

STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

CASE NO.: D-101-CV-2020-2059

NEW MEXICO TOP ORGANICS-ULTRA HEALTH, INC.,
Petitioner,

v.

NEW MEXICO DEPARTMENT OF HEALTH,
and DOMINICK ZURLO, in his official capacity as
Director of the New Mexico Medical Cannabis Program,
and SECRETARY BILLY JIMENEZ,
in her official capacity as Secretary of the
Department of Health,
Respondents.

WRIT OF MANDAMUS

THIS MATTER came before the Court on October 9, 2020, on the Petitioner's Petition for Alternative Writ of Mandamus. The Petitioner appeared through Jacob Candelaria. The Department of Health ("the DOH") appeared through Thomas Bird and Chris Woodward. Having reviewed the briefing in this matter and having entertained oral argument, THE COURT FINDS, CONCLUDES AND ORDERS:

1. The Court has subject matter and personal jurisdiction in this case.
2. The Medical Cannabis Act legalized the use and production of medical cannabis in New Mexico. NMSA 1978, § 26-2B-1, *et seq.*
3. "The purpose of the ... Act is to allow the beneficial use of medical cannabis in a regulated system for alleviating symptoms caused by debilitating medical conditions and their medical treatments." NMSA 1978, § 26-2B-2.

4. When first enacted, to participate in the medical cannabis program in New Mexico, an individual had to be a “qualified patient”. Section 26-2B-3(V) NMSA now defines a “qualified patient” [as] a resident of New Mexico who has been diagnosed by a practitioner as having a debilitating medical condition and has received written certification and a registry identification card pursuant to the ... Act on the basis of having been diagnosed, in person or via telemedicine, by a practitioner as having a debilitating medical condition; provided that a practitioner may only issue a written certification on the basis of an evaluation conducted via telemedicine if the practitioner has previously examined the patient in person....”

5. The Legislature amended the Medical Cannabis Act in 2019 to authorize the purchase and use of medical cannabis in New Mexico by reciprocal participants. The Act defines a “reciprocal participant” [as] an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo....” NMSA 1978, § 26-2B-3(W).

6. The statute further states that “[b]y March 1, 2020, the secretary of health shall adopt and promulgate rules relating to medical cannabis program reciprocity. The department may identify requirements for the granting of reciprocity, including provisions limiting the period of time in which a reciprocal participant may participate in the medical cannabis program.”

7. Under the Act, a reciprocal participant who wants to obtain reciprocal admission into the New Mexico medical cannabis program needs to meet the requirements established in NMSA 1978, § 26-2B-7(J), which reads:

A reciprocal participant:

- (1) may participate in the medical cannabis program in accordance with department rules;
- (2) shall not be required to comply with the registry identification card application and renewal requirements established pursuant to this section and department rules;
- (3) shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a licensee; and
- (4) shall register with a licensee for the purpose of tracking sales to the reciprocal participant in an electronic system that is accessible to the department.

8. As authorized by statute, the DOH promulgated rules associated with the medical cannabis program reciprocity. The rules adopted by the DOH regarding reciprocity requirements essentially mirror the statutory language developed by the Legislature and they state:

7.34.4.28 RECIPROCITY: Beginning July 1, 2020, an individual who holds proof of authorization to participate in the medical cannabis program of another state of the United States, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo may lawfully purchase and possess cannabis, provided that the quantity of cannabis does not exceed the reciprocal limit identified in this section.

A. Reciprocal participation:

(1) General requirements: A reciprocal participant:

- (a)** may participate in the medical cannabis program in accordance with department rules;
- (b)** shall not be required to comply with the registry identification card application and renewal requirements established pursuant to this section and department rules;
- (c)** shall at all times possess proof of authorization to participate in the medical cannabis program of another state, the District of Columbia, a territory or commonwealth of the United States or a New Mexico Indian nation, tribe or pueblo and shall present proof of that authorization when purchasing cannabis from a licensee; and
- (d)** shall register with a licensed non-profit producer for the purpose of tracking sales to the reciprocal participant in an electronic system specified by the department.

9. Neither the Legislature, by statute, nor the DOH, by rule, required that a reciprocal participant's government-issued identification and medical cannabis proof of authorization be issued by the jurisdiction where the participant lives, or that the reciprocal participant must produce a medical cannabis card as the only acceptable proof of authorization in order to obtain reciprocal admission into the New Mexico medical cannabis program.

10. Between June 23, 2020, and September 11, 2020, the DOH admitted reciprocal patients into the medical cannabis program in compliance with the statute and DOH rules. During this time, the DOH sanctioned and allowed licensed cannabis producers to sell medical cannabis to reciprocal participants whose government issued form of identification was not from the same state or jurisdiction that issued the reciprocal patient's proof of authorization to participate in a foreign jurisdiction's medical cannabis program. With regard to reciprocal patients who are authorized to participate in the California state medical cannabis program, the DOH further sanctioned and allowed licensed cannabis producers to accept a physician recommendation as proper proof of authorization for reciprocal admission into the New Mexico cannabis program.

