
Proposed Rule Abstract

1. **Agency:** Public Education Department
2. **Rule citation:** 6.19.9 NMAC
3. **Rulemaking action:** New rule
4. **Register issue and date of NPRM:** Volume 29, Issue 6, March 27, 2018
5. **Effective date:** July 1, 2018
6. **Citation to specific legal authority:** Sections 22-2C-1 to 22-2C-13 NMSA 1978, specifically 22-2C-6 NMSA 1978
7. **Short explanation of the rule's purpose:** The purpose of the proposed new rule is to support students in achieving reading proficiency; establish criteria for providing data-driven interventions for students, parent and family communication, provide parents with options to address student progress in reading, and standards for reading proficiency and promotion; and outline standards for identifying students who are not proficient in reading and the progress schools must follow for these students.
8. **Link to full text of the rule:** https://webnew.ped.state.nm.us/wp-content/uploads/2018/03/6.19.9-NMAC_Proposed-Rule.docx
9. **How information on the rule can be obtained:** <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rulenotification/>, or from Jamie Gonzales at (505) 827-7889.
10. **Comment period and deadlines:** March 27, 2018 to May 17, 2018 at 5:00 p.m. Written comments may be submitted to Jamie Gonzales, Policy Division, New Mexico Public Education Department, Room 101, 300 Don Gaspar Avenue, Santa Fe, New Mexico 87501, or rule.feedback@state.nm.us, or fax to (505) 827-6681.
11. **Rule hearing:** May 17, 2018 from 9:00 a.m. to 12:00 p.m., 300 Don Gaspar Avenue in Mabry Hall, Santa Fe, NM 87501
12. **Link to agency permanent rulemaking record:** http://statenm.force.com/public/SSP_RuleHearingSearchPublic

Summary of Proposed Rule

The March 27 issue of the *New Mexico Register* contained a Notice of Proposed Rulemaking for early reading benchmark assessments, interventions, promotion, and retention. The proposed new rule, which the Public Education Department (PED) is considering pursuant to Section 22-2C-6 NMSA 1978, will require school districts and charter schools (LEAs) to administer a PED-approved literacy benchmark assessment to kindergarten through third-grade students, and to use the resulting student performance data to guide academic improvement plans, interventions, retention, and promotion. (See **Attachment 1, Proposed New Rule, 6.19.9 NMAC, Early Literacy Remediation, Interventions, and Family Engagement**).

Analysis

As part of the executive's early reading initiative, legislation mandating the retention of third-graders who cannot read on grade level has been a priority since 2011.

Retention-related Bills Introduced 2011-2018

Bill Number	Session
HB21/HB100	2011
HJM2, SB2, SB23	2011 1st Special
HB53, HB54, HB69, HJM2, SB50, SB96	2012
HB257, SB260, SB474, SB640	2013
HB93, SB45, SB297, SB326	2014
HB41, SB66, SB468, SB560	2015
HB67	2016
HB114, SB403	2017
HB210	2018

Source: nmlegis.gov

However, proposed legislation has consistently failed to gather bipartisan support, with many members expressing concern about the use of a single test score to make retention decisions. While the executive indicated statutory changes were needed to mandate third-grade retention for students who are not proficient in reading based on a single test score since 2011, the executive is now proposing to impose the policy by rule.

The proposed new rule outlines criteria for early literacy intervention and retention and, according to PED, would support students in achieving reading proficiency. The requirements would be mandatory for all public schools and state-supported educational institutions and programs serving students in kindergarten through third grade, except for the New Mexico Military Institute.

The proposed new rule appears to exceed the authority granted to the department in Section 22-2C-6 NMSA 1978 in several key areas, which will be discussed in each relevant section below. According to the State Rules Act, no rule is valid or enforceable if it conflicts with statute, and a conflict between a rule and a statute will be resolved in favor of the statute.

Outline of the Proposed New Rule Requirements

Applicability. Kindergarten through third grade students would be subject to provisions of the proposed rule. The rule generally notes the Assessment and Accountability Act, and specifically Section 22-2C-6 NMSA 1978, as the statutory authority supporting promulgation of the rule. (See **Attachment 2, Article 2C, Assessment and Accountability**). Section 22-2C-6 NMSA 1978 only deals with remediation programs, promotion policies, and restrictions for first through 12th grade and does not give PED the statutory authority to promulgate intervention, promotion, and retention regulations for kindergarten students.

