

**TITLE 9 HUMAN RIGHTS**  
**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]

#### **HISTORY OF 9.2.1 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center:

SAA Rule No. 95-1, General Provisions, filed 4/13/1995.

#### **History of the Repealed Material:**

SAA Rule No. 95-1, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 2 FEDERAL AND STATE LAW**

**9.2.2.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.2 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State records center: SAA Rule No. 95-2, Federal and State Law, filed 4/13/1995.

**History of the Repealed Material:**

SAA Rule No. 95-2, filed 04/13/1995 - Repealed 06/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 3 ELIGIBILITY FOR AGING AND LONG-TERM SERVICES DEPARTMENT SERVICES**

**9.2.3.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMA LTSD)  
[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]

#### **HISTORY OF 9.2.3 NMAC:**



**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center:  
SAA Rule No. 95-3, Eligibility for State Agency on Aging Services, filed 4/13/95.

**History of Repealed Material:**  
SAA Rule No. 95-3, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 4 DESIGNATION OF PLANNING AND SERVICE AREAS**

**9.2.4.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.4 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center:

SAA Rule No. 95-4, Designation of Planning and Service Areas, filed 4/13/95.

**History of Repealed Material:**

SAA Rule No. 95-4, filed 4/13/1995 - Repealed 6/30/2015

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 5 AREA AGENCY ON AGING 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]

**HISTORY OF 9.2.5 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-5, Area Agency Designation, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-5, filed 4/13/1995 - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 6 AREA AGENCY ON AGING REQUIREMENTS**

**9.2.6.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.6 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center:

SAA Rule No. 95-6, Area Agency on Aging Requirements, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-6, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 7 DE-DESIGNATION OF AREA AGENCIES ON AGING**

**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]

**HISTORY OF 9.2.7 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State records center: SAA Rule No. 95-7, Withdrawal of Area Agency Designation, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-7, filed 4/13/1995 - Repealed 6/30/2015

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 8 ADEQUATE PROPORTION OF SERVICES**

**9.2.8.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMALTSB)  
[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.

[9.2.8.10 NMAC - Rp, SAA Rule No. 95-8.10, 6/30/2015]

**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]

**HISTORY OF 9.2.8 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-8, Adequate Proportion of Priority Services, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-8, filed 4/13/1995 - Repealed 6/30/2015

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**PART 9            DIRECT SERVICES**

**9.2.9.1            ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMA LTSD)  
[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]

**HISTORY OF 9.2.9 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:  
SAA Rule No. 95-9, Direct Services, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-9, filed 4/13/1995 - Repealed 6/30/2015

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**PART 10           MULTIPURPOSE SENIOR CENTERS ACQUIRED, CONSTRUCTED, ALTERED OR**  
**RENOVATED WITH OLDER AMERICANS ACT TITLE III FUNDS**

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

**HISTORY OF 9.2.10 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-10, Multipurpose Senior Centers Acquired, Constructed, Altered or Renovated with Older Americans Act Title III Funds, filed 4/13/95.

**History of Repealed Material:** [RESERVED]

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 11 APPEAL/HEARING PROCEDURES**

**9.2.11.1 ISSUING AGENCY:** New Mexico Aging and Long-Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.11 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: AOA 85-1, State Agency on Aging Hearing Procedures, filed 1/15/1985. SAA Rule No. 95-11, Appeal/Hearing Procedures, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-11, filed 4/13/1995 - Repealed 6/30/2015.

**TITLE 9        HUMAN RIGHTS**  
**CHAPTER 2    AGE**  
**PART 12       CORPORATE ELDERCARE**

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

**HISTORY OF 9.2.12 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center:  
SAA Rule No. 95-12, Corporate Eldercare, filed 4/13/95.

**History of Repealed Material:** [RESERVED]

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**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]

#### **HISTORY OF 9.2.13 NMAC:**

**Pre-NMAC History:** The material in this part was derived from that previously filed with the state records center and archives:

SAA Rule No. 95-13, Employment Programs for the Elderly, filed 4/13/95.

