



**State of New Mexico
Human Services Department
Human Services Register**



I. DEPARTMENT
NEW MEXICO HUMAN SERVICES DEPARTMENT (HSD)

II. SUBJECT
8.314.5 NMAC, *Long Term Care Services, Developmental Disabilities Home and Community-Based Services Waiver*

III. PROGRAM AFFECTED
(TITLE XIX) MEDICAID

IV. ACTION
FINAL RULE

V. BACKGROUND SUMMARY

New Mexico Human Services Register Vol. 37, No. 23, dated March 14, 2014, issued the proposed rule, 8.314.5 NMAC, *Long Term Care Services, Developmental Disabilities Home and Community-Based Services Waiver*.

A public hearing was held on Wednesday, April 30, 2014, to receive public comments and testimony on this proposed rule. The Human Services Department (the Department) received no oral testimony or recorded comments and two written comments.

Comments – Written Comments

Comment	HSD Response
<p>1. The Department is proposing two major additions to this section of the NMAC. It proposes adding information concerning how the SIS evaluation is administered and scored, and a more detailed description of the SIS group assignments and service packages that result. DRNM fully supports the inclusion of this information.</p>	<p>Thank you for your positive feedback.</p>

<p>2. Further, it is crucial that DD Waiver participants have easy access to this information when deciding whether or not to challenge their SIS Group assignment using the fair hearing process. Due Process requires that each participant be given the information necessary to dispute an unfavorable decision by the Medicaid program, including the specific reasons for denial and the basis for those reasons. <i>Goldberg v. Kelly</i>, 397 U.S. 254 (1970); 42 CFR Section 431.205(d). Including the SIS interview policies, the SIS algorithm, and other data in 8.313.5 NMAC is a positive step toward making sure that participants have access to key information and ensuring that due process requirements are met.</p>	<p>Thank you for your comment.</p>
<p>3. Proposed 8.314.5.13 H(2) NMAC stated that the SIS assessor must provide information about the SIS assessment process prior to starting the SIS assessment, but does not state to whom that information must be provided. DRNM suggests adding a line stating that information must be provided to the participant and all primary and ancillary respondents present for the SIS evaluation. We also suggest the SIS assessment be tape recorded to assure accurate reporting of the results.</p>	<p>The Department has added "primary and ancillary respondents present" to section 8.314.5.13.H.2. The Department will not add language regarding tape recording of the SIS assessments.</p>
<p>4. Proposed 8.314.5.13 I NMAC governs when a DD waiver participant may request a SIS reassessment prior to the expiration of the standard three year schedule. The pertinent passage states that a reassessment can be done when: "the recipient believes there is a substantial departure from the standard guidelines for administering the SIS AND the recipient has experience a change of condition that results in a significant change to the pattern and intensity of supports needed..." (emphasis added). The "AND" in the above sentence must be changed to "OR". Whether a participant believes the SIS assessment was conducted properly is completely independent of any change of condition he or she may experience. The proposal put forward by HSD requires both to occur before a reassessment can be granted. However, a significant change in condition must allow for a SIS reassessment on its own.</p>	<p>The Department changed "and" to "or" in section 8.314.5.13.</p>

<p>5. HSD has added critical information for participants into proposed 8.314.5.13 NMAC, including the algorithm used by the SIS process and notification about the existence of the verification process. DRNM fully endorses these additions. However key items are still omitted by the proposed language:</p> <p>a. The normative table had not be included in the proposed additions to 8.314.5.13 NMAC. This is a particularly glaring omission, as the Department relies almost exclusively on the mathematical formula in that table to reduce services available to some of the most significantly disabled persons in the state.</p> <p>b. Although it is a positive step forward that proposed 8.314.5.13 NMAC mentions the verification process, inclusion of the verification rules/questions themselves is necessary.</p> <p>c. The state should add language to the regulation stating that participants will be sent their SIS evaluations (the sheets containing the questions and their answers as written by the assessor) upon request. DRNM has encountered a number of cases where participants have had questions about whether their SIS assessments were conducted properly. These questions are extremely difficult to answer without access to a copy of the evaluation document. At present, that information is not sent to the participants along with their SIS Group Placement results, but it must be.</p>	<p>a. The Department is unable to add the AAIDD normative table to the proposed regulations due to its proprietary nature. It may be accessed through the SIS manual found on the AAIDD website.</p> <p>b. The proposed regulations will not include the verification rules and questions.</p> <p>c. A report that summarizes the results of the SIS assessment is sent to the recipient. The Department of Health is currently working on revising the report template to include additional information. The Department does not think this is relevant to include in the regulations.</p>
<p>6. The most crucial thing still missing from this regulation is that the state must create a process whereby a participant's SIS Group placement is reviewed if it results in the loss of services that an IDT or medical treatment professional believe is necessary to preserve health and safety. DRNM has encountered numerous cases where participants who have been receiving family living, ancillary therapies, and other necessary services for years are having them removed by the SIS process absent any change in their condition. In most of these cases, medical and treatment professionals maintain that the services eliminated remain critical to meeting the health and safety needs of a participant and should not be reduced or removed.</p>	<p>The Department does not believe that this is relevant to the regulation since the recipient has the opportunity to submit a Group H request and has the opportunity to provide medical documentation/justification through the appeal process.</p>