Benchmark Literacy Assessment. The proposed rule will require LEAs to administer a PED-approved benchmark literacy assessment three times a year to students in kindergarten through third grade to measure the acquisition of reading skills. The rule will require PED to set benchmark scores for the beginning, middle, and end of year assessments that school districts and charter schools will be required to use to determine student interventions and make retention decisions. Section 22-2C-4 NMSA 1978 only gives PED authority to establish an academic assessment program to test student achievement in reading and language arts for third through eighth grade and for 11th grade. Additionally, Section 22-2C-6 NMSA 1978 notes that “remediation programs, academic improvement programs and promotion policies shall be aligned with school-district-determined assessment results...”, “diagnosis of weakness identified by a student’s academic achievement may serve as criteria in assessing the

need for remedial programs and retention,” and student proficiency shall be measured “by grades, performance on school district assessments and other measures identified by the school district.” These statutory provisions do not give PED the statutory authority to mandate a benchmark literacy assessment nor to use the PED-approved assessment as the only metric to make decisions related to remediation and retention. They clearly grant school districts authority to set proficiency targets and to use multiple measures to measure proficiency rather than be required to use a single test score to determine proficiency.

Student Intervention and Retention. Generally, LEAs will be required to communicate student progress to parents with notification letters throughout the year. If the mid-year benchmark assessment shows a student is not proficient in reading based on the cut score established by PED, the student’s teacher will be required to notify the student’s parent or legal guardian in writing, and arrange for a parent-teacher conference. The teacher will be required to review student performance and specific interventions already implemented, as well options moving forward, including daily interventions, remediation, or alternative programs. A student assistance team will develop an academic improvement plan for any student not proficient in reading that clearly outlines progress monitoring activities and associated timelines to ensure students move toward achieving grade-level literacy proficiency. If a student is still not proficient by the end-of-year benchmark assessment, the student’s parent or guardian may retain their student at the same grade level.

However, if a student’s parent or guardian decides not to retain the student, they will be required to sign a retention waiver expressing their desire for the student to be promoted to the next grade with an academic improvement plan to address the student’s specific literacy deficiencies.

Should the student fail to achieve the proficiency standard set by PED on the PED-approved assessment the following year, the school will be required to retain the student. The requirement to make retention decisions based on the PED-determined cut score on a PED-approved assessment is not consistent with current statutory requirements outlined in Section 22-2C-6 NMSA 1978, which requires retention decisions to be based on student proficiency “at the end of the year as measured by grades, performance on school district assessments and other measures identified by the school district.”

Retention Waivers. Consistent with Statute, the regulation allows a parent to waive retention in the first year a student is determined not to be proficient. Parents will not have the option of promoting their student to the next grade in their second year if they are unable to achieve proficiency.

Schools will be able to “exempt students from retention for good cause or pursuant to the completion of a retention waiver letter provided by the LEA.” Good cause exemptions are limited to the following:

Benchmark assessments and statewide formative assessments are not aligned. For example, PARCC, a statewide formative assessment, aligns with state standards and measures student academic proficiency, defined by state statute as “mastery of the subject-matter, knowledge, and skills specified in state academic content and performance standards for a student’s grade level.” In addition, a required benchmark assessment for all students in kindergarten through third grade, monitors student achievement for purposes of the teacher evaluation system. When comparing student assessment results, the two assessments do not appear to be well aligned.

Section 504 plans ensure that children with disabilities or illnesses receive equal access to an education.

1. Students with disabilities whose individualized education plan (IEP) indicates participation in the benchmark assessment is not appropriate;
2. Students with disabilities who were previously retained in kindergarten through third grade whose IEPs or Section 504 plans indicate they have received literacy intervention for more than two years but are still not proficient in reading;
3. Students who have been previously retained in their current grade; and
4. Students identified as English language learners who have had less than three years of instruction in the United States.

It is unclear that PED has the authority to specify “good cause” exemptions included in the rule. Again, current statute allows school districts to make retention decisions based on “grades, performance on school district assessments, and other measures identified by the school district,” which appears to indicate local school districts being able to determine the metrics they want to make retention decisions or to allow a student to be promoted to the next grade.

Section 22-2C-6 NMSA 1978:

- “Academic Improvement plan” means a written document developed by the student assistance team that describes the specific content standards required for a certain grade level that a student has not achieved and that prescribes specific remediation programs such as summer school, extended day or week school and tutoring.

