



State of New Mexico
Human Services Department
Human Services Register



I. DEPARTMENT

NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT

8.321.2 NMAC, SPECIALIZED BEHAVIORAL HEALTH SERVICES

III. PROGRAM AFFECTED

(TITLE XIX) MEDICAID

IV. ACTION

FINAL RULE

V. BACKGROUND SUMMARY

New Mexico Human Services Register Volume 42, Register 20, dated 8/28/2019, issued the proposed rule, 8.321.2 NMAC, Specialized Behavioral Health Services.

Section 9-8-6 NMSA 1978, authorizes the Department Secretary to promulgate rules and regulations that may be necessary to carry out the duties of the Department and its divisions.

Notice Date: September 10, 2019

Hearing Date: October 16, 2019

Adoption Date: January 1, 2020

Technical Citations: 42 CFR 400-1099

A public hearing was held on October 16, 2019, to receive public comments and testimony on this proposed rule. The Human Services Department (the Department) received eight written comments and one oral comment.

Summary of Comments

Section 9 Subsection D

One commenter asked whether the new types of agencies, that are added to the list of agencies that may utilize non-independent practitioners under supervision for rendering behavioral health services will be required to obtain Supervisory Certification from BHSD.

Department Response: The new agency types that were added are not required to have Supervisory Certification from BHSD, unless they intend to render BH services by non-independently licensed clinicians.

Section 9 Subsection E

One commenter stated that requiring all practitioners to be enrolled as a MAD provider is unrealistic and ineffective as interns are typically only on site for about 3-6 months and obtaining a MAD provider number takes at least 30 days.

Department Response: For Medicaid reimbursement, a behavioral health practitioner must be enrolled and identifiable by the Medicaid system. The language stands as proposed.

One commenter inquired whether the reference which adds new non-independent practitioners to the list of those that can render services within one of the agencies listed in Subsection D, is intended to restrict individuals who do not have NPI's and cannot register with Conduent or be a rendering provider, to provide and bill for services under their supervisor only, if the agency they work for has a Supervisory Certification.

Department Response: Yes, it is the intent to have those individuals who do not have NPI's and cannot register with Conduent or be a rendering provider to provide and bill for services under their supervisor.

Section 12

One commenter requested the addition of the Developmentally Disabled Waiver (DDW) to the list of options for coordination with other services; and requested clarification that ABA is a covered benefit for adults.

Department Response: The Department appreciates the comments. The language of the rule has been revised in this section in accordance with the commenter's suggestions.

Section 12 Subsection A

Two commenters expressed support for the introduction of Behavior Analysts to be reimbursed for services provided in school settings.

Department Response: The Department appreciates the comment. The language stands as proposed.

Two commenters urged the Department to consider removing the diagnosis-specific coverage criteria for accessing the ABA benefit, citing potential benefits when the service is not limited by age or diagnosis.

Department Response: The Department may consider expanding the diagnostic criteria for ABA at a later time. Additional research is required to determine the effectiveness of this service for treating other conditions. The language stands as proposed.

Section 12 Subsection B

One commenter expressed concern that the proposed language in this section is not being recognized by Conduent, the Department's fiscal agent, and has caused enrollment delays for employees. The commenter stated that language should be added confirming that a provider has one year to take their BCBA exam from the date submitted on their attestation.

Department Response: The Department thanks the commenter for raising this issue. The ABA Program Manager will work with Conduent to ensure that providers are receiving consistent directions and claim adjudication. The Department does not believe that additional changes are necessary to the rule; the language stands as proposed.

One commenter asked why criteria for other providers is specified in the proposed rule but not for a behavioral technician.

Department Response: The Department intends to include these details in future revisions of the Behavioral Health Policy and Billing Manual. The Department does not believe that these details are appropriate or necessary for the regulatory language. The language stands as proposed.

Two commenters suggested adding a Behavior Analyst Candidate to the list of covered providers to address the state's provider shortage for ABA.

Department Response: The Department may consider adding this provider type through future rulemaking or via the Behavioral Health Policy and Billing Manual; however, it is not doing so at this time. The language stands as proposed.

Two commenters recommended that individuals in a residential facility be able access Stage 2 and 3 ABA services with a diagnosis from one of the approved provider types while waiting for an evaluation. The commenters expressed concern that many individuals in a residential facility will be adults and that the regulatory requirements could result in delays in their treatment.

Department Response: The rule currently states that a recipient may be referred for ABA services with a diagnosis of ASD by other medical provider types to expedite access to ABA stage 2 services. The Department does not agree that further clarity is needed, since this section already allows for stage 2 ABA services to begin when a diagnosis is provided by one of the provider types listed in the proposed rule. The language stands as proposed.

One commenter recommended removing the requirement to register as a Registered Behavior Technician (RBT) or changing this requirement to allow for longer time for the provider to obtain certification. The commenter further requested that if the requirement is kept, it not be limited to the BACB alone, but open to other ABA certifying boards.

Department Response: The Department allows for other credentialing boards for consideration of their specific ABA certificate. However, the Department must ensure that the ABA certificate programs and their practitioners are held to the same standards as the BACB does for other provider types. The Department will take these comments under consideration for a future rule change. Additional research is needed on the potential impact of these suggested changes and alternative ways to expand ABA certification programs. The language stands as proposed.

Section 12 Subsection C

One commenter asked why the proposed regulatory language removes the age for “at-risk”. The commenter stated that “at-risk” is generally clinically defined as up to age three.

