

Proposed Rule Abstract

1. **Agency:** PED
2. **Rule Citation:** 6.31.2 NMAC, Children with Disabilities/Gifted Children
3. **Rulemaking Action:** Amend
4. **Register Issue and Date of Notice of Proposed Rulemaking:** Volume 29, Issue 13, July 10, 2018
5. **Effective Date:** Upon publication of the final rule in the *New Mexico Register*
6. **Citation to Specific Legal Authority:** Section 22-13-5 NMSA 1978
7. **Short Explanation of the Rule's Purpose:** The purpose of the proposed amendment to 6.31.2 NMAC, Children with Disabilities/Gifted Children is to update the list of individuals and organizations receiving information regarding the state complaint procedures for children with disabilities or gifted children.
8. **Link to Full Text of the Rule:** <https://webnew.ped.state.nm.us/wp-content/uploads/2018/07/6.31.2-NMAC-Proposed-Amendment.docx>
9. **How Information on the Rule Can Be Obtained:** <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rule-notification/>, or from Jamie Gonzales at (505) 827-7889
10. **Comment Period and Deadlines:** July 10, 2018 to August 16, 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, rule.feedback@state.nm.us, or faxed to (505) 827-6681
11. **Rule Hearing:** August 16, 2018 from 9:00 a.m. to 11:00 a.m. at 300 Don Gaspar Avenue in Mabry Hall, Santa Fe, NM
12. **Link to Permanent Agency Rulemaking Record:** http://statenm.force.com/public/SSP_RuleHearingSearchPublic

Update

The amendments to 6.31.2 NMAC, proposed August 16, 2018, were adopted on September 11, 2018 with no changes, and is published in the September New Mexico Register. This rulemaking was presented to the LESC on July 20, 2018.

Summary of Proposed Rule

The July 10, 2018 issue of the *New Mexico Register* contained proposed amendments to Part 2 of 6.31 NMAC. The proposed amendment would update the list of individuals and organizations receiving information from the Special Education Bureau (SEB) of the Public Education Department (PED) regarding state complaint procedures for children with disabilities or gifted children. See **Attachment 1, Proposed Amended Rule, 6.31.2.13(H) NMAC, Children with Disabilities/Gifted Children.**

Analysis

The amendment to 6.31.2 NMAC, Children with Disabilities/Gifted Children, updates the list of individuals and organizations that will receive information regarding the state complaint procedures for children with disabilities under the federal Individuals with Disabilities Education Act (IDEA). Currently, SEB is required to disseminate information to parent centers, information centers, advocacy agencies and attorneys, private advocates, independent living centers, and other appropriate entities throughout the state.

The proposed rule strikes the list of entities to which PED must send an annual email providing information about state complaint procedures on behalf of children with disabilities from 6.31.13(H)(1)(b)(ii) NMAC, in favor of a cross-reference to the root Subparagraph 6.31.2.13(H)(1)(b), which requires SEB to “disseminate information regarding state complaint procedures,” to certain entities. The proposed rule eliminates attorneys and private advocates from that annual email list, although these entities can still request information and SEB is required to provide it in either electronic or print form.

The proposed change reflects current requirements in IDEA. PED cites Section 22-13-5NMSA 1978 as statutory authority for the regulation, which directs PED to establish rules and standards for the education of children with disabilities under Section 20 USC 1412(a)(11) of IDEA. Specifically, the federal law requires state educational agencies (SEAs) that receive funds under IDEA to ensure the requirements of the act are met in all educational programs administered by it for children with disabilities, including procedural safeguards such as complaint procedures. The implementing regulation for this section of IDEA (30 CFR 300.151) requires the wide dissemination of state complaint procedures to “parents and agencies, independent living centers, and other appropriate entities”-- note that attorneys and private advocates are not included in that list. See **Attachment 2, Individuals with Disabilities Act Regulation, 34 CFR 300.151, Adoption of State complaint procedures.**

A review of recent federal rulemakings affecting 34 CFR 300 shows no rulemakings since at least 2015 have impacted this requirement, suggesting PED is amending its rule to better reflect longstanding requirements at the federal level.



**Proposed Amended Rule, 6.31.2.13 (H) NMAC
Children with Disabilities/Gifted Children**

ATTACHMENT 1

6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:

A. General responsibilities of public agencies. Each public agency shall establish, implement and maintain procedural safeguards that meet the requirements of 34 CFR Secs. 300.500-300.536, and all other applicable requirements of these or other department rules and standards.

