

May 8, 2025

OPINION  
OF  
RAÚL TORREZ  
Attorney General

Opinion No. 2025-08

To: Dayan Hochman-Vigil, Majority Whip, New Mexico House of Representatives

Re: Attorney General Opinion – 8.325.12 NMAC as applied to county correctional facilities

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### **Questions Presented and Short Answers**

1. Does 8.325.12 NMAC exceed the statutory authority granted to the New Mexico Health Care Authority by Senate Bill 425 (SB 425) from the 2023 Regular Legislative Session and codified in Section 24-1-5.11 (2023)?

No. As to the subject matter addressed, 8.325.12 NMAC does not exceed the statutory authority granted to the New Mexico Health Care Authority by Section 24-1-5.11.

2. Is 8.325.12 NMAC an unfunded mandate that violates Article X, Section 8 of the New Mexico Constitution?

Yes. Unless a county receives sufficient new funding, by grant or direct legislative appropriation, the regulations promulgated in 8.325.12 NMAC constitute an unfunded mandate violating Article X, Section 8 of the New Mexico Constitution.

### **Introduction**

On September 1, 2024, 8.325.12 NMAC issued by the New Mexico Health Care Authority (NMHCA), formerly known as the Department of Human Services, took effect. The Attorney General received a request for an opinion asking whether 8.325.12 NMAC (the Rule), exceeds the statutory authority conferred by Section 24-1-5.11, and whether this rule, as applied to counties, constitutes an unconstitutional unfunded mandate.

As the request pertains to questions of law from a sitting legislator, an Attorney General Opinion is properly entertained. NMSA 1978, Section 8-5-2(D) provides that the “[A]ttorney [G]eneral shall ... give his opinion in writing upon *any question of law* submitted to him by the Legislature

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or of any branch thereof, any state official, elective or appointive, or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office.” (emphasis added). Accordingly, we proceed to opine on the questions of law posed.

### Analysis

As to the first question, to analyze whether 8.325.12 NMAC exceeds the statutory authority given to the NMHCA, we must first construe the statute and determine the authority granted. We use the same canons of statutory construction utilized by the New Mexico courts. *Pirtle v. Legislative Council*, 2021-NMSC-026, ¶ 14 (internal citation omitted). “When construing statutes, our guiding principle is to determine and give effect to legislative intent.” *Southwestern Pub. Serv. Co. v. New Mexico Pub. Regul. Comm’n*, 2024-NMSC-012, ¶ 19. Our analysis of the statute begins with “the plain language of the statute and the context in which it was enacted, taking into account its history and background.” *Pirtle*, 2021-NMSC-026, ¶ 14 (internal citation omitted). “We give effect to the statute as written without room for construction unless the language is doubtful, ambiguous, or ... would lead to injustice, absurdity or contradiction, in which case the statute is to be construed according to its obvious spirit or reason.” *Southwestern Pub. Serv. Co.*, 2024-NMSC-012, ¶ 19.

We turn to the relevant statutory text at issue. Section 24-1-5.11(B) requires that

[n]o later than December 1, 2023, the human services department [health care authority department] shall promulgate rules for the operation of medication-assisted treatment programs in correctional facilities in consultation with the corrections department, county corrections administrators and providers who specialize in substance use disorder treatment and have experience working in corrections settings.

For purpose of the statute, a “correctional facility” is defined to “mean[] a prison or other detention facility, whether operated by a government or private contractor, that is used for confinement of adult persons who are charged with or convicted of a violation of a law or an ordinance.” NMSA 1978, § 24-1-5.11(E)(1). Generally, county detention facilities are used for pre-trial detention or post-conviction confinement for offenses with penalties of less than a year of jail time, such as misdemeanors or ordinance violations. *See* §§ 33-3-12, 31-19-1, and 31-20-2. By covering facilities used for both adult pre-conviction detention and post-conviction incarceration, the definition of “correctional facility” addresses all manner of adult facilities, including county detention facilities.