Proposed Rule:

- “Academic improvement plan” means a written document developed by the student assistance team that outlines the grade-level literacy content not mastered by the student, and prescribes specific remediation programs.

Section 22-2C-6 NMSA 1978:

- “Student assistance team” means a group consisting of a student’s:
 - a) Teacher;
 - b) School counselor;
 - c) School administrator; and
 - d) Parent.

Proposed Rule:

- “Student assistance team” means a group consisting of a student’s:
 - a) Teacher;
 - b) School counselor;
 - c) School administrator; and
 - d) Parent or legal guardian, if they choose to participate.

Other Technical Issues. Two of the definitions in the proposed new rule are inconsistent with statutory definitions, and according to the State Rules Act, should not be included in the proposed rule. According to the State Rules Act, a word or phrase defined in an applicable statute should not be defined in rule, and conflicts are to be resolved in favor of the statute. Both “academic improvement plan” and “student assistance team” are defined in the proposed new rule and in Section J of 22-2C-6 NMSA 1978, and in both cases, the definitions conflict. The proposed rule defines “academic improvement plan” as the document outlining grade-level literacy content not mastered by the student, while the definition in statute applies to all content standards. The definition for “student assistance team” in the proposed rule indicates that a parent or legal guardian could choose whether to participate; however, statute requires a parent to participate on the student assistance team.

Data Reporting to PED. LEAs will be required to report the following to PED by March 1 of each year:

1. The number of students not proficient in reading on the middle of year benchmark assessment;
2. The number of student assistance teams convened for students not proficient in reading; and
3. The number of parent notification letters sent regarding individual students not proficient in reading on the middle of year benchmark assessment.

LEAs will be required to report the following to PED by June 1 of each year:

1. The number of students not proficient in reading on the end of year benchmark assessment; and



2. The number of retention waiver letters signed by parents or legal guardians of students not proficient in reading.

LEAs will be required to report the following to PED by August 1 of each year:

1. The number of students not proficient in reading, as determined by the end of year benchmark assessment and
2. Number of students not proficient in reading, as determined by the end of year benchmark assessment, promoted to the next grade;
3. Number of students reading at performance level one, according to his or her grade three individual student report;
4. Explanation of final determinations of student retention and promotion for which student proficiency on the end of year benchmark assessment was not the deciding factor;
5. Copies of the LEA's retention waiver letter template;
6. Copies of all parent notification letters sent to parents or legal guardians regarding individual students not proficient in reading, as determined by the middle of the year benchmark assessment; and
7. Copies of all retention waiver letters signed by parents or legal guardians for individual students not proficient in reading, as determined by the end of year benchmark.

Acceleration Options. The proposed new rule also includes requirements for accelerated instruction for kindergarten through third grade students. While student retention will be based on PED-approved benchmark assessments and associated PED-determined proficiency cut scores, student acceleration criteria are to be established by LEAs, and must be included in LEAs' comprehensive student progression plans. School principals will also be required to establish student eligibility requirements and a process for parents or guardians to request student participation in acceleration options. When establishing acceleration eligibility requirements, school principals and LEAs will be required to consider, at a minimum:

1. Performance on a locally determined assessment;
2. Performance as indicated on the individual student report;
3. Grade point average;
4. The student's attendance and conduct record;
5. Recommendations from one or more of the student's teachers in core-curricula courses;
6. A recommendation from a certified school counselor, if one is assigned to the school in which the student is enrolled; and
7. A recommendation from the student's parent or guardian.

LEAs will be required to provide options for whole-grade and mid-year promotion, subject acceleration, and online instruction in personalized content at a higher grade level, and may provide additional options such as enrichment programming.

The requirement for LEAs to make accelerated instruction available to kindergarten through third grade students appears to fall outside of PED's statutory authority, as the associated statute makes no mention of accelerated instruction.

PROPOSED NEW RULE

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 19 PUBLIC SCHOOL ACCOUNTABILITY – ASSESSMENT AND ACCOUNTABILITY
PART 9 EARLY LITERACY REMEDIATION, INTERVENTIONS, AND FAMILY
ENGAGEMENT

6.19.9.1 ISSUING AGENCY: Public Education Department, herein after the department.
 [6.19.9.1 NMAC - N, 7/1/2018]

6.19.9.2 SCOPE: All public schools, state education institutions, and educational programs conducted in state institutions, other than the New Mexico military institute, serving students in kindergarten and grades one through three. If any part or application of this rule is held invalid, the remainder of the rule or its application in other situations shall not be affected.
 [6.19.9.2 NMAC - N, 7/1/2018]

