

Proposed Rule Abstract

1. **Agency:** Public Education Department (PED)
2. **Rule Citation:** 6.19.6 NMAC, Title I Supplemental Educational Services
3. **Rulemaking Action (Amend, Repeal, Repeal and Replace, New):** Repeal
4. **Register Issue and Date of NPRM:** Volume 28, Issue 19, October 17, 2017
5. **Effective date:** None noted. Effective upon publication in the *New Mexico Register*
6. **Specific Legal Authority:** Sections 22-2-1 and 22-2-2 NMSA 1978
7. **Purpose of Rule:** Align NMAC with the federal Every Student Succeeds Act
8. **Rulemaking Information Contact:** Jamie Gonzales, 505-827-7889; ; rule.feedback@state.nm.us
9. **Comment Period:** October 17 through 5:00 p.m. on November 17, 2017
10. **Rule Hearing:** November 20, 2017, 2:00 p.m. to 4:00 p.m., Jerry Apodaca Building, 300 Don Gaspar Ave., Santa Fe, NM 87501

Rule Summary

The October 17, 2017 issue of the *New Mexico Register* contains the proposed repeal of Part 6 of 6.19 NMAC, “Title I Supplemental Educational Services” (see **Attachment, Proposed Repeal 6.19.6, Supplemental Educational Services**).

Analysis

Supplemental educational services were included in both the federal No Child Left Behind (NCLB) and its successor, the Elementary and Secondary Education Act (ESEA). Requirements for Title I supplemental educational services are not included in the federal Every Student Succeeds Act (ESSA). Moreover, the statute that required supplemental educational services in New Mexico, Section 22-2C-7 NMSA 1978, was repealed in Laws 2015, Chapter 58, Section 15, which was LESC-sponsored legislation. Considering the absence of requirements in ESSA, as well as the repeal of pertinent state law, PED found the rule unnecessary, and proposed this repeal.

Background

The federal NCLB required Title I schools that failed to make adequate yearly progress (AYP) for three consecutive years to use a portion of its Title I funds to provide supplemental educational services to students from low-income families attending the school. These services were academic instruction provided in addition to instruction during the school day, such as tutoring, remediation, and other

academic enrichment services that were consistent with the content and instruction used by the local educational agency (LEA) and were aligned with the state's academic content and achievement standards. They were required to be high quality, research-based, and designed to increase student achievement. They were to be offered through public- or private-sector providers and selected by parents.

In 2011, the supplemental educational services landscape began to change as the reauthorization of NCLB became uncertain. The US Department of Education (USDE) offered states the opportunity for flexibility from certain provisions of ESEA in exchange for rigorous, state-developed plans to improve educational outcomes for all students, close achievement gaps, increase equity, and improve quality of instruction. New Mexico's ESEA flexibility request was approved by USDE in February 2012. Under that program, New Mexico received a waiver from the requirement to identify schools in need of improvement, corrective action, or restructuring. In turn, this flexibility also relieved school districts and schools that may have been identified for improvement from a number of requirements, including the provision of supplemental educational services.

New Mexico's Assessment and Accountability Act still included provisions for AYP and other issues of federal law under NCLB that were waived under ESEA flexibility. The state's ESEA flexibility plan put schools in the state under two separate accountability systems: the determination of AYP and schools in need of improvement, which included provision for supplemental educational services, and the state flexibility program that required the identification of "priority" and "focus schools" under the accountability systems established for the flexibility program.

Laws 2015, Chapter 58 (House Bill 165), endorsed by the LESC, was proposed during the 2015 regular legislative session to repeal certain provisions of the Assessment and Accountability Act related to the then defunct AYP requirements, including the requirement for the promulgation of rules administering supplemental educational services. The bill passed the Legislature and was signed by the governor, effectively ending the supplemental educational services requirements at the state level. When NCLB was finally reauthorized as ESSA in 2015, provision of supplemental educational services was no longer required, although states were required to withhold 7 percent of their Title I funds for school improvement grants that may include the sorts of services previously required for supplemental educational services. Additionally, states may withhold an additional 3 percent of Title I funds for "direct student services," including extended learning times.

