IN THE MATTER OF ADOPTION OF RULES FOR THE PATIENT'S COMPENSATION FUND

DOCKET NO. 21-0005-PCF

REPORT OF:

Robert J. Desiderio, Hearing Officer

Pursuant to a Notice of Proposed Rulemaking, dated September 14, 2021, the Superintendent of Insurance ("OSI") proposed to repeal and replace Parts 1 and 2 of 13.21 NMAC, amend Parts 3 and 4 of 13.21 NMAC, and adopt a new Part 5 of 13.21 NMAC. The rules are being promulgated pursuant to Section 41-5-25 NMSA 1978. The Notice called for a public hearing on April 1, 2019 and solicited written comments. The purpose of the rule making is to bring the current Patient's Compensation Fund ("PCF") rules into conformity with the House Bill 75 amendments to the New Mexico Medical Malpractice Act ("MMA") that were adopted in the Regular Session of the 2021 Legislature. The public hearing was held on October 18, 2021, at which the Hearing Officer presided.

Pre-hearing written comments were received from Thomas M. Landrigan, Corporate & Regulatory Counsel for MedPro Group.

Post-hearing written comments were received by Annie Jung, Executive Director, New Mexico Medical Society ("NMMS") and Deborah E. Mann, Esq., Sutin, Thayer & Browne, PC, representing the New Mexico Hospital Association ("NMHA")

At the Public Hearing, R. Alfred Walker, Legal Counsel for OSI, Craig Sherbonby, Vice President of MedPro Group, Thomas M. Landrigan of MedPro Group, and Nick Autio, Esq., representing NMMS gave public comment.

No responses were submitted.

This report will address and respond to the oral and written comments to the rules addressed by each commentator. The Hearing Officer will not speak to rules not in controversy. The Hearing Officer will address each commentator's recommendation with respect to the specific rule in question.

Throughout this report, the commentators will be referred to as follows:

MedPro Group – MedPro

New Mexico Medical Society – NMMS

The New Mexico Hospital Association – NMHA

1. **Rule 13.21.1.7 (G)**

NMHA recommends that the word "means" be added after "**Slot coverage**". The Hearing Officer agrees with this recommendation. "Means" appears to have been inadvertently omitted from the defined.

2. **Rule 13.21.1.8 (I)**

NMMS recommends that the following language be added to the end of the rule: "and obtain approval from the superintendent or superintendent's designee before entering into an agreement involving."

The Hearing Officer agrees with adding this language; the superintendent should have final approval.

3. **Rule 13.21.1.8 (M)**

NMMS recommends that the following language be added at the beginning of the rule: "subject to the approval from the superintendent…"

Similar to 13.21.18 (I), the Hearing Officer agrees with the recommendation.

4. **Rule 13.21.1.9**

NMMS recommends that the PCF advisory board should be included as persons whose expenses are borne by the fund. According to NMMS, the rule should state: "All expenses incurred for, by, or on behalf of the superintendent, the TPA, or the PCF advisory board in the administration, operation and defense of the fund shall be borne by the fund."

The Hearing officer agrees with this recommendation; advisory board members should be reimbursed for their expenses that are related to fund responsibilities.

5. **Rule 13.21.1.12**

NMHA recommends that the rule be amended to provide that the superintendent approve the forms. The rule would read: "The TPA, with the approval of the superintendent, may prescribe forms…"

The Hearing Officer agrees that the superintendent should have final approval of the forms.

6. **Rule 13.21.2.8 (C) (1)**

MedPro recommends deletion of "qualified" before "healthcare provider" in the first line of the rule. MedPro's reason is that "qualified health care provider" is not defined, and it appears unclear whether "qualified health care provider" has a different meaning from "health care provider."

The Hearing Officer does not agree with the proposed amendment. "Qualified health care provider" is defined in Rule 13.21.1.7 (E), which adopts the definition in MMA Section 41-5-3 (A), [1]and ends "who is admitted to the fund…" Section 41-5-5 then specifies the requirements for a "qualified health care provider." Thus, a qualified health care provider is a health care provider as defined in MMA 41-5-3 (C), who is "qualified" under Section 41-5-5.

7. **Rule 13.21.2.8 (C) (1), (C) (2)**

NMMS recommends deleting both Rule 13.21.2.8 (C) (1) and Rule 13.21.2.8 (C) (2). Its reasoning is that the definition of an independent provider only includes individual health care providers, not health care providers that are qualified under MMA 41-5-5. Its conclusion is that a qualified independent provider, may be admitted to the PCF irrespective of whether any of its individual health care providers are qualified.

