



## DISABILITY RIGHTS NEW MEXICO

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Gary Housepian, Chief Executive Officer

*Promoting and Protecting the Rights of Persons with Disabilities*

March 11, 2022

Submitted via email to: [madrules@state.nm.us](mailto:madrules@state.nm.us)

Human Services Department  
Office of the Secretary  
ATT: Medical Assistance Division Public Comments  
P.O. Box 2348  
Santa Fe, NM 87504-2348

RE: Public Comment on 8.320.6 NMAC: *Early and Periodic Screening, Diagnosis and Treatment (EPSDT), School-Based Services for MAP Eligible Recipients Under Twenty-One Years of Age*

To Whom It May Concern:

Disability Rights New Mexico (DRNM) is the designated protection and advocacy agency in New Mexico whose purpose is to promote, protect, and expand the rights of individuals with disabilities. As part of that mission, DRNM advocates on behalf of individuals, including students with disabilities, across the state to have access services to which they are entitled. DRNM appreciates that the Human Services Department (HSD) and the Medical Assistance Division (MAD) are promulgating revisions to 8.320.6 NMAC, and we believe the proposed changes will increase access to school-based medically necessary services for students with disabilities. While DRNM generally appreciates the aim of these regulation revisions, we offer comments which we strongly urge HSD and MAD to consider before final publication of the rule.

### *Proposed Revisions for 8.320.6 NMAC by HSD and MAD*

DRNM would like to take this opportunity to applaud HSD and MAD for proposing amendments to the school-based Medicaid regulations and expanding the sources which justify the provision of EPSDT-covered, medically necessary services to students. Most of HSD's proposed amendments to the current regulations under 8.320.6 NMAC are appropriate, and DRNM extends our appreciation to the Department. However, there are certain provisions that DRNM believes HSD can improve by adding clarifying language and appropriate citations to other regulatory provisions in the New Mexico Administrative Code (NMAC).

Comments on Delegation of School Nursing Services

HSD proposes to amend language on certain provisions of 8.320.6 with respect to the delegation of nursing services. Those provisions are found at 8.320.6.11(B)(15) and 8.320.6.13(G). However, the proposed regulations could be made more clear with slight revisions. DRNM proposes that HSD's vague reference to the delegation of nursing services "in accordance with the New Mexico board of nursing..." be changed to the specific regulatory authority found at 16.12.1.12(B) NMAC, which is the New Mexico board of nursing's standards with respect to the delegation of nursing services.

HSD proposes to amend the following language of 8.320.6.11(B)(15) NMAC to add to the list of individual service providers who must be employed by or under contract with schools: "(15) registered nurse (RN), licensed practical nurse (LPN) or unlicensed school personnel providing delegated nursing services in accordance with the New Mexico board of nursing under the supervision of an RN."

At 8.320.6.13(G) NMAC, HSD proposes the following: "... Delegated nursing services which are tasks in accordance with the New Mexico board of nursing that may be delegated by the RN to unlicensed school personnel. Delegated staff may include, but is not limited to, school or contracted staff, such as health assistants, teachers, teacher assistants, therapists, school administrators, administrative staff, cafeteria staff, or personal care aides."

HSD should change its language in both provisions by adding a more definable standard than mere reference to the New Mexico board of nursing. The New Mexico board of nursing has its standards on delegating nursing services to both licensed and unlicensed personnel published in New Mexico regulations at 16.12.2.12(B) NMAC.

DRNM proposes that HSD amend its proposed language at 8.320.6.11(B)(15) NMAC and 8.320.6.13(G) NMAC to read, respectively:

"(15) registered nurse (RN), licensed practical nurse (LPN) or unlicensed school personnel providing delegated nursing services in accordance with the New Mexico board of nursing under the supervision of an RN, *as described in 16.12.2.12(B) NMAC.*" *(Emphasis added for DRNM proposed language.)*

"(G)... Delegated nursing services which are tasks in accordance with the New Mexico board of nursing that may be delegated by the RN to unlicensed school personnel, *as described in 16.12.2.12(B) NMAC.* Delegated staff may include, but is not limited to, school or contracted staff, such as health assistants, teachers, teacher assistants, therapists, school administrators, administrative staff, cafeteria staff, or personal care aides." *(Emphasis added for DRNM proposed language.)*

Proposed Revisions for 8.320.6 NMAC do not Adequately Include Medically Necessary Behavioral Health Services

DRNM has concerns with the lack of clarity in the regulations under 8.320.6 with respect to EPSDT funding and the provision of medically necessary behavioral health services in the public schools. Specifically, it does not appear that all EPSDT-covered behavioral health services are represented in the Eligible Providers section of 8.320.6. *See* 8.320.6.11 NMAC.