<p>7. The ability of the SIS process to remove services that medical and treatment professionals believe are necessary for continued health and safety is highly dangerous. DRNM appreciates the proposed addition to 8.314.5.13(G), which states that "ancillary respondents" (such as therapists and doctors) can participate in the SIS evaluation to provide "clinical information that adds perspective" but that does not go nearly far enough to protect waiver participants. If a doctor maintains that a participant cannot live on his own after family living is removed by a placement in SIS Group B, the state must review the information that the professional is looking at to avoid a potentially disastrous result. Courts have long recognized that the judgment of a participant's treating physician is of paramount importance when considering what service are needed under Medicaid. <i>Weaver v. Reagan</i>, 886 F.2d 194, 200 (8th Cir. 1989). As currently implemented, the SIS systems superficially acknowledges the observations of the treatment professionals that know the participant best, while effectively ignoring the input when service allocation decisions are made. In order to comply with the mandates of federal law and safeguard the health and safety of New Mexicans on the DD Waiver, the state must create a process that reviews the case when the SIS assessment and a participant's treatment providers disagree on the continued provision of crucial services.</p>	<p>The Department does not believe that this is relevant to the regulation since the recipient has the opportunity to submit a Group H request and has the opportunity to provide medical documentation/justification through the appeal process.</p>
<p>8. Proposed 8.314.5.14(B) NMAC lists the services generally available to participants based upon their SIS Group assignment. DRNM supports the addition of these descriptions, and has been requesting that the Department add this information to the NMAD since November 2012.</p>	<p>Thank you for your comment.</p>

<p>9. The regulation mandates that participants in groups A-D will lose access to at least one ancillary therapy. Speech and Language Therapy, Physical Therapy, and Occupational Therapy will be available generally under the waiver, but there is a limitation on what participants in A-D can receive. For example, DD Waiver participants in group A can only receive one ancillary therapy. DRNM opposes the limitation of ancillary therapies for any reason other than the judgment of a qualified medical professional or care provider. Therapies should be provided on the basis of individual need and medical evaluation of a person's best interest rather than through categorical denial based on group placement. The limitation upon ancillary therapies should be eliminated from the proposed regulations.</p> <p>In the alternative, the language that conveys these limitations must be changed in order to provide essential clarity. In each section where a therapeutic service is being limited, the suggested regulation states that a certain service must be "prioritized". This sounds like means that they will all be available with one therapy in a primary position over the others. Instead it means that all but one of the therapies will be faded out over time. A DD Waiver participant in SIS Group A will not have access to three ancillary therapies; will have access to one once the fade of other therapies is complete.</p> <p>This is needlessly confusing for participants, their families and caregivers. Instead of using the "prioritize" language, the state should clearly assert how many ancillary therapies will be available in each SIS Group package over the long term.</p>	<p>Thank you for your comment; however, the Department will not change the limitation of therapies.</p>
<p>10. Proposed 8.314.5.14(D) adds a description of the Group H process to the NMAC. This is a key addition to the state regulations that DRNM fully supports. Our agency has long maintained that the H systems - which provides additional Medicaid services to those with complex medical or behavioral needs - is broken and inaccessible to DD Waiver participants. The main reason for this is because of the failure of the Department to make information about the workings of the H process available to DD Waiver participants, their caregivers, or their IDT so that they can use it to request additional services. The constructive absence of a process through which a participant may request additional Medicaid services is a violation of both the Americans with Disabilities Act 42 U.S.C. Section 12132 (2006) and Section 504 of the Rehabilitation Act. 29 U.S.C. Section 794(a). DRNM has encountered numerous cases where DD Waiver participants and those assisting them had little idea how or when to use the H Process, and have been asking that the Department address this problem since the original regulations were made known in November 2012.</p>	<p>The Department will not add additional language to the newly added Group H description.</p>

