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July 10, 2013

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Kevin Force

**RE: STAFF BRIEF: ADMINISTRATIVE RULEMAKING**

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**Adopted Rules:**

- 6.31.2 NMAC, Children with Disabilities/Gifted Children
- 2.82.5 NMAC, Public Finance, Educational Retirement, Retirement Benefits

**Proposed Rule:**

- 6.69.8 NMAC, Teacher and School Leader Effectiveness

**Adopted Rule**

**6.31.2 NMAC, Children with Disabilities/Gifted Children**

The June 28, 2013 issue of the *New Mexico Register* contained the final adoption of amendments to the section 6.31.2.9 of the *New Mexico Administrative Code* (NMAC), Children with Disabilities/Gifted Children, Public Agency Responsibilities.

The Notice of Proposed Rulemaking was published in the *Register* on May 15, 2013 and, soliciting comment on the rules, noted that the Public Education Department (PED) would

conduct a public hearing June 14, 2013, in Mabry Hall of the Jerry Apodaca Education Building, Santa Fe.

These rules have been amended in order to comply with recent changes to federal regulations.<sup>1</sup> The amended federal regulations, which the amended rules mirror, require a public agency responsible for providing free and appropriate public education (FAPE) to:

- provide parents with written notice of various safeguards to protect their rights before the agency may access the child’s or parent’s public benefits, such as Medicaid, to pay for services required under the *Individuals with Disabilities Education Act* (IDEA); this notice must:
  - be provided to parents before an initial attempt to access public benefits, as well as annually thereafter;
  - be written in a language understandable to the general public;
  - be provided to the parent in their native language, or other mode of communication used by the parent, unless clearly not feasible to do so;
  - be translated orally or by other means to the parent, if the parent’s native language or other means of communication is not written, ensuring that the parent understands the content of the notice and that there is written evidence that these requirements have been met; and
  - contain a statement of federal parental consent provisions, which include:
    - the requirement of parental consent;
    - the records that may be disclosed;
    - the purpose of the disclosure;
    - the parties to whom the disclosure may be made;
    - a statement that the parents understand and agree that the public agency may access public benefits to pay for these services;
    - a statement that the parents have the right to withdraw consent to disclosure of personally identifiable information at any time;
    - a statement that withdrawal of consent does not relieve the public agency of its responsibility to ensure that all required services are provided at no expense to the parents; and
    - a statement that the public agency may not require:
      - ✓ enrollment in public benefits programs in order for their child to receive FAPE;
      - ✓ incurrance an out-of-pocket expense, such as a deductible or copay amount;
      - ✓ use of a child’s public benefit if that use would decrease the lifetime benefit, result in the family paying for services that would otherwise be covered by public benefits and that are required for the child outside of school, or increase premiums or lead to loss of benefits; or

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<sup>1</sup> “Assistance to States for the Education of Children with Disabilities; Final Regulations” 78 Federal Register 31 (February 14, 2013), pp. 10525-10538. Prior to these changes, federal regulations required parental consent each time access to public benefits was sought. The amended requirements require only a one-time consent, but require annual notice be given to parents of their rights under the program.

- ✓ parents to risk loss of home and community-based waivers, based on aggregate healthcare expenditures; and
- obtain a one-time written consent from the parents that includes:
  - the records that may be disclosed;
  - the purpose of the disclosure;
  - the parties to whom the disclosure may be made; and
  - a statement that the parent understands and agrees that the public agency may access public benefits to pay for FAPE services.

Additionally, the public agency is *not* required to obtain a new consent under these regulations if:

- there is no change in the type, amount, or costs of services to be provided to the child; and
- the public agency has on file a parental consent fulfilling all of the above requirements.

However, an agency must obtain parental consent the first time after the effective date of the rules there is a change to the type, amount, or costs of services to the child. Further, if a child transfers to a school administered by a different public agency, that agency must provide written notice and obtain parental consent, as outlined above.

One difference between the rules as adopted and the rules as originally proposed is the addition of a new Subparagraph 6.31.2.9(B)(7)(e), which was apparently omitted from the proposed rule. This subparagraph notes that, consistent with the new federal regulations, once a public agency obtains this initial one-time consent, as required after the effective date of the rules, it is not required to obtain parental consent again before it accesses the child's or parent's public benefits or insurance in the future, regardless of whether there is a change in the type or amount of services to be provided to the child or a change in the cost of the services to be charged to the public benefits or insurance program. (See Attachment 1, *Adopted Rule, 6.31.2 NMAC, Children with Disabilities/Gifted Children, 6/28/13.*)

### **Adopted Rule**

#### **2.82.5 NMAC, Public Finance, Educational Retirement, Retirement Benefits**

The June 28, 2013 issue of the *New Mexico Register* contained the final adoption of a new section, 2.82.5.16 NMAC, Public Finance, Educational Retirement, Retirement Benefits, Termination of Plan; Accrued Rights of Members.

The Public Comment Notice was published on the New Mexico Educational Retirement Board (ERB) website<sup>2</sup> on February 21, 2013, soliciting public comment on the proposed rule, from the period of February 21, 2013 to March 23, 2013. (See Attachment 2, *Public Comment Notice, Proposed ERB Rule 5.16 – Termination of Plan; Accrued Rights of Members, 2/21/13*, and Attachment 3, *Additional Information Regarding Proposed ERB Rule 5.16 – Termination of Plan; Accrued Rights of Members, 3/12/13*).

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<sup>2</sup> [http://www.nmerb.org/News\\_stories.html](http://www.nmerb.org/News_stories.html)

The newly adopted section of the NMAC reads, in its entirety:

**“2.82.5.16 TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS:** The rights of members to benefits accrued, to the extent funded, will become vested to the extent required by and upon the events set forth in Treas. Reg. Section 1.401-6(a)(1)<sup>3</sup>. See 26 CFR 1.401-6.”

