt payment of Set-Aside fees; prompt payment of creditors and employees; prompt payment of creditors and employees; control of labor and food costs to demonstrate ability to make a reasonable profit; demonstrated ability to provide quality menu items; and supervise, schedule and hire and fire staff. This is demonstrated in managing previous BEP facilities and/or on-the-job training.

_____ (possible 25 pts.)

=====

TOTAL POINTS _____ (possible 100 pts.)

[4/15/97; Recompiled 10/01/01]

9.4.7.16 APPENDIX 5: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

MEMORANDUM

TO: Executive director

FROM: Christina Nieto, BEP Manager

SUBJECT: Recommendation for Award of Facility

DATE:

The following applicants applied for _____ facility (state location of facility).

Their bids were received by the specified date listed in the "Facility Bid Notice". Each applicant has been scored according to the criteria of Chapter 2 2.3 (2) of the BEP Rules and Regulations. A copy of the scoring sheet for each applicant is attached.

A summary of applicants and their scores is as follows:

1. Name: _____ Score: _____ Number Yrs: _____

2. Name: _____ Score: _____ Number Yrs: _____

3. Name: _____ Score: _____ Number Yrs: _____

4. Name: _____ Score: _____ Number Yrs: _____

5. Name: _____ Score: _____ Number Yrs: _____

6. Name: _____ Score: _____ Number Yrs: _____

The applicant with the greatest seniority (greatest number of years) receiving a satisfactory score in all of the criterion areas is _____ (name of applicant).

Add five points to the score of this applicant: _____.

Based on the criteria set forth in Chapter 2 2.3 (2), BEP Rules and Regulations, it is my recommendation that _____ be awarded the vending facility under consideration.

[4/15/97; Recompiled 10/01/01]

9.4.7.17 APPENDIX 6: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

MEMORANDUM

TO:

FROM: Executive director

SUBJECT: Facility Award

DATE:

I am pleased to inform you that you have been selected to operate the vending facility at _____ (state location of facility).

The facility is scheduled to open on _____ (state appropriate date).

Ms. Christina Nieto, BEP Manager, will be in touch with you in order to discuss preparations for beginning operation at your new facility.

Best wishes for success in your new endeavor.

[4/15/97; Recompiled 10/01/01]

9.4.7.18 APPENDIX 7: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

MEMORANDUM

TO:

FROM: Executive director

SUBJECT: Selection Announcement

DATE:

I wish to thank you for bidding on the vending facility located at _____ (state location of facility).

I regret to inform you that you were not selected to operate this facility. I hope that you will continue to bid on other facilities in the future.

Thank you for your continued interest and support in this program.

[4/15/97; Recompiled 10/01/01]

9.4.7.19 APPENDIX 8: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

OPERATING FUND AGREEMENT

I hereby agree that on this date _____ my beginning operating fund was \$ _____, consisting of \$ _____ of petty cash and \$ _____ of initial stock.

VENDING FACILITY #

LICENSED MANAGER _____

LOCATION _____

[4/15/97; Recompiled 10/01/01]

9.4.7.20 APPENDIX 9: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

1. Report for the Month of _____
 2. Facility Number: _____
 3. Manager's Name: _____
 4. Number of Employees: _____
 5. Cash Sales from Operations (Including Tax) \$ _____
 6. Other Income (Vending Machines) \$ _____
 7. Total Income for this Period \$ _____
- Cost of Goods Sold:
8. Beginning Inventory \$ _____
 9. Add Purchases for the Month \$ _____
 10. Total Goods Available \$ _____
 11. Less Ending Inventory \$ _____
 12. Total Cost of Goods Sold \$ _____
 13. Gross Income \$ _____
- Operating Expenses
14. Salary Expense \$ _____
 15. Payroll Tax Expense \$ _____
 16. Sales Tax Expense \$ _____
 17. Other Miscellaneous Expense \$ _____
 18. Total Operating Expenses \$ _____

19. Sub Profit or Loss from Facility Operations \$ _____

20. Vending Machine commissions \$ _____

21. Net Profit or Loss \$ _____

22. Set-Aside (5% of N.P.) _____ \$ _____

23. Net Profit to the Manager \$ _____

I certify to the best of my knowledge that the above figures are true and correct.

Check # _____

Licensed Manager's Signature Date

[4/15/97; Recompiled 10/01/01]

9.4.7.21 APPENDIX 10: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM REVIEW OF LOCATION:

Location _____ Stand No. _____

Date _____ Licensed Manager's Name _____

(Check applicable items only)

	Very Good	Standard	Improvement Needed	
1. GENERAL APPEARANCE				
a. Floor	()	()	()	
b. Walls and ceilings	()	()	()	
c. Counters.....	()	()	()	
d. Display equipment	()	()	()	
2. SANITATION AND SAFETY				
a. Refrigerators.....	()	()	()	
b. Dishwashing and utensil washing.....		()	()	()
c. Storage of clean dishes....	()	()	()	

- d. Food handling..... () () ()
 - e. Food storage..... () () ()
 - f. Working area..... () () ()
 - g. Food temperatures..... () () ()
 - h. Vermin control..... () () ()
 - i. Cleaning of equipment
(slicers, grinders, choppers, etc.)... () () ()
 - j. Cleaning tables, chairs, etc..... () () ()
 - k. Disposal of garbage;
grease disp. and rubbish () () ()
 - l. First aid facilities. () () ()
- 3. MERCHANDISING**
- a. Display..... () () ()
 - b. Appearance..... () () ()
 - c. Quality..... () () ()
 - d. Quantity..... () () ()
 - e. Variety..... () () ()
 - f. Other..... () () ()
- 4. CUSTOMER RELATIONS**
- a. Personality..... () () ()
 - b. Work habits..... () () ()
- 5. EQUIPMENT CARE AND MAINTENANCE**
- a. Counters..... () () ()
 - b. Refrigeration..... () () ()
 - c. Dishwashing..... () () ()

- d. Coffee urns..... () () ()
- e. Ranges..... () () ()
- f. Hoods..... () () ()
- g. Consumables..... () () ()
- h. Lighting, plumbing and electrical..... () () ()
- i. Fire protection..... () () ()

6. OPERATION

- a. Customer service..... () () ()
- b. Courtesy..... () () ()
- c. Attitude..... () () ()
- d. Speed..... () () ()
- e. Accuracy..... () () ()
- f. Other..... () () ()

7. OPERATOR HYGIENE

- a. Clothing..... () () ()
- b. Body odor..... () () ()
- c. Hair..... () () ()
- d. Breath..... () () ()
- e. Proper shoes..... () () ()
- f. Professional dress.... () () ()

8. EMPLOYEE HYGIENE

- a. Clothing..... () () ()
- b. Body odor..... () () ()
- c. Hair..... () () ()
- d. Breath..... () () ()

=====

=

Ones _____

Fives _____

Tens _____

Twenties _____

Other _____

TOTAL _____

=====

=

Checks _____

TOTAL _____

=====

=

Other Income

TOTAL _____

=====

=

Pay Outs

_____ TOTAL _____

=====

=

ENDING READING A _____ (FROM CASH REGISTER)

OVERRINGS B _____

SALES C _____ A-B = C

DRAWER TOTAL D _____ ADD ALL OF THE TOTALS ABOVE

=====

BALANCE E _____ C-D OVER _____ SHORT

=====

=

DEPOSIT \$ _____ E-PAYOUT TOTAL \$ _____

DAY _____

DRAWER START _____

SAFE TOTAL _____

OTHER PETTY CASH _____

=====

TOTAL CASH ON

HAND LESS DEPOSIT _____

=====

=

SALES _____ (C) SALES | AVERAGE TICKET

TAX X _____ | SALES _____

_____ TAX % | DIV.

_____ | TICKET _____

_____ SALES TAX] |

OWED = _____

[4/15/97; Recompiled 10/01/01]

9.4.7.23 APPENDIX 12: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

MERCHANDISE INVENTORY

	Quantity	Description	X	Extensions Price Unit	Cost

Amount Forward

[4/15/97; Recompiled 10/01/01]

9.4.7.24 APPENDIX 13: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

APPLICATION FOR LEAVE

Licensed Manager Name: _____ Facility No. _____

Date _____

Type of Leave:

_____ ANNUAL START DATE _____ ENDING DATE _____ TOTAL HOURS _____

_____ *SICK START DATE _____ ENDING DATE _____ TOTAL HOURS _____

TOTAL HOURS _____

Licensed Mgr. Signature Date BEP Manager Signature Date

*Any request for five days or more of sick leave must be accompanied by a release form from the doctor.