B. Examination of records. Each public agency shall afford the parents of a child with a disability an opportunity to inspect and review all education records related to the child in compliance with 34 CFR Secs. 300.501(a), 300.613-300.620, 34 CFR Part 99, and any other applicable requirements of these or other department rules and standards.

C. Parent and student participation in meetings. Each public agency shall afford the parents of a child with a disability and, as appropriate, the child, an opportunity to participate in meetings with respect to the identification, evaluation and educational placement or the provision of FAPE to the child, in compliance with 34 CFR Secs. 300.322, 300.501(b) and (c), and any other applicable requirements of these or other department rules and standards.

D. Notice requirements.

(1) Notice of meetings. Each public agency shall provide the parents of a child with a disability with advance written notice that complies with 34 CFR Sec. 300.322 for IEP meetings and any other meetings in which the parent has a right to participate pursuant to 34 CFR Sec. 300.501.

(2) Notice of agency actions proposed or refused. A public agency must give written notice that meets the requirements of 34 CFR Sec. 300.503 to the parents of a child with a disability a reasonable time before the agency proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. If the notice relates to a proposed action that also requires parental consent under 34 CFR Sec. 300.300, the agency may give notice at the same time it requests parental consent.

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy must be given to the parents, (a) upon initial referral for evaluation; (b) upon receipt of the first state complaint under 34 CFR Secs. 300.151-300.153; (c) upon receipt of the first due process complaint under 34 CFR Sec. 300.507 of the school year; (d) in accordance with the discipline procedures in 34 CFR Sec. 300.530(h); and (e) upon request of the parents. The notice must meet all requirements of 34 CFR Sec. 300.504, including the requirement to inform the parents of their obligation under 34 CFR Sec. 300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. A public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

E. Communications in understandable language. Pursuant to 34 CFR Secs. 300.9(a), 300.322(e), 300.503(c) and 300.504(d), each public agency must communicate with parents in understandable language, including the parent's native language or other mode of communication, unless it is clearly not feasible to do so, if necessary for understanding, in IEP meetings, in written notices and in obtaining consent where consent is required.

F. Parental consent.

(1) Informed parental consent as defined in 34 CFR Sec. 300.9 must be obtained in compliance with 34 CFR Sec. 300.300 before (a) conducting an initial evaluation or reevaluation; and (b) initial provision of special education and related services to a child with a disability. Consent for initial evaluation must not be construed as consent for initial provision of special education and related services. If parental consent is not provided for the initial evaluation or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC.

(2) Pursuant to 34 CFR Sec. 300.300(d)(1), parental consent is not required before (a) reviewing existing data as part of an evaluation or a reevaluation; or (b) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(3) Pursuant to 34 CFR Sec. 300.300(b), if the parents of a child with a disability refuse consent for the initial provision of special education and related services, the public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that the services may be provided to the child. If the parent refuses consent or fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child and is not required to convene an IEP team meeting or develop an IEP under 34 CFR Secs. 300.320 and 300.324. All provisions of 34 CFR Sec. 300.300 must be followed with respect to parental consent.

(4) Pursuant to 34 CFR Sec. 300.300(c)(2), informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent by using procedures consistent with those in 34 CFR Sec. 300.322(d) and the child's parent has failed to respond.

(5) Pursuant to 34 CFR Sec. 300.300(d)(3), a public agency may not use a parent's refusal to consent to one service or activity for which consent is required to deny the parent or child any other service, benefit or activity of the public agency, except as required by 34 CFR Part 300.

(6) Pursuant to 34 CFR Sec. 300.300(b)(4), parents may revoke consent for the continued provision of all special education and related services for their child. The revocation of consent must be in writing. After providing prior written notice in accordance with 34 CFR Sec. 300.503, the public agency must cease the provision of special education and related services for that child. The public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that services may be provided to the child. The public agency will not be considered to be in violation of the requirement to make FAPE available to the child once consent has been revoked. The public agency will also not be required to convene an IEP team meeting or develop an IEP for the child for further provision of special education and related services.

G. Conflict management and resolution.

(1) Each public agency shall seek to establish and maintain productive working relationships with the parents of each child the agency serves and to deal constructively with disagreements. Toward that end, each public agency is strongly encouraged to provide appropriate training for staff and parents in skills and techniques of conflict prevention and management and dispute resolution, and to utilize an informal dispute resolution method as set forth under Subparagraph (a) of Paragraph (2) of Subsection G of 6.31.2.13 NMAC to resolve disagreements at the local level whenever practicable.