According to ERB, it is proposing this rule to comply with Internal Revenue Service (IRS) requirements, consistent with New Mexico law, as part of the process of maintaining the ERB defined benefit plan’s tax-favored status under federal tax law. Specifically, the new section:

- addresses the accrued rights of members to benefits in the event that the defined benefit plan were ever terminated or if there was ever a complete discontinuance of contributions;
- provides that, to the extent that they are funded, the rights of members to benefits accrued to the date of any such termination or discontinuance would become vested to the extent required by, and upon the events set forth in U.S. Treasury Regulation 26 CFR 1.401-6;
- does not alter or diminish the benefits earned by members of the ERB defined benefit retirement plan (“regular plan”);
- is consistent with the rights currently provided to members of the ERB regular plan under the New Mexico Constitution and the *Educational Retirement Act*;
- does not impose any additional obligations on the ERB or on the State of New Mexico;
- is the result of an IRS requirement that defined benefit plans, such as that managed by ERB, have a provision addressing the rights of members in the event that a plan were to be terminated or there was a complete discontinuance of contributions;
- contains language required by the IRS in order to issue a “determination letter” stating that the plan meets federal tax requirements, and maintain “tax-favored status,” which allows:
  - member contributions to be exempt from taxation; and
  - the investments of the educational retirement fund to grow without being subject to taxation;
- complies with the framework established by Federal regulation for public pensions to follow in vesting employees who were not vested if a pension plan were terminated or if all contributions to the plan ceased; and
- does not imply that ERB or the New Mexico Legislature are considering terminating the ERB defined benefit retirement plan or completely discontinuing contributions to it.

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<sup>3</sup> Treasury Regulations, Sec 1.401-6, “Termination of a Qualified Plan.” (a) *General rules.* (1) In order for a pension, profit-sharing, or stock bonus trust to satisfy the requirements of section 401, the plan of which such trust forms a part must expressly provide that, upon the termination of the plan or upon the complete discontinuance of contributions under the plan, the rights of each employee to benefits accrued to the date of such termination or discontinuance, to the extent then funded, or the rights of each employee to the amounts credited to his account at such time, are nonforfeitable. As to what constitutes nonforfeitable rights of an employee, see paragraph (a)(2) of §1.402(b)-1.

## **Proposed Rulemaking**

### **6.69.8 NMAC, Teacher and School Leader Effectiveness**

In the June 28, 2013 issue, PED published in the *Register* a Notice of Proposed Rulemaking introducing amendments to the rules regarding teacher and school leader effectiveness, at 6.69.8 NMAC. The Notice solicited comments on the rules and announced a public hearing on the proposal, to be held on January 29, 2013, in Mabry Hall of the Jerry Apodaca Education Building, in Santa Fe. (See Attachment 4, *NPRM 6.69.8 NMAC, Teacher and School Leader Effectiveness, 6/28/13*, and Attachment 5, *PED Proposed Amendments 6.69.8 NMAC, 6/28/13*.)

The proposed amendments to the rules include:

- new definitions;
- a clarification regarding the data to be used for the evaluation of school leaders; and
- guidelines for the observations of teachers.

New definitions in these rules include:

- “Approved observer” which means, for school year 2013-2014, an individual who holds a Level 3-B license, is employed by a school district or charter school as an administrator, and who has completed PED’s teacher observation training; and
- “Certified observer” which means:
  - for school year 2013-2014, a teacher who has a minimum of five years of verifiable consecutive classroom teaching experience, has completed PED’s teacher observation training, and who passes PED’s assessment of the adopted observation protocol; and
  - for the 2014-2015 and succeeding school years, an individual who:
    - holds an active Level 3-B license or an active teaching license;
    - is employed by a school district or charter school as an administrator or a teacher;
    - completes PED’s teacher observation training and who passes PED’s assessment of the adopted observation protocol;
    - receives a highly effective or exemplary rating during the previous school year; and
    - completes follow-up training and passes PED’s assessment of the adopted observation protocol on an annual basis.

The amendments also clarify that the effectiveness of school leaders shall, whenever possible, include growth based on three years of data for students assigned to public schools, provided that the student achievement growth component be based on the change in a schools A through F letter grade.

Proposed amendments to the guidelines for teacher evaluation primarily address the teacher observation component of the evaluations. (Previous language regarding the frequency of observations and the qualifications of observers is stricken in the proposal.) According to the proposed amendments:

- During school year 2013-2014, every classroom teacher must be observed using one of the following options:
  - three observations conducted by the same approved observer; or
  - two observations, consisting of one observation by each of two different approved observers; or
  - two observations consisting of one observation by an approved observer and one observation by a certified observer.
  
- During the 2014-2015 and each succeeding school year, every classroom teacher must be observed using one of these options:
  - three observations conducted by the same certified observer; or
  - two observations, consisting of one observation by each of two different certified observers.
  
- For the 2014-2015 and succeeding school years, districts may propose alternative plans, which must be submitted to PED for approval, for observing teachers who have “highly effective” and “exemplary” performance ratings.
- Both approved and certified observers must use a PED-developed protocol and form that contains at least:
  - the observer’s name;
  - the classroom teacher’s name;
  - the date, the start and stop time of the observation;
  - the number of students present;
  - space for subjective and objective observation; and
  - a total point score for that teacher.
  
- Observers must also:
  - complete the written observation of a classroom teacher before leaving the school on the day of the observation;
  - agree to maintain confidentiality of the observations, discussing them with no one but the principal; and
  - verify that the observer has not retained, or removed from school premises, a copy of the observation or field notes.