[4/15/97; Recompiled 10/01/01]

9.4.7.25 APPENDIX 14: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

PLAN FOR IMPROVEMENT DATE

Performance Deficiency #1:

Ways to Correct Deficiency #1:

Performance Deficiency #2:

Ways to Correct Deficiency #2:

Performance Deficiency #3:

Ways to Correct Deficiency #3:

Performance Deficiency #4:

Ways to Correct Deficiency #4:

Performance Deficiency #5:

Ways to Correct Deficiency #5:

Date of Conference: _____

Manager

Comments: _____

SLA Staff

Comments: _____

I have read the above "Plan for Improvement". My signature does not necessarily represent agreement nor disagreement with the above plan.

Licensed Manager

DURING THE REVIEW A MEMBER OF THE COMMITTEE OF LICENSED MANAGERS MAY BE PRESENT.

Date _____

[4/15/97; Recompiled 10/01/01]

9.4.7.26 APPENDIX 15: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

ACKNOWLEDGEMENT FORM

I, _____, have received copies

(Licensed Manager's name)

of

1. the Commission for the Blind's Vending Program Rules and Regulations,

2. the Operating Agreement for the facility to which I have been assigned,

3. and the Permit with the Property Managing Agency of the facility to which I have been assigned. _____

Licensed Manager's Signature

Date

Date

S.L.A. Staff

[4/15/97; Recompiled 10/01/01]

9.4.7.27 APPENDIX 16: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

BENEFITS SCHEDULE

Effective July 1, 1997

Sick Leave *	\$6.00 per hour
Vacation Pay Rate	\$6.00 per hour
Displaced Manager Benefit	\$200.00 per month
Fair Minimum Return Maximum Amount	\$200.00 per month

* Any request for five days or more of sick leave must be accompanied by release form from a doctor.

[4/15/97; Recompiled 10/01/01]

9.4.7.28 APPENDIX 17: COMMISSION FOR THE BLIND BUSINESS ENTERPRISE PROGRAM:

FACILITY VISIT SUMMARY

Location _____

Date _____

Licensed Manager's
Name _____

Purpose of
Visit: _____

Licensed Manager's
Comments: _____

9.4.20.1 ISSUING AGENCY:

Governor's Commission on Disability formally known as governor's committee on concerns of the handicapped.

[9.4.20.1 NMAC - Rp 9.4.20.1 NMAC, 12/27/2018]

9.4.20.2 SCOPE:

The provisions in Part 20 apply to all parts of Chapter 4 of Title 9, and provide relevant information to anyone affected or interested in Chapter 4 of Title 9.

[9.4.20.2 NMAC - Rp 9.4.20.2 NMAC, 12/27/2018]

9.4.20.3 STATUTORY AUTHORITY:

These rules are adopted pursuant to Subsection I of Section 28-10-2 NMSA 1978. Any conflict with the constitution or laws of the state of New Mexico or of the United States of America is not intended and void.

[9.4.20.3 NMAC - Rp 9.4.20.3 NMAC, 12/27/2018]

9.4.20.4 DURATION:

Permanent.

[9.4.20.4 NMAC - Rp 9.4.20.4 NMAC, 12/27/2018]

9.4.20.5 EFFECTIVE DATE:

December 27, 2018, unless a later date is cited at the end of the section.

[9.4.20.5 NMAC - Rp 9.4.20.5 NMAC, 12/27/2018]

9.4.20.6 OBJECTIVE:

The purpose of the governor's commission on disability is the removal of barriers to the full integration of persons with disabilities into the mainstream of New Mexico life, increase the quality of life of New Mexicans with disabilities, and to meet all of the responsibilities and exercise all of the authorities granted by law.

[9.4.20.6 NMAC - Rp 9.4.20.6 NMAC, 12/27/2018]

9.4.20.7 DEFINITIONS:

A. "Agency" means an entity, public or private, which provides various social and/or health related services.

B. "Applicant" means an individual in the community with a disability and capable of self-directed care.

C. "Client" means an applicant who has been approved by the governor's commission on disability to receive services of the residential accessibility modification program.

D. "Commission" means the governor's commission on disability.

E. "Contractor" means person(s) who may provide one or more of the services authorized for payment with residential accessibility modification program funds.

F. "Disability" means a physical or mental impairment that substantially limits one or more of the major life activities such as caring for oneself, walking, toileting, etc.

G. "GCD" means the governor's commission on disability;

H. "Notice to Proceed" means a notification letter from the RAMP project manager addressed to the contractor awarding the project, and notification stating the contractor can commence work on the referenced project within 10 consecutive calendar days.

I. "Payer of last resort" means as a condition of eligibility for residential accessibility modification program services, another public or private insurance or coverage and a community resource is exhausted first.

J. "Proof of disability" means a statement of disability signed by a physician or a verification of federally issued disability benefits.

K. "RAMP" means residential accessibility modification program.

[9.4.20.7 NMAC - Rp 9.4.20.7 NMAC, 12/27/2018]

9.4.20.8 COMMISSION CREATED:

A. There is created the "governor's commission on disability".

B. The commission shall consist of 15 members, nine of whom shall be appointed by the governor. Initially, three members shall be appointed for terms ending December 31, 1978, three members for terms ending December 31, 1980 and three members for terms ending December 31, 1982. Thereafter, appointments shall be for six years expiring on December 31 of even-numbered years. Appointed members shall be appointed from different geographic areas of the state and from the major disability services in the state. Appointed members shall include individuals with disabilities, representatives of government and private enterprise, parents or guardians of individuals with disabilities and professionals in, or those who are interested in, service

for individuals with disabilities. Not more than five of the members appointed by the governor shall be of the same political party.

C. The six remaining members shall be the director of the department of vocational rehabilitation of the public education department, the secretary of labor or the secretary's designee, the director of the behavioral health services division of the human services department, the secretary of children, youth and families or the secretary's designee, the secretary of aging and long-term services or the secretary's designee and the secretary of human services or the secretary's designee.

D. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall meet at least twice a year and shall annually elect a chair and a vice chair.

E. The commission shall be primarily concerned with those individuals with disabilities who have a condition that, regardless of its physical or mental origin, constitutes a substantial occupational disadvantage.

[9.4.20.8 NMAC - Rp 9.4.20.8 NMAC, 12/27/2018]

9.4.20.9 POWERS AND DUTIES:

The governor's commission on disability shall establish and maintain a comprehensive statewide program designed to encourage and promote attention to the concerns of education and employment of individuals with disabilities in this state.

