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## Special Education Update

Chronic disparities in opportunity have led to low educational outcomes for special education students and achievement gaps between special education student subgroups. Feedback from advocates and families have raised concerns about the services available to students with disabilities in New Mexico. Approximately 16.5 percent, or just over 50 thousand, students in New Mexico were identified as needing special education services in the 2022-2023 school year, higher than the last reported national rate of 14.5 percent in the 2020-2021 school year. The latest data shows only 15 percent of special education students were proficient in early literacy, 9 percent were proficient in language arts and science, and only 6 percent were proficient in math. Additionally, nearly a third of special education students did not graduate from high school on time in 2021. Students with disabilities are twice as likely to receive an out-of-school suspension (13 percent) as students without disabilities (6 percent).

The consolidated *Martinez* and *Yazzie* lawsuit found the state failed to meet its constitutional obligation to provide an adequate, sufficient education to special education students, as well as economically disadvantaged students, English learners, and Native American students. While the legislature has made significant investments to address the court's findings, few of these initiatives have specifically addressed special education students. On May 25, 2023, Governor Michelle Lujan Grisham announced Executive Order 2023-062 establishing the Office of Special Education within the Public Education Department (PED). The executive order closely resembles the House Education Committee Substitute for House Bill 285 (HB285/HECS) which proposed to create and amend several sections of law related to special education, but the measure was not passed by the 56th Legislature. Over the interim, LESC staff will conduct a special education stakeholder public engagement process. This work will begin with a series of nine listening sessions for all stakeholders. Next, a special education stakeholder working group that will use the feedback and recommendations from the listening sessions to inform a draft bill proposal for potential LESC endorsement in December 2023, including considering if any part of Executive Order 2023-062 should be codified. This brief will provide an overview of special education in New Mexico, as well as Executive Order 2023-062, to update the committee on special education as it begins this work.

### Key Takeaways

The consolidated *Martinez* and *Yazzie* lawsuit found the state failed to meet its constitutional obligation to students in special education.

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IEPs are legal documents developed to ensure students with disabilities receive specialized instruction and related services.

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SEG funds for special education are based on needs a student has been identified as requiring in their IEP along with the number of staff providing diagnostic services or speech therapy and other ancillary services.

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Executive Order 2023-062 creates an Office of Special Education and appears to be based on HB285/HECS, which died in the 2023 legislative session.

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# Overview of Special Education

## Special Education Services in New Mexico

Federal law ensures students with disabilities receive free and appropriate public education through the Individuals with Disabilities Education Act of 2004 (IDEA) and Section 504 of the Rehabilitation Act of 1973. These federal laws ensure states provide free and appropriate public education tailored to each student's individual needs, regardless of cost, to prepare them for postsecondary education, employment, and independent living. IDEA stipulates education for these students should occur in the least restrictive environment to the maximum extent appropriate, meaning students with disabilities should be educated with their peers as much as possible.

Federal law requires states to provide students with disabilities the same opportunity for education as students without disabilities.

As New Mexico law does not contain a special education act but rather outlines broad requirements within Section 22-13 NMSA 1978,

the process for identifying and providing educational services for children with disabilities is articulated in rule, specifically 6.31.2 NMAC, which PED is in the process of updating. PED proposed amendments to this section of rule with a proposed effective date of July 31, 2023. The proposed amendment removes all references and material related to gifted students and retitles the section of rule Children with Disabilities. The amendment also updates and adds language regarding graduation requirements, to be in alignment with PED's proposed rule 6.19.7 NMAC, Demonstrations of Competencies for High School Graduation.

***Qualified Disability Categories.*** Special education qualifying disability categories are outlined in both federal law and state administrative rule, and qualifying students are legally entitled to special education services. Federally defined categories include: autism, deaf blindness, developmental delay, emotional disturbance, hearing impairment/deafness, intellectual disability, multiple disabilities, orthopedic impairment, other health impaired, specific learning disability, speech-language impairment, traumatic brain injury, and visual impairment.