11. Many reciprocal participants who have been patronizing New Mexico medical cannabis dispensaries are residents of New Mexico and Texas who present authorization to participate in California's medical cannabis program. Up until recently and under the rules established by the DOH, New Mexico residents could elect between participating in the New Mexico cannabis program as a "qualified patient" or as a "reciprocal participant". In essence, a New Mexico resident could bypass or circumvent the more stringent requirements for becoming a "qualified patient" and elect to participate in the program as a "reciprocal participant."

12. The DOH concluded that it was authorized to require, by rule, that reciprocal participants be residents of the same jurisdiction in which the authorizing healthcare provider practices, and that reciprocal participants must have cards as proof of authorization. On September 11, 2020, the DOH issued a “mandate” to licensed cannabis providers requiring that reciprocal patients’ government issued identification and proof of medical cannabis program authorization must be issued by the same jurisdiction, and, that reciprocal patients presenting a cannabis card is the only form of acceptable proof of authorization that the DOH will accept for California medical cannabis patients seeking reciprocal admission into the New Mexico medical cannabis program.

13. The Petitioner filed its Petition on September 22, 2020. On September 30, 2020, the Court issued a Notice of Hearing setting this matter for hearing on October 9, 2020. On October 8, 2020, at 5:02 p.m., the DOH filed with the New Mexico State Records Center an emergency amendment to 7.34.4 NMAC, Section 28. The emergency amendment essentially adopts the September 11, 2020, mandate as a DOH rule under NMSA 1978, 14-4-5.6 (Emergency rule).

14. Section 14-4-5.6 NMSA states “[a]n agency shall comply with the rulemaking procedures of the State Rules Act unless the agency finds that the time required to complete the procedure would: ... cause an imminent peril to the public health, safety or welfare....”

15. The DOH argues that any delay in implementing the emergency rule would cause imminent peril to the public health, safety and welfare, insofar as it would 1) permit New Mexico residents who would not otherwise meet criteria to enroll as qualified patients in the medical cannabis program to access cannabis; 2) allow non-residents who are not demonstrably authorized to participate in the medical cannabis program of another jurisdiction to access

cannabis; and 3) negatively impact the availability of medical cannabis in New Mexico by diverting medicine from qualified patients, thereby harming the health, safety, and welfare of qualified patients in the state.

16. The Cambridge English Dictionary defines “imminent peril” as “a situation in which something very bad is likely to happen, for example that you might be so badly hurt that you are unlikely to survive....” dictionary.cambridge.org/dictionary/english/imminent-peril. By the term “imminent peril” or “danger” is meant a place where there is certain danger – not a place where there is just a mere possibility of an injury occurring. “[I]mminent peril, which means certain, immediate, and impending, and not remote, uncertain or contingent, and likelihood or bare possibility of injury is not sufficient to create ‘imminent peril.’” *Calvert v. Super Propane Corp.*, 400 S.W.2d 133, 140 (1966). The Supreme Court in *State v. Morris*, 1965-NMSC-113, ¶ 22, 75 N.M. 475, 406 P.2d 349, defined “imminent peril” as a clear and present danger. The DOH’s justification for their emergency rule is inadequate. As a result, the DOH is in violation of the State Rules Act and the emergency rule is unenforceable.

17. The Petition for Writ of Mandamus is GRANTED.

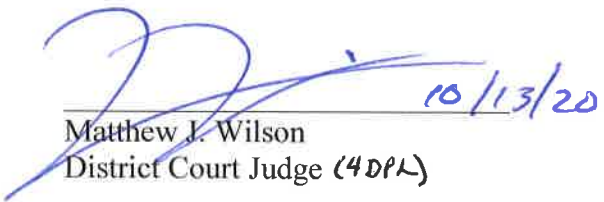
18. The Respondents are commanded to:

- a. Allow licensed cannabis producers to authorize and sell medical cannabis to reciprocal patients whose government-issued identification and proof of medical cannabis program authorizations are used by different jurisdictions or the same jurisdiction;
- b. Allow licensed cannabis producers to authorize and sell medical cannabis to reciprocal patients who present a valid proof of authorization, including those

reciprocal patients that present a California physicians authorization as their proof of authorization;

- c. Reauthorize and re-enroll any reciprocal patient removed from the program when the reason for the reciprocal participant's removal was because the reciprocal participant's state-of-residency and state-of-authorization are not the same, or, in the case of California-authorized reciprocal participants, the reciprocal participant did not produce a California issued medical cannabis program card as proof of authorization to participate in the California medical cannabis program.
- d. Otherwise permit all licensed cannabis producers to authorize and sell medical cannabis to reciprocal patients that meet the definition of "reciprocal participant" under the Medical Cannabis Act and the DOH Rule in existence prior to October 8, 2020.
- e. Immediately refrain from any further enforcement of the emergency rule of October 8, 2020, or the September 11, 2020, mandate.
- f. Administer the medical cannabis reciprocity program in full compliance with NMSA 1978, § 26-2B-7(J).

IT IS SO ORDERED.


Matthew J. Wilson
District Court Judge (4DPL)


CERTIFICATE OF SERVICE

I, the undersigned, certify that a copy of this order was provided to the parties listed below via e-file and serve on the date that this order was accepted for filing by the Clerk's Office.

Jacob Candelaria, Esq.
Via e-file and serve

Thomas Bird, Esq.
Via e-file and serve

Chris Woodward, Esq.
Via e-file and serve


Jackie Roberson
TCAA