To further this purpose, the commission shall:

A. cooperate with the president's committee on employment of individuals with disabilities and other federal efforts on behalf of disability concerns;

B. cooperate with all employers and training leaders, both public and private, in locating or developing employment opportunities for individuals with disabilities;

C. encourage and assist in the organization and operation of committees at the community level, the chairs of which shall automatically become members of the advisory council authorized under Section 28-10-4 NMSA 1978;

D. assist state, local and federal agencies to coordinate their activities to secure maximum utilization of funds and efforts that aid in the training and employment of individuals with disabilities;

E. enter into written agreements with public and private employers, unions and rehabilitation agencies for the purpose of achieving the maximum employment of individuals with disabilities;

F. inform individuals with disabilities who are seeking jobs from specific facilities available to assist them in locating suitable training and employment;

G. conduct educational programs via publications and other means to acquaint the public, the legislature and the governor with the abilities and the accomplishments of individuals with disabilities;

H. promote the elimination of architectural barriers in construction so as to make buildings used by the public readily accessible to and usable by persons with physical limitations;

I. make by-laws as it determines advisable for the conduct of its own business;

J. designate standing committees related to state planning, community organization, public relations and information, legislative action, federal coordination, state coordination, youth, medical rehabilitation, employers and awards;

K. designate such special committees as necessary for undetermined periods to carry out special short-term programs;

L. establish and administer a residential accessibility modification program to assist low-income individuals with disabilities to make accessibility modifications to residential dwellings as needed to enable those individuals with disabilities to remain in their homes or to leave institutional settings and be reintegrated into the community;

M. give advice and testimony on disability concerns to the governor or the legislature or any committee established by them, upon request; and

N. provide training to state and local law enforcement officers regarding matters pertaining to accessible parking for persons with disabilities.

[9.4.20.9 NMAC - Rp 9.4.20.9 NMAC, 12/27/2018]

9.4.20.10 MEETINGS:

All meetings shall be conducted in accordance with the "Open Meetings Act"_(Section 10-15-1 et. seq. NMSA 1978) and the commission's open meetings resolution.

A. Regular meetings of the commission shall be held at least two times each year at the call of the chairperson in consultation with the director. Special or emergency meetings shall likewise be held following the provisions of the applicable section of the open meetings act.

B. No meeting shall be held before reasonable notice to the commission and to the public as described in 9.4.20.11 NMAC.

C. Meetings shall be conducted in accordance with generally accepted principles of parliamentary procedure as determined by the chairperson.

D. Meetings shall be held in accessible locations throughout the state as determined by the director.

E. Annual meeting: One of the regular meetings of the commission will be designated as the annual meeting. This meeting shall be held generally in the spring and shall be conducted in the manner of a statewide conference for all persons with disabilities and agencies and professionals working with persons with disabilities; other meetings shall be generally limited to regular business. The commission will endeavor to hold this meeting in different locations throughout the state. At the annual meeting, the commission will review and make necessary changes to the by-laws and rules, strategic plan and open meetings resolution. The commission shall also approve the operating budget for the next fiscal year at the annual meeting.

[9.4.20.10 NMAC - Rp 9.4.20.10 NMAC, 12/27/2018]

9.4.20.11 REASONABLE NOTICE:

Notice for all meetings will be provided in accordance with the "Open Meetings Act" Section 10-15-1 et. seq. and the commission's open meetings resolution.

A. For the public:

(1) At least 10 days prior to each regular meeting an announcement in at least two newspapers of general circulation, including one with statewide circulation and a second with regional or local circulation in the community in which the meeting shall take place, shall be published advising the date, time, place, and general agenda.

(2) Special meetings may be held at least three days subsequent to the release of the general press announcement containing the date, time, location and specific need for a special meeting.

(3) Emergency meetings may be held at least 24 hours subsequent to release of a general press announcement containing the date, time, location and specific need for an emergency meeting.

B. For the commission:

(1) Commissioners shall be notified of the date, time and location of regular meetings via regular mail or email at least three weeks prior to the meeting.

(2) Commissioners shall be notified by regular mail or e-mail at least three days before a special meeting.

(3) Commissioners should be notified by regular mail or e-mail at least three days before an emergency meeting, but in no event without at least three attempted phone calls placed at least 24 hours prior to said emergency meeting.

[9.4.20.11 NMAC - Rp 9.4.20.11 NMAC, 12/27/2018]

9.4.20.12 VOTING:

A. All commissioners, including statutory members, shall be entitled to vote on all matters before the commission.

B. All votes shall be recorded.

C. A commissioner may vote by proxy executed in writing by that commissioner and filed with the director.

D. Commissioners whose terms of appointment have expired, but for whom no replacements have been named, shall continue to serve and be eligible to vote on all matters until such replacement are appointed.

[9.4.20.12 NMAC - Rp 9.4.20.12 NMAC, 12/27/2018]

9.4.20.13 OFFICERS:

A. At the annual conference meeting of each year a chairperson and vice chairperson shall be elected to serve for a period of one year.

B. The duty of the chairperson shall be to call and conduct the meetings and the vice chairperson shall serve in the absence of the chairperson.

C. No commissioner shall be elected to office in a year in which the term of appointment to the commission expires.

[9.4.20.13 NMAC - Rp 9.4.20.13 NMAC, 12/27/2018]

9.4.20.14 ATTENDANCE:

A. For commissioners appointed by the governor: The director shall request the governor to replace any commissioner who is absent for two consecutive regular meetings without an excuse approved by the chairperson regardless of whether a proxy is sent.

B. For statutory commissioners: The director shall notify the governor of any statutory commissioner who fails to attend any two consecutive regular meetings in person or by proxy, and request the governor to take appropriate action.

[9.4.20.14 NMAC - Rp 9.4.20.14 NMAC, 12/27/2018]

9.4.20.15 DUTIES OF THE COMMISSIONERS:

The commissioners shall:

- A. perform all duties required by law;
- B. hire a director and perform an annual personnel evaluation of the director;
- C. approve annual budget requests and operating budgets;
- D. ratify inventory deletions;
- E. establish priorities for staff activities, according to statute;
- F. approve the commission's annual report;
- G. adopt positions of support, neutrality or opposition for proposed legislation affecting persons with disabilities;
- H. endeavor to learn the needs and concerns of persons with disabilities statewide;
- I. perform such other tasks as the governor or legislature may request.

[9.4.20.15 NMAC - Rp 9.4.20.15 NMAC, 12/27/2018]

9.4.20.16 DUTIES OF THE DIRECTOR:

The director shall:

- A. direct daily operation of the agency in compliance with applicable laws and regulations;
- B. hire and supervise staff as authorized by New Mexico state personnel board rules and regulations;
- C. advocate for the achievement of agency goals within state, federal, and local governments, and among service providers, private sector and the general public;
- D. maintain close ties to the executive and legislative branches of state government; provide testimony on issues affecting persons with disabilities, and keep advised of the status of legislative actions affecting persons with disabilities or the commission;

E. report on activities in past legislative sessions and present issues expected to be discussed in legislative hearings to the commission prior to each session and promote the positions, if any, adopted on such issues by the commission;

F. notify the chair or vice-chair before traveling out-of-state or taking more than three consecutive days of leave;

G. serve full time in that capacity and shall maintain residency in New Mexico during the times of occupancy of that position;

H. ensure that the annual report is prepared in a timely manner.

[9.4.20.16 NMAC - Rp 9.4.20.16 NMAC, 12/27/2018]

9.4.20.17 CODE OF CONDUCT:

A. All commissioners and staff shall be provided with a copy of the New Mexico Governmental Conflict of Interest Act and shall abide by the terms.

B. Any commissioner endorsing a particular commercial product or service shall do so in their individual capacity only.

C. The commission acts only as a body; commissioners wishing to volunteer time between meetings on commission business are encouraged to do so in consultation with the director. No per diem or travel expenses shall be reimbursed unless the travel or expense was first approved by the director.

D. No commissioner may make any commitment or decision which binds on the commission unless that commissioner received specific authorization.

E. All commissioners and staff shall treat their positions as a public trust. They shall use the powers and resources of their positions only to advance the public interest, and not obtain personal benefits or pursue private interests incompatible with public interest.