New Mexico funds special education based on a classification system that assigns students a program class based on the degree of services they receive. In other words, the proxy for need is student classification. Section 22-8-21 NMSA 1978 of the Public School Finance Act classifies special education programs as class A, class B, class C, and class D, with increasing levels of services and funding from class A to class D. Special education programs are classified by the following:

- Class A programs, in which PED-certified individuals provide services to children whose Individualized Education Programs (IEPs) require a minimal amount of special education and in which the ratio of students to professionals is regulated by PED;
- Class B programs, in which PED-certified individuals provide services to children whose IEPs require a moderate amount of special education and in which the ratio of students to professionals is regulated by PED;
- Class C programs, in which PED-certified individuals provide services to children whose individualized IEPs require an extensive amount of special education and in which the ratio of students to professionals is regulated by PED; and



- Class D programs, in which PED-certified individuals provide services to children whose IEPs require a maximum amount of special education and in which the ratio of students to professionals is regulated by PED. Students in class D programs may be enrolled in private, nonsectarian, nonprofit educational training centers.

New Mexico rule, specifically 6.31.2.10 NMAC, delineates identification, evaluation, and eligibility determinations for each classification.

School districts and charter schools use the IEP process to determine student eligibility for special education and the appropriate level of service.

**Individualized Education Programs.** IDEA requires schools provide special education services to eligible students as outlined in their IEPs. IEPs are legal documents developed to ensure a child with an identified disability receives specialized instruction and related services, and is developed by an IEP team. New Mexico rule provides further guidance on how IEPs are developed, reviewed, and revised in accordance with federal law and provides guidance on improving educational outcomes and promoting successful post-school employment and/or education for students with IEPs. IEPs typically include:

- The involvement and progress of the child with a disability in the general curriculum;
- All related services for which the child qualifies;
- Appropriate educational accommodations necessary for the child to be successful;
- The child’s present levels of educational performance; and
- Measurable annual goals and objectives of the child’s education.

Subsection B of 6.31.2.11 NMAC provides guidance on disability specific considerations IEP teams must use in developing IEPs for students with a qualified disability. It is PED’s responsibility to assist educators and parents in developing quality IEPs for students who receive special education services.

### Special Education Funding

**FY23 State and Local Appropriations for Special Education.** In FY23, the legislature appropriated \$612.2 million for special education programs and services through the state equalization guarantee (SEG). Those SEG funds are based on a student’s special education classification along with the number of full-time-equivalent certified or licensed staff providing diagnostic services or speech therapy and other ancillary services. Additionally, IDEA distributes federal grant funding for states to provide special education and related services for students between the ages of 3 and 21 who have been identified as having a

disability. In FY23, those grant programs will distribute \$103 million to public schools in New Mexico.

**FY23 State Appropriations for Special Education**

Program	Index	Membership	Funds
Class A/B	0.7	45,935.50	\$177.6 million
Class C	1	8,769	\$48.4 million
Class D	2	8164.50	\$90.2 million
DD for 3- and 4-year-olds	2	3022	\$33.4 million
Ancillary	25	1902.61	\$262.7 million

Source: PED

The number of special education program units each local education agency (LEA) receives through the SEG is determined by adding the following:

- The number of students (MEM) in approved class A and B programs multiplied by the cost differential factor 0.7;
- The number of students (MEM) in approved class C programs multiplied by the cost differential factor 1.0;
- The number of students (MEM) in approved class D programs multiplied by the cost differential factor 2.0;
- The number of students (MEM) for three- and four-year-old children with developmental disabilities multiplied by the cost differential factor 2.0; and
- For related services ancillary to providing special education, the number of full-time-equivalent certified or licensed ancillary service and diagnostic service personnel multiplied by the cost differential factor 25.

