

From: [Chris Mechels](#)
To: [Burmeister, Christopher, DOH](#)
Subject: [EXT] 7.8.2 Rulemaking comment #4
Date: Friday, September 25, 2020 4:34:09 PM

Dear Sir,

This comment is to support and extend my comments at today's hearing.

The first area I will comment on concerns the Rules Act violations of the changes concerning both 7.8.2 and 7.9.2. These changes belong together as they concern the same changes to the age requirements of direct care providers. The changes are so closely connected that the 7.9.2 transmittal on 3/26/2020 was mistakenly submitted with 7.8.2 information, which was of course useless. The following errors are found on the Sunshine Portal.

7.9.2 on 3-24-2020: This set a Rules Hearing for 5-6-2020. It violates the Rules Act by declaring its Purpose to be: "receive public comments regarding the proposed repeal and replacement of the rule, 7.9.2 NMAC". This is false, and misleading, as the Real Purpose is to lower the age of employment from 18 YOA to 16 YOA. The repeal and replacement are incidental to this purpose.

7.9.2 on 3-26-2020: There is an Emergency Rule, which lowers the age of employment from 18YOA to 17YOA. It violates the Rules Act as the required Purpose on the SSP entry. The Transmittal is also in violation as it contains material for a 7.8.2 submittal on the same date, not the 7.9.2 material. It also fails to establish a credible reason for the Emergency Rulemaking as required.

7.9.2 on 5-6-2020: This hearing information violates the Rule Act by misstating the Purpose as detailed earlier, by not filing the required information in the Record, including the Concise Explanatory Statement, and by not conducting the hearing in compliance with NMAC 1.24.25, the Default Hearing Procedure, as required.

7.8.2 on 3-26-2020: This is an Emergency Rulemaking, which has two of the same issues as the 7.9.2 Emergency Rule listed above; with no required Purpose and no credible reason for an Emergency Rule.

7.8.2 on 8-18-2020: The Public Hearing, posted on 14 July, violated the Rules Act by not posting the hearing the SSP. This led to a cancellation on 8-11-2020 which was also a violation, as it was not posted to the NM Register as required and was not posted in the media as required.

7.8.2 on 9-25-2020: This Public Hearing violated the Rules Act by failing to describe the Purpose as required. It simply said that 16 YOA would replace 18YOA, with no reason given. Repeated emails concerning this email produced no effect, and the Hearing Officer would not allow questions on this, or any, matter. He would not supply a legal basis for his refusal. This violated NMAC 1.24.25..

It seems that the Department of Health, and the Hearing Officer are either unaware of, or unwilling to abide by, the Rules Act, thus the hearings are invalid. Some of the errors are simply sloppiness, such as submitting 7.8.2 materials for the 7.9.2 Emergency Rule. The SRCA also seems remiss in not catching the many blunders and Rules Act failures.

Checking the Department of Health Rulemakings since the 2017 Rules Act changes I find NO hearing which did not violate the Rules Act. It seems, from the Record, that the Hearing Officer, Mr. Erickson, was unaware of NMAC 1.24.25 until the 7.1.30 hearing, when I brought it to his attention. Now aware of it, he refuses to follow it. A sorry showing, by Erickson and the DOH, which employs him.

As for the substance of the changes to 7.8.2 and 7.9.2, these changes lower the age for direct employees at Long Term Facilities and Nursing Homes from 18YOA to 16YOA. This is obviously intended to employ more high schools students. No reason is provided, in spite of my requests, so we must assume a shortage. This change was discussed, briefly, at the 7.9.2 hearing, as intended in January 2020 by the Secretary of Health, therefore it was not Covid related. Bringing the changes as Emergency Rules seems unwarranted, and simply to avoid any public input

to the process. The simply used Covid as a dodge, to avoid using a proper hearing. This seems part of the overuse of Emergency Rules under the current administration, with 23 such Rules in 2019, pre Covid, and 26 to date in 2020. During the 7 years preceding this administration the average use of Emergency Rules was 10 per year. This reflects very poorly on the Governor, as these Emergency Rules bypass the public involvement required under the Rules Act. It shows a profound lack of respect for our laws and our processes.

As for the effect of these changes, they can be murderous. Our reopening of the schools at the current time is very contentious, and very fraught. We have learned that children, such as those 16 and 17 years of age involved in this change, are more likely than adults to be asymptomatic with Covid, so they can go undetected and infect others. We have also learned that our nursing homes are very deadly with Covid, with over 40% of the Covid deaths, not just in New Mexico, but across the nation.

With reopening of the schools, the Governor, and Dr. Scrase, have told us that Covid cases are expected to increase, due to the schools. This sets up a conduit from the highs schools to the nursing homes, via the 16 and 17 year olds, which need not exist. It seems a way to kill nursing home residents, or at least raise their risk of death. Even it the change was appropriate in January 2020, it seems very questionable knowing what we know today.

At minimum, these changes are illegal/invalid, and need to be halted and redone. The changes also demand a thorough, and open, discussion as lives are at risk in this decision. The purpose of the Rules Act is to allow public input to Rules Making, to enable that discussion. It is precisely that input that the Department of Health, and Mr. Erickson, are intent on preventing, with their illegal actions.

I therefore call on the Department of Health, and the Governor, to desist with these changes. The changes are illegal/invalid as detailed above, due to to sloppy, inept, administration and overuse of Emergency Rules. Lives are at risk due to these changes, and obvious parties, such as parents, schools and nursing homes, and the patients, deserve an OPEN hearing, before the changes are in place.

Obstructing this public involvement, as DOH has done, is undermining our very Democracy, and shows a contempt for the people of New Mexico and their well being.

I look forward to a better performance by the DOH in the future, and a bit more respect for our lives, rights and laws.

Regards,

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