(2) Spectrum of dispute resolution options. To facilitate dispute prevention as well as swift, early conflict resolution whenever possible, the department and the public agency shall ensure that the following range of dispute resolution options is available to parents and public agency personnel.

(a) Informal dispute resolution option. If a disagreement arises between parents and a public agency over a student's IEP or educational program, either the parents or the public agency may convene a new IEP meeting at any time to attempt to resolve their differences at the local level, without state-level intervention.

(b) Third-party assisted intervention. The special education bureau (SEB) of the department will ensure that mediation is available to parents and public agencies who request such third-party assisted intervention before filing a state-level complaint or a request for a due process hearing. The SEB will honor a request for mediation that:

- (i) is in writing;
- (ii) is submitted to the SEB;
- (iii) is a mutual request signed by both parties or their designated

representatives;

(iv) includes a statement of the matter(s) in dispute and a description of any previous attempts to resolve these matters at the local level; and

(v) any request that does not contain all of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(c) Formal dispute resolution.

(i) A state-level complaint may be filed with the SEB of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the parties may agree to convene a FIEP meeting or mediation as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by a public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(d) The Mediation Procedures Act does not apply to mediations conducted under 6.31.2 NMAC.

H. State complaint procedures.

(1) Scope and dissemination.

(a) This Subsection H of 6.31.2.13 NMAC prescribes procedures to be used in filing and processing complaints alleging the failure of the department or a public agency to comply with state or federal laws or regulations governing programs for children with disabilities under the IDEA or with state statutes or regulations governing educational services for gifted children.

(b) The SEB shall disseminate information regarding state complaint procedures to parents and other interested individuals and organizations, as identified by the SEB, including parent centers, information centers, advocacy agencies [~~and attorneys, private advocates~~], independent living centers, and other appropriate entities throughout the state.

(i) The SEB shall place documents regarding state complaint procedures in English and Spanish, including state complaint forms, in an easily accessible location on the SEB website.

(ii) The SEB shall, on a yearly basis, send an email to [~~all parent centers, information centers, advocacy agencies and attorneys, private advocates, independent living centers, and other appropriate entities throughout the state as identified by the SEB,~~] the organizations and individuals identified in Subparagraph (b) of Paragraph (1) of Subsection H of 6.31.2.13 NMAC [~~to provide~~] providing information regarding state complaint procedures and [~~to encourage~~] encouraging these organizations and individuals to post a link to the SEB website on their website.

(iii) Upon request by any individual or organization, the SEB shall provide the information regarding state complaint procedures, as posted on the SEB's website, in print or electronic form.

(2) Requirements for complaints.

(a) The SEB of the department shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint must: (i) be in writing; (ii) be submitted to the SEB (or to the secretary of education, in the case of a complaint against the department); (iii) be signed by the complainant or a designated representative and have the complainant's contact information; (iv) if alleging violations with respect to a specific child, include the name and address of the child and the school the child is attending; (v) include a statement that the department or a public agency has violated a requirement of an applicable state or federal law or regulation; (vi) contain a statement of the facts on which the allegation of violation is based; and (vii) include a description of a proposed resolution of the problem to the extent known. Any complaint that does not contain each of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(b) If the complaint alleges violations with respect to a specific child, the complaint must include the information required by 34 CFR 300.153(b)(4).

(c) The party filing the complaint must forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the SEB of the department.

(d) Pursuant to 34 CFR Sec. 300.153(c), the complaint must allege a violation that occurred not more than one year before the date the complaint is received by the SEB in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC.

(3) Preliminary meeting.

(a) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation. To do so, the public agency must (and the parent may) notify the SEB of the department in writing within 1 business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.

(b) Mediation requirements. If the parties choose to use mediation, the following requirements apply.

(i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.

(ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.

(iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.

(iv) The mediator shall transmit a copy of the written mediation agreement to each party within 7 days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.

(v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(vi) Any other requirement provided in 34 CFR 300.506(b) that is not otherwise provided herein.

(4) Complaints and due process hearings on the same issues. Pursuant to 34 CFR Sec. 300.152(c).

(a) The SEB of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.

(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.

(c) A complaint alleging a public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

(5) Complaints against public agencies.