F. All commissioners and staff shall protect and maintain state property within their possession and shall promptly report all lost, stolen or damaged property beyond normal wear and tear.

G. All commissioners and staff shall familiarize themselves with applicable rules and laws governing their conduct.

H. All commissioners and staff shall conduct themselves in a manner that justifies the confidence placed in them by the public and at all times shall maintain their integrity and discharge ethically the high responsibilities of public service.

I. All commissioners and staff shall fully disclose all activities which constitute a real or potential conflict of interest.

J. All commissioners and staff shall not engage in undue influence or abuse of their positions.

K. All commissioners and staff shall treat each other and members of the public with appropriate respect and courtesy.

L. Staff shall not hold outside employment or consulting work without the prior written approval of the director. The director shall not hold outside employment or consulting work without the prior written consent of the chair.

[9.4.20.17 NMAC - Rp 9.4.20.17 NMAC, 12/27/2018]

9.4.20.18 EXECUTIVE COMMITTEE:

There is created an executive committee consisting of from three to six members appointed by the chairperson to serve at her or his pleasure. The executive committee shall:

A. Meet at least once between regular commission meetings and keep informed on activities of the agency;

B. Make recommendations to the commission on issues, legislative proposals, budget and finance matters and report on activities in process;

C. Advise the director on courses of action in pursuit of commission goals.

D. Perform specific duties and tasks as assigned by the full commission, including but not limited to:

(1) Review of budget requests and operating budgets;

(2) development of draft strategic plan;

(3) recommendations of special projects or taskforces pertinent to current issue resolutions;

(4) actions relative to the agency director; candidate search, recommendation for hire, annual evaluation and recommendation of termination; and

E. all recommendations by executive committee will be taken to the full commission for possible action.

[9.4.20.18 NMAC - Rp 9.4.20.18 NMAC, 12/27/2018]

9.4.20.19 LOCAL CHAPTERS:

[RESERVED]

[9.4.20.19 NMAC - Rp 9.4.20.19 NMAC, 12/27/2018]

9.4.20.20 COMPENSATION:

Members of the governor's commission on disability shall be reimbursed as provided in the Per Diem Act, Section 10-8-1 et seq. NMSA 1978, but shall receive no other compensation, perquisite or allowance.

[9.4.20.20 NMAC - Rp 9.4.20 NMAC, 12/27/2018]

9.4.20.21 AMENDMENTS:

As authorized by the State Rules Act, the Uniform Licensing Act, the attorney general's default procedural rule and other applicable state law, a quorum of the commission may amend its administrative rules.

[9.4.20.21 NMAC - Rp 9.4.20.21 NMAC, 12/27/2018]

9.4.20.22 RESIDENTIAL ACCESSIBILITY MODIFICATION PROGRAM:

GCD will provide residential accessibility modifications to New Mexicans with disabilities, in accordance with policies and procedures as approved by the commission.

A. Eligibility: Applicants must meet all the following eligibility criteria:

- (1)** Must be a citizen of the United States of America;
- (2)** must be a resident of New Mexico for at least six months;
- (3)** must have a physical disability documented by receipt of Social Security Disability Benefits e.g. Social Security Disability Income, other federally issued benefits or a statement from a physician;
- (4)** must have applied for another appropriate and available residential modification community resource leaving the RAMP as the payer of last resort;
- (5)** Taxable or reportable income must be within two-hundred fifty percent of the most current federal poverty income eligibility guidelines for medicaid and children's health insurance program.

B. Application process: All completed applications must be returned, by United States mail, private carrier, or in person, with original signatures. Where providing an

original signature is impossible or impractical, GCD staff may elect to accept an electronic or digital signature or a legally acceptable alternative, such as those accepted by the State of New Mexico and its agencies. GCD will accept the following types of applications:

(1) Regular applications containing all information needed for a decision on eligibility and need for service.

(2) Emergency applications may be submitted only by an independent living center or department of health developmental disabilities support division. The emergency must be such that an individual will likely be placed in an institutional setting within the next 30 days if action is not taken immediately.

C. Application review: All applications will be reviewed and evaluated by a review committee made up of GCD staff members, who will meet to determine which of the completed applications will be pre-approved to contract for good and services. The applications will be rated based on the information the applicant provides.

D. Review committee: The RAMP review committee will meet and determine which of the completed applications will be pre-approved to contract for goods and services.

E. Appeal process: If an applicant is denied services from RAMP, a written request for reconsideration may be made to the director of GCD and received within 30 calendar days from the date on the denial letter.

F. Construction contractor:

(1) Qualifications: The contractor must:

(a) Verify that the contractor and any subcontractors utilized are licensed and bonded in the state of New Mexico.

(b) Demonstrate knowledge and have a work history that shows the ability to:

(i) Interpret the principles and practices of architecture; building codes and standards; building materials and construction methods; and structural, mechanical, plumbing and electrical systems;

(ii) interpret architectural working drawings and specifications to ensure compliance with all laws, rules, and standards of the state of New Mexico, including the federal, state and local building codes;

(iii) understand and implement contracting practices and procedures, construction costs, estimating and knowledge of comparable costs to accomplish the adaptations;

(iv) incorporate architectural design, standards and technical data relating to design and construction; and

(v) interpret, implement and ensure that applicable guidelines are followed in all environmental adaptations when applicable to the client's needs.

(2) Responsibilities. The contractor is responsible for:

(a) Providing an itemized price quote to GCD staff within 10 calendar days from receipt of plans and scope of work;

(b) commencing work on a project within 10 calendar days of receipt of notice to proceed letter;

(c) attending RAMP project preliminary construction meetings with the client or client's representative and GCD staff;

(d) providing consultation to client or representative and subcontractors regarding RAMP modifications throughout the construction process;

(e) obtaining all necessary permits as required by local and state laws;

(f) meeting reasonable timelines for completion of RAMP projects;

(g) completing all modifications within four weeks. A waiver of the time period must be sought from GCD if extraordinary circumstances prevent the contractor from meeting this requirement. Issues surrounding extraordinary circumstances resolution may occur in person, via US mail, fax or electronic mail;

(h) completing all project work to GCD satisfaction;

(i) Participating in project meetings which can occur in person or via electronic media with GCD staff; and

(j) providing a minimum one-year written warranty of the work completed, including materials and labor to GCD and the client or the client's representative.

G. Reimbursement procedures:

(1) All RAMP service providers must maintain all records necessary to fully disclose the costs, service, quality and quantity of materials necessary for RAMP project. The records must be sufficiently detailed to substantiate the date, project name, and nature of services.

(2) Two business days prior to completion of work, contractor shall contact GCD staff. Upon completion, contractor shall submit written notice by electronic mail or fax stating project is complete and ready for final inspection and approval.

(3) Upon final approval contractor shall submit a completed GCD generated invoice with the following information:

- (a) Governor's commission on disability purchase order number indicated;
- (b) contractor's name and address;
- (c) residential accessibility modifications program project name and address;
- (d) original contract awarded amount;
- (e) change order information, if any were approved;
- (f) contractor to sign and date the invoice;
- (g) must provide an invoice number; and
- (h) addressed to the main office of GCD.

(4) Contractor must complete work to GCD satisfaction, withholding or denial of payment may occur if (a) the client or the client's representative files a written dispute to GCD regarding the quality of work completed and (b) GCD agrees with the complaint.

H. Report to governor's commission on disability commission: A project tracking spreadsheet will be provided to the commission at each commission meeting. An annual summary report will be provided to the commission at its annual meeting. The project tracking spreadsheet and annual summary report will contain the following information, but not limited to:

- (1) Type of modification;
- (2) location where the home modification took place;
- (3) project budget; and
- (4) the project construction start date; and
- (5) the project completion date.