6.19.9.3 STATUTORY AUTHORITY: This regulation is adopted pursuant to NMSA 1978, 22-2C-1 to 13, specifically 22-2C-6 NMSA 1978.
 [6.19.9.3 NMAC - N, 7/1/2018]

6.19.9.4 DURATION: Permanent.
 [6.19.9.4 NMAC - N, 7/1/2018]

6.19.9.5 EFFECTIVE DATE: July 1, 2018, unless a later date is cited at the end of a section.
 [6.19.9.5 NMAC - N, 7/1/2018]

6.19.9.6 OBJECTIVE: This rule establishes the conditions for improving early literacy outcomes for students in kindergarten and grades one through three by outlining interventions, providing mechanisms for engaging families, and notifying parents or legal guardians of all available options to improve student progress in early literacy.
 [6.19.9.6 NMAC - N, 7/1/2018]

6.19.9.7 DEFINITIONS:

A. “Academic improvement plan” means a written document developed by the student assistance team that outlines the grade-level literacy content not mastered by the student, and that prescribes specific remediation programs.

B. “English language learner” means a student whose first or heritage language is not English and who is unable to read, write, speak, or understand English at a level comparable to grade-level English proficient peers and native English speakers.

C. “Benchmark assessment” means a department-approved assessment for student literacy that diagnoses and regularly measures the acquisition of reading skills, including phonemic awareness, letter knowledge, alphabetic decoding, vocabulary, spelling, comprehension and fluency to be given a minimum of three times during the academic year.

D. “Individual student report” means the report that indicates the student’s performance on the required state assessment using scale scores, performance levels, and subclaim performance indicators.

E. “Intervention” means the intensive targeted instruction of individual students or small groups of students, as determined by student performance on the benchmark assessment.

F. “Local education agency or “LEA” means a school district, or a locally chartered, or state-chartered charter school.

G. “Remediation” means tutoring, extended school day or school week programs, summer programs, and other evidence-based interventions and proven models for student improvement.

H. “Student assistance team” means a group consisting of a student’s:

- (1) teacher;
- (2) school counselor;
- (3) school administrator; and
- (4) parent or legal guardian, if they choose to participate.

[6.19.9.7 NMAC - N, 7/1/2018]

PROPOSED NEW RULE**6.19.9.8 GENERAL REQUIREMENTS FOR INTERVENTION, NOTIFICATION, AND REPORTING:**

A. The benchmark assessment for student literacy shall be administered a minimum of three times during the academic year. The beginning of year, middle of year, and end of year benchmarks shall be designated by the department. Student progress shall be carefully monitored throughout the academic year and shall be clearly communicated to parents or legal guardians through parent notification letters. The benchmark assessment shall measure, at a minimum, student performance on the five components of early reading: phonemic awareness, phonics, fluency, vocabulary, and reading comprehension. For English language learners, the assessment shall be grade-level appropriate and in the student's first language if appropriate and approved by the department.

B. Academic improvement plans shall be developed for students in need of early literacy intervention, as determined by performance on the benchmark assessment. School administrators shall ensure that academic improvement plans align with department guidance and evidence-based best practices. The department may request to review student academic improvement plans at any time.

C. The determination of a student's literacy strengths and weaknesses, as measured by the benchmark assessment, shall serve as criteria for offering parents or legal guardians the option for their student to receive an additional year of instruction in the same grade level. The benchmark assessment results shall also direct the use of daily intervention, remediation, or alternative programming.

D. For kindergarten and grades one through three, LEAs shall track and report student literacy promotion data in accordance with department requirements. Student proficiency shall be measured by the benchmark assessment, as defined in 6.19.9.7 NMAC. The department may issue additional guidance or provide additional tools to facilitate the collection and reporting of literacy promotion data.