(a) Impartial review. Upon receipt of a complaint that meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC above, the SEB of the department shall:

(i) undertake an impartial investigation which shall include complete review of all documentation presented and may include an independent on-site investigation, if determined necessary by the SEB;

(ii) give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(iii) provide the public agency with the opportunity to respond to the allegations in the complaint; and

(iv) review all relevant information and make an independent determination as to whether the public agency is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision which includes findings of fact, conclusions, and the reasons for the decision and which addresses each allegation in the complaint shall be issued by the SEB and mailed to the parties within 60 days of receipt of the written complaint, regardless of whether or not the parties agree to convene a FIEP meeting, or mediation. Such decision shall further include procedures for effective implementation of the final decision, if needed, including technical assistance, negotiations, and if corrective action is required, such action shall be designated and shall include the timeline for correction and the possible consequences for continued noncompliance.

(c) Failure or refusal to comply. If the public agency fails or refuses to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance may be effected by the department by any means authorized by state or federal laws or regulations. The department shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required.

(6) Complaints against the department. If the complaint concerns a violation by the department and: is submitted in writing to the secretary of education; is signed by the complainant or a designated representative; includes a statement that the department has violated a requirement of an applicable state or federal law or regulation; contains a statement of facts on which the allegation of violation is based, and otherwise meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the secretary of education or designee shall appoint an impartial person or impartial persons to conduct an investigation.

(a) Investigation. The person or persons appointed shall: acknowledge receipt of the complaint in writing; undertake an impartial investigation which shall include a complete review of all documentation presented and may include an independent onsite investigation, if necessary; give the complainant

the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the department with the opportunity to respond to the complaint; and review all relevant information and make an independent determination as to whether the department is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision, including findings of fact, conclusions, recommendations for corrective action, and the reasons for the decision and addressing each allegation in the complaint, shall be issued by the person or persons appointed pursuant to this paragraph and mailed to the parties within sixty (60) days of receipt of the written complaint. The person appointed pursuant to this paragraph has no authority to order rulemaking by the department.

(7) Extension of time limit. An extension of the time limit under Subparagraph (b) of Paragraph (5) or Subparagraph (b) of Paragraph (6) of this Subsection H of 6.31.2.13 NMAC shall be permitted by the SEB of the department only if exceptional circumstances exist with respect to a particular complaint or if the parent or any other party filing a complaint and the public agency involved agree to extend the time to engage in mediation or a FIEP meeting.

(8) Conflicts with federal laws or regulations. If any federal law or regulation governing any federal program subject to this regulation affords procedural rights to a complainant which exceed those set forth in Subsection H of 6.31.2.13 NMAC for complaints within the scope of these rules, such statutory or regulatory right(s) shall be afforded to the complainant. In acknowledging receipt of such a complaint, the SEB shall set forth the procedures applicable to that complaint.

I. Due process hearings.

(1) Scope. This Subsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for the following types of cases:

(a) requests for due process in IDEA cases governed by 34 CFR Secs. 300.506-300.518 and 300.530-300.532; and

(b) claims for gifted services.

(2) Definitions. In addition to terms defined in 34 CFR Part 300 and 6.31.2.7 NMAC, the following definitions apply to this Subsection I of 6.31.2.13 NMAC.

(a) "Expedited hearing" means a hearing that is available on request by a parent or a public agency under 34 CFR Secs. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

(b) "Gifted services" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

(c) "Transmit" means to mail, send by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

(i) an electronic mail system's confirmation of a completed transmission to an e-mail address that is shown to be valid for the individual to whom the transmission was sent;

(ii) a telecopier machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent;

(iii) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery;

(iv) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered; or

(v) a due process final decision to any party not represented by counsel in a due process hearing by the U.S. postal service, certified mail, return receipt requested, showing to whom the articles was delivered and the date of delivery.

(3) Bases for requesting hearing. A parent or public agency may initiate an impartial due process hearing on the following matters:

(a) the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;

(b) the public agency refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child;

(c) the public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of, or services to, a child who needs or may need gifted services.

(4) Bases for requesting expedited hearing.

n, filed 8/1/2000 - Repealed, 6/29/2007

Individuals with Disabilities Act Regulation, 34 CFR 300.151
Adoption of State complaint procedures

ATTACHMENT 2

§ 300.151 Adoption of State complaint procedures.

(a)General. Each SEA must adopt written procedures for -

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of § 300.153 by -

(i) Providing for the filing of a complaint with the SEA; and

(ii) At the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under §§ 300.151 through 300.153.

(b)Remedies for denial of appropriate services. In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address -

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all children with disabilities.