

**NEW MEXICO DEPARTMENT OF AGING AND
LONG-TERM SERVICES DEPARTMENT RULEMAKING**

Public Hearing: Proposed Repeal and Replacement of Rule 9.2.24 NMAC

Actions in Question: Repeal and Replacement of 9.2.24 NMAC

Hearing Date: May 19, 2022

Report Date: June 1, 2022

REPORT OF HEARING OFFICER

A Public Hearing was held on Thursday, May 19, 2022 at 9:03 a.m. via Zoom. The hearing was held for the purpose of considering the Department of Aging and Long-Term Services (“ALTSD” or “the Department”) proposed repeal and replacement of 9.2.24 NMAC, designated at “The Administration of the Continuing Care Act.” Craig T. Erickson presided as Hearing Officer. The Department was represented by Michal Hayes, ALTSD Deputy General Counsel, and Jennifer Scott, Assistant General Counsel for the Department.

The proceeding was recorded in Zoom and hosted in that platform by Archie Wyman from the Department. The original Zoom recording is in the possession of the ALTSD, Office of General Counsel.

Individuals who attended the Public Hearing on May 19, 2022 included the following individuals:

1. Michal Hayes
2. Jennifer Scott
3. Carmen Bliss
4. Archie Wyman
5. Bruce Malott
6. Stephanie Macek
7. Flori Martinez
8. Jared Sanchez
9. Anastasia Martin

10. Elizabeth Dwyer

The Hearing Officer opened the proceeding by introducing himself, Ms. Hayes, Ms. Scott, and Ms. Bliss, the State Long-Term Care Ombudsman. The Hearing Officer then explained that the purpose of this public hearing was to give the public an opportunity to comment on the proposed repeal and replacement of 9.2.24 NMAC, “The Administration of the Continuing Care Act,” in the ALTSD Rules.

The Hearing Officer further stated that, pursuant to Notice, this matter was being heard on the 19th day of May, 2022 via Zoom online, and via telephone. He also stated that pursuant to notice, the public had been given the opportunity to comment on the proposed rule via Zoom and telephonically, and through the submission of written comments via email messages. The opportunity was also given to the public to submit written comments via email messages, through the close of business on May 19, 2022, at 5:00 p.m.

The Hearing Officer also explained that the proceeding was being recorded, and that we have learned from experience how to get the best recording we can obtain from the Zoom platform. Participants were instructed that they could assist with that effort by being on “mute” at all times, except when speaking. In addition, they were asked to turn off the video on their computers unless speaking. It was explained that this is important for the recording and also important for the ability of all of us to hear clearly each person who speaks during the course of the hearing. The Hearing Officer explained that if too many people have their video on, or are “unmuted,” the voice of the speaker will become garbled and broken up.

The Hearing Officer also stated that this proceeding was being held in accordance with NMSA 1978, § 9-23-6(E) of the Aging & Long-Term Services Act; and NMSA 1978, Sections 24-17-1 through 24-17-18 of the Continuing Care Act. The Hearing Officer also noted that the proceeding was governed by the Default Procedural Rule for Rulemaking found at 1.24.25 NMAC.

The Hearing Officer also explained that after his opening remarks, Ms. Bliss from the Department would provide a brief introduction to the proposed repeal and replacement rule. Ms. Scott would then introduce the Department’s Exhibits and move for admission of the Department’s Exhibits into the record.

The public would then be provided the opportunity to make public comment. Participant were reminded to state their full names when they speak, and if they are appearing on behalf of an organization to indicate what that is.

The Hearing Officer also stated that the Department is not bound by the formal rules of evidence during these proceedings, and the Hearing Officer may, in his discretion, exclude evidence that is incompetent, irrelevant, immaterial, or unduly repetitious. He further noted that the Hearing Officer may take notice of judicially cognizable, technical, or scientific facts within the Department’s specialized knowledge.