[9.4.20.22 NMAC; N, 12/27/2018]

9.4.20.23 [RESERVED]

PART 21: GUARDIANSHIP SERVICES

9.4.21.1 ISSUING AGENCY:

New Mexico Developmental Disabilities Planning Council Office of Guardianship (NMDDPC office of guardianship).

[9.4.21.1 NMAC - N, 04/14/2006]

9.4.21.2 SCOPE:

These rules apply to all New Mexico residents and other New Mexico state agencies requesting guardianship services from the NMDDPC office of guardianship and other private businesses that contract directly with the NMDDPC office of guardianship to provide guardianship services.

[9.4.21.2 NMAC - N, 04/14/2006]

9.4.21.3 STATUTORY AUTHORITY:

Section 28-16B-1 through 28-16B-6 NMSA 1978 permits the NMDDPC office of guardianship to promulgate rules in accordance with the State Rules Act to carry out the provisions of the Office of Guardianship Act.

[9.4.21.3 NMAC - N, 04/14/2006]

9.4.21.4 DURATION:

Permanent.

[9.4.21.4 NMAC - N, 4/14/2006]

9.4.21.5 EFFECTIVE DATE:

April 14, 2006, unless a later date is cited at the end of a section.

[9.4.21.5 NMAC - N, 4/14/2006]

9.4.21.6 OBJECTIVE:

The objective of this rule is establish standards for the provision of guardianship services to income and resource eligible incapacitated adults who are residents of the state of New Mexico, when there are no lesser forms of intervention, such as a power of attorney or surrogate decision maker, available, and to monitor contracts that provide guardianship services.

[9.4.21.6 NMAC - N, 4/14/2006]

9.4.21.7 DEFINITIONS:

Unless defined below, terms used in 9.4.21 NMAC correspond to those defined in NMSA 1978, Section 45-5-101 (2009), NMSA 1978, Section 45-1-201 or in NMSA, 1978, Section 43-1-15. The following words and terms when used in this part shall have the following meanings unless the context clearly indicates otherwise.

A. "Complaint" means an allegation of wrongdoing by a contractor or a violation of the contract with the NMDDPC office of guardianship and the contractor, including but not limited to:

- (1) failure to provide appropriate services;
- (2) violations of the civil rights of the wards; and
- (3) abuse, neglect or exploitation of the ward.

B. "Complaint against the office of guardianship" means an allegation of wrongdoing by the NMDDPC office of guardianship or its staff, including but not limited to:

- (1) failure to appropriately monitor and supervise contractors;
 - (2) violations of the due process rights of the protected person or contractor;
- and
- (3) failure to comply with complaint procedures as set forth herein.

C. "Comprehensive evaluation" is an assessment using a variety of diagnostic tools to determine the appropriate level of intervention, if any, in order to maximize self-reliance and independence for a [ward] protected person as mandated by NMSA 1978, Section 45-5-301.1 (2009).

D. "Contracted guardianship providers" means some private/public entity or individual under contract with the NMDDPC office of guardianship to act as guardian for an adjudicated incapacitated person who has no family or friends willing, able and appropriate to be his/her guardian.

E. "Contractor" means an entity or individual under a contract with the NMDDPC office of guardianship to provide some type of guardianship service; i.e., attorneys, court visitors, or guardians.

F. "Designated entity" is a person or organization contracted or appointed by the NMDDPC office of guardianship to conduct the comprehensive evaluations.

[9.4.21.7 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.8 ELIGIBILITY:

A. The alleged incapacitated person must be eighteen (18) years old to qualify for services from the NMDDPC office of guardianship.

B. The alleged incapacitated person must be financially and otherwise eligible for medicaid or a similar public benefit.

C. For a guardianship where the proposed guardian is not a contracted service provider, to obtain legal services the proposed guardian's household income must not exceed 200% of the federally established poverty level as that term is defined by the federal HHS poverty guidelines.

(1) Proof of income is required and is determined by the following:

(a) providing the NMDDPC office of guardianship a copy of the proposed guardian's most recent federal income tax return and proof of all income and benefits such as unemployment compensation, child support, food stamps or social security income; or, if no income tax return, by completing a financial eligibility form provided by the office of guardianship; or

(b) proof of qualification by the proposed guardian under any federal or state program with income restrictions equal to or greater than that required above.

(2) At the discretion of the director of the NMDDPC office of guardianship, exceptions may be made for financial hardship.

(3) The NMDDPC office of guardianship may develop a sliding-fee scale for private guardianships for persons who do not meet income eligibility guidelines.

(4) This program is for low income New Mexicans with very limited resources who are unable to pay for private legal services to be appointed as the guardian. The proposed guardian will be required to attest to not having net liquid assets after appropriate exclusions (which are the principal residence, vehicles used for transportation, assets used in producing income and any other asset exempt from attachment under state or federal law) to pay for the legal services. Services may be declined to a proposed guardian whose income is at or below 200% of the federal poverty level if evidence exists of sufficient resources to pay for private legal services.

[9.4.21.8 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.9 PRIORITIZATION OF SERVICE:

A. In general, service will be provided based on the date of application.

B. When service requests exceed capacity, funding or resources, individuals in the categories noted in Subparagraph C below will be prioritized to receive the first available services, as appropriate.

C. Priority categories:

(1) high need guardianships:

(a) high need for a guardian of last resort (with no family member or other willing, able and appropriate to serve as guardian) for an adult protective services (APS) referral, military veteran, Jackson class member (former resident of the state training schools from 1987 to 1997), Foley referral (former resident of the state training schools who was discharged between 1970 and 1987), and others;

(b) high need for a guardian with a family member or other willing, able and appropriate to serve as guardian for a military veteran, Jackson class member or Foley referral (does not include others);

(2) lesser need guardianships:

(a) lesser need for a guardian of last resort for an APS referral, military veteran, Jackson class member or Foley referral (does not include others);

(b) lesser need for guardian with a family member or other willing, able and appropriate to serve as guardian for a military veteran, Jackson class member or Foley referral (does not include others); requests for legal services paid by the state seeking to appoint family members or other willing, able and appropriate to serve as guardian are not in the priority categories unless the person to be served is a military veteran, Jackson class member or Foley referral.

D. If service requests in general, including those from the Subsection C categories above, exceed the NMDDPC office of guardianship's ability to provide services due to limited funding or resources, the NMDDPC office of guardianship may prioritize the requests by rating them according to a referred individual's need for guardianship. Rating criterion may include such factors as the status of an individual's support system, services, finances, medical needs, and safety and stability of placement or residence.

[9.4.21.9 NMAC - N, 4/14/2006; A, 9/15/11]

9.4.21.10 DESIGNATION OF SERVICE AREA:

Services are to be provided throughout the state of New Mexico. The NMDDPC office of guardianship recognizes the individual sovereignty of each tribe and pueblo in the state of New Mexico.

[9.4.21.10 NMAC - N, 4/14/2006; A, 9/15/11]

9.4.21.11 SERVICES TO BE PROVIDED BY THE NMDDPC OFFICE OF GUARDIANSHIP:

A. The provision of adult guardianship services to income eligible, incapacitated persons as follows:

- (1)** contracting with attorneys to petition for the appointment of probate code guardians;
- (2)** contracting with entities/individuals to serve as probate code guardians;
- (3)** contracting with entities/individuals to serve as visitors (court visitors) in probate code guardianship proceedings;
- (4)** contracting with attorneys to serve as guardian ad litem in probate code guardianship proceedings;
- (5)** serving as an interested person pursuant to Subsection 6 of Section 28-16B-3, NMSA 1978;
- (6)** identifying available persons to serve as mental health treatment guardian;
- (7)** contracting to provide for recruitment and training for persons interested in serving as mental health treatment guardians;
- (8)** providing information regarding the duties and responsibilities of probate code guardianship, including less restrictive alternatives; and
- (9)** investigating and addressing complaints made against the NMDDPC office of guardianship contractors.