**This is an amendment to Section 9 (PUBLIC AGENCY RESPONSIBILITIES) of 6.31.2 NMAC (CHILDREN WITH DISABILITIES/GIFTED CHILDREN), effective June 28, 2013. Subsection B (Public agency funding and staffing) is amended to add new subparagraphs (b), (c), (d), (e) and (f) to align the rule with amendments to 34 CFR Sec. 300.154, with respect to notice and consent requirements required of public agencies prior to accessing a child's or parent's public benefits or insurance. Subparagraph (b) has been renumbered as paragraph (8) and has been amended with respect to children with disabilities who are covered by private insurance benefits. Subparagraph (c) has been renumbered as paragraph (9) and paragraph (8) has been renumbered as paragraph (10).**

**6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:**

**A.** Compliance with applicable laws and regulations. Each New Mexico public agency, within the scope of its authority, shall develop and implement appropriate policies, procedures, programs and services to ensure that all children with disabilities who reside within the agency's educational jurisdiction, including children who are enrolled in private schools or facilities such as residential treatment centers, day treatment centers, hospitals, mental health institutions, or are schooled at home, are identified and evaluated and have access to a free appropriate public education (FAPE) in compliance with all applicable requirements of state and federal laws and regulations. This obligation applies to all New Mexico public agencies that are responsible under laws, rules, regulations or written agreements for providing educational services for children with disabilities, regardless of whether that agency receives funds under the IDEA and regardless of whether it provides special education and related services directly, by contract, by referrals to private schools or facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions or through other arrangements.

**B.** Public agency funding and staffing.

**(1)** Each public agency that provides special education or related services to children with disabilities shall allocate sufficient funds, staff, facilities and equipment to ensure that the requirements of the IDEA and all department rules and standards that apply to programs for children with disabilities are met.

**(2)** The public agency with primary responsibility for ensuring that FAPE is available to a child with a disability on the date set by the department for a child count or other report shall include that child in its report for that date. Public agencies with shared or successive responsibilities for serving a particular child during a single fiscal year are required to negotiate equitable arrangements through joint powers agreements or memorandums of understanding or interstate agreements for sharing the funding and other resources available for that child. Such agreements shall include provisions with regard to resolving disputes between the parties to the agreement.

**(3)** Placement of students in private residential treatment centers, or other out of home treatment or habilitation programs, by the IEP team or by a due process decision. In no event shall a child with an IEP be allowed to remain in an out of home treatment or habilitation program for more than 10 days without receiving special education and related services. The school district in which the qualified student or school-age person lives, whether in-state or out-of-state, is responsible for the educational, nonmedical care and room and board costs of that placement.

**(a)** Agreements between the resident school district of the qualified student or school-age person and a private residential treatment center must be on the form posted on the department's website or on a form otherwise approved by the department and must be reviewed and approved by the secretary of public education.

**(b)** Agreements must provide for:

**(i)** student evaluations and eligibility;

**(ii)** an educational program for each qualified student or school-age person that meets state standards for such programs, except that teachers employed by private schools are not required to be highly qualified;

**(iii)** the provision of special education and related services in conformance with an IEP that meets the requirements of federal and state law and applicable regulations and rules;

**(iv)** adequate classroom or other physical space that allows the school district to provide an appropriate education;

**(v)** a detailed description of the costs for the placement; and

**(vi)** an acknowledgement of the authority of the local school board and the department to conduct on-site evaluations of programs and student progress to ensure that state standards are met.

**(4)** Placement of students in public residential treatment centers, or other out of home treatment or habilitation programs, by the IEP team or by a due process decision. The sending school shall be responsible for the provision of special education and related services. In no event shall a child with an IEP be allowed to remain in an out of home treatment or habilitation program for more than 10 days without receiving special education and related services.

**(5)** Educational agencies may seek payment or reimbursement from noneducational agencies or public or private insurance for services or devices covered by those agencies that are necessary to ensure FAPE to children with disabilities. Claims for payment or reimbursement shall be subject to the procedures and limitations established in 34 CFR Secs. 300.154(b) and 300.154(d) through (g), Section 22-13-8 NMSA 1978 and any laws, regulations, executive orders, contractual arrangements or other requirements governing the noneducational payor's obligations.

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- (6) Risk pool fund. (Puente para los niños fund.)
- (a) Local educational agency high cost fund.
- (i) In compliance with 34 CFR Sec. 300.704(c) the department shall maintain a risk pool fund to support high cost children with disabilities identified by LEAs.
- (ii) Funds distributed under this program will be on a reimbursable basis.
- (b) Application for funds. LEAs desiring to be reimbursed for the cost of children with disabilities with high needs shall file an application in accordance with the department's puente para los niños fund as described on the department's website.
- (7) Children with disabilities who are covered by public benefits or insurance. Pursuant to 34 CFR Sec. 300.154(d), a public agency may use the medicaid or other public benefits or insurance in which a child participates to provide or pay for services required under the IDEA Part B regulations, as permitted under the public insurance program, except as provided in (a) below.
- (a) With regard to services required to provide FAPE to an eligible child, the public agency:
- (i) may not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the IDEA;
- (ii) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to the IDEA Part B regulations, but pursuant to 34 CFR Sec. 300.154(f)(2), may pay the cost that the parent otherwise would be required to pay; and
- (iii) may not use a child's benefits under a public benefits or insurance program if that use would: (A) decrease available lifetime coverage or any other insured benefit; (B) result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school; (C) increase premiums or lead to the discontinuation of benefits or insurance; or (D) risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.
- (b) Prior to obtaining the parental consent described in Subparagraph (c) of this paragraph, and prior to accessing the parent or child's public benefits, the public agency must provide written notice to the child's parents, consistent with 34 CFR Sec. 300.503(c). The written notice must be provided annually thereafter.
- (i) The notice must include a statement of the parental consent provisions in 34 CFR Sec. 99.30 and 34 CFR Sec. 300.622 and must specify: (A) the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to the child; (B) the purpose of the disclosure (e.g., billing for services under 34 CFR Part 300; (C) the agency to which the disclosure may be made (e.g. New Mexico medicaid program); and (D) that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under 34 CFR Part 300.
- (ii) The notice must further include: (A) a statement of the "no cost" provisions in 34 CFR Sec. 300.154(d)(2)(i)-(iii); (B) a statement that the parents have the right under 34 CFR Parts 99 and 300 to withdraw their consent to disclosure of their child's personally identifiable information to the New Mexico medicaid program at any time; and (C) a statement that the withdrawal of consent or refusal to provide consent under 34 CFR Parts 99 and 300 to disclose personally identifiable information to the New Mexico medicaid program does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.
- (c) Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notice to the child's parents consistent with Subparagraph (b) of this paragraph, the public agency must obtain written parental consent as defined by 34 CFR Sec. 300.9. The written consent, consistent with the requirements of 34 CFR Sec. 300.154(d)(2)(iv), must:
- (i) meet the requirements of 34 CFR Sec. 99.30 and 34 CFR Sec. 300.622 and must specify: (A) the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to the child; (B) the purpose of the disclosure (e.g., billing for services under 34 CFR Part 300; (C) the agency to which the disclosure may be made (e.g. New Mexico medicaid program); and
- (ii) must specify that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under 34 CFR Part 300.
- (d) The public agency is not required to obtain a new parental consent if the following conditions are present:
- (i) there is no change in any of the following: the type of services to be provided to the child; the amount of services to be provided to the child; or the cost of the services to be charged to the public benefits or insurance program; and
- (ii) the public agency has on file a parental consent meeting the requirements of 34 CFR Sec. 300.9, 34 CFR Sec. 99.30 and 34 CFR Sec. 300.622.
- (e) Once the public agency obtains the one-time consent consistent with 34 CFR Sec. 300.154(d)(2)(iv), the public agency is not required to obtain parental consent before it accesses the child's or parent's public benefits or insurance in the future, regardless of whether there is a change in the type or amount of services to be provided to the child or a change in the cost of the services to be charged to the public benefits or insurance program.
- (f) If a child transfers to a new public agency, the new public agency must provide the written notification described in 34 CFR Sec. 300.154(d)(2)(v) and Subparagraph (b) of this paragraph, and must then obtain parental consent meeting