The Hearing Officer stated that this hearing is the opportunity to offer public comment. He stated that the hearing is intended to provide the public with an opportunity to voice opinions on

the proposed rule. He explained that the hearing is an opportunity for testimony and comments on the proposed rules, not a question-and-answer session. The Hearing Officer stated that if anyone has questions regarding the proposed rules, they are free to include those questions in their public comments. He also explained that the Department will respond to public comments at the time when the Department issues its concise explanatory statement regarding all comments received. In addition, he stated that the Department will not be responding individually to those making comments on the proposed rules; the Department will publish a concise explanatory statement responding to all comments provided by the public at a later time, in keeping with the requirements of 1.24.25 NMAC.

The Hearing Officer further stated that public comments would be limited to five minutes per participant.

SUMMARY OF PROCEEDINGS

Preliminary Matters

Introductory Remarks of Carmen Bliss, State Long-Term Care Ombudsman

Ms. Bliss began her comments by introducing herself as the State Long-Term Care Ombudsman. She oversees the Long-Term Care Ombudsman and Care Transition Programs of the ALTSD. She stated that she was appearing at the hearing to offer an overview of the changes to Rule 9.2.24 NMAC that the Department is considering. She stated that the Department is proposing to repeal and replace 9.2.24 NMAC, previously designated as “Rate and Fee Increases by Continuing Care Communities.”

Ms. Bliss stated that the purpose of this action is to comply with the amendments to the Continuing Care Act, Sections 24-17-1 through 24-17-18. She stated that the proposed rule will provide guidance for the administration of the Continuing Care Act in accordance with New Mexico law. She stated that the rule will no longer only address rate and fee increases by continuing care communities. She stated that the rule will now be entitled “The Administration of the Continuing Care Act.”

She stated that she would briefly explain the changes that are being proposed, as follows:

- The most substantial change is the incorporation of four new sections—Sections 15, 16, 17, and 18.
- Section 15 discusses financial reserves including liquid reserves and other reserves, imposes a certification requirement for compliance regarding financial reserves, and requires the provider to submit a proposed corrective action plan if a provider does not meet the financial reserves requirements.
- Section 16 outlines the requirements of the continuing care communities’ annual disclosure statement. This section requires that the disclosure statement include a sample copy of the contract used by the provider, and that the contract include all the minimum requirements

as set forth in the Continuing Care Act. Examples of such requirements include a description of the community's admission policies, all items of service to be received by the resident, and whether those services will be provided for a designated time period or for the resident's lifetime, the taxes and utilities that the resident must pay, and the community's plan for resident relocation upon closure or circumstances that necessitate relocation. The full lists of requirements are set forth in the Act.

- Section 17 requires that the continuing care communities include a summary of comprehensive actuarial analysis and a future service conservation as part of the annual disclosure as well as certifications signed by the actuary who performed the analysis.
- Section 18 outlines the process for the issuance of notice of violation to a continuing care community.

In addition to the foregoing changes, the Department also proposes amendments to the Definition Section, which is Section 7 of the proposed 9.2.24 NMAC. Some definitions are maintained. Some are amended, and some new definitions are added. The amended definitions include "cost of care," "cost of operating the continuing care community," "economic necessity," and "investment income."

Ms. Bliss stated that new definitions include "affiliate," "ALTSD," "community," "continuing care," "fees," "liquid reserves," "net operating expenses," "person," "policy," "provider," "reserves," "type A agreement," and "type B agreement."

Ms. Bliss stated that the Department also proposes a new Section 8 to require a continuing care contract to include the policy for rate and fee increases and indicate which of the four factors a continuing care community will utilize for rate fee increases, which are: economic necessity, the reasonable cost of operating the continuing care community, the cost of care and/or reasonable return on investment.

In addition, Ms. Bliss stated that the Department proposes clarifying that any publicly available documentation used by a continuing care community to applicable GAAP standards (not GAAS standards) and shall be included in the notice provided to residents. Additionally, the proposed rules provide that any non-public documentation shall be aggregated into summarized budgets or pro forma financials. She stated that non-public information might include individual staff salaries, legal expenses, legal and other third-party contracts, internal expenses, etc.

Ms. Bliss stated that the Department proposes amending Section 9 to state that "[a]ny 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." *See* 9.2.24.9(B) NMAC.

Ms. Bliss next addressed the Department's proposed amendments to Section 10 to specify that rate and fee increases based on cost of care increases for medical care or health-related supportive services, shall be governed by the continuing care contract. *See* 9.2.24.10(A) NMAC.

