

This is an amendment to 13.21.3 NMAC Sections 2, 3, 7, 8, 9, 11, 12 and 13, effective 09/10/2024.

13.21.3.2 SCOPE: This rule applies to all proceedings relating to the Patient’s Compensation Fund (the fund) in which the superintendent adopts rules as required by ~~[law]~~ the MMA.
[13.21.3.2 NMAC – N/E, 3/01/2019; Rp, 13.21.3.2 NMAC, 4/30/2019 A, 01/01/2022; A, 09/10/2024]

13.21.3.3 STATUTORY AUTHORITY: ~~[Section 14-4-5.8 NMSA 1978; 1.24.25.8 NMAC.] Sections 14-4-1 et seq., NMSA 1978, State Rules Act, and Section 59A-2-9 NMSA 1978.~~
[13.21.3.3 NMAC – N/E, 3/01/2019; Rp, 13.21.3.3 NMAC, 4/30/2019; A, 09/10/2024]

13.21.3.7 DEFINITIONS: This rule adopts the definitions found in Section 41-5-3 NMSA 1978, in Section 14-4-2 NMSA 1978, in Chapter 59A, Article 1 NMSA 1978, in 1.24.1.7 NMAC, and in 13.21.1.7 NMAC. In addition:

- ~~A.~~ **“Business day”** means Monday through Friday, excluding holidays observed by the state.
- ~~A.] B.~~ **“Final order”** also means “concise explanatory statement” as described in Section 14-4-5.5 NMSA 1978.
- ~~B.] C.~~ **“Logical outgrowth”** occurs when a final rule differs from the proposed rule if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.
- ~~C.]~~ **“Recommended decision”** ~~means the written decision of any designated hearing officer which contains a description of the rulemaking proceeding, a summary of any written comments submitted to the superintendent, a summary of any oral comments made at the public hearing, any analysis or conclusions of the designated hearing officer, and recommendations to the superintendent concerning adoption, rejection, or amendment of the proposed rule.]~~
- ~~D.~~ **“MMA”** means medical malpractice act as described in Sections 41-5-1 et seq., NMSA 1978.
- ~~E.~~ **“PCF”** means patient compensation fund as described in Subsection A of Section 41-5-25 NMSA 1978.

[13.21.3.7 NMAC – N/E, 3/01/2019; Rp, 13.21.3.7 NMAC, 4/30/2019; A, 01/01/2022; A, 09/10/2024]

13.21.3.8 INITIATION OF THE RULEMAKING PROCESS BY THE SUPERINTENDENT:

- A.** The rulemaking process may be initiated by the superintendent through a notice for a rule hearing that is publicly posted pursuant to this rule and pursuant to 14-4-5.2 NMSA 1978.
- B.** The superintendent shall proceed with the rulemaking process by posting public notice, publishing the proposed rule for comment, and setting a public rule hearing in accordance with the State Rules Act and any other applicable law.
- C.** Once the superintendent initiates the rulemaking process, the superintendent must maintain a rulemaking record as prescribed in Section 14-4-5.4 NMSA 1978.

[13.21.3.8 NMAC – N/E, 3/01/2019; Rp, 13.21.3.8 NMAC, 4/30/2019; A, 09/10/2024]

13.21.3.9 INITIATION OF THE RULEMAKING PROCESS BY THE PUBLIC:

- A.** Any person may file a petition for rulemaking with the superintendent.
- B.** A petition for rulemaking shall be made in writing and include an explanation of the purpose or statement of reasons for the proposed rule. A petition shall include a citation to the legal authority authorizing the superintendent to adopt the rule and a copy of or citation to technical information, if any, that serves as the basis for the proposed rule. A petition should be as clear as possible and may include the proposed rule in underline and strikethrough format, consistent with requirements of the state records administrator.
- C.** The superintendent shall, if required by law, consider the petition and make a determination within 30 calendar days whether to grant or deny the petition. If the superintendent denies the petition, the superintendent shall issue a final order explaining the reason for denial. No affirmative duty to respond to a public petition is created by these rules. If a public right to petition the superintendent exists under the MMA, the superintendent must follow all timelines or responses governed by the MMA.
- D.** Once the superintendent initiates the rulemaking process, the superintendent must maintain a rulemaking record as prescribed in Section 14-4-5.4 NMSA 1978.

[13.21.3.9 NMAC – N/E, 3/01/2019; Rp, 13.21.3.9 NMAC, 4/30/2019; A, 09/10/2024]

13.21.3.11 WRITTEN COMMENT PERIOD:

A. The public comment period must be at least 30 calendar days, beginning after publication of the notice in the New Mexico register and issuance of the rulemaking notice. The superintendent shall not adopt a proposed rule before the end of the public comment period.

B. As long as the public comment period is at least 30 calendar days, the public comment period will close for initial comments at 4:00 p.m. ~~[on the day of the public hearing, or on the last day of the public hearing if the public hearing extends for more than one day]~~ five days prior to the date of the hearing. For purposes only of responses to written comments or oral comments at the public hearing, the public comment period will ~~[extend]~~ close at ~~[least 10 calendar days beyond the public hearing or close of the 30 day comment period, whichever is later, unless the necessity of adopting or publishing the rule by a certain date makes the extension of the public comment period impractical]~~ 4:00 p.m. one business day after the date of the final public hearing.

C. A person may submit, by mail or in electronic form, written comments or responses to comments on a proposed rule, and those comments or responses shall be made part of the rulemaking record. ~~[Written comments may be submitted through the end of the public comment period, and responses to comments may be submitted for an additional 10 days, unless the necessity of adopting or publishing the rule by a certain date makes a response period impractical.]~~

D. The superintendent may decide to amend the comment period, or response period, if the superintendent provides to the public, as defined in Section 14-4-2 NMSA 1978, notice of the changes.