As supplemental educational services is no longer required under ESSA, and the state requirement to promulgate rules for the program's administration is no longer required at state law, PED is proposing to repeal the rule.

~~TITLE 6 — PRIMARY AND SECONDARY EDUCATION
CHAPTER 19 — PUBLIC SCHOOL ACCOUNTABILITY
PART 6 — TITLE I SUPPLEMENTAL EDUCATIONAL SERVICES~~

~~6.19.6.1 — ISSUING AGENCY: Public Education Department
[6.19.6.1 NMAC — N, 08/15/2005]~~

~~6.19.6.2 — SCOPE: This rule applies to all school districts, public schools, including charter schools, and all state approved supplemental educational services providers who offer or plan to offer such services in New Mexico.
[6.19.6.2 NMAC — N, 08/15/2005]~~

~~6.19.6.3 — STATUTORY AUTHORITY: Sections 22-2-1, 22-2-2, 22-9-3, 22-9-15 NMSA 1978; 20 U.S. Code Section 6316; 34 Code of Federal Regulations Part 200.
[6.19.6.3 NMAC — N, 08/15/2005]~~

~~6.19.6.4 — DURATION: Permanent
[6.19.6.4 NMAC — N, 08/15/2005]~~

~~6.19.6.5 — EFFECTIVE DATE: August 15, 2005, unless a later date is cited at the end of a section.
[6.19.6.5 NMAC — N, 08/15/2005]~~

~~6.19.6.6 — OBJECTIVE: This rule establishes requirements for:~~

- ~~— A. — supplemental educational services providers who seek to use incentives as a method of promoting selection of their services by parents of eligible children;~~
- ~~— B. — allowable rewards to students to reward attendance, continued participation and achievement related to the supplemental educational services;~~
- ~~— C. — establishing a range of hourly per student rates a provider may charge a school district;~~
- ~~— D. — establishing a sliding hourly fee schedule a provider may charge a school district based on the education level of the tutors being used by the supplemental educational services provider;~~
- ~~— E. — implementation of basic program parameters and required assessments;~~
- ~~— F. — provision of on site audits conducted by eligible school districts and the department;~~
- ~~— G. — establishing that all supplemental educational services providers and eligible school districts will submit all relevant student data; and~~
- ~~— H. — removal of providers from approved list.~~

~~[6.19.6.6 NMAC — N, 08/15/2005; A, 08/31/2006; A, 10/31/2011]~~

~~6.19.6.7 — DEFINITIONS:~~

- ~~— A. — “Department” means the public education department.~~
- ~~— B. — “Eligible child or eligible children” means a child or children from low income families as determined by a school district, public school, or charter school for the purposes of allocating federal funds made available under Title I of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6301 et seq.) as amended.~~
- ~~— C. — “Incentives” means any goods, facilities, services, gifts, coupons, discounts, rebates, or cash offered or given to anyone by or on behalf of a supplemental educational services provider to promote selection of their services by parents or guardians of eligible children.~~
- ~~— D. — “Removal” means deleting the provider from the list of state approved supplemental educational services providers.~~
- ~~— E. — “Rewards” means an acceptable classroom incentive with no redeemable monetary value to an eligible child or that child’s parent or guardian and that is offered to an eligible child only as a reward for attendance, continued participation, or achievement related to a provider’s services.~~
- ~~— F. — “Supplemental educational services” means tutoring and other supplemental academic enrichment services that are in addition to instruction provided during the school day and are of high quality, research based, and specifically designed to increase the academic achievement of eligible children on required academic assessments and attain proficiency in meeting the state’s academic achievement standards.~~
- ~~— G. — “Tutor to student ratio” means the established number of students a tutor may provide supplemental educational services to at one time.~~

[6.19.6.7 NMAC – N, 08/15/2005; A, 08/31/2006; A, 10/31/2011]

6.19.6.8 REQUIREMENTS:

A. All school districts, public schools, including charter schools and all state approved supplemental educational services providers who offer or plan to offer supplemental educational services in New Mexico, shall offer an initial enrollment period of at least 10 working days.