She stated that the Department proposes striking the section regarding reserves [the former 9.2.24.11 NMAC] as this will be addressed in a new section, Section 15 in 9.2.24 NMAC.

She stated that the Department proposes amending the section on “Historical and Current Data,” in a new Section 11, to allow for a deviation from historical data when exigent circumstances exist making the historical data inapplicable to circumstances surrounding the need for the increase, for instance, public health emergencies such as COVID-19, and to differentiate between publicly available data and non-public data. The proposed rule provides that non-public data will be aggregated when permissible.

The Department also proposes amending the section on Reasonable Return of Investment, Section 12, to clarify that reasonable return of investment in this section pertains to rate and fee increases.

Ms. Bliss stated that the Notice of Rulemaking lists the changes described and additional changes have been proposed to address formatting requirements. Copies of the Notice of Rulemaking and the proposed Rule are available on the New Mexico Sunshine Portal and the ALTSD website.

She closed by thanking the attendees for their interest in the Department’s proposed repeal and replacement of this Rule. She conveyed her appreciation the fact that the attendees had joined in the rulemaking hearing and expressed her excitement to hear the comments of the public.

The Department’s Exhibits

Ms. Scott offered the Department’s exhibits into the record, and the exhibits were admitted by the Hearing Officer into the record. The exhibits are as follows:

ALTSD Exhibit No. 1:	Proposed Repeal and Replacement of 9.2.24 NMAC
ALTSD Exhibit No. 2:	ALTSD Request to Name Part 24 of Title 9, Chapter 2, “The Administration of the Continuing Care Act”
ALTSD Exhibit No. 3:	SRCA (State Records) Approval of ALTSD Request for New Part Name
ALTSD Exhibit No. 4:	SRCA Pre-Approval of Repeal
ALTSD Exhibit No. 5:	Hearing Officer Appointment Letter Dated March 28, 2022
ALTSD Exhibit No. 6:	Hearing Officer Encumbrance Letter Dated March 28, 2022
ALTSD Exhibit No. 7:	ALTSD Notice of Rulemaking and Public Hearing Published in the NM Register and Posted on NM Sunshine Portal

ALTSD Exhibit No. 8:	ALTSD Billing Information Sheet
ALTSD Exhibit No. 9:	ALTSD Purchase Order for Publication in NM Register
ALTSD Exhibit No. 10:	NM Commission of Public Records Invoice and Affidavit of Publication in NM Register
ALTSD Exhibit No. 11:	ALTSD Purchase Order for Publication in Albuquerque Journal
ALTSD Exhibit No. 12:	Albuquerque Journal Ad Proof/Order Confirmation
ALTSD Exhibit No. 13:	Albuquerque Journal Publication
ALTSD Exhibit No. 14:	NM Press Association Publication
ALTSD Exhibit No. 15:	Screenshots of Notices
ALTSD Exhibit No. 16:	Email Notice Sent to Stakeholders
ALTSD Exhibit No. 17:	Zoom Hearing Attendance List
ALTSD Exhibit No 18:	Public Comments

Ms. Scott then stated that the Department moved for the admission of the Department's Exhibits. The motion was granted and the Exhibits were admitted.

Public Comments

The following is a summary of the public comments offered into the record at the Mary 19, 2022 Public Hearing.

The Public Comments of Elizabeth Dwyer

Ms. Dwyer is a resident of the Neighborhood in Rio Rancho ("NIRR"), a continuing care life-plan community located in the city of Rio Rancho. She stated that NIRR is a sister community to La Vida LLena (ACCRA) in Albuquerque—they are both subsidiaries of the same non-profit owner.

Ms. Dwyer stated that she chairs the legislative committee of the Resident's Council of NIRR. She also serves as a board member of the regional chapter of the National Continuing Care Resident's Association, which includes members NIRR and La Vida LLena.

She stated that on May 7, 2022, she submitted written comments regarding the proposed rule to ALTSD on behalf of each of these leadership groups. She stated that members of the legislative committee of the Neighborhood and the NCCRA board members want to thank

Secretary Hotrum-Lopez and her staff for working with them to first, get Senate Bill 152 passed during the 2021 legislative session, and then continuing to listen to their concerns and comments during the process of drafting the rules. They are encouraged to see many of their recommendations included in these final proposed rules.