**History of Repealed Material:** SAA Rule No. 95-13, Employment Programs for the Elderly (filed 4/13/95) repealed 02/12/2010.

**Other History:**

SAA Rule No. 95-13, Employment Programs for the Elderly (filed 4/13/95) was renumbered, reformatted and replaced by 9.2.13 NMAC, Employment Programs for Older Workers, effective 02/12/2010.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 14 STATE-FUNDED FOSTER GRANDPARENT PROGRAM**

**9.2.14.1 ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.14 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-14, State Funded Foster Grandparent Program, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-14, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**PART 15           STATE-FUNDED SENIOR COMPANION PROGRAM**

**9.2.15.1            ISSUING AGENCY:** New Mexico Aging and Long-Term Services Department (NMALTSB)  
[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]

**HISTORY OF 9.2.15 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-15, State Funded Senior Companion Program, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-1, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**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]

**HISTORY OF 9.2.16 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-16, State Funded Retired and Senior Volunteer Program, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-1, filed 4/13/1995 - Repealed 6/30/2015.

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**PART 17           LEGAL ASSISTANCE SERVICES**

**9.2.17.1            ISSUING AGENCY:** New Mexico Aging and Long Term Services Department (NMA LTSD)  
[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]

**HISTORY OF 9.2.17 NMAC:**

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center: SAA Rule No. 95-17, Legal Assistance Services, filed 4/13/1995.

**History of Repealed Material:**

SAA Rule No. 95-17, (filed 4/13/1995) - Repealed 6/30/2015.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 18 NUTRITION SERVICES**

**9.2.18.1 ISSUING AGENCY:** New Mexico Aging and Long-Term Services Department (NMALTSB)  
[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 (1/2) 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]

**HISTORY OF 9.2.18 NMAC:**

Pre-NMAC History: SAA Rule 95-18, Nutrition Services Standards, filed 4/13/1995. 9.2.18 NMAC, Nutrition Services Standards, effective 5/31/2001- replaced SAA Rule 95-18, filed 4/13/1995.

**History of Repealed Material:**

9.2.18 NMAC, filed 5/10/2001 - Repealed 6/30/2015.

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGING**  
**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 aides 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]

**2.9.19.39 [RESERVED]**

**2.9.19.40 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]

**HISTORY OF 9.2.19 NMAC:**

**History of Repealed Material:**

9.2.19 NMAC, Aging - Long Term Care Ombudsman, filed 1/16/2001 - Repealed effective 12/29/2017.

**Other History:**

9.2.19 NMAC, Aging - Long Term Care Ombudsman (filed 1/16/2001) was replaced by 9.2.19 NMAC, Aging - Long Term Care Ombudsman, effective 12/29/2017.

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**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 (NMALTSB)  
[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]

**HISTORY OF 9.2.20 NMAC:**

**History of the Repealed Material:**  
9.2.20 NMAC, filed 5/10/2001 - Repealed 6/30/2015.



**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**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]

**History of 9.2.21 NMAC:** [RESERVED]

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**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]

**History of 9.2.22 NMAC:** [RESERVED]



**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**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]

**History of 9.2.23 NMAC:** [RESERVED]

**TITLE 9 HUMAN RIGHTS**  
**CHAPTER 2 AGE**  
**PART 24 RATE AND FEE INCREASES BY CONTINUING CARE COMMUNITIES**

**9.2.24.1 ISSUING AGENCY:** Aging and Long-Term Services Department.  
[9.2.24.1 NMAC - N, 1/31/06]

**9.2.24.2 SCOPE:** This rule applies to the general public.  
[9.2.24.2 NMAC - N, 1/31/06]

**9.2.24.3 STATUTORY AUTHORITY:** This rule is adopted pursuant to the terms of Sections 9-23-6(E), 24-17-5(B)(11), 24-17-17 and 28-4-6(B) NMSA 1978.  
[9.2.24.3 NMAC - N, 1/31/06]