- (1) LEAs shall report the following data to the department by March 1 of each year:
 - (a) number of students not proficient in reading, as determined by the middle of year benchmark assessment;
 - (b) number of student assistance teams convened for students not proficient in reading; and
 - (c) number of parent notification letters sent regarding individual students not proficient in reading, as determined by the middle of year benchmark assessment.
- (2) LEAs shall report the following data to the department by June 1 of each year:
 - (a) number of students not proficient in reading, as determined by the end of year benchmark assessment; and
 - (b) number of retention waiver letters signed by parents or legal guardians of students not proficient in reading.
- (3) LEAs shall report the following data to the department by August 1 of each year:
 - (a) number of students retained as a result of not being proficient in reading, as determined by the end of year benchmark assessment;
 - (b) number of students not proficient in reading, as determined by the end of year benchmark assessment, promoted to the next grade;
 - (c) number of students reading at performance level one, according to his or her grade three individual student report;
 - (d) explanation of final determinations of student retention and promotion for which student proficiency on the end of year benchmark assessment was not the deciding factor;
 - (e) copy of the LEA's retention waiver letter template;
 - (f) copies of all parent notification letters sent to parents or legal guardians regarding individual students not proficient in reading, as determined by the middle of year benchmark assessment; and
 - (g) copies of all retention waiver letters signed by parents or legal guardians for individual students not proficient in reading, as determined by the end of year benchmark.

[6.19.9.8 NMAC - N, 7/1/2018]

6.19.9.9 PARENT OR LEGAL GUARDIAN NOTIFICATION AND ENGAGEMENT:

A. If a student is not proficient in reading as determined by the middle of year benchmark assessment, the student's teacher shall notify the student's parent or legal guardian formally, in writing, and hold a parent-teacher conference.

- (1) Written notification shall include:

PROPOSED NEW RULE

monitoring;

- (a) student performance on the benchmark assessment and ongoing progress
- (b) specific interventions implemented to-date;
- (c) strategies for parents or legal guardians to implement at home; and
- (d) parent or legal guardian options including:
 - (i) daily intervention;
 - (ii) remediation; or
 - (iii) alternative programs.

(2) During the parent-teacher conference, the teacher shall review:

- (a) the student's performance in comparison to grade-level literacy standards;
- (b) assessment results that indicate the student is not on track to meet literacy benchmarks;
- (c) student growth targets that will lead to student proficiency in reading by the end of the academic year; and
- (d) whether or not the student is on track to be college and career ready as measured by the mid-year benchmark assessment.

B. A student assistance team shall develop an academic improvement plan for any student not proficient in reading as determined by the middle of year benchmark assessment. The academic improvement plan shall clearly outline progress monitoring activities and associated timelines to ensure student progress toward achieving grade-level literacy proficiency.

C. If a student has not reached grade-level literacy benchmarks as determined by the end of year benchmark assessment, the student's teacher shall notify the student's parent or legal guardian formally, in writing.

(1) Written notification shall include:

- (a) student performance on the benchmark assessment;
- (b) specific interventions implemented to-date;
- (c) strategies for parents or legal guardians to implement at home; and
- (d) a retention option pursuant to 22-2C-6 NMSA 1978.

(2) Retention shall ensure that a student receives an additional year of instruction in the same grade with an amended academic improvement plan. If a student's parent or legal guardian decides not to retain the student, the parent or legal guardian shall sign a retention waiver expressing their desire for the student to be promoted to the next higher grade with an academic improvement plan designed to address specific early literacy deficiencies. A retention waiver shall only prevent the student's retention for one school year. If the student fails to reach proficiency in reading, as determined by the benchmark assessment, the following year, the school shall retain the student.

D. In all grades and subject areas, parents or legal guardians shall be notified of their student's results on required state assessments and provided their individual student report no later than 30 days after the start of the academic school year. This notification shall also be shared with the student's former and current teachers no later than 30 days after the start of the academic school year.

[6.19.9.9 NMAC - N, 7/1/2018]

6.19.9.10 EXEMPTIONS: Schools may only exempt students from retention for good cause or pursuant to the completion of a retention waiver letter provided by the LEA. A student who is promoted with an exemption shall continue to receive literacy interventions that include specific literacy strategies prescribed in his or her academic improvement plan until proficiency is achieved.

A. Good cause exemptions shall be limited to the following:

- (1) students with disabilities whose individualized education program (IEP) indicate that participation in the benchmark assessment is not appropriate, pursuant to Subsection I of Section 22-2C-6 NMSA 1978, or other applicable state laws and regulations;
- (2) students with disabilities who were previously retained in kindergarten or grades one, two, or three, and who participate in the benchmark assessment, and whose IEPs or section 504 plans reflect that they have received literacy intervention for more than two years but are still deficient in reading. ;
- (3) students who have been previously retained in their current grade; or
- (4) students identified as English language learners who have had less than three years of instruction in schools in the United States.

PROPOSED NEW RULE

B. Documentation shall be submitted by the student's teacher to the school principal indicating why promotion is appropriate. Documentation shall include the reason for exemption and an existing academic improvement plan or IEP.