The regulations under 8.320.6.13(H) state that “MAD covers counseling, evaluation, and therapy required for treatment of an identified behavioral health condition that is part of an eligible recipient’s ITP.” However, HSD’s regulations on “Eligible Providers” for school-based Medicaid services (*see* 8.320.6.11(B) NMAC) fail to adequately include providers credentialed for the provision of certain medically necessary behavioral health services covered under EPSDT.

DRNM is identifying the general issue of needed revisions to 8.320.6.11(B) to adequately account for all EPSDT-covered, medically necessary behavioral health service providers; however, we limit these comments by providing the specific example of Applied Behavior Analysis (ABA) Therapy. At a minimum, DRNM notes that ABA Therapy providers are not included (and should be) as “Eligible Providers” under the applicable section found at 8.320.6.11(B) NMAC, and that there are other behavioral health service providers that ought to be reviewed by HSD to be included as eligible providers under that section.

EPSDT Covers Medically Necessary Behavioral Health Services

The regulations which currently describe New Mexico’s EPSDT program are found at 8.320.2 NMAC. Relevant provisions for the purposes of these comments include:

- “MAD covers services considered medically necessary for the treatment or amelioration of conditions identified as a result of a complete tot to teen healthcheck screen, partial medical screen, or interperiodic screen... If appropriate, treatment is furnished by the screening provider at the time of the tot to teen healthcheck.” 8.320.2.15(C) NMAC.
- “For a MAP eligible recipient requiring extensive or long term treatment, he or she must be referred to a MAD behavioral health professional for further evaluation, and if medically necessary, treatment.” *Id* at (C)(2).
- “See to [*sic*] 8.321.2 NMAC for additional information regarding specialized behavioral health services for an ESPDT [*sic*] MAP eligible recipient.” *Id.* at (C)(2)(d).
- “Behavioral health services are diagnostic or active treatments with the intent to reasonably improve the MAP eligible recipient’s condition; see 8.321.2 NMAC for a detailed description of behavioral health services.” 8.320.2.16(D)(2)(e) NMAC.

Clarification of ABA Therapy as a Medically Necessary, EPSDT-Covered Behavioral Health Service that is Eligible for Reimbursement under the School Based Service Program

New Mexico’s rules under 8.321.2 NMAC regulate Behavioral Health Services covered by MAD, including behavioral health services that, if medically necessary, are covered under

EPSDT. Among those allowed to bill for reimbursement for the delivery of behavioral health services (when all conditions for providing services are met) are school based health centers with behavioral health supervisory certification. 8.321.2.9(D)(15) NMAC.

The regulations under 8.321.2 NMAC identify specific behavioral health services that are covered by MAD. Each service contains subsections addressing: eligible providers, coverage criteria, identified population, covered services, and non-covered services. For instance, Behavior Management Skills (BMS) is a covered behavioral health service. However, the regulations under BMS specifically state that “BMS is not a reimbursable service through the medicaid school based service program.” 8.321.2.16(D)(4) NMAC.

ABA Therapy is covered by MAD for eligible recipients when medically necessary and empirically supported, and when the recipient has a well-documented medical diagnosis of ASD or if the eligible recipient has a well-documented risk of developing ASD<sup>1</sup>. 8.321.2.12 NMAC. ABA services “may be provided in coordination with other medically necessary services (e.g. family infant toddler program (FIT) services, occupational therapy, speech language therapy... etc.).” *Id.* Unlike the regulatory prohibition on reimbursing BMS services under the school based service program, there exists no such prohibition on ABA services. Rather than a total exclusion, as seen with BMS, ABA services would not be covered if it were provided in the school setting “and have the potential to supplant educational services.” 8.321.2.12(F)(4) NMAC.