Ms. Dwyer stated that at hearing she would briefly emphasize a few of the suggestions they made in their May 7, 2022 public comments to ALTSD. First, they believe the definition of “economic necessity” as defined in 9.2.24.7(G) NMAC needs to be revisited. It does not address instances where a sole corporate owner may be lacking funds due to expansion decisions they made and then placing their subsidiary CCRCs in a “obligated group.” She stated that this could potentially cause those CCRCs to be in a position of having to cover debts incurred by a subsidiary that is not part of the obligated group in order to meet loan and bond requirements or comply with a _____ [inaudible] venture. She stated that the question goes to the basis for why funds are lacking needs to be expanded in this definition.

The second issue addressed by Ms. Dwyer is as follows. She addressed the proposed rule on disclosure statement and provider certification in 9.2.24.16(A) NMAC, “Annual Disclosure Statement.” She stated that they suggest that ALTSD require a standing reporting form in the annual disclosure statement for all CCRCs so that financial information is presented in a way that residents can understand. She noted that in their written comments they shared a link to a copy of such a format required by the State of Florida Department of Insurance. [A hard copy of the form is included in ALTSD Exhibit No. 18.] She noted that this reporting form also addresses some of their concerns regarding minimum liquid reserves, escrow statements, and vulnerabilities for CCRCs that result from being part of an obligated group.

Ms. Dwyer’s third point relates to 9.2.24.17 NMAC—“Actuarial Studies.” She stated that in addition to the important requirements incorporated into this rule for actuarial studies and the professionals who perform them, they suggest the following language be added: require that actuaries who conduct a CCRC’s actuarial analysis provide their best judgment of the Community’s chances of remaining viable for the next five to ten years on a scale of poor, average, or good.

Ms. Dwyer closed by thanking everyone for their hard work and providing them the opportunity to present public comment.

There were no other public comments at hearing.

The attendees were reminded by the Hearing Officer that written comments would be accepted up to 5:00 p.m. on May 19, 2022. He also stated that no deadline had been established for the Hearing Officer’s Report, but he anticipated that it would be done soon.

The Hearing Officer thanked all the participants for their presence in the hearing. He also reminded the attendees that the rule would become effective 30 days after being filed with State Records and Archives.

The Hearing Officer then closed the proceeding and went off the record.

Written Comments and Other Materials Submitted for Hearing

ALTSD Exhibit No. 18 contains two written comments from the public.

The Written Comments of Elizabeth Dwyer

Elizabeth Dwyer is the Chair of the Legislative and NaCCRA (“L & N”) Committee of The Neighborhood in Rio Rancho Resident’s Counsel and serves on the Board of the New Mexico Regional Chapter of the National Continuing Care Resident’s Association (NaCCRA). Her comments were collected from NIRR residents and members of the NaCCRA Board.

On behalf of both the L & N Committee and the Regional Chapter of the NaCCRA Board, she thanked the Secretary and her staff for working with those organizations to get SB 152 passed, and then listening to their concerns and comments during the initial process of rulemaking. She expressed the encouragement they felt to see many of the recommendations included in the proposed rules.

She articulated her specific comments as follows:

1. 9.2.24.8 – Rate and Fee Increases

Ms. Dwyer addressed Subsection (A) of the foregoing rule. She suggested that monthly fees should be changed no more frequently than annually. She stated that interim fee increases are disruptive to resident budgeting and can mislead prospective residents who would assume only annual changes to monthly fees. She also suggested that if fee increases are to be assessed more often than on an annual basis, the rule should require that such possibility or policy should be clearly addressed in resident contracts.

In her discussion of rate and fee increases, Ms. Dwyer raised a question about the definition of “economic necessity” found in 9.2.24.7(G) NMAC. She asked: “What if funds are lacking because our sole member owner has invested in other properties and made La Vida LLena and NIRR part of the Obligated Group of non-profits that are responsible to cover any of the subsidiary losses?”