MedPro, on the other hand, accepts that at least one of the individual health care providers must be a qualified health care provider, although others may not be qualified. It, however, would not require that health care providers, who are not covered by an independent providers malpractice liability policy, prevent the independent provider from being eligible for admission to the fund.

[1] Rule 13.21.2.8 (C) (2) actually provides that "health care provider is defined in MMA 41-5-3 (C). Reference to Section 41-5-1 (A) as the definition of "healthcare provider" is incorrect. The cite should be "Sub-section C of Section 41-5-3 NMSA 1978 (2022)"

According to the Hearing Officer, the issue is not whether all members or employees of an independent provider must be qualified health providers, but whether such a requirement is consistent with the Medical Malpractice Act ("MMA"). The opinion of the Hearing Officer is that the MMA does not require members or employees of an independent provider to be qualified health providers. MMA Section 41-5-3 (C) includes within the definition of a health provider a New Mexico business entity "that provides health care services primarily through natural persons defined in this subsection; that is specified individual health care providers." Section 41-5-3 (E) adds that an "independent provider" is a business entity "that employees or consists of members" who are specified, licensed individual health care providers. MMA Section 41-5-5 (A) then details the conditions for a health care provider to be "qualified" without adding that an independent provider must employ or consist of qualified health care providers. Thus, the MMA does not prescribe that an independent provider's employee or have members that are qualified health care providers.

8. **Rule 13.21.2.9 (B) (2)**

NMHA recommends that Rule 13.21.2.9 (B) (2) be amended to provide that the exception for hospitals and outpatient health care facility be: "for so long as such hospital or outpatient health care facility participates in the fund". NMHA's reasoning is that "demonstration of financial responsibility is required of hospitals and outpatient facilities applies only during the time the hospitals and outpatient facilities remain in the fund, currently through December 31, 2026."

The Hearing Officer does not agree with this proposed amendment. Rule 13.21.2.9 (B) (2), as written, merely reflects that a hospital or outpatient health care facility is not required to acquire a "per occurrence" policy. MMA Section 41-5-5 (A) (1), on the other hand, states that a hospital or outpatient health facility "may use any form of malpractice insurance." Rule13.21.2.9 (B) (2) does not address what if any financial responsibilities hospitals and outpatient health care facilities have after December 31, 2026. Sec MMA §41-5-5 (C) (indicating that hospitals and outpatient health care facilities must meet the financial responsibilities after December 31, 2026, to enjoy the other provisions of the MMA, most importantly the limitation on damage recovery.)

9. **Rule 13.21.2.11 (A)**

NMMS's recommends that Rule 13.21.2.11 (A) be changed to read:

> The superintendent shall perform a risk assessment for each applicant hospital or outpatient health care facility seeking participation in the fund. As part of the risk assessment process, each applicant hospital or outpatient health care facility shall provide, at a minimum, the hospital's or outpatient health care facility's direct and indirect cost information as reported to the federal centers for Medicare and Medicaid services for all self-insured malpractice claims, including claims and paid loss detail, and the claims and paid loss detail for any professional liability insurance carriers for each hospital or outpatient health care facility and each employed health care provided for the last eight years to the third-party actuary.

NMMS's reason for the change is to accord the rule with MMA Section 41-5-25 (D).

The Hearing Officer agrees with the change because MMA Section 41-5-25 (D) requires that direct and indirect cost information reported for Medicaid and Medicare services by submitted to the superintendent.

The Hearing Officer, however, recommends that the following language be added at the end of the rule as amended by NMMS:

> The superintendent may also consider the information and documents that the applicant submitted to its insurer, all of which, if requested by the superintendent, shall be provided to the superintendent by, or on behalf of the applicant, along with all other information that the superintendent has or requests of the applicant.

10. **Rule 13.21.2.11 (B)**

NMMS recommends that "from New Mexico claims and lost expenses" be added in the last line of the rule before the word "among". NMMS reasons that under MMA Section 41-5-25 (D), the data must be collected from "New Mexico claims and lost expenses."

The Hearing Officer agrees with the recommended amendment as it is consistent with MMA Section 41-5-25(D).

11. **Rule 13.21.2.11 (E)**

NMMS recommends that the application by a hospital or outpatient health care facility for admission to the fund be submitted to March 1 of the year prior to first admission to the fund, not April 1 as provided in the rule.

The Hearing Officer does not agree with this recommended change; he believes that the superintendent is in the best position to decide the amount of time necessary for a complete analysis of an application.