<p>11. The additions made in proposed 8.314.5.14(D) lay out the H process in some detail, and go a long way toward addressing this longstanding problem. DRNM and the Department are now in agreement that the workings of the H process must be publicized and included in the NMAC. DRNM believes the following changes are necessary to clarify and refine the presentation of the H process to the public:</p> <p>a. Proposed 8.314.5.14(D)(3)(e) asserts that a decision concerning whether to provide services under H will be based on whether the request meets "the definition of extenuating circumstances or extremely complex needs." This section states that this definition will be based on DDS criteria, but does nothing further to define the terms that decide whether a participant receives additional services. These terms must be defined within this section of the NMAC.</p> <p>b. No timeline is given for when a participant can expect a decision concerning his or her H application from the time it is submitted. A number of DD Waiver Participants and those assisting them have approached DRNM asking about how long an H application might take; so far there is no known answer. A waiver participant should be able to anticipate a response within a definitive timeframe so as to aid in treatment planning for critical services. HSD should add an H timeframe to this policy; DRNM suggests that an answer must be given no later than 10 date after all information pertinent to the H application has been received.</p>	<p>The Department of Health addresses the definition of extenuating circumstances or extremely complex needs in their policies and procedures. This language will not be added to this proposed rule.</p>
<p>12. The proposed definition and use of "SIS sum ABE" in the administration of the SIS is a crucial part of the SIS assessment and the Group assignment process. Under proposed 8.314.5.13 K (5) NMAC, "SIS Sum ABE" determines a waiver recipient's assignment to four SIS Groups (A, B, D, and E). These SIS Groups serve a level of need from mild to high support. The services provided in these groups range from one to three therapies and two groups provide 24-hour care and two do not. The definition presented here is therefore critical.</p> <p>The Department provides no reason to only include support needs scale parts A, B and E in this definition. DRNM is especially concerned that the definition excludes support needs scale part C (lifelong learning) in a waiver that primarily serves persons with intellectual disabilities.</p> <p>The Department has excluded support needs scale parts C, D and F from any role in the SIS Group assignment process. The Department must provide its reasons concerning why certain parts of the support needs scale are used and others are excluded before it can be determined whether it should be part of the SIS evaluation process.</p>	<p>The Department will not add language to this section of the regulations.</p>
<p>13. Proposed 8.314.5.14D(1)(b) NMAC add "or family living" Recipients who are in family living at age 55 should be treated the same as those in supported living.</p>	<p>The Department will not add "family living" to this section of the regulation.</p>

<p>14. The version of these regulations currently in place clearly violates federal law by placing restrictions on what issues a DD Waiver participant can raise at a fair hearing. 42 CFR 431.220(a) (1) and (2) do not allow for these kinds of restrictions, mandating that the participant's right to raise issues during an administrative appeal be as broad as possible. DRNM has been asserting that the state must restore full hearing rights in order to comply with federal law since November 2012.</p> <p>Newly proposed 8.314.5.19 NMAC shows that DRNM and HSD are now in full agreement concerning this issue. The offending language has been deleted, replaced with a line stating that a hearing must be granted pursuant to 42 CFR 431.220 (a)(1) and (2). This change appears to fully solve the issue of hearing rights going forward, and DRNM endorses it.</p>	<p>Although the comment is incorrect in claiming that the current version of the regulations violates federal law, we thank you for your comment.</p>
<p>15. The Department must also add a section to this regulation concerning adequate notice of appeal rights that must be provided to all DD Waiver participants. DRNM suggests the following language: "The Department of Health shall send the SIS Group assignment notice to the recipient and the case manager. The notice shall include the algorithm and normative table. Pursuant to 42 CFR Section 431.210, the notice must provide the reasons for the recipient's SIS Group assignment. The notice must state whether the assignment was based on the SIS sum ABE for SIS Groups A, B, D and E or the medical support score for SIS Group F or the behavior support score for SIS Groups C and G. The novice must also state if the verification process was triggered. If the verification process did not change the recipient's SIS Group assignment the notice must state the reason why the services were not approved.</p> <p>This section must be added to bring the SIS process in compliance with federal regulations. The waiver participant must have a clear and simple notice so the recipient can understand why he/she was assigned to a specific SIS Group or whay the recipient's request for H Group services was rejected.</p>	<p>The commenter is incorrect in stating that HSD must include proposed language in order to comply with federal law. The notice provided by DOH meets the test set forth in <u>Mullane v. Central Hanover Bank & Trust Co., 39 U.S. 306 (1950)</u> in being "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".</p>
<p>16. Finally, the following language must be added as 8.314.5.19 A (1) NMAC</p> <p>"The recipient's decision not to participate in an agency conference or file an application for H Group services cannot be raised as a defense in a fair hearing challenging the recipient's SIS Group assignment."</p> <p>This addition to the regulations is needed because the Department of Health has argued in most fair hearings attended by DRNM that the recipient's failure to participate in an agency conference or file and H Group application invalidates their fair hearing request to change their SIS Group assignment. There is not support in the law for this position; 42 CFR 431.220(a) (1) and (2) ensures that participants can raise issues concerning their DD Waiver services without restriction during the fair hearing process. Requiring participants to submit to the H process or an agency conference before their argument can be heard at fair</p>	<p>The commenter is again incorrect regarding the alleged violation of federal law. The Department will not add language to this section of the regulations.</p>