E. The superintendent shall post all written comments and responses on the patient's compensation fund website, and on the sunshine portal as soon as practicable, and no more than three business days following receipt to allow for public review. All written comments and responses received by the superintendent shall also be available for public inspection at the main office of the superintendent.

[13.21.3.11 NMAC – Rp, 13.21.3.11 NMAC, 4/30/2019; A, 01/01/2022; A, 09/10/2024]

13.21.3.12 PUBLIC HEARING:

A. Prior to adopting a proposed rule, the superintendent must hold a public rule hearing. The purpose of the hearing is to provide all interested persons a reasonable opportunity to submit data, views or arguments orally or in writing on the proposed rule. The superintendent, at the superintendent's discretion, directly or through a designated hearing officer, may determine whether to hold more than one hearing.

B. The superintendent may act as the hearing officer or designate an individual hearing officer to preside over the hearing. The hearing officer may ask questions and provide comments for clarification purposes only, but should refrain from providing opinions or engaging in discussion regarding the merits of the proposed rule or any public comment presented. All written comments submitted during the public comment period, as well as any written comments submitted during the hearing, will be made part of the rulemaking record.

D. Individuals wishing to provide public comment or submit information at the hearing must state their name and any relevant affiliation for the rulemaking record and must be recognized by the hearing officer before presenting. Public comment shall not be taken under oath unless required by law or separate rule. Any individual who provides public comment at the hearing may be questioned by the superintendent or hearing officer or, at the discretion of the superintendent or hearing officer, or as otherwise provided by law, by other persons at the hearing.

E. The hearing shall be conducted in a fair and equitable manner. The superintendent or hearing officer may determine the format in which the hearing is conducted (e.g. introduction of each part or section one at a time for comment), but the hearing will be conducted in a simple and organized manner that facilitates public comment and a clear rulemaking record.

F. The rules of evidence do not apply to public rule hearings and the superintendent or hearing officer may, in the interest of efficiency, exclude or limit comment or questions deemed irrelevant, redundant, or unduly repetitious.

G. The superintendent must hold the hearing in a venue that reasonably accommodates all persons who wish to participate or observe, and appropriate audio equipment should be secured to ensure all in attendance can hear the proceeding and be heard when presenting comment. Reasonable efforts shall be made to accommodate the use of audio and video recording devices. Hearings shall be open to the public, but are not subject to the New Mexico Open Meetings Act.

H. The hearing shall be recorded by any stenographic method in use in the district court or by audio recording.

13.21.3.13 RULEMAKING RECORD AND ADOPTION OF RULE:

A. The superintendent shall maintain a record of the rulemaking proceeding as required in Section 14-4-5.4 NMSA 1978, and any written comment, document, or other exhibit entered into the rulemaking record during the rule hearing shall be labeled clearly. Pre-filed written comments are part of the rulemaking record without the need for formal admission. Pre-filed comments include, but are not limited to: the petition; public notices of the rulemaking, including any lists of individuals to whom notice was mailed or sent electronically; the proposed rule in underline and strikethrough format; and any written comment submitted during the comment period prior to the rule hearing. Written comments or other documents introduced during the hearing should be admitted into the rulemaking record after being marked as an exhibit.

B. If the rule hearing is conducted by a designated hearing officer, the complete rulemaking record, including any memoranda summarizing the contents of the hearing, if written, shall be compiled and forwarded to the superintendent with sufficient time to review. The superintendent shall review the rulemaking record [~~or the hearing officer's recommended decision~~] before rendering a final decision on the proposed rule.

C. The superintendent may adopt, amend, or reject the proposed rule. Any amendments to the proposed rule must fall within the scope of the current rulemaking proceeding. Amendments to a proposed rule are within the scope of the rulemaking if the amendments:

- (1) are a logical outgrowth of the rule proposed in the notice; or
- (2) are proposed, or are reasonably suggested, by comments made during the comment period, and the 10 day response period after the close of the comment period has been provided, and
 - (a) any person affected by the adoption of the rule, if amended, should have reasonably expected that any change from the published proposed rule would affect that person's interest; or
 - (b) the subject matter of the amended rule or the issues determined by that rule are the same as those in the published proposed rule.

D. The date of adoption of the proposed rule shall be the date the final order is signed by the superintendent, unless otherwise specified in the final order.

~~[F]~~ **E.** In accordance with Section 14-4-5. NMSA 1978, [The] the final order shall include [may adopt by reference some or all of any recommended decision and shall include by reference or otherwise,] but not be limited to, the following:

- (1) citation to specific statutory or other authority authorizing the rule;
- (2) effective date of the rule;
- (3) date of adoption of the rule, if different than the date of the final order;
- (4) reasons for adopting the rule, including any findings otherwise required by law of the superintendent, and a summary of any independent analysis done by the superintendent;
- (5) reasons for any change between the published proposed rule and the final rule; ~~and~~
- (6) any findings required by a provision of law for adoption of the rule; and
- (7) reasons for not accepting substantive arguments made through public comment.

[13.21.3.13 NMAC – N/E, 3/01/2019; Rp, 13.21.3.13 NMAC, 4/30/2019; A, 09/10/2024]

History of 13.21.3 NMAC:

13.21.3 NMAC, Procedural Rules For Public Rule Hearings, effective 3/1/2019.

History of Repealed Material:

13.21.3 NMAC, Procedural Rules For Public Rule Hearings, effective 3/1/2019 was repealed and replaced by 13.21.3 NMAC, Procedural Rules For Public Rule Hearings, effective 4/23/2019.