C. The school principal shall review and discuss the recommendation with the student's teacher and parent or legal guardian and determine whether or not the student qualifies for the requested exemption. If the school principal determines that, based on the provided documentation, the student qualifies for the requested exemption, the school principal shall make such a recommendation in writing to the superintendent or charter school administrator. The superintendent or charter school administrator shall accept or reject the school principal's recommendation in writing.

[6.19.9.10 NMAC - N, 7/1/2018]

6.19.9.11 ACCELERATION OPTIONS: Academically challenging curriculum options that provide accelerated instruction shall be made available to public school students in kindergarten and grades one through three as follows:

- A.** At a minimum, each school shall offer the following options:
- (1) whole-grade and mid-year promotion;
 - (2) subject-matter acceleration; and
 - (3) online instruction in personalized, higher grade level content.
- B.** Additional options may include the following:
- (1) enriched science, technology, engineering, and mathematics;
 - (2) enrichment programs;
 - (3) flexible grouping;
 - (4) advanced academic courses;
 - (5) combined classes;
 - (6) self-paced instruction;
 - (7) curriculum compacting;
 - (8) advanced-content instruction; and
 - (9) telescoping curriculum.

[6.19.9.11 NMAC - N, 7/1/2018]

6.19.9.12 ELIGIBILITY AND PROCEDURAL REQUIREMENTS FOR ACCELERATION:

A. LEAs shall establish student eligibility requirements and procedural requirements for any whole-grade promotion, mid-year promotion, or subject-matter acceleration that may result in a student attending a different school. Student eligibility requirements and procedural requirements established by the LEA shall be included in the LEA's comprehensive student progression plan.

B. School principals shall establish student eligibility requirements and a process by which parents or legal guardians may request student participation in acceleration options offered at their school.

- (1) Each principal shall inform parents or legal guardians and students of the options available at the school and the associated eligibility requirements for each option.
- (2) If the parent or legal guardian selects one of these options, and the student meets the eligibility requirements established by the principal, the student shall be provided the opportunity to participate in the acceleration option.

C. When establishing student eligibility requirements for acceleration, principals and LEAs shall consider, at a minimum:

- (1) the student's performance on a locally determined assessment;
- (2) the student's performance as indicated on his or her individual student report;
- (3) the student's grade point average;
- (4) the student's attendance and conduct record;
- (5) recommendations from one or more of the student's teachers in core-curricula courses;
- (6) a recommendation from a certified school counselor, if one is assigned to the school in which the student is enrolled; and
- (7) a recommendation from the student's parent or legal guardian.

[6.19.9.12 NMAC - N, 7/1/2018]

HISTORY OF 6.19.9 NMAC: [Reserved]

ARTICLE 2C

Assessment and Accountability

Section

22-2C-1	Short title.
22-2C-2	Purposes.
22-2C-3	Academic content and performance standards; department powers and duties.
22-2C-4	Statewide assessment and accountability system; indicators; required assessments; alternative assessments; limits on alternatives to English language reading assessments.
22-2C-4.1	Statewide college and workplace readiness assessment system.
22-2C-5	Measuring and categorizing students' academic performance.
22-2C-6	Remediation programs; promotion policies; restrictions.
22-2C-7	Repealed.
22-2C-7.1	Repealed.
22-2C-8	State improving schools program.
22-2C-9	Incentives for school improvement fund; created; distributions.
22-2C-10	Schools in need of improvement fund; created.
22-2C-11	Assessment and accountability system reporting; parent survey; data system; fiscal information.
22-2C-12	Repealed.
22-2C-13	Reporting recommended changes to laws.

22-2C-4. Statewide assessment and accountability system; indicators; required assessments; alternative assessments; limits on alternatives to English language reading assessments.

A. The department shall establish a statewide assessment and accountability system that is aligned with the state academic content and performance standards.

B. The academic assessment program shall test student achievement as follows:

(1) for grades three through eight and for grade eleven, standards-based assessments in mathematics, reading and language arts;

(2) for grades three through eight, a standards-based writing assessment with the writing assessment scoring criteria applied to the extended response writing portions of the language arts standards-based assessments; and

(3) for one of grades three through five and six through eight and for grade eleven, standards-based assessments in science by the 2007-2008 school year.

C. The department shall involve appropriate licensed school employees in the development of the standards-based assessments.