Ms. Dwyer noted that this situation currently exists in that one of the entities owned by their sole member continues to be downgraded by Fitch and may become insolvent. She asked that the Department revisit the definition of “economic necessity” to protect their CCRCs should this occur.

Also, in her discussion of rate and fee increases, Ms. Dwyer asked whether a reasonable rate of return, referenced in 9.2.24.8(C)(4) NMAC is appropriate for a non-profit organization. She further commented on 9.2.24.12 NMAC (“Reasonable Return on Investment as It Pertains to Rate and Rate Increases”) as summarized below in Section 2.

Finally, with respect to rate and fee increases, Ms. Dwyer commented in response to 9.2.24.8(D) NMAC that fee increases at La Vida LLena and NIRR have been assessed down to one-hundredths of a percent and noted that such an accurate calculation certainly involves mathematics. She suggests that the Department require that the mathematical computation that support rate increases accurate to one-hundredth of a percent be provided to residents, stating that vague explanations supporting rate increases are subjective and defy accurate evaluation. Mathematical calculations, however, can be checked.

2. 9.2.24.12 NMAC – Reasonable Return on Investment as it Pertains to Rate and Fee

With respect to 9.2.24.12(A) NMAC, Ms. Dwyer comments that the 90-day U.S. Treasury bill rate is a low, but positive, measurement. In response to 9.2.24.12(B) NMAC, she comments that the six-percentage point return on investment would be excessive for a non-profit. She suggests that there should be a separate “reasonable” return standard for non-profit versus for-profit organizations.

3. 9.2.24.16 NMAC – Disclosure Statement and Provider Certification

Annual disclosure statements to ALTSD are addressed in 9.2.24.16(A) NMAC. Ms. Dwyer suggests that the Department require a standard financial reporting form in the Annual Disclosure Statement for all CCRCs so that financial information is presented in a way that persons without degrees in accounting can understand them. She notes that this will provide important information to current and prospective CCRC residents.

Ms. Dwyer also attached a copy of the Florida Office of Insurance Regulation’s Annual Financial Report as an example. She notes that this form addresses some of her concerns regarding minimum liquid reserves, escrow statements, and both La Vida LLena’s and NIRR’s vulnerabilities that result from being part of the obligated group that could potentially be responsible for losses in a property in another state that is owned by their sole member.

4. 9.2.24.17 NMAC – Actuarial Studies

In reference to 9.2.24.17 NMAC, Ms. Dwyer states that each of the three subsections of this rule are extremely important to residents and potential residents of CCRCs, as well as the future of the CCRC industry in general. She states that the new requirement that the actuarial analysis and the annual future-service obligation calculation must be performed by an actuary who certifies that they are a member of the American Academy of Actuaries is critical to the substance of the results of those calculations.

Ms. Dwyer states that residents in Type-A continuing care communities often invest their life savings to pay the buy-in fees to such communities. Many, and perhaps most, senior citizens who invest in the communities do so on blind faith since they are not qualified to assess the long-term future viability of such communities. However, she says, unfortunately Type-A communities sometimes go bankrupt, and this has happened in New Mexico. Ms. Dwyer states that this can render residents destitute.

She suggests a requirement that actuaries who perform a community's comprehensive actuarial analysis provide their best judgment of the Community's chances of remaining viable for the next 5 to 10 years and rate the probability of 5 to 10 years of viability on a scale of poor, average, or good. She suggests, for comparison, a requirement that residents and prospective residents be provided the ratings that have been assigned to every Type-A community in the state.

Finally, based upon her experience, Ms. Dwyer state that she believes that CCRC's are good public policy. She stated that if we can keep a handle on what it costs to live in a CCRC, those costs can be factored into our financial planning over our lifetimes. She said that the saddest stores that she has witnessed are watching friends and colleagues work to convince their parents that they need to rid themselves of their assets in time to have incomes low enough to qualify for Medicaid. She noted that keeping a healthy CCRC industry is good for CCRCs and for our country's economy.

Ms. Dwyer expressed her thanks for "all the excellent work" the Department has done for her and her constituents.