## Maintenance of Effort

The federal IDEA local maintenance of effort (MOE) requirement obligates states and LEAs receiving IDEA funds to budget and spend at least the same amount of state and local funds for education for students with disabilities on a year-to-year basis. In addition, federal IDEA-B funds are to be used to supplement, not supplant, the level of a state's special education funding.

Failure to meet MOE requirements may result in an LEA losing eligibility to receive IDEA formula funding and requiring an LEA to repay funds, using a nonfederal source, to PED, who is required to send the penalty funds to the U.S. Department of Education. MOE is particularly challenging in New Mexico, given the state's high share of special education funding.

The amount of state funding allocated to each LEA is based on program units generated by special education students and ancillary service staff employed to provide special education services. Each school board or governing body of a charter school is responsible for allocating the appropriation. PED must ensure all LEAs are in compliance with all statutes and rules related to special education and that all LEAs provide a free and appropriate public education to all special education students.

When the federal government first mandated special education services for public school students in kindergarten through twelfth grade (K-12) in 1975 with the Education For All Handicapped Children Act, which was reauthorized in 1990 as IDEA, lawmakers promised that federal funding for special education would cover a portion of the costs schools incurred to serve students with disabilities. Lawmakers set a ceiling of 40 percent of the nation's average per-pupil expenditure (APPE) for this federal funding, and laid out a schedule of gradually growing federal investments from 5 percent of the APPE in 1987 to 40 percent of the APPE in 1982. However, the federal government never followed through on the proposed schedule, and the language in the law was changed to authorize a "maximum level of funding" without requiring it. The current federal special education funding formula guarantees states the same amount of IDEA funding they got in 1999. If the product of the original formula (40 percent of APPE times the number of students with disabilities in the state) exceeds the 1999 sum, the additional funds are adjusted by the state's total number of K-12 students and the state's total number of K-12 students living in poverty.

## Executive Order

According to the Office of the Governor Michelle Lujan Grisham, Executive Order 2023-062 (see **Attachment 1**) creates an Office of Special Education to ensure students with disabilities receive a high quality education. Executive Order 2023-062 creates the Office of Special Education, whose director will report directly to the PED Secretary, and establishes duties of the Office.



The Executive Order specifies the duties of the Office of Special Education, requiring, in coordination with the PED Secretary and relevant divisions and bureaus of PED, the Office to:

- Develop and annually update a state plan establishing special education standards and goals to improve outcomes for students with disabilities;
- Collect statewide data on students with disabilities, effectiveness and provision of special education programs and services, specific disciplinary actions taken against students with disabilities, and school spending of state and federal special education funds;
- Submit an annual report to the PED Secretary, the Governor, and LESC;
- Oversee and enforce compliance with IDEA and state law pertaining to special education;
- Monitor spending of federal and state funds for special education programs;
- Develop, review, and propose updates to special education statutes and rule;
- Consult and coordinate with stakeholders to address the needs of students with disabilities in all educational activities, prioritize and expand appropriate services for children with disabilities from birth to career, ensure timely and comprehensive screenings for students with disabilities, ensure all students with disabilities in state custody receive free and appropriate education;
- Coordinate with school districts and public postsecondary institutions to develop and provide professional learning programs and materials for staff educating and serving students with disabilities; targeted training on federal and state laws for students with disabilities, disability-specific policies and practices, de-escalation practices and techniques, positive behavior interventions, inclusion and integration practices, individualized education programs, and engagement with students and parents;
- Provide technical assistance to school districts and charter schools to implement evidence- and research-based programs and services that are culturally and linguistically responsive;
- Conduct activities to promote recruitment and retention of qualified special education staff;
- Analyze, collect data, and take appropriate action on recommendations of the Office of the Special Education Ombud;
- Solicit input on the quality of special education service delivery from stakeholders; and
- Take any other actions as directed by the PED Secretary.

Executive Order 2023-062 provides for a transition of the special education division to the Office of Special Education and requires the preschool special education coordinator to transfer to the Early Childhood and Care Department by July 1, 2024. Finally, Executive Order 2023-062 requires the Office of Special Education to study and make recommendations regarding special education salary differential levels also by July 1, 2024.