B. The provision of recruitment and training for persons interested in serving as probate code guardians.

C. The provision of information regarding the duties and responsibilities of probate code guardianship, including less restrictive alternatives.

D. The provision of investigative measures/ processes to address complaints made against entities and individuals providing contracted guardianship services.

[9.4.21.11 NMAC - N, 4/14/2006; A, 4/30/07; A, 9/15/11]

9.4.21.12 REQUIREMENTS OF CONTRACTED GUARDIANSHIP PROVIDERS:

- A.** meet RFP Requirements when published;

B. meet office of guardianship requirements including but not limited to:

- (1) comply with all the terms of one's contract;
- (2) agree to be paid at the state approved rate;
- (3) must comply with the Caregivers Criminal History Screening Act (See NMSA, 1978 29-17-2);
- (4) must become a registered guardian within 18 months after the award of a contract;
- (5) assure the civil rights of the incapacitated persons;
- (6) guarantee access to all records on incapacitated persons assigned through the office of guardianship; and
- (7) comply with the office of guardianship individual caseloads, standards of practice and ethics.

[9.4.21.12 NMAC - N, 04/14/2006; A, 4/30/07]

9.4.21.13 REFERRAL PROCESS:

Any person interested in the well being of an alleged incapacitated person, and seeking guardianship services to be paid for by the NMDDPC office of guardianship, must submit or have submitted a completed application form and provide supporting documentation to the NMDDPC office of guardianship.

[9.4.21.13 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.14 COMPLAINTS AGAINST A CONTRACTED PROVIDER WITH THE NMDDPC OFFICE OF GUARDIANSHIP:

A. A complaint shall be made in writing by the client or another person on behalf of the client, including but not limited to a friend, relative, advocate, or other interested person, such as a caregiver or provider. An exception to the requirement that a complaint shall be made in writing shall be made if a reasonable accommodation is necessary.

B. Except as provided in Subsection D of 9.4.21.14 NMAC, below, prior to filing a complaint against a provider contracting with the NMDDPC office of guardianship, individuals shall first try to resolve their complaints with the contracted provider through that provider's grievance process.

C. If the complaining party and contractor are unable to reach a resolution or agreement then the complaining party may file a complaint with the office of guardianship and may file a copy with the contractor.

D. Exceptions shall be made to Subsections A & B of 9.4.21.14 NMAC when the NMDDPC office of guardianship has reason to believe that an emergency situation exists or that a delay of the investigation could result in harm to the protected person or retaliation by the contractor.

E. The complaint should include as much information as possible, including the following:

- (1) name of the incapacitated person;
- (2) name of the contact information for the individual making the complaint on behalf of the incapacitated person;
- (3) relationship of the complaining party to the incapacitated person;
- (4) name of the individual contractor against whom the complaint is being made;
- (5) name of the party who has attempted to resolve the complaint, if known;
- (6) what actions have been taken to attempt to resolve the complaint;
- (7) details of the complaint including the alleged wrongdoing, the involved parties and when and where the wrongdoing occurred;

F. The complaint made to the office of guardianship may be submitted by mail or fax unless a reasonable accommodation is necessary.

G. In order to preserve the confidentiality of the incapacitated person, the complaint shall be submitted to: The NMDDPC Office of Guardianship; 810 W. San Mateo, Ste. C; Santa Fe, NM 87505-4144; (505) 476-7324; (505) 476-7322 (Fax).

H. Upon receipt of a verbal or written complaint, the NMDDPC office of guardianship shall:

- (1) acknowledge receipt of a the complaint in writing;
- (2) notify all parties involved; and
- (3) initiate an investigation within 15 working days of the filing of the complaint with the NMDDPC office of the guardianship;

(4) where sufficient information is provided to allow the NMDDPC office of guardianship to continue the investigation, the NMDDPC office of guardianship will make further inquiries if possible or discontinue the investigation; justification for closure of investigations based on insufficient information will be documented.

I. A determination decision shall be made within 60 working days after the complaint is filed with the NMDDPC office of guardianship unless a shorter time frame is required to protect the protected person.

J. A determination decision shall include:

(1) the decision made;

(2) the basis for the decision;

(3) notice of the complaining party's right to file a complaint about the actions taken by the NMDDPC office of guardianship related to the investigational process pursuant to 9.4.21.15 NMAC;

(4) further actions to be taken by the NMDDPC office of guardianship and the contractor which may include, but shall not be limited to:

(a) the imposition of a corrective action plan on the contractor; and

(b) a referral of the complaint to other agencies for investigation and prosecution.

K. Persons objecting to the process of the complaint investigation taken by the NMDDPC office of guardianship may file a grievance against the NMDDPC office of guardianship with the New Mexico human services department pursuant to 9.4.21.15 NMAC below.

L. None of these regulations restrict the due process rights of an individual to request a less restrictive guardianship or to overturn the decision of a guardianship contractor or the NMDDPC office of guardianship through a court of law.

[9.4.21.14 NMAC - N, 04/14/2006; A. 04/30/07; A, 9/15/11]

9.4.21.15 COMPLAINTS AGAINST THE NMDDPC OFFICE OF GUARDIANSHIP:

Complaints against the NMDDPC office of guardianship or a staff member of the NMDDPC office of guardianship shall be filed with and investigated by the human services department, by sending a complaint in writing directly to the secretary of human services department with a copy sent to the director of the NMDDPC office of guardianship. (NMSA 2003 28-16B-6E)

[9.4.21.15 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.16 TRANSFER OF PROTECTED PERSON FROM A PRIVATE PAY GUARDIANSHIP TO A PROGRAM FUNDED THROUGH THE NMDDPC OFFICE OF GUARDIANSHIP:

A. Purpose: It is not the intention of the NMDDPC office of guardianship to create a hardship on any private pay provider of guardianship services in cases where resources are being exhausted, but in order to work in a more collaborative fashion these procedures are being developed to move the private pay protected persons into the state funded program under the NMDDPC office of guardianship in a timely and reasonable manner to minimize the impact on the protected person.

B. Requirements: In order to affect a protected person's transfer to a program funded through the NMDDPC office of guardianship, the private pay guardianship must do the following:

- (1)** obtain an application for services from the NMDDPC office of guardianship and fill it out completely (failure to do so will result in delay of transfer);
- (2)** the filing of the request for services with the NMDDPC office of guardianship does not guarantee the request will be granted;
- (3)** to be eligible for transfer into this program, a protected person must be financially eligible for institutional medicaid and medicaid in New Mexico;
- (4)** appropriate placement must be secured by the private pay guardians for the protected person prior to transfer to a publically funded guardian;
- (5)** all necessary medical and other information regarding the protected person must be provided to the new guardian in a timely manner;
- (6)** any original legal documents such as birth certificates, social security cards, medicaid cards, etc. shall be turned over to the new guardian upon appointment;
- (7)** legal fees for the transferring of the case must be paid by the private provider (this would include the closing of the conservatorship);
- (8)** if the protected person has a conservatorship and no assets, then the conservatorship must be closed prior to transfer; if the conservatorship cannot be closed for some appropriate reason, then a complete accounting must be given to the NMDDPC office of guardianship at the time of transfer;
- (9)** there must be a burial policy for the ward; ownership is to be transferred by the private provider to the NMDDPC office of guardianship's appointed guardian;

(10) these transfers will not be given any priority status;

(11) the private pay provider will agree to cooperate with the new guardian on matters, including, but not limited to, providing any information the new guardian might need, which may be in the possession of the private guardian;

(12) these transfers will be effectuated according to NMSA 1978, Section 45-5-307.