B. Supplemental educational services providers shall not directly or indirectly use incentives as a method of promoting selection of their services by parents or guardians of eligible children. Provided, however, that rewards may be offered to eligible children:

(1) to reward attendance, continued participation, or achievement related to a provider's services;

(2) if the reward has no redeemable monetary value to the eligible child or his parent/guardian and is otherwise consistent with accepted classroom incentives, such as pizza parties, ice cream parties, school supplies having nominal value, or the opportunity to order discounted instructional material for the eligible child's personal use; and

(3) parents or guardians of an eligible child or children consent to the offering of such incentives.

C. Beginning school year 2011-2012, all providers of supplemental educational services shall charge an hourly per pupil rate between \$25.00 per hour and \$65.00 per hour. Beginning in school year 2012-2013 all providers of supplemental educational services shall charge an hourly per pupil rate between \$25.00 per hour and \$45.00 per hour.

D. All school districts, public schools, including charter schools and all state approved supplemental educational services providers who offer or plan to offer supplemental educational services in New Mexico, shall adhere to the following requirements:

(1) Each supplemental educational services provider must use a sliding hourly fee schedule when invoicing eligible school districts for services rendered. The sliding hourly fee schedule shall comport as follows:

(a) A supplemental educational services provider may charge the eligible school district its full hourly amount if the tutor has a valid teaching license or a four year degree or greater from an accredited university or college, and the per pupil cap will not be ratably reduced based on the education level of the tutor providing supplemental educational services.

(b) A supplemental educational services provider may charge the eligible school district eighty five percent of its hourly amount if the tutor has less than a four year degree, but more than an associates of arts degree, or its equivalent of 48 credit hours, from an accredited post secondary institution, and the per pupil cap will be ratably reduced by fifteen percent based on the education level of the tutor providing supplemental educational services.

(c) A supplemental educational services provider may charge the eligible school district seventy five percent of its hourly amount if the tutor has less than an associates of arts degree, or its equivalent of 48 credit hours, from an accredited post secondary institution but more than a high school diploma, and the per pupil cap will be ratably reduced by twenty five percent based on the education level of the tutor providing supplemental educational services.

(2) Invoices submitted by supplemental educational services providers must accurately reflect the tutor to student ratio of the tutoring session and the qualifications of the tutor providing services. The invoiceable tutor to student ratios shall comport as follows:

(a) A supplemental educational services provider that maintains a tutor: student ratio of one tutor to three students or less may charge the eligible school district the full hourly amount based on tutor qualifications.

(b) A supplemental educational services provider that maintains a tutor to student ratio of one tutor to four students, one tutor to five students, or one tutor to six students may charge the eligible school district eighty five percent of its hourly amount based on tutor qualifications.

(c) A supplemental educational services provider that maintains a tutor to student ratio of one tutor to seven students or greater may only charge the eligible school district fifty percent of its hourly amount based on tutor qualifications.

E. In its application, each provider of supplemental educational services shall include documentation, as prescribed by the department, that the tutoring services to be offered are consistent with instructional program by

the school district or charter school whose students the provider intends to serve. The department may consult with the school district or charter school to determine whether an applicant has met this requirement.

~~F. A district may, prior to entering into agreement with approved supplemental educational service providers, require providers to participate in training designed to assist providers in providing services consistent with the district's instructional program.~~

~~G. Each student who is enrolled in supplemental educational services must have a student improvement plan, with goals relating to academic improvement based on state standards and consistent with the local district instructional program in place and approved by parents or guardians, appropriate school personnel and chosen supplemental educational services provider before any invoice for services rendered may be paid.~~

~~H. Each student who is enrolled with an approved supplemental educational services provider must be pre and post tested, with an instrument approved in the supplemental educational services provider application to the department. Students must be pre tested in order to determine student achievement goals. Students must be post tested when they have completed the program to document progress.~~

~~I. Parents or guardians, and appropriate school personnel must be notified of student progress in a format that is easily understandable.~~

