

STATE OF NEW MEXICO  
COUNTY OF SANTA FE  
FIRST JUDICIAL DISTRICT

FILED 1st JUDICIAL DISTRICT COURT  
Santa Fe County  
5/3/2021 9:10 AM  
KATHLEEN VIGIL CLERK OF THE COURT  
Maureen Naranjo

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

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

v.

NEW MEXICO DEPARTMENT OF HEALTH,  
and Dr. DOMINICK ZURLO, in his official capacity as  
DIRECTOR of the NEW MEXICO MEDICAL  
CANNABIS PROGRAM, and SECRETARY Dr.  
TRACIE COLLINS, in her official capacity as Secretary  
of the Department of Health,  
Respondents.

**WRIT OF MANDAMUS**

THIS MATTER came before the Court on April 28, 2021, on the Petitioner's Verified Petition for Writ of Mandamus. The Petitioner appeared through attorney Jacob Candelaria via Google Meet. The Respondents appeared through attorney Thomas Bird via Google Meet. Having heard argument, THE COURT FINDS, CONCLUDES AND ORDERS:

1. The Court has subject matter and personal jurisdiction in this case.
2. The New Mexico Legislature amended the Lynn and Erin Compassionate Use Act (LECUA) in 2019 to permit patients qualified to participate in the medical cannabis programs of other jurisdictions to obtain reciprocal admission into the New Mexico cannabis program.
3. The Legislature set forth the qualifications that a person must meet in order to become a reciprocal patient in New Mexico. The relevant statute 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. NMSA 1978, § 26-2B-7(J).

4. The Legislature also defined 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, § 26-7-3(W).

5. This action for mandamus arises from Respondents’ March 23, 2021, amendment to Rule 7.34.4.28 NMAC, which prohibits a licensee from enrolling reciprocal patients into the New Mexico cannabis program who possess a government issued identification and medical cannabis proof of authorization from different jurisdictions, or who present a California physician’s authorization as proof of authorization. The amended Rule also prohibits a licensee from enrolling a New Mexico resident into the program if the New Mexico resident would otherwise qualify to participate in the Program as a reciprocal patient.

6. By virtue of the reciprocity provisions of the LECUA, Respondents have a non-discretionary, ministerial duty to implement the reciprocal patient program in the manner directed by the Legislature. “Mandamus lies to compel the performance of a ministerial act or duty that is clear and indisputable.” *New Energy Economy, Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207. ““A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done.” (internal quotation omitted) *Id.*

7. The Respondents’ March 23, 2021, Rule is unenforceable as a matter of law because it violates legislative intent and is inconsistent with the LECUA.

8. Respondents owe a ministerial duty to allow the registration of individuals into the New Mexico cannabis program who hold 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.

9. Respondents cannot act contrary to statutory authority and cannot create a rule or regulation that is not in harmony with its statutory authority. “[T]he Court generally will not hold that the policymaking of an administrative agency violates separation of powers principles unless such administrative policymaking ‘conflict[s] with or infringe[s] upon what is the essence of legislative authority—the making of law.’ ... Such an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own.” (internal quotation omitted) *State ex rel. Sandel v. New Mexico Public Utility Com’n*, 1999-NMSC-019, ¶ 12, 127 N.M. 272.

10. “A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration. . . . Courts must take the act as they find it and construe it according to the plain meaning of the language employed.” (internal quotation omitted) *Perea v. Baca*, 1980-NMSC-079, ¶ 22, 94 N.M. 624.

11. Respondents have enacted a Rule that exceeds its statutory authority and have created policy that is not in consonance with the LECUA.

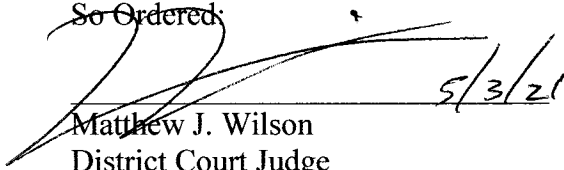
12. The Supreme Court wrote in *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 18, 125 N.M. 343, that “‘mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.’ ... As our courts have held since territorial days, the authority to

prohibit unlawful official conduct is implicit in the nature of mandamus.... New Mexico courts commonly use forms of prohibitory mandamus.... Since Petitioner[] [is] alleging that the Respondents engaged in unlawful or unconstitutional official acts, Petitioner[] may request mandamus as the necessary relief.” (internal quotations omitted).

13. The Petition for Writ of Mandamus is GRANTED.
14. The Respondents are therefore commanded to:
  - a. Allow Licensed Cannabis Producers to authorize and sell cannabis to reciprocal patients whose government-issued identification and proof of medical cannabis program authorizations are issued by different jurisdictions or the same jurisdiction;
  - b. Allow Licensed Cannabis Producers to authorize and sell medical cannabis to New Mexico residents who enroll in the medical cannabis program as reciprocal patients;
  - c. Allow Licensed Cannabis Producers to authorize and sell medical cannabis to reciprocal patients who present a valid proof of authorization, including those reciprocal patients who present a California physician’s authorization as their proof of authorization;
  - d. Reauthorize and re-enroll any reciprocal patient removed from the program when the reason for the reciprocal participant’s removal was a mismatch between the reciprocal participant’s state-of-residency and state-of-authorization, or, in the case of California-authorized reciprocal participants, the reciprocal participant did not produce a California issued cannabis program card as proof of authorization to participate in the California medical cannabis

program; or, when the patient was dis-enrolled because he or she is a New Mexico resident and was enrolled as a reciprocal patient;

- e. Permit all Licensed Cannabis Producers to authorize and sell medical cannabis to reciprocal patients who meet the definition of “reciprocal participant” under the LECUA and the Respondents’ original June 23, 2020, Rule.
- f. Refrain from any further enforcement of the March 23, 2021, Rule.


So Ordered:   
Matthew J. Wilson  
District Court Judge

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that a copy of the foregoing Order was served on the parties to this case on the date that the foregoing Order was accepted for e-filing by the Clerk of the Court.

Jacob Candelaria, Esq.  
Via e-file and serve

Thomas Bird, Esq.  
Via e-file and serve

  
Victoria Martinez  
Administrative Assistant