## Next Steps

Over the interim, LESC staff will convene special education stakeholders in a conversation regarding the provision of special education services. To this end, the LESC will be organizing listening sessions and convening a special education stakeholder working group. Nine listening sessions for special education stakeholders—five in-person sessions around the state and four virtual only sessions—from June through August 2023 will be held to provide the opportunity for stakeholders to express opinions and share ideas. The

special education stakeholder engagement working group will meet virtually from August through October 2023 to provide specific feedback on policy proposals. The special education stakeholder engagement working group has already been seated, and the working group members will have the opportunity to attend the listening sessions in June through August 2023. LESC staff will use feedback and recommendations from the special education stakeholder engagement process to inform any draft proposals.



# State of New Mexico

Michelle Lujan Grisham  
Governor

## EXECUTIVE ORDER 2023-062

### ESTABLISHING THE OFFICE OF SPECIAL EDUCATION WITHIN THE PUBLIC EDUCATION DEPARTMENT

**WHEREAS**, the New Mexico Public Education Department (the “Department”) was established to ensure every New Mexico student, including those with disabilities, receives high-quality education;

**WHEREAS**, over 16% of students enrolled in public schools qualified for special education services in the 2022-2023 school year, but low academic proficiency of special education students (e.g., 15% proficient in early literacy, 9% in language arts and science, and 6% in math), as well as high dropout and low graduation rates, indicate a need for significant improvement in the quality of education provided to students with disabilities;

**WHEREAS**, in the *Martinez/Yazzie* consolidated lawsuit, the district court held that New Mexico has not met its duty to provide an education to the State’s “at-risk” students, which explicitly included students with disabilities;

**WHEREAS**, the State must develop and implement a plan to set consistent statewide standards and goals for special education, and collect and report comprehensive data to inform evidence-based policies, processes, and programs that adequately serve students with disabilities;

**WHEREAS**, the State must monitor all federal and State funding distributed to public schools for special education students to ensure special education spending leads to high-quality special education services and excellent outcomes for students with disabilities; and

**WHEREAS**, to improve the outcomes of students with disabilities in this State from cradle to career, the Department must elevate special education and lead a collaborative effort, including key education stakeholders and every State agency that serves children and youth with disabilities and their families, to accomplish the full intent of the federal Individuals with Disabilities Education Act of 2004 (the “IDEA”).

**NOW, THEREFORE, I**, Michelle Lujan Grisham, Governor of the State of New Mexico, by the authority vested in me by the Constitution and the Laws of the State of New Mexico do hereby **ORDER** and **DIRECT** as follows:

1. **Creation of Office; Appointment of Director.** The Office of Special Education (the “Office”) is hereby established within the Department. The Department Secretary shall appoint and hire a director of the Office, who shall report directly to the Secretary. The Department shall remain the state agency responsible for enforcing the IDEA.

2. **Duties of Office.** In coordination with the Department Secretary and relevant divisions and bureaus of the Department, the Office shall:

A. Develop and annually update a state plan that establishes statewide special education standards and goals to improve outcomes for students with disabilities;

B. Collect statewide data on the following: students with disabilities, effectiveness and provision of special education programs and services, specific disciplinary actions taken against students with disabilities, and school spending of state and federal special education funds;

C. Submit a report on the status of special education, nationwide compensation trends, and best practices to the Department Secretary, the Governor, and the Legislative Education Study Committee by July 31 of each year;



D. Oversee and enforce the State's compliance with the IDEA and any state law pertaining to special education;

E. Monitor spending of state and federal funds for special education programs for students with disabilities, including state equalization guarantee distributions and Medicaid, and take actions to ensure appropriate spending, as needed; provided that the Office shall coordinate with the Human Services Department to monitor Medicaid spending for special education;

F. Develop, review, and propose updates to state special education statutes, rules, policies, and technical assistance to ensure that they meet the needs of students with disabilities;