D. Before August 5 of each year, the department shall provide student scores on all standards-based assessments taken during the prior school year and required in Subsection B of this section to students' respective school districts in order to make test score data available to

assist school district staff with appropriate grade-level and other placement for the current school year.

E. All students shall participate in the academic assessment program. The department shall adopt standards for reasonable accommodations in standards-based assessments for students with disabilities and limited English proficiency, including when and how accommodations may be applied. The legislative education study committee shall review the standards prior to adoption by the department.

F. Students who have been determined to be limited English proficient may be allowed to take the standards-based assessment in their primary language. A student who has attended school for three consecutive years in the United States shall participate in the English language reading assessment unless granted a waiver by the department based on criteria established by the department. An English language reading assessment waiver may be granted only for a maximum of two additional years and only on a case-by-case basis.

History: 1978 Comp., § 22-2A-4, enacted by Laws 2003, ch. 153, § 13; 2004, ch. 31, § 1; 2005, ch. 315, § 2; 2007 ch. 306, § 1; 2007, ch. 307, § 3; 2007, ch. 308, § 3; 2015, ch. 58, § 6.

Compiler's notes. — Laws 2003, ch. 153, §§ 10 to 20 were enacted as 22-2A-1 to 22-2A-11 NMSA 1978, but were relocated due to the existing Article 2A.

The 2015 amendment, effective June 19, 2015, removed references to adequate yearly progress and removed the requirement to test student achievement in social studies for certain grades; in Subsection A, after "content and performance standards", deleted the remainder of the subsection relating to adequate yearly progress; in Subsection B, after "assessment program", deleted "for adequate yearly progress"; and in Subsection B, Paragraph (1), after "language arts", deleted "and social studies".

The 2007 amendment, effective July 1, 2007, in Subsection B, changed "grades three through nine" to "grades three through eight"; in Subsections A, B, C and E, changed "standards-based academic performance tests" to "standards-based assessments"; and in Subsection D, changed "academic testing" to "standards based assessments".

The 2005 amendment, effective April 7, 2005, deleted former Subsection B(1) which provided that the assessment program shall test achievement for grades kindergarten through two by diagnostic and standards based tests on reading that include phonemic awareness, phonics and comprehension by the 2003-2004 school year.

The 2004 amendment, effective May 19, 2004, revised Paragraph (3) of Subsection B to change the grades from "four, six, eight and eleven" to grades "three to nine" and to add after "writing" and before "tests", "assessment with the writing assessment scoring criteria applied to the extended response writing portions of the language arts criterion-referenced".

22-2C-6. Remediation programs; promotion policies; restrictions.

A. Remediation programs, academic improvement programs and promotion policies shall be aligned with school-district-determined assessment results and requirements of the state assessment and accountability program.

B. Local school boards shall approve school-district-developed remediation programs and academic improvement programs to provide special instructional assistance to students in grades one through eight who do not demonstrate academic proficiency. The cost of remediation programs and academic improvement programs shall be borne by the school district. Remediation programs and academic improvement programs shall be incorporated into the school district's educational plan for student success and filed with the department.

C. The cost of summer and extended day remediation programs and academic improvement programs offered in grades nine through twelve shall be borne by the parent; however, where parents are determined to be indigent according to guidelines established by the department, the school district shall bear those costs.

D. Diagnosis of weaknesses identified by a student's academic achievement may serve as criteria in assessing the need for remedial programs or retention.

E. A parent shall be notified no later than the end of the second grading period that the parent's child is not academically proficient, and a conference consisting of the parent and the teacher shall be held to discuss possible remediation programs available to assist the student in becoming academically proficient. Specific academic deficiencies and remediation strategies shall be explained to the student's parent and a written intervention plan developed containing time lines, academic expectations and the measurements to be used to verify that a student has overcome academic deficiencies. Remediation programs and academic improvement programs include tutoring, extended day or week programs, summer programs and other research-based interventions and models for student improvement.