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the requirements of 34 CFR Sec. 300.154(d)(2)(iv).

~~[(b)] (8)~~ Children with disabilities who are covered by private insurance benefits. Pursuant to 34 CFR Sec. 300.154(e), an educational agency must obtain a parent's informed written consent for each proposed use of private insurance benefits and must inform parents that their refusal to permit the use of their private insurance will not relieve the educational agency of its responsibility to ensure that all required services are provided at no cost to the parents. The public agency may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to the IDEA Part B regulations.

~~[(e)] (9)~~ Pursuant to 34 CFR Sec. 300.154(f):

~~[(ii)] (a)~~ if a public agency is unable to obtain parental consent to use the parent's private insurance, or public benefits or insurance when the parent would incur a cost for a specified service required under the IDEA Part B regulations, to ensure FAPE the public agency may use its Part B funds to pay for the service; and

~~[(ii)] (b)~~ to avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

~~[(8)] (10)~~ Staff training and qualifications.

(a) Each public agency is responsible for ensuring that personnel serving children with disabilities are qualified under state licensure requirements and are adequately prepared for their assigned responsibilities, pursuant to 34 CFR Sec. 300.156. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with applicable department licensure rules or written department policy may be used to assist in the provision of special education and related services to children with disabilities under Part B of the IDEA.

(b) Each public agency and charter school shall train their school administrators and teachers who teach reading to implement appropriate research-based reading interventions prior to referring the student for a special education evaluation and shall train their special education teachers to provide appropriate specialized reading instruction for students with dyslexia who have been identified as eligible for special education services.

C. IDEA applications and assurances. Each New Mexico public agency that desires to receive IDEA flow-through funds shall file an annual application with the department in the form prescribed by the department. Each application shall:

- (1) provide all information requested by the department;
- (2) demonstrate to the department's satisfaction that the agency is in compliance with all applicable requirements of 34 CFR Secs. 300.200-300.230 and these or other department rules and standards;
- (3) include an agreement that the agency upon request will provide any further information the department requires to determine the agency's initial or continued compliance with all applicable requirements;
- (4) include assurances satisfactory to the department that the public agency does and will continue to operate its programs in compliance with all applicable federal and state programmatic, fiscal and procedural requirements including the development of joint powers agreements, memoranda of understanding or other interagency agreements to address shared or successive responsibilities to meet the educational needs of a particular child during a single fiscal year; and
- (5) pursuant to Subsection C of Section 22-8-11, NMSA 1978, the department shall not approve and certify an operating budget of any school district or state-chartered charter school that fails to demonstrate that parental involvement in the process was solicited.

D. Early intervening services set aside funds. Fifteen percent set aside.

- (1) Pursuant to 34 CFR Secs. 300.208(a)(2) and 300.226, LEAs may use up to fifteen percent of the amount the LEA receives under Part B of IDEA to implement early intervening services for children with or without disabilities in kindergarten through grade 12 with particular emphasis on children in kindergarten through grade three.
- (2) Prior to the implementation or use of these set aside funds, the LEA must have on record with the department an approved plan for use of these funds as described by 34 CFR Sec. 300.226(b) and how such activities will be coordinated with regional education cooperatives as described in 34 CFR Sec. 300.226(e), if applicable.
- (3) The LEA plan for use of set aside funds shall be submitted as an addendum to its annual application for Part B funding. If the LEA determines to implement a set aside plan after the initial application, a request for implementation of a set aside plan must be submitted for approval 60 days before the implementation of the plan.
- (4) Each LEA that develops and maintains coordinated, early intervening services must report annually to the department as provided in 34 CFR Sec. 300.226(d).

E. Significant disproportionality.

- (1) Pursuant to CFR 34 Sec. 300.646, LEAs must provide for the collection and examination of data to determine if significant disproportionality, based on race and ethnicity, is occurring with respect to:
  - (a) the identification of children as children with disabilities including the identification of children as children with disabilities in accordance with a particular impairment as defined by 34 CFR Sec. 300.8;
  - (b) the placement in particular educational settings of these children; and
  - (c) the incidence, duration and type of disciplinary actions, including suspensions and expulsions.
- (2) Each public agency must reserve the fifteen percent early intervening funds if they are identified for having data that is significantly disproportionate in any one of the following categories:
  - (a) suspension of students with disabilities;

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- (b) over identification of students with disabilities;
- (c) over identification of students in accordance with a particular impairment as defined by 34 CFR Sec.

300.8; and

- (d) placement of students with disabilities in a particular setting.