12. **Rule 13.21.2.14 (A) (1)**

NMHA recommends that the order of admission for an entity health care provider should state that the employees of the entity are also covered by the order.

The Hearing Officer does not agree with the adoption of this proposed change. The rule as written requires that all health care providers who have been admitted to the fund be identified. Employees who are qualified health care providers admitted to the fund, therefore, must be identified.

The Hearing Officer, however, has a question: Rule 13.21.2.14 (A)'s preamble begins with "Periodically after healthcare providers have been approved…. The superintendent… shall issue an order of admission to the fund…" Thus, there is a time gap between approval and admission. Suppose that a malpractice action is brought against a health care provider during the period between approval and admission, does the fund come into play?

13. **Rule 13.21.2.16 (B)**

NMHS recommends that the superintendent have the authority to terminate a healthcare provider, not the TPA, after a recommendation from the TPA for termination.

The Hearing Officer agrees with this suggested change to the rule. Under Rule 13.21.2.4, the superintendent, not the TPA, admits a healthcare provider to the fund. Therefore, the superintendent should make the decision to terminate that health care provider.

14. **Rule 13.21.2.17 (A), (B)**

NMMS recommends that in the second line of paragraph (A) and the first line of paragraph (B), the "may" should be "shall".

The Hearing Officer agrees with this recommended change. MMA Section 41-5-25 (B) includes the mandatory "shall," and not the permissive "may".

15. **Rule 13.21.5.9 (A)**

NMMS recommends that the "or" be deleted in the last line and the following language add at the end of that line: "or may designate a non-board member to preside as the hearing officer." Similar changes also should be included throughout 13.21.5.9.

The Hearing Officer agrees with this recommendation. The advisory board should be able to determine the most efficient manner to conduct a surcharge rate hearing, including designating some of its members, or a non-board member.

16. **Rule 13.21.5.9 (E)**

NMMS recommends that the rule should begin: "If the advisory board or any number of its member presides over a surcharge hearing" and also that the addition of the following two sentences at the end of the rule to reflect its suggestion that advisory board may appoint a hearing officer and that under MMA Section 41-5-25.1 (E)(2), the advisory board is required to "advise the superintendent concerning surcharge data accumulation and results":

> If the advisory board designates a non-board member to preside as the hearing officer over a surcharge rate hearing, the hearing officer shall provide the hearing officer's recommended decision to the advisory board and the superintendent on or before October 11 of each year. The hearing officer shall base his or her determination upon substantial evidence in the whole record. The advisory board shall meet to discuss the hearing officer's recommended decision and provide the superintendent with the advisory board's advice on the surcharges by no later than October 21 of each year.

The Hearing Officer agrees with the recommendations, except that he has no opinion as to efficacy of dates by which reports are to be given to the superintendent.

17. **Rule 13.21.5.10 (C)**

NMMS recommends adding "or its designee" after "advisory board" in the second line. This recommendation is consistent with NMMS's recommended change to 13.21.5.19 (A), permitting the advisory board to designate one of its members or a non-member as its hearing officer.

The Hearing Officer agrees with this recommended change.

18. **Rule13.21.5.25**

NMHA recommends that any "person", and not just a "party" should have the right to appeal a surcharge rate hearing.

The Hearing Officer does not agree with this recommendation. Under NMSA, 1978 Section 14-4-2 (B), a "person" includes all individuals, entities and political subdivision and corporations. A "party", on the other hand, is a person allowed to enter a surcharge rate hearing and "made a party". Rule 13.21.5.10 (1), 13.21.5.11 (A). Although NMHA is concerned that under the present rule, requiring interested partners to intervene in the surcharge rate hearing, "would result in an unrelated number of parties to the proceedings or deprive persons with a genuine interest in the surcharge rates from being allowed to challenge them after they are set," allowing any person to appeal without having intervened is equally, or more, unwieldy. Persons affected by the surcharge have the opportunity to express their concerns on the record before an appeal.

19. MedPro also "requests that the PCF rules that clarify that solo corporations may share malpractice insurance limits with the entity's sole provider." MedPro's position is that the PCF's website and its representations are inconsistent as to whether policy limits may be shared.

The Hearing Officer has insufficient information to evaluate this proposal; he therefore has no recommendation as to its implementation.

ISSUED this 17th day of November, 2021.

Robert J. Desiderio

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Robert J. Desiderio, Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Report* was emailed to the following individuals, as indicated below, this 18th day of November, 2021.

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