[9.4.21.16 NMAC - N, 04/14/2006; A, 9/15/11]

9.4.21.17 REQUESTS FOR INFORMATION:

A. Any requests for non-confidential information will be treated as a request for inspection of public records under the state inspection of public records act. (NMSA 1978, Section 14-2-1 through 14-2-12).

B. Any requests for confidential information or client specific information will be handled according to state and federal law. (NMSA 2003 28-16B-4B).

[9.4.21.17 NMAC - N, 04/14/2006]

9.4.21.18 COMPREHENSIVE EVALUATIONS:

A. Depending upon the availability of funding and resources, and unless otherwise provided for by another agency or program, comprehensive evaluations for protected persons with contracted providers may be obtained through a referral to the NMDDPC office of guardianship by the contract guardian if the protected person appears to have made gains in her/his capacity or to be in need of increased protection or other such that a request for review of the guardianship by the court appears indicated.

B. Comprehensive evaluations will occur in the following manner:

(1) The comprehensive evaluations will be done by the entity designated by the NMDDPC office of guardianship.

(2) All contracted guardianship providers will provide the names of their protected persons who meet the criterion in Subsection A of this section at any time and upon request by the NMDDPC office of guardianship. The referral process will be established by the NMDDPC office of guardianship.

(3) The components of the comprehensive evaluation will be determined by the designated entity after consultation with the guardian.

(4) The designated entity will set up the appointments.

(5) The contracted guardianship provider will provide written authorization for the protected person selected for a comprehensive evaluation.

(6) The contracted guardianship provider will provide the following documents at a time and place determined by the designated entity:

(a) name of the protected person, living arrangements of the ward, day placement and daily activity, and relevant contact information;

(b) medical history and assessment history of the protected person that may come from other state and federal programs such as the DD waiver program, medicaid, schools, division of vocational rehabilitation, commission for the blind, etc.;

(c) the current level of guardianship, and;

(d) any additional information requested by the designated entity relevant to the comprehensive evaluation.

(7) These provisions are in addition to any terms and conditions regarding comprehensive evaluations as set forth in the contract between the NMDDPC office of guardianship and the contracted guardianship provider.

(8) If a protected person has undergone some part of the comprehensive evaluation within the last three years, the contracted guardianship provider may request to substitute that part of the evaluation for the report of the evaluation undergone within the last three (3) years. The designated entity may deny the request, based on professional judgment, it should not be substituted. If a substitution is allowed, the contracted guardianship provider will provide the report of that evaluation to the designated entity.

(9) If the contracted guardianship provider has clear and convincing evidence that a protected person does not need an evaluation, the contracted guardianship provider will provide to the NMDDPC office of guardianship a short description explaining why the protected person should not be evaluated.

(10) The NMDDPC office of guardianship or its agent has the right to review the files and records of any protected person under contract between the NMDDPC office of guardianship and a contracted guardianship provider for the purpose of determining whether the protected person should have a comprehensive evaluation.

(11) If the NMDDPC office of guardianship determines that a protected person should undergo an evaluation, despite the justification provided in Paragraph (9) of Subsection B of 9.4.21.18 NMAC, the NMDDPC office of guardianship will send a letter to the contracted guardianship provider so stating ("Notice Letter"). If, after receipt of the notice letter, the contracted guardianship provider does not agree with the NMDDPC

office of guardianship that a protected person should undergo an evaluation, the following procedure will commence.

(a) Within ten (10) working days after receiving the notice letter, the contracted guardianship provider will contact the NMDDPC office of guardianship in writing with the basis for its disagreement with the notice letter and during that same time period set up a meeting at the office of the NMDDPC office of guardianship for the purpose of attempting to resolve this issue. The contracted guardianship provider attending the meeting must have full authority to resolve this issue. The proposed location of the meeting will be at the office of the NMDDPC office of guardianship at a day and time proposed by the NMDDPC office of guardianship. The contracted guardianship provider may propose a different time and location. The meeting must be held no more than thirty (30) days from the date of receipt of the notice letter. If the parties cannot agree on a location and time, the NMDDPC office of guardianship may petition the court pursuant to Subparagraph (d) of Paragraph (11) of Subsection B of 9.4.21.18 NMAC.

(b) If the parties come to an agreement, the protected person may or may not undergo an evaluation depending on the agreement reached by the parties.

(c) The NMDDPC office of guardianship will confirm the outcome of the meeting by letter (outcome letter) within two working days of the meeting between the parties.

(d) If there is no agreement, the NMDDPC office of guardianship may, within fourteen (14) working days from the date of the outcome letter, petition the court in which the guardian was appointed to have the protected person evaluated.

[9.4.21.18 NMAC - N, 04/30/07; A, 9/15/11]

PART 22-101: [RESERVED]

PART 102: ELIGIBILITY REQUIREMENTS FOR PARTICIPANTS IN THE TELECOMMUNICATIONS EQUIPMENT DISTRIBUTION PROGRAM

9.4.102.1 ISSUING AGENCY:

New Mexico Commission for the Deaf and Hard of Hearing.

[7/1/99; Recompiled 10/01/01]

9.4.102.2 SCOPE:

All applicants for participation in the specialized telecommunications program.

[7/1/99; Recompiled 10/01/01]

9.4.102.3 STATUTORY AUTHORITY:

Section 63-9F-4 NMSA 1978 directs the commission to "design, establish and administer a program for providing specialized telecommunications equipment to impaired individuals" and to "adopt regulations for the program."

[7/1/99; Recompiled 10/01/01]

9.4.102.4 DURATION:

Permanent.

[7/1/99; Recompiled 10/01/01]

9.4.102.5 EFFECTIVE DATE:

July 1, 1999, unless a later date is cited at the end of a section and paragraph.

[7/1/99; Recompiled 10/01/01]

[Compiler's note: The words *or paragraph*, above, are no longer applicable. Later dates are now cited only at the end of sections, in the history notes appearing in brackets.]

9.4.102.6 OBJECTIVE:

The purpose of the Telecommunications Access Act [63-9F-1 to 63-9F-13 NMSA 1978] is to provide a statutory framework and funding under which the opportunity for full access to telecommunications services is made available to hearing or speech impaired New Mexicans. The purpose of the specialized telecommunications equipment program [63-9F-4 NMSA 1978] is to provide specialized telecommunications equipment to impaired individuals.

[7/1/99; Recompiled 10/01/01]

9.4.102.7 DEFINITIONS:

The definitions included in Section 63-9F-3 NMSA 1978 are hereby incorporated by reference.

[7/1/99; Recompiled 10/01/01]

9.4.102.8 ELIGIBILITY REQUIREMENTS FOR PARTICIPANTS IN THE TELECOMMUNICATIONS EQUIPMENT DISTRIBUTION PROGRAM:

The following rules for eligibility in the telecommunications equipment distribution program have been adopted by the commission.

A. Income limits: Participants in the program must provide:

- (1) proof of total household income of fifty thousand dollars (\$50,000) or less;
- (2) if the applicant is a student residing in New Mexico and is a dependent of his or her parent(s) as defined by the internal revenue service, the parent(s)' income shall be considered "household income" regardless if the student resides with the parents and regardless if the parent(s) reside within New Mexico.

B. Impairment: Participants in the program must provide:

- (1) certification that the applicant(s)' hearing and/or speech precludes normal use of the telephone;
- (2) hearing/speech impairment may be certified through medical practitioner, audiologist, speech/language pathologist, speech therapist, representative of DVR, or an authorized staff member of the commission.

C. Telephone service: Participants in the program must provide verification of current telephone service at residence.

D. Residency: Participants in the program must provide:

- (1) verification of permanent state residence with a physical address (not P.O. Box address);
- (2) equipment will not be distributed to individuals living in public or private educational institutions, or any other public or private accommodation which has a responsibility to provide such equipment pursuant to the Americans with Disabilities Act.