(3) Review and revision of policies, practices and procedures. In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, in accordance with Paragraph (1) of this subsection, the LEA must:

- (a) provide for the review and, if appropriate, revision of the policies, procedures and practices used in the identification or placement to ensure that the policies, procedures and practices comply with the requirements of the IDEA; and
- (b) require any LEA identified under Paragraph (1) of this subsection to reserve the maximum amount of funds under 34 CFR Sec. 300.226 to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified under Paragraph (1) of this subsection; and
- (c) require the LEA to publicly report on the revision of policies, practices and procedures described under Subparagraph (b) of this paragraph.

**F.** Annual determinations. Each local educational agency and other public agencies when applicable shall be assigned an annual determination. The determinations must be consistent with those provided in 34 CFR Sec. 300.603(b) based on the local educational agency's performance on the targets established in the department's state performance plan.

(1) For determinations of needs intervention and needs substantial intervention, the local educational agency may request an opportunity for an informal hearing. The request for hearing must be made in writing to the secretary of public education within 30 days of the date of the determination.

(2) The hearing will afford the local educational agency the opportunity to demonstrate why the department should not make the determination of needs intervention or needs substantial intervention. The hearing shall be conducted by the secretary or the secretary's designee. Formal rules of evidence shall not apply to the hearing.

**G.** Notification of public agency in case of ineligibility. Pursuant to 34 CFR Sec. 300.221, if the department determines that a public agency is not eligible under Part B of the act, the department shall notify the affected agency of that determination and provide the agency with reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d).

**H.** Withholding of funds for noncompliance. Pursuant to 34 CFR Sec. 300.222, if the department, after reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d), finds that a public agency that has previously been determined to be eligible is failing to comply with any requirement described in 34 CFR Secs. 300.201-300.213 and 34 CFR Sec. 300.608, the department must reduce or may not provide any further Part B payments to the public agency until the department is satisfied that the public agency is in compliance with that requirement.

**I.** Reallocation of funds. If a new LEA is created, the base payment portion of the IDEA subgrant of the LEA that would have served children with disabilities now being served by the new LEA will be adjusted pursuant to 34 CFR Sec. 300.705(b)(2). IDEA funds to new charter schools that are LEAs will be allocated pursuant to 34 CFR Secs. 76.785-76.799 and 34 CFR Sec. 300.705(b). Pursuant to 34 CFR Sec. 300.705(c) if the department determines that a public agency is adequately providing FAPE to all children with disabilities residing in the area served by that public agency with state and local funds, the department may reallocate any portion of the funds under this part that are not needed by that public agency to provide FAPE to other LEAs in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs or the department may also retain those funds for use at the state level as provided by 34 CFR Sec. 300.705(c).

**J.** Prohibition on mandatory medication. Each LEA and other public agencies serving students with disabilities are prohibited from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a student as a condition of attending school, receiving an evaluation under 34 CFR Secs. 300.300 through 300.311, or receiving services under Part B of the IDEA. This prohibition shall be construed as provided in 34 CFR Sec. 300.174(b).

[6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12; A, 06/28/13]



**STATE OF NEW MEXICO**  
**Educational Retirement Board**  
**P.O. BOX 26129**  
**SANTA FE, NEW MEXICO 87502-0129**  
**PHONE: (505) 827-8030 FAX: (505) 827-1855**

PROPOSED RULE AMENDMENT  
PUBLIC COMMENT PERIOD  
*February 21, 2013 through March 23, 2013*

PROPOSED ERB RULE 5.16 -  
TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS

The Educational Retirement Board (“ERB”) is asking for public comment on the attached draft to amend Rule 5 to include new material as Rule 5.16.

The proposed amendment would add a section to Rule 5 addressing the accrued rights of members to benefits in the event that the defined benefit plan were ever to be terminated or if there was ever a complete discontinuance of contributions. The amendment provides that, to the extent that they are funded, the rights of members to benefits accrued to the date of any such termination or discontinuance would become vested to the extent required by and upon the events set forth in U.S. Treasury Regulation 26 CFR 1.401-6. The proposed rule does not alter or diminish the benefits earned by members of the ERB defined benefit retirement plan (also sometimes referred to as the “ERB regular plan”). The proposed rule is also consistent with the rights currently provided to members of the ERB regular plan under the New Mexico Constitution and the Educational Retirement Act. The proposed amendment does not impose any additional obligations on the ERB or on the State of New Mexico.

The proposed rule is the result of an Internal Revenue Service (“IRS”) requirement that defined benefit plans such as that managed by the ERB have a provision addressing the rights of members in the event that a plan were to be terminated or there was a complete discontinuance of contributions to the plan. The proposed rule should not be taken to imply that the ERB or the New Mexico Legislature are considering terminating the ERB defined benefit retirement plan or completely discontinuing contributions to it. The ERB is proposing this rule to comply with IRS requirements that are consistent with the New Mexico constitution and statutes and as part of the process of maintaining the ERB defined benefit plan’s tax-favor status under federal tax law.

The ERB looks forward to receiving your comments on the proposed adoption of Rule 5.16.

Comments should be e-mailed to [rulechange@nmerb.org](mailto:rulechange@nmerb.org) by 5 pm on March 23, 2013.



STATE OF NEW MEXICO  
*Educational Retirement Board*

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ADDITIONAL INFORMATION  
REGARDING  
PROPOSED ERB RULE 5.16 -  
TERMINATION OF PLAN; ACCRUED RIGHTS OF MEMBERS  
PUBLIC COMMENT PERIOD  
*February 21, 2013 through March 23, 2013*

The Educational Retirement Board (the “ERB”) has received a number of inquiries regarding: (1) whether the proposed Rule 5.16 indicates either an intention to terminate the ERB defined benefit plan (a/k/a, the “regular plan”) or for employees and employers to cease making contributions to the plan and (2) why adoption of proposed Rule 5.16 is required.

The ERB wants to reiterate that there is no current plan or intention to either terminate the ERB defined benefit plan or for employees and employers to cease making contributions to the plan. As stated in the notice on the ERB web site, the proposed rule does not imply that the ERB or the New Mexico Legislature are considering terminating the ERB defined benefit plan or completely discontinuing contributions to it.