Reading Sections 24-1-5.11(B) and 24-1-5.11(E)(1) together, NMHCA was duly authorized to adopt rules “concerning the operation of medication-assisted treatment programs in correctional facilities,” including county detention facilities. To wit, NMHCA did not exceed the grant of authority in NMSA 1978, Section 24-1-5.11 in promulgating 8.325.12 NMAC.

Turning to the second question presented, whether 8.325.12 NMAC constitutes an unfunded mandate in violation of Article X, Section 8 of the New Mexico Constitution, our analysis of the provision begins with “the plain language of the [provision] and the context in which it was

enacted, taking into account its history and background.” *Pirtle*, 2021-NMSC-026, ¶ 14 (internal citation omitted). In this instance we review the plain language of 8.325.12 NMAC, the plain language and legislative history of Section 24-1-5.11, and the appropriations bills from the 2023, 2024, and 2025 legislative sessions, in light of the restrictions imposed by Article X, Section 8 of the New Mexico Constitution.

The New Mexico Constitution in Article X, Section 8 provides that,

[a] state *rule or regulation* mandating any county or city to engage in any new activity, to provide any new service or to increase any current level of activity or to provide any service beyond that required by existing law, shall not have the force of law, unless, or until, the state provides sufficient new funding or a means of new funding to the county or city to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed.

(emphasis added).

Thus, an unfunded mandate occurs when a rule-making authority requires a county or city to provide new or expanded services without corresponding funding. *See* N.M. Cons. art. X, § 8.

Here, the NMHCA issued rule 8.325.12 NMAC (the Rule), requiring *all* correctional facilities to implement medication assisted treatment (MAT) programs including administering substance use disorder (SUD) screening during intake (8.325.12.9(B)(1) NMAC), providing “comprehensive assessment[s] and diagnostic evaluation[s] for SUD” (8.325.12.9(B)(2) NMAC), the “provision of all medications approved by the FDA for the treatment of SUD and withdrawal management” (8.325.12.9(C)(1) NMAC), and ensuring “treatment services, once initiated, are available for the duration of a program participant’s period of incarceration (8.325.12.9(G) NMAC). This goes beyond regulating existing MAT programs. It creates a series of new requirements for correctional facilities, including establishing a MAT program where none currently exists. Because the Rule does not provide any exceptions or contingencies for counties, it constitutes a mandate to provide new activities and services.

Having established that the Rule creates a mandate upon counties, the question becomes whether there is corresponding funding from the Legislature. When first introduced on February 2 of the 2023 regular legislative session, Senate Bill 425 (SB 425) initially proposed the establishment of MAT programs at county detention facilities and included a proposed appropriation of \$10,000,000 to fund the new MAT programs. <https://www.nmlegis.gov/Sessions/23%20Regular/bills/senate/SB0425.pdf>. However, on March 3, 2023, the Senate Finance Committee adopted a committee substitute to SB 425 which removed the references to counties as well as the proposed appropriation. <https://www.nmlegis.gov/Sessions/23%20Regular/bills/senate/SB0425FCS.pdf>. Ultimately, the final bill, as adopted, did not include the appropriation. <https://www.nmlegis.gov/Sessions/23%20Regular/final/SB0425.pdf>.

Similarly, a review of the State’s funding bill for 2023, known as House Bill 2 or HB 2, confirms that no funds were appropriated to counties for MAT programs. The only references to MAT programs in HB 2 are appropriations to the New Mexico Department of Health and the State’s Corrections Department, which does not include county detention facilities. <https://www.nmlegis.gov/Sessions/23%20Regular/final/HB0002.pdf>. Thus, at the time the Rule was adopted it constituted an unconstitutional, unfunded mandate as to counties.