**9.2.24.4 DURATION:** Permanent.  
[9.2.24.4 NMAC - N, 1/31/06]

**9.2.24.5 EFFECTIVE DATE:** January 31, 2006, unless a later date is cited in the history note at the end of a section.  
[9.2.24.5 NMAC - N, 1/31/06]

**9.2.24.6 OBJECTIVE:** This rule establishes the terms and conditions under which continuing care communities may increase the rates and fees they charge residents under the terms of the Continuing Care Act, Sections 24-17-1 through 24-17-18 NMSA 1978.  
[9.2.24.6 NMAC - N, 1/31/06]

**9.2.24.7 DEFINITIONS:** The following terms are used in this rule:

- A. “continuing care community”** means a community as defined by Section 24-17-3(B) NMSA 1978;
- B. “cost of care”** means the direct cost of providing care to residents;
- C. “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, and all other costs associated with running a continuing care community, other than cost of care;
- D. “economic necessity”** means insolvency or circumstances where funds are lacking to maintain a reasonable level of service and care for residents;
- E. “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;
- F. “GAAS”** means generally accepted auditing standards; it is a set of systematic guidelines used by auditors when conducting audits on companies’ finances, ensuring the accuracy, consistency and verifiability of auditor’s actions and reports;
- G. “gift income”** means income from any gift or grant, or portion thereof, that is used to pay for or offset an expense;
- H. “expenses”** mean cost of care plus cost of operating the continuing care community;
- I. “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;
- J. “investment income”** means income received by a continuing care community on investments made with funds received from residents unless the funds and income are held in reserve accounts as described in this rule. Investment income does not include income on resident trust accounts;
- K. “net income”** means income minus expenses;
- L. “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; and
- M. “resident”** means an actual or prospective purchaser of, nominee of or subscriber to a continuing care contract.

[9.2.24.7 NMAC - N, 1/31/06]

**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.
  - B.** A continuing care community shall give residents at least thirty 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, and no others:
    - (1) economic necessity;
    - (2) the reasonable cost of operating the continuing care community;
    - (3) the cost of care; and
    - (4) a reasonable return on investment.
  - D.** Any documentation used by a continuing care community to support a rate or fee increase shall comply with applicable GAAP and GAAS standards.
  - 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 - N, 1/31/06]

**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 owners' investment for any other type of business enterprise.
- [9.2.24.9 NMAC - N, 1/31/06]

**9.2.24.10 COST OF CARE INCREASES:**

- A.** Rate and fee increases based on cost of care increases for providing care 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 - N, 1/31/06]

**9.2.24.11 RESERVES:**

- A.** A continuing care community may establish and maintain reserve accounts in accordance with applicable GAAP and GAAS standards.
  - B.** Any reserve accounts that are used to refund entrance fees shall be administered in accordance with applicable statutory and contractual provisions.
  - C.** Except as provided in the preceding subsection, any reserve accounts that are funded with funds received from residents shall be used for the benefit of residents. If they are not used for the benefit of residents, the funds plus any income earned on the funds shall be returned to the residents or their representatives on an equitable basis.
- [9.2.24.11 NMAC - N, 1/31/06]

**9.2.24.12 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.
  - 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 data used to support a rate or fee increase. 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.
- [9.2.24.12 NMAC - N, 1/31/06]

**9.2.24.13 REASONABLE RETURN ON INVESTMENT:**

**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 ninety-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 ninety-day United States treasury bills shall be presumed to be unreasonable. The presumption is rebuttable.

[9.2.24.13 NMAC - N, 1/31/06]

**9.2.24.14 ACCOUNTING DATA 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.

[9.2.24.14 NMAC - N, 1/31/06]

**9.2.24.15 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.

[9.2.24.15 NMAC - N, 1/31/06]

**History of 9.2.24 NMAC:** [RESERVED]