The ERB is proposing the draft rule for adoption in order to comply with IRS requirements governing public pension plans such as the ERB defined benefit plan. The IRS requires public pension plans to include the proposed language in order for the IRS to issue a “determination letter” stating that the plan meets federal tax requirements.

Although the ERB defined benefit plan is a state pension plan, the plan must comply with IRS requirements in order to maintain its tax-favored status. The ERB’s tax-favored status is what allows member contributions to the defined benefit plan to be exempt from taxation. Instead of paying taxes on contributions, a member pays taxes only on the annuity that the member receives after retirement or if the member takes a refund<sup>1</sup> of contributions after terminating employment. The defined benefit plan’s tax-favored status also allows the investments of the educational retirement fund to grow without being subject to taxation. It is the growth of the fund through

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<sup>1</sup> A refund occurs when a former member asks the ERB to pay that member’s contributions directly to the member rather than “rolling” the contributions over to another tax-favored retirement fund or to an Individual Retirement Account (“IRA”).

investment earnings, together with member and employer contributions, that allows the ERB to pay retirement annuities to the members and their beneficiaries.

Treasury Regulation 26 CFR 1.401-6 establishes a framework for public pension plans to follow in vesting employees who were not vested if a defined benefit pension plan is ever terminated or if all contributions to the plan were halted. The proposed ERB Rule 5.16, and through the proposed rule, the Treasury Regulation, would not apply to members of a pension plan who were vested at the time that the plan was terminated or all contributions to the plan were halted, if such events were to occur.

In the ERB's case, the extent of funding on the date of termination would be determined by a process of allocating plan assets (i.e., the assets of the educational retirement fund at that date) to accrued benefits. The Treasury Regulation does not set out a method of allocating plan assets to accrued benefits. Other IRS guidance, however, indicates that an allocation method that satisfies ERISA<sup>2</sup> requirements may be used to allocate assets in a partial termination. ERISA is the federal statute which sets out minimum requirements or standards for actions taken by private industry pension plans. ERISA requirements or standards are frequently used as guidance or references for public sector defined benefit plans. In response to some of the comments received, the ERB is providing the following example drawn from ERISA-based requirements of how a distribution of plan assets could be carried out if there ever were a plan termination or cessation of contributions.

Under a distribution plan based on ERISA requirements, assets would be allocated first to benefits attributable to employee contributions, then second to certain benefits of participants who had retired or could have retired as of the first day of a three year period that would end on the date that the plan actually had been terminated.<sup>3</sup> After the first and second distributions, assets would then be distributed to all other vested benefits. Fourth and finally, assets would be distributed to all remaining benefits under the plan. Under this allocation method, non-vested benefits would be in this final distribution category. In other words, vesting "to the extent funded" generally means that only if there were assets remaining after assets were used to support the benefits of all the members already vested at the time the plan was terminated would the remaining assets be distributed to members who were not vested at the time the plan was terminated, if such an event ever were to happen.

It is important to note again that the proposed rule is not being proposed to address a planned or proposed termination of the plan or cessation of contributions. The New Mexico legislature is not currently considering any proposals to terminate the defined benefit plan nor is it considering any proposals to stop employee or employer contributions from being made to the plan. As noted above, the IRS has required the ERB to adopt the proposed rule as a condition of the IRS issuing the ERB a favorable determination letter. Again, as outlined above, that determination letter allows the ERB to maintain its tax-favor status, a status that benefits all members, both active and retired, of the ERB defined benefit plan. The ERB is proposing to adopt the rule solely to comply

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<sup>2</sup> Employee Retirement Income Security Act of 1974, Public Law No. 93-406, codified in part at 29 USCS § 1002 *et seq.*

<sup>3</sup> This example omits a distribution that a private industry pension plan would have to make to the Pension Benefit Guaranty Corporation, which provides a partial guaranty or 'insurance' of certain private pension plan benefits.

Additional Information Regarding Proposed ERB Rule 5.16 – Termination  
of Plan; Accrued Rights of Members, 3/12/13

with IRS requirements concerning language that must be in the plan to maintain the plan's tax-favored status.

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT**  
**NOTICE OF PROPOSED RULEMAKING**

The Public Education Department (“Department”) hereby gives notice that the Department will conduct a public hearing at Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786, on Monday, July 29, 2013, from 9:00 a.m. to 1:00 p.m.. The purpose of the public hearing will be to obtain input on the proposed amendments to 6.69.8 NMAC (TEACHER AND SCHOOL LEADER EFFECTIVENESS).

Interested individuals may provide comments at the public hearing and/or submit written comments to Ms. Mary H. Deets, Administrative Assistant, Office of General Counsel, via email at [Rule.FeedBack@state.nm.us](mailto:Rule.FeedBack@state.nm.us), fax (505) 827-6681, or directed to Ms. Deets at Office of General Counsel, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786. Written comments must be received no later than 5:00 p.m. on the date of the hearing. However, the submission of written comments as soon as possible is encouraged.

Copies of the proposed rules may be accessed on the Department’s website (<http://ped.state.nm.us/>) under the “Public Notices” link, or obtained from Ms. Deets by calling (505) 827-6641.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Ms Deets as soon as possible. The NMPED requires at least ten (10) days advance notice to provide requested special accommodations.