<p>hearing violates federal law.</p>	
<p>17. The changes HSD proposes to 8.314.5 NMAC do not fully address or correct the problems with the implementation and utilization of the SIS in the state of New Mexico. However, these additions and alterations represent a positive step forward, as HSD has acknowledged a significant number of the legal infirmities in the original November 2012 regulations and has attempted to correct them going forward. DRNM commends HSD for addressing the initial violations of law and good practice that have long required correcting.</p>	<p>Thank you for the comment.</p>
<p>18. Yet further steps are necessary to fix a broken SIS process. The state must allow any DD Waiver participant who disagrees with his or her Group assignment as provided by the current regulations to have another SIS evaluation if it is requested. By making drastic alterations to 8.314.5 NMAC - many of which were suggested by DRNM and others in the community since this process began - the Department is tacitly acknowledging that the current regulations are improper and not in accordance with law. The proposed regulations are much closer to where they should be than the original version, but will do little to help the majority of New Mexicans who have already gotten their SIS assessments through the operation of the deeply flawed current regulations.</p>	<p>The Department has not 'tacitly' acknowledged that the current regulations are "improper and not in accordance with the law". Rather, the Department affirmatively states that the regulations as currently promulgated fully comply with State and Federal law. All recipients under the prior waiver were offered the opportunity of availing themselves of a second SIS assessment in their transition to the new waiver. The State will not amend the regulations to allow new participants to opt for multiple SIS assessments.</p>
<p>19. In sum, HSD has managed to fix a number of the problems with the SIS process going forward. The Department must now apply those fixes retroactively to those who did not get a change to benefit from them when their assessment was done. DRNM commends many of the things that the Department is doing through these proposed revisions, and challenges HSD to do the right thing and make these changes available to all DD Waiver</p>	<p>As all prior assessments have been done in full accordance with state and federal law, the Department will take no retroactive action.</p>

<p>Participants.</p>	
<p>20. SLCO believes that the regulations should not prohibit medical, behavioral, or therapy professional from being primary respondents to the SIS. These professional may have critical information about the DD Waiver recipient's functional capacity and medical, behavioral, or therapeutic needs but may not meet the observation requirement set out in (E)(2).</p>	<p>The language is not prohibitive but does define parameters for qualified respondents. The Department will not change the language in the regulation.</p>
<p>21. SLCO is concerned that HSD does not provide information about how the raw score on the SIS is converted into the score that determines which DD Waiver service package an individual will receive. Subsection (K) (there are two Ks in 8.314.5.13; one before the table and one after the table. The numbering should be corrected.) provides "NM DDW groups A through G are assigned through standardized application for decision rules associated with select SIS scores, and when relevant, the supplemental question verification process." HSD provides no explanation or definition of the phrases "standardized application," "decision rules," or "supplemental question verification process." Also there is not information about which SIS scores are the "select" scores that will be used to determine eligibility.</p>	<p>Additional language is not required in the regulations. Interested parties may access information sought by the commenter about how the SIS raw scores are converted into the SIS standard scores by accessing the AAIDD website or purchasing a manual. The select SIS standard scores that determine placement into the DD waiver group are outlined in the regulations. The second "K" has been corrected - thank you for your comment.</p>
<p>22. DD Waiver recipients should be able to find in the regulations an explanation of how the raw score on the SIS is converted into the standard score that will be used to determine their DD Waiver service package. This information is important to DD Waiver recipients because it tells them how far away their raw score is from a different scaled score, and thus how far their score is away from a different service package. the conversion of the SIS raw score to a standard score and the verification process are both used to determine eligibility for a particular package of DD Waiver services and must be adopted as regulation. See NMSA 1978, Section 9-8-6(E) and (H) (rules that affect people outside the agency must be adopted by HSD pursuant to notice and comment.</p>	<p>The Department will not add language to this section of the regulations. Interested parties may access information about how the SIS raw scores are converted into the SIS standard scores by accessing the AAIDD website or purchasing a manual.</p>