The Comments of Edward Streit

Mr. Streit is a resident of NIRR. His comments are summarized as follows:

1. 9.2.24.17 NMAC – Actuarial Studies

Mr. Streit supports Ms. Dwyer's comments regarding the proposed rule on actuarial studies and tracts the language of her comments very closely, in an abridged form. *See* ALTSD Exhibit No. 18. Because his statements tract Ms. Dwyer's statements so closely, they are not summarized in detail here.

2. 9.2.24.8 NMAC – Rate and Fee Increases

Mr. Streit here offers his supports for the statements of Ms. Dwyer that monthly fees should be charged no more often that annually, and if they are allowed to be assessed more often than annually, there should be a requirement that such policy or possibility be clearly and specifically spelled out in residents' contracts.

3. Suggested Regulation

Mr. Streit echoes Ms. Dwyer's comments that there should be a requirement that mathematical computations that support rate increases accurate to one-hundredth of a percent should be provided to residents.

There were no additional written comments from the public.

ANALYSIS AND RECOMMENDATIONS

Guidance in determining whether a rule adopted by an administrative agency will be upheld can be found in *New Mexico Mining Ass'n v. New Mexico Mining Com'n*, 1996-NMCA-098, 122 N.M. 332, which states as follows:

Rules adopted by an administrative agency will be upheld if they are in *harmony* with the agency's express statutory authority or *spring from those powers that may be fairly implied therefrom*. [Citations omitted.] Similarly, regulations adopted by an agency are presumed to be valid if they are shown to be *reasonably consistent* with the statutory purposes of the agency. [Citation omitted.] [Emphasis added.]

See also *Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25.

In addition:

"The court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function.'"

Id., quoting *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 120 N.M. 579, 583 (1995).

The Hearing Officer has fully considered the Department's proposed repeal and replacement of 9.2.24 NMAC, as well as the public and written comments submitted in this proceeding to the Department and recommends approval and adoption of the proposed Rule 9.2.24 NMAC, for the following reasons:

The proposed rule was well supported by the comments of Carmen Bliss, as set forth above. Her comments, and review of the Continuing Care Act, NMSA 1978, § 24-17-1, *et seq.* by the Hearing Officer, support the conclusion that the proposed rule is in harmony with the express statutory authority of the Department and springs from the powers that may be implied from the Continuing Care Act and the Aging & Long-Term Services Department Act, at Section 9-23-6(E).

The public comments offered at hearing and the written comments from the public submitted prior to hearing reveal no express opposition to the proposed repeal and replacement of 9.2.24 NMAC. They do offer questions and suggestions which should be considered by the Department and addressed in its concise explanatory statement as required by Attorney General's Default Procedural Rule in 1.24.25 NMAC.

The suggestions/issues raised in public comments are as follows:

- Should increases in monthly fees be limited to changes made no more frequently than annually?

- If increases in monthly fees are allowed more frequently than annually, should the rule require that such policy or possibility be clearly and specifically spelled out in residents' contract?
- Should the Department require that the mathematical computations that support rate increases be accurate to one-hundredth of a percent and provided to residents?
- Should there be a separate "reasonable" return standard for non-profit versus for-profit organizations?
- Should a required financial reporting form be included in the Annual Disclosure Statement for all CRCCs so that financial information is presented in a way that persons without degrees in accounting can understand? Should a form like the form used in Florida, as referenced by Ms. Dwyer, be required?
- Should the Department require that actuaries who do a Community's comprehensive actuarial analysis provide their best judgment of the Community's chances of remaining viable for the next 5 to 10 years, and require that the actuaries rate the probability of a Community's 5 year and 10-year future viability on a scale of poor, average, or good?
- If the foregoing ratings system is incorporated into the rule, should the Department require that residents and prospective residents be provided such ratings that have been assigned to every Type A Community in the state?

The questions expressly raised by the public include the following:

- What if funds are lacking because a sole member owner has invested in other properties and made La Vida LLena and NIRRR part of their obligated group of non-profits that are responsible to cover any of the subsidiary losses? Should the definition of "economic necessity" be revised to protect CRCCs should this occur?
- Is a reasonable return on investment as referenced in 9.2.24.12NMAC appropriate for a non-profit association?