G. Consult and coordinate with other units of the Department, other state agencies, public post-secondary educational institutions, and key education and community stakeholders to: (1) address the needs of students with disabilities in all educational activities, programs, and policies; (2) prioritize and expand appropriate services for children and youth with disabilities from birth to career; (3) ensure timely and comprehensive screenings and evaluations for students with disabilities or students who are suspected of having a disability; (4) reduce restraint, seclusion, and disciplinary actions for students with disabilities, including removal from the classroom; and (5) ensure that all students with disabilities in State custody receive free and appropriate public education;

H. Coordinate with school districts and public post-secondary education institutions to develop and provide: (1) education, training, and professional development programs and materials for licensed school employees, instructional support providers, and related service providers in educating and serving students with disabilities; and (2) targeted training for school district and public school officials, governing boards, and employees on the IDEA, Section 504 of the federal Rehabilitation Act of 1973, state laws that prohibit discrimination against students with disabilities, disability-specific policies and practices, de-escalation practices and techniques,

positive behavior interventions, inclusion and integration practices, individualized education programs, and engagement with students and parents;

I. Provide technical assistance and recommendations to school districts and public schools to implement evidence- and research-based programs and services that are culturally and linguistically responsive in all state and federally funded special education settings;

J. Conduct activities to promote the recruitment and retention of qualified special education educators, instructional support providers, related services providers, and diagnosticians;

K. Analyze, collect data on, and take appropriate action on the recommendations of the Office of the Special Education Ombud, as needed;

L. Solicit input regarding quality of special education service delivery in the State from community and educational stakeholders, including educators, students, and their families; and

M. Take any other actions, as directed by the Department Secretary.

**3. Special Education Salary Differential Levels.** No later than July 1, 2024, the Office shall, in consultation with the Department, relevant state agencies, educators, legislative committees, and school districts, identify and study options and make recommendations for salary differential levels, time allocations, and other supports for licensed school employees, educational assistants, and other instructional support providers who educate or provide instructional support to students with disabilities, taking into consideration their duties and responsibilities.

**4. Transfer of Preschool Special Education.** No later than July 1, 2024, the Department and the Office shall consult and coordinate with the Early Childhood Education and Care Department to execute a formal written agreement that transfers the Part B, 619 Coordinator to the Early Childhood Education and Care Department in compliance with Part B of the IDEA and identifies the administrative

roles, responsibilities, personnel, and funding for both the Office and the Early Childhood Education and Care Department.

**5. Transition of Special Education Division.** By July 1, 2024, the Office shall assume the duties of the Special Education Division (the “Division”) of the Department, provided that the Division shall continue to function until the director of the Office has been hired.

**I FURTHER ORDER and DIRECT** as follows:

1. This Order shall take effect immediately and shall remain in effect until renewed, modified, or rescinded.
2. Nothing in this Order shall be construed to conflict with federal or state law.
3. Nothing in this Order shall be construed to create a private right of action, including an action to enforce any provision of this Order or mandate the undertaking of any particular action pursuant to this Order.
4. Nothing in this Order shall be construed to limit the rights of students with disabilities or the responsibilities and duties of the Department, school districts, or public schools pursuant to federal and state law.

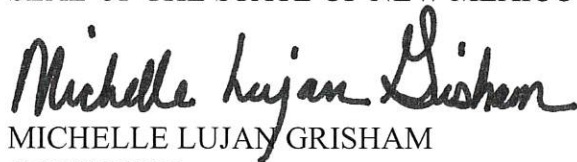
ATTEST:



MAGGIE TOULOUSE OLIVER  
SECRETARY OF STATE

DONE AT THE EXECUTIVE OFFICE  
THIS 25TH DAY OF MAY 2023

WITNESS MY HAND AND THE GREAT  
SEAL OF THE STATE OF NEW MEXICO



MICHELLE LUJAN GRISHAM  
GOVERNOR