Although no funding was appropriated in 2023, because Article X, Section 8 of the New Mexico Constitution recognizes that the legislature could subsequently “provide[] sufficient new funding or a means of new funding to the county ... to pay the cost of performing the mandated activity or service,” we must review whether the legislature subsequently appropriated funds to support counties in implementing the mandated MAT programs. A review of the bills from the 2024 legislative session shows funding for such programs run by the State’s Corrections Department, but again, there are no funds appropriated for county-run MAT programs. <https://www.nmlegis.gov/Sessions/24%20Regular/final/HB0002.pdf>. Accordingly, for fiscal year 2025, the Rule remains an unconstitutional, unfunded mandate to counties.

In the 2025 legislative session, the funding picture changes. For the first time since the adoption of the Rule, the means to new funds for a county to conduct MAT activities and services becomes a possibility. Section 5(152) of the 2025 version of House Bill 2 appropriates \$10,000,000 to the NMHCA for the following purpose:

For **grants** to counties, municipalities, Indian nations, tribes and pueblos and behavioral health providers based on the submitted regional plans for assisted outpatient treatment, medication assisted treatment including for juveniles, assertive community treatment, other best-practice and evidence-informed outpatient and diversion services, promising practices and community-based wraparound services and resources pursuant to the Behavioral Health Reform and Investment Act for expenditure in fiscal years 2026 through 2029. Any unexpended balance remaining at the end of fiscal year 2029 shall revert to the behavioral health trust fund.

<https://www.nmlegis.gov/Sessions/25%20Regular/final/HB0002.pdf>. (emphasis added).

With that language, rather than making a direct appropriation to counties, the legislature establishes a grant program to be administered by NMHCA to make new funding available to counties for medication assisted treatment beginning in fiscal year 2026, which commences on July 1, 2025. *See* NMSA 1978, § 6-10-1 (designating July 1st as the beginning of each fiscal year).

Even then, the mere establishment of a grant program does not cure the Rule’s constitutional infirmity. For a rule’s mandate to have effect on a county, Article X, Section 8 requires “the state provide[] sufficient new funding or a means of new funding to the county ... to pay the cost of performing the mandated activity or service.” Thinking through the example of the county that does not receive grant funds demonstrates why the Rule’s constitutional issue remains unchanged. In the circumstance of the county not receiving grants funds, Article X, Section 8’s requirement for sufficient new funding or a means of new funding to pay the costs of the mandated service is

unmet. Thus, as to counties not receiving grant funds, the Rule still constitutes an unfunded mandate. For the county receiving grant funds, Article X, Section 8's funding sufficiency requirement comes into play. In the case of a county receiving grant funds, the question becomes whether the grant is sufficient "to pay the cost of performing the mandated activity or service for the period of time during which the activity or service is required to be performed."

At the time of this writing, the mandate to counties in 8.325.12 NMAC is not supported by a corresponding appropriation of funds or means for new funds. As such, the mandate may be characterized as an unfunded mandate in violation of Article X, Section 8 of the New Mexico Constitution.

That being said, when part of a law or regulation is unconstitutional, courts will attempt to sever the unconstitutional part of a statute or regulation to give effect to the valid provision or application. NMSA 1978, § 12-2A-9 (1997).

It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid.

*Baca v. New Mexico Dept. of Pub. Safety*, 2002-NMSC-017, ¶ 8, 132 N.M. 282, 47 P.3d 441 (internal citation omitted).

Therefore, upon the initiation of the grant program in July of 2025, the Rule's enforceability as to counties will be conditioned on whether a county receives a grant sufficient to perform the activities and services the Rule mandates.

### **Conclusion**

As discussed above, NMHCA acted within its statutory authority in promulgating 8.325.12 NMAC on the subject matter of MAT programs. However, unless and until sufficient funding is made available to a county to comply with the mandates of 8.325.12 NMAC, the Rule constitutes an unfunded mandate and is unconstitutional as applied to county correctional facilities.

Please note that this opinion is a public document and is not protected by the attorney-client privilege. It will be published on our website and made available to the general public.

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ATTORNEY GENERAL