E. Age: Applicants must demonstrate the ability to use and care for the equipment. Parent(s) or other legal guardian of children below the age of 18 must sign a loan agreement accepting financial responsibility for the equipment.

[7/1/99; Recompiled 10/01/01]

CHAPTER 5: NATIVE AMERICANS

PART 1: GENERAL PROVISIONS [RESERVED]

PART 2: ORGANIZATION AND CONDUCT OF BUSINESS

9.5.2.1 ISSUING AGENCY:

Commission on Indian Affairs.

[Recompiled 10/01/01]

9.5.2.2 SCOPE:

[RESERVED]

[Recompiled 10/01/01]

9.5.2.3 STATUTORY AUTHORITY:

[RESERVED]

[Recompiled 10/01/01]

9.5.2.4 DURATION:

Permanent.

[Recompiled 10/01/01]

9.5.2.5 EFFECTIVE DATE:

[Filed September 3, 1992]

[Recompiled 10/01/01]

9.5.2.6 OBJECTIVE:

This rule establishes the bylaws of the commission pursuant to Section 73-31-4 NMSA 1953 [now 28-12-6 NMSA 1978], which provides that the "commission shall organize by the election of a vice chairman and a secretary, and by the adoption of rules and regulations pertinent to the conduct of the business of the commission."

[Recompiled 10/01/01]

9.5.2.7 DEFINITIONS:

[RESERVED]

[Recompiled 10/01/01]

9.5.2.8 MEETINGS:

The commission shall meet at least once every quarter at such time and place as may be determined by the commission and shall hold such other meetings as may be called by the chairman, in accordance with statutory requirement.

[Recompiled 10/01/01]

9.5.2.9 NOTICE OF MEETINGS:

Notice of time and place of each regular or special meeting shall be given each member prior to the date of said meeting.

[Recompiled 10/01/01]

9.5.2.10 ORGANIZATION:

The chairman shall be appointed by and serve at the pleasure of the governor, as provided by statute. The vice chairman and secretary shall be elected by the commission from among its membership and shall serve at the pleasure of the commission.

[Recompiled 10/01/01]

9.5.2.11 CONDUCT OF BUSINESS:

A majority of the total members must be present in person at any regular or special meeting in order to constitute a quorum for the conduct of business. The affirmative vote of the majority of the members present shall be necessary to authorize any action by the commission.

[Recompiled 10/01/01]

9.5.2.12 ATTENDANCE AT MEETINGS:

If any member of the commission fails to attend any four consecutive meetings called by the chairman; and if there is no indication that the absences are warranted or that such member intends to fulfill his/her obligation as a member, then the chairman shall so advise the governor.

[Recompiled 10/01/01]

9.5.2.13 AMENDMENTS:

Amendments hereto must be presented in writing to each member of the commission in advance of a meeting and shall be voted upon at the next regular or special meeting.

[Recompiled 10/01/01]

9.5.2.14 APPROVED:

Donald Benally, Chairman.

[Recompiled 10/01/01]

PART 3: REPRESENTATION AT OUT OF STATE FUNCTIONS

9.5.3.1 ISSUING AGENCY:

Commission on Indian Affairs.

[Recompiled 10/01/01]

9.5.3.2 SCOPE:

[RESERVED]

[Recompiled 10/01/01]

9.5.3.3 STATUTORY AUTHORITY:

[RESERVED]

[Recompiled 10/01/01]

9.5.3.4 DURATION:

Permanent.

[Recompiled 10/01/01]

9.5.3.5 EFFECTIVE DATE:

[Filed September 3, 1992]

[Recompiled 10/01/01]

9.5.3.6 OBJECTIVE:

This rule establishes the policy of the commission with respect to the delegation of authority to represent the commission at out-of-state meetings, conferences or hearings, and procedure to be followed thereunder.

[Recompiled 10/01/01]

9.5.3.7 DEFINITIONS:

[RESERVED]

[Recompiled 10/01/01]

9.5.3.8 POLICY:

It is the policy of the commission that out-of-state absences on official business by members of the commission or its staff be restricted to those that will advance the current program and the functions of the commission.

[Recompiled 10/01/01]

9.5.3.9 PROCEDURE:

Representation by any commission member or staff member at out-of-state meetings, conferences or hearings shall require prior authorization by the commission at a regular or other meeting, provided that if no meeting is scheduled to be held in time for such action, the chairman is empowered to grant such authorization in accordance with the policy set forth above.

[Recompiled 10/01/01]

9.5.3.10 APPROVED:

Donald Benally, Chairman.

[Recompiled 10/01/01]

PART 4: STAFF AUTHORITY AND SUPERVISION

9.5.4.1 ISSUING AGENCY:

Commission on Indian Affairs.

[Recompiled 10/01/01]

9.5.4.2 SCOPE:

[RESERVED]

[Recompiled 10/01/01]

9.5.4.3 STATUTORY AUTHORITY:

[RESERVED]

[Recompiled 10/01/01]

9.5.4.4 DURATION:

Permanent.

[Recompiled 10/01/01]

9.5.4.5 EFFECTIVE DATE:

[Filed September 3, 1992]

[Recompiled 10/01/01]

9.5.4.6 OBJECTIVE:

This rule establishes the policy of the commission with respect to authority over and supervision of members of the staff.

[Recompiled 10/01/01]

9.5.4.7 DEFINITIONS:

[RESERVED]

[Recompiled 10/01/01]

9.5.4.8 POSITIONS EXEMPT FROM PERSONNEL ACT:

Authority to supervise, appoint or dismiss the executive director rests with the commission. Other personnel whose positions are exempt from the Personnel Act shall be employed or whose positions are exempt from the Personnel Act shall be employed or dismissed by the executive director. The responsibility and authority for supervision of their performances shall rest with the executive director.

[Recompiled 10/01/01]

9.5.4.10 TEMPORARY PERSONNEL AND POSITIONS SUBJECT TO PERSONNEL ACT:

Subject to the provisions of the State Personnel Act, the executive director shall have authority to employ, dismiss and supervise personnel whose positions are governed by the act and temporary personnel, and shall be responsible for their performance.

[Recompiled 10/01/01]

9.5.4.11 APPROVED:

Donald Benally, Chairman.

[Recompiled 10/01/01]

PART 5: INDIAN CITIZENSHIP EDUCATIONAL FUNCTIONS

9.5.5.1 ISSUING AGENCY:

COMMISSION ON INDIAN AFFAIRS.

[RECOMPILED 10/01/01]

9.5.5.2 SCOPE:

[RESERVED]

[Recompiled 10/01/01]

9.5.5.3 STATUTORY AUTHORITY:

[RESERVED]

[Recompiled 10/01/01]

9.5.5.4 DURATION:

Permanent.

[Recompiled 10/01/01]

9.5.5.5 EFFECTIVE DATE:

Filed September 3, 1992.

[Recompiled 10/01/01]

9.5.5.6 OBJECTIVE:

This rule establishes the policy of the commission with respect to informational and educational functions in the field of Indian citizenship.

[Recompiled 10/01/01]

9.5.5.7 DEFINITIONS:

[RESERVED]

[Recompiled 10/01/01]

9.5.5.8 POLICY:

The commission recognizes the need for programs to inform and educate Indian communities concerning their rights and responsibilities as citizens, including the right to

vote. The commission's staff shall do everything possible consonant with its approved program to assist and cooperate with appropriate agencies in filling this need upon request; provided that such activities are not associated with a political campaign or a particular candidate. It is not a proper function of the commission to participate in the sponsorship of or arrangements for meetings to hear political candidates during an election campaign.

[Recompiled 10/01/01]

9.5.5.9 APPROVED:

Donald Benally, Chairman.

[Recompiled 10/01/01]

CHAPTER 6: VETERANS [RESERVED]