## PED Proposed Amendments 6.69.8 NMAC, 6/28/13

**TITLE 6            PRIMARY AND SECONDARY EDUCATION**  
**CHAPTER 69      SCHOOL PERSONNEL - PERFORMANCE**  
**PART 8            TEACHER AND SCHOOL LEADER EFFECTIVENESS**

**6.69.8.1            ISSUING AGENCY:** Public Education Department. (PED)  
 [6.69.8.1 NMAC - N, 08-30-12]

**6.69.8.2            SCOPE:** Chapter 69, Part 8 governs standards for determining and measuring teacher and school leader effectiveness.  
 [6.69.8.2 NMAC - N, 08-30-12]

**6.69.8.3            STATUTORY AUTHORITY:** Sections 22-2-1, 22-2-2, 22-10A-18, 22-10A-19 and 22-10A-19.2, NMSA 1978.  
 [6.69.8.3 NMAC - N, 08-30-12]

**6.69.8.4            DURATION:** Permanent.  
 [6.69.8.4 NMAC - N, 08-30-12]

**6.69.8.5            EFFECTIVE DATE:** August 30, 2012, unless a later date is cited at the end of a section.  
 [6.69.8.5 NMAC - N, 08-30-12]

**6.69.8.6            OBJECTIVE:** This rule establishes uniform procedures for conducting annual evaluations of licensed school employees, for setting the standards for each effectiveness level, for measuring and implementing student achievement growth, and for monitoring each school district's implementation of its teacher and school leader effectiveness evaluation system. This rule also seeks to change the dynamic of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, thereby replacing the binary system that emphasizes years of experience and credentials.  
 [6.69.8.6 NMAC - N, 08-30-12]

**6.69.8.7            DEFINITIONS:**

A. "Approved observer" means, for the 2013-2014 school year, an individual who holds a level 3-B license, is employed by a school district or charter school as an administrator and who has completed the PED's teacher observation training.

~~A.~~ B. "Assistant principal" means a properly licensed instructional leader who assists a principal in a public school.

~~B.~~ C. "BIE school" means a bureau of Indian education school that is governmentally owned and controlled, located in New Mexico, provides instruction for first through twelfth grades and is not sectarian or denominational.

D. "Certified observer" means, for the 2013-2014 school year, a teacher, as defined by this rule, who has a minimum of five years of verifiable consecutive classroom teaching experience, has completed the PED's teacher observation training, and who passes the PED's assessment of the adopted observation protocol.

E. "Certified observer" means, for the 2014-2015 school year and succeeding school years, an individual who:

(1) holds an active level 3-B license or an active teaching license;

(2) is employed by a school district or charter school as an administrator or a teacher as defined by this rule;

(3) completes the PED's teacher observation training and who passes the PED's assessment of the adopted observation protocol;

(4) receives a highly effective or exemplary rating during the previous school year; and

(5) completes follow-up training and who passes the PED's assessment of the adopted observation protocol on an annual basis; for purposes of this subsection, annual basis means the earlier of August 1 of a given school year or 90 days after hire; provided, however, that the annual training and certification is transferable within the state.

~~C.~~ F. "Department" means the New Mexico public education department or PED.

~~D.~~ G. "EES" means effectiveness evaluation systems which are developed by school districts to measure the effectiveness of licensed school employees.

## PED Proposed Amendments 6.69.8 NMAC, 6/28/13

~~[E-]~~ H. “Fidelity observations” means the requirement of school leaders to periodically observe and evaluate assigned teachers in the classroom with observations that have been documented and are verifiable.

~~[F-]~~ I. “Licensed school employee” means teachers and school leaders employed in a public school.

~~[G-]~~ J. “New Mexico standards-based assessment (SBA)” means the collection of instruments that assess student academic performance annually and the students’ progress toward meeting the New Mexico content standards with benchmarks and performance standards.

~~[H-]~~ K. “Principal” means the chief instructional leader and administrative head of a public school.

~~[I-]~~ L. “School district” means one of the 89 political subdivisions of the state created for the administration of public schools and includes those state-authorized charter schools that have not requested waiver of evaluation standards for school personnel. District-authorized charter schools are excluded from being considered a school district for purposes of this rule.

~~[J-]~~ M. “School district superintendent” means the chief executive officer of a school district and the head administrator of a charter school.

~~[K-]~~ N. “School leader” means a principal or assistant principal employed in a public school.

~~[L-]~~ O. “State agency” means the New Mexico military institute, the New Mexico school for the blind and visually impaired, the New Mexico school for the deaf, any juvenile detention center or facility served by the juvenile justice service of the children youth and families department, the New Mexico youth diagnostic and development center, the Sequoyah adolescent treatment center of the department of health, Carrie Tingley crippled children's hospital, the New Mexico behavioral health institute at Las Vegas and any other state agency responsible for educating resident children.

~~[M-]~~ P. “Teacher” means a person who holds a level one, two or three-A license and whose primary duty is classroom instruction or the supervision, below the school principal level, of an instructional program or whose duties include curriculum development, peer intervention, peer coaching or mentoring or serving as a resource teacher for other teachers. “Teacher” shall not include any person issued a Native American language and culture certificate pursuant to the School Personnel Act [Sections 22-10A-1 to 22-10A-39 NMSA 1978]. [6.69.8.7 NMAC - N, 08-30-12; A, xx-xx-13]

### **6.69.8.8 EFFECTIVENESS EVALUATION SYSTEMS:**

A. As soon as possible but not later than the commencement of the 2013-2014 school year, all school districts shall develop and submit to the department for approval and for implementation during the 2013-2014 school year, an effectiveness evaluation system for measuring performance of licensed school employees.

B. School districts may continue to use the highly objective uniform statewide standards of evaluation described in 6.69.4 NMAC for evaluating, promoting, terminating and discharging licensed school employees for performance during the 2012-2013 school year.

C. Each school district shall report annually to the department the results of its effectiveness evaluations of its licensed school employees and the alignment of its effectiveness evaluation system with the three-tiered licensure system.

D. A teacher and school leader EES shall:

- (1) be designed to support effective instruction and student achievement, with the results used to inform school district and school level improvement plans;
- (2) provide appropriate instruments, procedures and criteria and continuous quality improvement of professional skills, with results used to support the professional development of licensed school employees;
- (3) include a mechanism to examine effectiveness data from multiple sources, which may include giving parents and students opportunities to provide input into effectiveness evaluations when appropriate;
- (4) identify those teaching fields for which special evaluation procedures and criteria may be developed in a manner that is consistent and reliable;
- (5) include measures of student achievement growth worth 50%, observations worth 25% and other multiple measures worth 25%, unless otherwise provided for;
- (6) differentiate among at least five levels of performance, which include the following:
  - (a) exemplary, meets competency;
  - (b) highly effective, meets competency;
  - (c) effective, meets competency;
  - (d) minimally effective, does not meet competency; and
  - (e) ineffective, does not meet competency.