Department Response: The Department is aware that the current requirements to meet the at-risk criteria are based on well-researched findings that a child between the ages of 12 months up to three years may not present during that time with the requirements to meet a full diagnosis of autism spectrum disorder (ASD). The Department has revised this section of the rule to clarify the clinical recommendation and to accord with current research.

Section 12 Subsection D

One commenter expressed concern that the term “residential facility” is unclear.

Department Response: A residential facility as intended in this section means any type of residential facility (such as a residential treatment center or group home) or other type of institutional setting. The Department has added clarifying language but chooses not to define this term further, which could unintentionally limit the types of settings that are meant to be included in this section.

One commenter expressed that the language in this section is unclear and asked whether residential facilities are expected to provide ABA.

Department Response: The Department believes that this section is clear; however, there was a typo in the proposed rule that has been corrected. The typo refers to residential providers offering ABA services to the extent that they are *unable* to do so. The correct word should be *able* in this sentence. This may have been a cause for misunderstanding and has been fixed in the final rule language.

Section 12 Subsection E

Two commenters suggested that due to the complexity of ABA treatment and individual reactions, a Board Certified Behavior Analyst (BCBA) should be part of the utilization review (UR) team.

Department Response: The Department refers the commenters to 8.308.15 NMAC, which requires that managed care organizations (MCOs) must utilize a health care professional with

appropriate clinical expertise to make the UR determination to approve or deny a requested service. The language stands as proposed.

Two commenters requested that the criteria “age out of comprehensive ABA services” be removed because it is not aligned with standards of care or best practices.

Department Response: The commenters are correct. There is no maximum age limit for receiving comprehensive ABA services. The language has been revised accordingly.

Section 12 Subsection F

One commenter pointed out that there is now no maximum age range for receiving ABA services.

Department Response: The Department thanks the commenter for finding this error in the proposed rule. The language in this section has been stricken from the final rule.

Section 13 Subsection A

One commenter conveyed that the statement “Previously, the team leader was required to be a psychiatrist” in Section 13, Subsection A of 8.321.2 is inaccurate. The prescriber for the team was required to be a psychiatrist.

Department Response: The commenter is correct. Previously, each Assertive Community Treatment (ACT) team was required to include at least one board certified or board eligible psychiatrist, but a psychiatrist was not required to be the team leader.

One commenter expressed concern regarding Certified Peer Support Worker (CPSW) training access issues. Specifically, CPSW certification is now required; however, there is a long waitlist for the training which bottlenecks supply and demand. The Behavioral Health Services Division (BHSD) advised that Peer Support Workers could have lived experience and work in Assertive Community Treatment (ACT) while awaiting placement into class; however, there are individuals who have been waiting for six months for the class to open.

Department Response: The Department recognizes there is a backlog of training, despite increased training opportunities that have been offered over the past couple of years. The state is working to reduce the wait time for training.

Section 14 Subsection B

The commenter supports the removal of the requirement for an updated assessment in Section 14, Subsection B and indicated this change removes a probable violation of parity.

Department Response: The Department appreciates the commenter’s support.

Section 16

One commenter stated there is a lack of clarity in Behavior Management Skills (BMS) Medicaid definition services related to education and special education.

Department Response: The Department agrees that BMS regulations need to be clarified with regard to BMS and special education; clarification needs to happen across the educational domain. The Department will work to make improvements in this area.

The commenter requested that clarification be added to NMAC or the BH Policy and Billing Manual to inform providers about how to pursue certification for new services. The individual conveyed there is confusion as to whether respite is approved by CYFD or BHSD.

Department Response: The Department appreciates this being brought to its attention and will work with BHSD and CYFD on this issue.

Section 18 Subsection A

One commenter indicated that Comprehensive Community Support Services (CCSS) training requirements appear to have removed grandfathering and now require state training only. According to the commenter, this change will be burdensome because the class is only held once every other month at UNM. The change will bottleneck onboarding for agencies.

Department Response: The State is considering other training options.

One commenter inquired as to whether the Comprehensive Community Support Services (CCSS) supervisor criteria will continue to allow supervisors with years of experience in lieu of a bachelor's degree to continue to be permitted.

Department Response: At this time, the Department is uncertain as to whether this substitution will continue to be permitted.

Section 20 Subsection C

One commenter asked for clarification regarding what provider type can provide Crisis Triage Center (CTC) outpatient crisis stabilization and residential services.

Department Response: The following types of providers can provide CTC services: provider type 342 with a specialty type 246 for residential or both residential and non-residential; and provider type 342 with a specialty type 247 for non-residential only.

Section 24 Subsection A

One commenter advocated for broader inclusion of additional diagnoses in the inpatient IMD waiver. Currently only substance use disorder (SUD) patients/diagnoses are included.

Department Response: The Department is considering allowing for other diagnoses to be included in the inpatient IMD waiver.

One commenter expressed that the Medicaid Provider due process rules should be incorporated into NMAC and Medicaid policy.

Department Response: The Department feels it unnecessary to add to the New Mexico Administrative Code (NMAC). This is state statute; SB41 passed.

The Department appreciates all of the commenters' comments.

VI. RULES

These amendments will be contained in 8.321.2 NMAC. The final register and rule languages are available on the HSD website at:

<https://www.hsd.state.nm.us/LookingForInformation/registers.aspx> . If you do not have internet access, a copy of the final register and rules may be requested by contacting the Medical Assistance Division at (505) 827-1337.

VII. EFFECTIVE DATE

This rule will have an effective date January 1, 2020.

VIII. PUBLICATION

Publication of these rules approved by:



DAVID R. SCRASE, M.D., SECRETARY
HUMAN SERVICES DEPARTMENT