<p>23. Similarly, HSD leaves out other important information regarding how medical and behavioral support scores are evaluated in determining a DD Waiver recipient's service package. Proposed sections 8.314.5.13 (K)(3) and (4) state that extraordinary medical risk, dangerousness to others, and self injury risk are "determined by verification of responses to supplemental questions through a document review by two subject matter experts." There is no explanation of what documents will be reviewed, who the subject matter experts will be, what subject they have to be expert in, and what they will be trying to 'verify.' In any event, the opinion of subject matter experts who are not treating physicians of the DD Waiver recipients should not be given more weight than the DD Waiver recipient's treating physician.</p>	<p>The Department will not add language to the regulation.</p>
<p>24. SLCO is please that HSD proposes to include the DD Waiver regulations a description of the waiver services available for each DD Waiver group. However, capping the budget amount for each service package and limiting therapy services available under each DD Waiver service package does not necessarily provide DD Waiver recipients a service package sufficient in amount, duration, and scope to meet their needs, and could put those with more severe disabilities at risk of institutionalization. The SIS results are given more weight than the DD Waiver recipient's treating professionals and team. The creation of category H for individuals with extenuating circumstances or extremely complex needs is not a reasonable accommodation to the arbitrary caps and limitations. Group H is a system operated in the dark, without clear standard readily available for DD waiver recipients to review. Pursuant to proposed 8.314.5.14 (D)(2)(d) and (D)(3)(e), determinations about eligibility for Group H are based on "criteria from DDS," but the criteria are not set out in the regulations. These criteria need to be adopted as rules so the public is afforded an opportunity to comment on them, and so DD Waiver recipients can find them and challenge adverse determinations. See NMSA 1978 Section 9-8-6(E).</p>	<p>CMS provides State Medicaid Agencies the latitude to design a waiver program that is cost-effective and employs a variety of delivery services. Federal law specifically states that "a state agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures" (42 CFR, 440.230(d)). The Department's resource allocation system assigns service packages that are based on group designation and living arrangements. As the DD waiver groups and their relative budgets were carefully developed and are far from 'arbitrary' there is no reasonable accommodation required by the Department as is claimed by the commenter. Contrary to the claim of the commenter, the services available under Group H are both designed and operated to provide a safety net to participants by making available additional services that may not be available in their designated groups. Accordingly, the Department will not supplement the newly added Group H description.</p>

25. Finally, proposed regulation 8.314.5.14 (D)(1)(b) allows individuals over 55 who have been on DD Waiver supported living prior to March 1, 2013, to receive categorical assignment to Group H and to continue to receive their supported living services if they wish. However, individuals who are over 55 and have been receiving family living are not provided the categorical assignment to Group H and offered the option of having their family living continued. The distinction seems arbitrary and unreasonable. There seems to be no clear underlying policy that would justify the treating of those two groups of individuals differently. Both groups over 55 should be able to continue to receive their living supports.

The Department will not add "family living" to this section of the regulation.

VI. RULE

The above referenced rule will be contained in the Medical Assistance Division Program Policy Manual. This Final Register and rule will be available on the HSD website at <http://www.hsd.state.nm.us/LookingForInformation/registers.aspx> and the corresponding rules will also be posted at on the HSD website at <http://www.hsd.state.nm.us/providers/rules-nm-administrative-code-.aspx>. If you do not have internet access, a copy of the rules may be requested by contacting the Medical Assistance Division at 505-827-3152.

VII. EFFECTIVE DATE

This rule will have an effective date June 15, 2014.

VIII. PUBLICATION

Publication of these rules approved by:



SIDONIE SQUIER, SECRETARY
HUMAN SERVICES DEPARTMENT