While it remains unclear what it means to “have the potential to supplant education services,” DRNM does not see how ABA services provided through the public school system would supplant educational services. ABA services are encouraged to be provided in conjunction with other medically necessary services, including other EPSDT-covered school-based Medicaid services like Physical Therapy (PT), Occupational Therapy (OT), and Speech-Language Pathology (SLP). *See* New Mexico Human Services Department, State of New Mexico Medical Assistance Program Manual, Supplement 22-02, *Applied Behavior Analysis (ABA) Guidance*, at 25 Jan. 27, 2022 (listing school among natural settings for delivery of ABA treatment). For many students with disabilities, functional performance and behavioral goals are central focuses of their educational experience and their IEPs. ABA does not supplant educational services for children with disabilities who have an established medical need for them. Rather, ABA services integrates with and enhances students’ special education and related services. *See id.* (“ABA services are not replacing educational instruction, they are supporting the recipient to participate in their educational services”).

Stages two and three of HSD’s approved “three-stage comprehensive approach” to ABA services must be provided by Behavior Analyst Certification Board (BACB) approved behavior analysts (BA), or by assistant behavior analysts, or behavior technicians under the supervision of a BACB certified Behavior Analyst (referred to as BCBA or BCBA-D). *See* 8.321.2.12(B). Some exceptions exist for independent providers. *Id.* at (B)(6). These providers are not included in HSD’s “Eligible Providers” regulations under 8.320.6.11(B) NMAC, either in its current or its proposed form. DRNM urges that they be included.

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<sup>1</sup> Although beyond the scope of these proposed amendments, DRNM urges HSD to expand the scope of ABA service eligibility, as it is well known that individuals with a variety of disabilities (not just ASD) need and benefit from ABA services to build behavioral skill.

## Proposed Revisions to Better Reflect EPSDT Coverage of Medically Necessary Behavioral Health Services

The proposed regulations, as written, state that “MAD pays for medically necessary services...when the services are part of the MAP eligible recipient’s (eligible recipient’s) individualized education program (IEP), or an individualized family service plan (IFSP), a section 504 accommodation plan pursuant to 34 CFR 104.36 (504 plan), and individualized health care plan (IHCP), or are otherwise medically necessary as appropriate for each covered service...”. 8.320.6.9 NMAC.

DRNM asserts that despite the clear language that MAD “pays for medically necessary services...as appropriate for each covered service,” HSD should expressly include language that would include applicable EPSDT-covered behavioral health services.

Our proposed language for 8.320.6.9 NMAC reads: “MAD pays for medically necessary services, *including covered behavioral health services*, for a MAP eligible recipient under twenty-one years of age when the services are part of the MAP eligible recipient’s individualized education program (IEP), or an individualized family service plan (IFSP), a section 504 accommodation plan pursuant to 34 CFR 104.36 (504 plan), and individualized health care plan (IHCP), or are otherwise medically necessary as appropriate for each covered service...” (*Emphasis added for DRNM proposed language.*)

HSD should include all applicable behavioral health services providers in its regulations on “Eligible Providers” under 8.320.6.11 NMAC, including those providers which HSD requires for the provision of ABA services under 8.321.2.12 NMAC.

DRNM further asserts that HSD should include additional language to 8.320.6.13(H) which would clearly refer to EPSDT-covered behavioral health services under 8.321.2 NMAC.

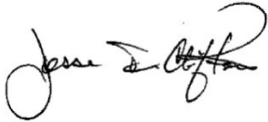
Our proposed language reads: “MAD covers counseling, evaluation, therapy *and other behavioral health services, as described in 8.321.2 NMAC*, required for treatment of an identified behavioral health condition that is part of an eligible recipient’s ITP.” (*Emphasis added for DRNM proposed language.*)

### Conclusion

DRNM urges HSD to incorporate our proposed revisions prior to the final publication of 8.320.6 NMAC. By providing this clarification in the proposed regulations, HSD will be providing another avenue to strengthen New Mexico’s behavioral health system for children in our state. While most schools do not currently employ or contract with many behavioral health service providers, including ABA providers, the promising growth of school-based health centers may provide opportunity for school districts to address the medically necessary, behavioral health needs of their students with appropriately credentialed behavioral health providers. If HSD were to provide this clarification, districts will have the opportunity to grow into providing these behavioral health services, including ABA services. Such clarification would work toward

HSD's rehabilitation of New Mexico's behavioral health network as well as meet the educational and medical needs of students with disabilities across the state.

Sincerely,

A handwritten signature in black ink, appearing to read "Jesse D. Clifton". The signature is fluid and cursive, with a large initial "J" and a prominent "C" at the end.

Jesse D. Clifton  
Staff Attorney  
Disability Rights New Mexico