F. At the end of grades one through seven, three options are available, dependent on a student's academic proficiency:

(1) the student is academically proficient and shall enter the next higher grade;

(2) the student is not academically proficient and shall participate in the required level of remediation. Upon certification by the school district that the student is academically proficient, the student shall enter the next higher grade; or

(3) the student is not academically proficient after completion of the prescribed remediation program and upon the recommendation of the teacher and school principal shall either be:

(a) retained in the same grade for no more than one school year with an academic improvement plan developed by the student assistance team in order to become academically proficient, at which time the student shall enter the next higher grade; or

(b) promoted to the next grade if the parent refuses to allow the child to be retained pursuant to Subparagraph (a) of this paragraph. In this case, the parent shall sign a waiver indicating the parent's desire that the student be promoted to the next higher grade with an academic improvement plan designed to address specific academic deficiencies. The academic improvement plan shall be developed by the student assistance team outlining time lines and

monitoring activities to ensure progress toward overcoming those academic deficiencies. Students failing to become academically proficient at the end of that year as measured by grades, performance on school district assessments and other measures identified by the school district shall be retained in the same grade for no more than one year in order to have additional time to achieve academic proficiency.

G. At the end of the eighth grade, a student who is not academically proficient shall be retained in the eighth grade for no more than one school year to become academically proficient or if the student assistance team determines that retention of the student in the eighth grade will not assist the student to become academically proficient, the team shall design a high school graduation plan to meet the student's needs for entry into the work force or a post-secondary educational institution. If a student is retained in the eighth grade, the student assistance team shall develop a specific academic improvement plan that clearly delineates the student's academic deficiencies and prescribes a specific remediation plan to address those academic deficiencies.

H. A student who does not demonstrate academic proficiency for two successive school years shall be referred to the student assistance team for placement in an alternative program designed by the school district. Alternative program plans shall be filed with the department.

I. Promotion and retention decisions affecting a student enrolled in special education shall be made in accordance with the provisions of the individual educational plan established for that student.

J. For the purposes of this section:

(1) "academic improvement plan" means a written document developed by the student assistance team that describes the specific content standards required for a certain grade level that a student has not achieved and that prescribes specific remediation programs such as summer school, extended day or week school and tutoring;

(2) "school-district-determined assessment results" means the results obtained from student assessments developed or adopted by a local school board and conducted at an elementary grade level or middle school level;

(3) "educational plan for student success" means a student-centered tool developed to define the role of the academic improvement plan within the public school and the school district that addresses methods to improve student learning and success in school and that identifies specific measures of a student's progress; and

(4) "student assistance team" means a group consisting of a student's:

- (a) teacher;
- (b) school counselor;
- (c) school administrator; and
- (d) parent.

History: 1978 Comp., § 22-2-8.6, enacted by Laws 1986, ch. 33, § 7; 1987, ch. 320, § 3; 1993,

ch. 226, § 9; 2000, ch. 20, § 1; recompiled and amended as § 22-2C-6 by Laws 2003, ch. 153, § 15; 2007, ch. 309, § 4.

Cross references. — For student achievement, see 22-2C-1 NMSA 1978 et seq.

Compiler's notes. — This section was compiled as Section 22-2-8.6 NMSA 1978 at the time of the enactment of Laws 2003, ch. 143, § 2.

The 2007 amendment, effective June 15, 2007, amended Subsection B to change "fail to attain adequate yearly progress" to "do not demonstrate academic proficiency" and provided that students failing to become academically proficient as measured by grades, performance on school district assessments and other measures identified by the school district shall be retained in the same grade to provide additional time to achieve academic proficiency.

The 2003 amendment, effective April 4, 2003, recompiled former 22-2-8.6 NMSA 1978 as 22-2A-6 NMSA 1978 (relocated to 22-2C-6), and deleted "Educational content standards" at the beginning of the section heading; rewrote Subsection A to the extent that a detailed comparison is impracticable; in Subsection B substituted "adequate yearly progress" for "a level of proficiency established by the content standards" near the middle and deleted "of education" at the end.

The 2000 amendment, effective May 17, 2000, in the section heading, substituted "Educational content" for "Essential competencies" and "restrictions" for "exception"; rewrote Subsections A through D; added Subsection E; redesignated former Subsection E as F and rewrote that section; added Subsection G; redesignated former Subsection G as H and rewrote that section; and added Subsections I and J.

The 1993 amendment, effective July 1, 1993, deleted "of education" following "state board" in Subsection C; deleted former Subsection H, which read "The provisions of Subsection A of this section shall take effect in the 1987-88 school year"; and deleted former Subsection I, which read "The provisions of Subsections B through G of this section shall take effect beginning in the 1989-90 school year."

ANNOTATIONS

Constitutionality. — Subsection C does not offend the "free school guaranty" of N.M. Const., art. XII, § 1, as that provision is construed by the New Mexico Supreme Court. 1990 Op. Att'y Gen. No. 90-06.