~~J. Eligible school districts must conduct on site audits of supplemental educational services providers.~~

~~K. The department will conduct on site audits of supplemental educational services providers and eligible school districts.~~

~~L. Each eligible school district and supplemental educational services provider will collect and submit all relevant student data to the department or its authorized contractor upon request.~~

~~M. For the 2012-13 school year, all existing and interested supplemental educational services providers must submit an application to become a supplemental educational services provider.~~

~~N. If a supplemental educational services provider is removed from the approved list, the supplemental educational services provider must wait a minimum of two years before they may reapply to become a supplemental educational services provider in the state of New Mexico.~~

~~[6.19.6.8 NMAC— N, 08/15/2005; A, 08/31/2006; A, 10/31/2011]~~

6.19.6.9 UNFAIR PRACTICES: Supplemental educational services funds are funds that have been provided by grant to the department. The department disburses these funds to school districts and charter schools for purposes of reimbursing providers for services performed pursuant to professional services contracts entered into between districts and providers. The department is not a party to contracts between districts and providers. For purposes of performing supplemental educational services and as a condition of receipt of these public funds, it shall constitute an unfair practice for providers to offer or provide any incentive other than those allowed by this rule or to recruit in a way that is not in accordance with established guidelines and the policies of this rule.

~~A. School districts or charter school employees who learn that a supplemental educational services provider has offered to or actually provided an incentive other than those allowed by this rule, shall:~~

~~(1) promptly notify the provider in writing to cease and desist this practice immediately;~~

~~(2) promptly notify any parent or guardian that any incentive other than those allowed by this rule may not be offered by a provider and may not be accepted by the parent or guardian, and~~

~~(3) notify the department in writing if a provider fails or refuses to cease or desist in offering or providing non allowed incentives.~~

~~B. The department upon receiving a written notification under this section or upon receiving a complaint from any other sources, may, after verifying such offering:~~

~~(1) notify the provider in writing to cease and desist this practice immediately because any incentive other than those allowed by this rule may not be offered by a provider nor accepted by the parent or guardian;~~

~~(2) notify parents or guardians that any incentive other than those allowed by this rule may not be offered by a provider and may not be accepted by the parent or guardian;~~

~~(3) notify appropriate authorities of suspected conduct that may constitute soliciting or receiving illegal kickbacks in whole or in part with public money.~~

~~C. School district administrators or charter school administrators may not hold a position or work on behalf of any supplemental educational services provider unless the school district, school or charter school is an approved supplemental educational services provider.~~

~~D. If a school district or charter school employee learns that a supplemental educational services provider is recruiting in a way that is not in accordance with established district guidelines and the policies of this rule, that person shall:~~

~~(1) promptly notify the provider in writing to cease and desist this practice immediately; and~~
~~(2) notify the department in writing if a provider fails or refuses to cease or desist in recruiting in a manner not allowable.~~

~~E. Eligible school district personnel may not show favoritism to any supplemental educational services provider.~~

~~[6.19.6.9 NMAC N, 08/15/2005; A, 08/31/2006; A, 10/31/2011]~~

~~**6.19.6.10 REMOVAL OF PROVIDERS:** Supplemental educational services providers must strictly adhere to their approved application and the policies of this rule. If any provider demonstrates a pervasive pattern of violating any aspect of their application or any part of this rule they will be removed from the state approved list of supplemental education services providers. Providers will be removed from the state approved list of supplemental educational services providers if there are any violations of test security of the New Mexico standards based assessment. In addition, providers will be removed for failing to contribute to the academic improvement of students as determined by the state evaluation. Each supplemental educational services provider that is to be removed may ask for an opportunity to clarify reasons for dismissal and request an appeal. A district or charter school has the option not to enter into a contract with a supplemental educational services provider who fails to meet the terms of the contract in the preceding year or does not provide services to eligible students who have requested their services in the preceding year.~~

~~[6.19.6.10 NMAC N, 08/31/2006; A, 10/31/2011]~~

~~**HISTORY OF 6.19.6 NMAC: [RESERVED]**~~