The Continuing Care Act give the Department the authority to "promulgate all rules and regulations necessary or appropriate to administer the provisions of the Continuing Care Act." NMSA 1978, § 24-17-17. There was no challenge at hearing or in the two written comments submitted by members of the public making the argument that any of the proposed provisions of the new rules fall outside the authority of the Department, or that they are not necessary or are inappropriate.

As to each of the proposed rules identified by members of the public for which suggestions were made, the Hearing Officer recommends that Secretary Hotrum-Lopez find that each of the rules, as written, are in harmony with the provisions of the Continuing Care Act, or spring from those powers that may be fairly implied therefrom, as follows:

9.2.24.8, “Rate and Fee Increases,” is in harmony with or springs from the powers implied in NMSA 1978, § 24-17-2, “Findings and Purpose,” NMSA 1978, § 24-17-3(K) and (L), “Type A” and Type B” agreements, and NMSA 1978, § 24-17-5(B)(11), regarding fee increases. There is no requirement that such increases be allowed annually only. Thus, whether the Department accepts the suggestion that the rule be revised in that manner is a matter of the Department’s discretion.

With respect to 9.2.24.12(A) and (B) NMAC (“Reasonable return on investment as it pertains to rate and fee”), the suggestion was made that the 90-day U.S. Treasury bill rate is a low, but positive, measurement. In response to 9.2.24.12(B) NMAC, but the six-percentage point return on investment would be excessive for a non-profit. It was also suggested that there should be a separate “reasonable” return standard for non-profit versus for-profit organizations.

As written the proposed 9.2.24.12 NMAC is in harmony with or springs from those powers that may be fairly implied therefrom. It is consistent with the findings and purpose of the Continuing Care Act, found in NMSA 1978, § 24-17-2, as well as NMSA 1978, § 24-17-5(B)(11), which provides that a reasonable return on investment as defined by rules promulgated by ALTSD be addressed in continuing care contracts. The suggestions offered by the public should be considered by the Department; whether to adopt them or not is in the Department’s discretion.

Suggestions were also offered regarding 9.2.24.16 NMAC—Disclosure Statement and Provider Certification. It was suggested the Department require a standard financial reporting form in the Annual Disclosure Statement for all CCRCs so that financial information is presented in a way that persons without degrees in accounting can understand them. A form used in Florida was offered for this purpose. As written, the proposed rule in 9.2.24.16 NMAC is consistent with the requirements found in the Continuing Care Act, NMSA 1978, § 24-17-4 (“Disclosure.”) The proposed rule, as written, is in harmony with the statute. However, the Department in its discretion may consider the suggestions from the public.

The public commented on 9.2.24.17 (“Actuarial Studies”) as well. In particular, it was suggested that the Department establish a requirement that actuaries who perform a community’s comprehensive actuarial analysis provide their best judgment of the Community’s chances of remaining viable for the next 5 to 10 years and rate the probability of 5 to 10 years of viability on a scale of poor, average, or good. It was also suggested that there be a requirement that residents and prospective residents be provided the ratings that have been assigned to every Type-A community in the state.

As written, the proposed rule is in harmony with or springs from those powers that may be implied from the Continuing Care Act, as set forth in NMSA 1978, § 24-17-2 and § 24-17-4(B) (11). The Department may choose to consider the suggestions offered as to this rule.

Recommendation:


The Hearing Officer recommends that Secretary Hotrum-Lopez find that proposed amendments to 9.2.24 NMAC are in harmony with the agency’s express statutory authority or spring from those powers that may be fairly implied therefrom, and that the proposed amendments

are reasonably consistent with the statutory purposes of the agency. *See Rio Grande Chapter of Sierra Club v. New Mexico Mining Com'n*, 2003-NMSC-005, 133 N.M. 97 at ¶ 25. Rule 9.2.24 NMAC as proposed by the Department in ALTSD Exhibit No. 1 meets these requirements. The comments of the public do not include any argument to the contrary. However, the Department should consider whether to make additional revisions to the proposed Rule based upon the comments of the public, and the suggestions and questions from the public should be addressed in a concise explanatory statement from the Department as required by 1.24.25 NMAC.

The Hearing Officer further recommends that the Secretary adopt the proposed repeal and amendment of 9.2.24 NMAC, as set forth in ALTSD Exhibit No. 1.



Craig T. Erickson



Date