E. Teacher and school leader effectiveness evaluation procedures for licensed school employees shall be based on the performance of students assigned to their classrooms or public schools.

## PED Proposed Amendments 6.69.8 NMAC, 6/28/13

F. Every public school classroom teacher who teaches in a grade or subject that has a standards-based assessment that would permit the calculation of student achievement growth, must have an annual effectiveness evaluation, provided that:

(1) each evaluation shall be based on sound educational principles and contemporary research in effective educational practices; and  
(2) the student achievement growth component of a teacher's effectiveness evaluation shall be based on:

(a) valid and reliable data and indicators of student achievement growth assessed annually through a combination of 35% standards-based assessment and 15% additional department-approved assessments, for a total of 50%, provided that this calculation shall not be based upon a single test score;

(b) assessments that are selected by a school district from a list of options approved by the department for any subjects and grade levels not measured by state assessments; and

(c) the PED-adopted measure of student achievement growth calculated for all courses associated with state assessments and for which the school district shall select comparable measures of student achievement growth for other grades and subjects.

G. Every public school classroom teacher who teaches in a grade or subject that does not have a standards-based assessment, also must have an annual effectiveness evaluation, provided that:

(1) each evaluation shall be based on sound educational principles and contemporary research in effective educational practices; and

(2) the student achievement growth component of a teacher's effectiveness evaluation shall be based on:

(a) valid and reliable data and indicators of student achievement growth assessed annually on district-selected and department-approved assessments, for a total of 50%;

(b) assessments that are selected by a school district from a list of options approved by the department for any subjects and grade levels not measured by department-approved assessments; and

(c) the PED-adopted measure of student achievement growth calculated for all courses associated with department-approved assessments and for which the school district shall select comparable measures of student achievement growth, and approved by the PED, for other grades and subjects.

H. An EES shall base at least 25% of the results on data and indicators of instructional practice for teachers. School leaders shall observe instructional practice of teachers using common research-based observational protocol approved by the department that correlates observations to improved student achievement.

I. Effectiveness evaluation criteria for evaluating classroom teachers shall include indicators based on research-based instructional practices as determined by the department.

J. School districts that receive funding under the Bilingual Multicultural Education Act [Sections 22-23-1 to 22-23-6 NMSA 1978] or with students possessing limited English proficiency should ensure that they are doing all they can to carry out all state and federal activities and programs to assist those student populations. [6.69.8.8 NMAC - N, 08-30-12]

[The department maintains a list of approved assessment options and effectiveness evaluation measures and criteria for evaluating classroom teachers on its website, which can be accessed at <http://ped.state.nm.us/> and used by school districts for determining the student achievement growth component and evaluation criteria in a teacher's effectiveness evaluation.]

### **6.69.8.9 STUDENT ACHIEVEMENT GROWTH AND STUDENT ASSESSMENT PROGRAMS:**

A. School districts shall use the department-adopted student achievement growth measure to measure the growth in achievement of each student, provided that a school district may request permission to use a combination of the department-approved achievement growth measure and an alternative student achievement measure for non-tested subjects and grades which is department approved.

B. Whenever possible, an EES rating the performance of a classroom teacher shall include three years or more of student achievement growth data.

C. An EES rating the performance of any teachers who are assigned to courses not associated with state assessments may, upon request by their school district through the EES approval process, be permitted to include achievement growth that is demonstrated on state assessments as a percentage of the overall effectiveness evaluation. If that request is permitted and a percentage applied:

(1) achievement growth on the state assessment shall be based on the students assigned to the teacher; and

## PED Proposed Amendments 6.69.8 NMAC, 6/28/13

(2) the achievement growth of the teacher's assigned content area, as measured by the district-selected assessment, shall be the greater percentage.

D. Beginning with school year 2013-2014, if a school district has not implemented appropriate assessments of courses for classroom teachers nor adopted a comparable measure of student achievement growth, student achievement growth shall be measured by:

- (1) the growth in achievement of the classroom teacher's student on state assessments;
- (2) the school's A through F letter grade pursuant to 6.19.8 NMAC for courses in which enrolled students do not take the state assessment, provided that a school district may assign instructional team student achievement growth to classroom teachers in lieu of using the school grade growth calculation; or
- (3) state-developed end of course examinations or other PED-recommended options.

E. Beginning with the 2013-2014 school year, each school district shall be responsible for measuring the achievement gains of their students in all subjects and grade levels other than subjects and grade levels required for the state student achievement testing programs. To accomplish this, each school district shall administer a student assessment for each course they offer that measures mastery of the content as described in the state-adopted course description at the necessary level of rigor for the course. The student assessments may include:

- (1) statewide assessments currently administered in mathematics and reading;
- (2) other standardized assessments approved by the department, including nationally recognized standardized assessments;
- (3) industry certification examinations; and
- (4) department-approved school district-developed or selected end-of-course assessments.

F. A school district may develop its own assessment that measures student achievement growth for classroom teachers who do not teach in a standards-based assessment grade or subject, provided that, it submits the assessment to the department for approval.

[6.69.8.9 NMAC - N, 08-30-12]

[The department maintains a list of approved student achievement growth measures on its website, which can be accessed at <http://ped.state.nm.us/> and used by school districts for determining the growth in advancement of each student.]

### **6.69.8.10 EFFECTIVENESS EVALUATIONS OF SCHOOL LEADERS:**

A. Every school leader must have an annual effectiveness evaluation, which shall be conducted by a qualified person and approved by PED.

B. All EES ratings for the performance of a school leader shall be based 50% on the change in a school's A through F letter grade that has been assigned pursuant to 6.19.8 NMAC, 25% based on the school's multiple measures and 25% based upon documented fidelity observations of the school leader.

C. The effectiveness evaluation of school leaders shall, whenever possible, include ~~[student achievement growth data]~~ growth based on three years of data for students assigned to the public school ~~[for at least three consecutive school years]~~, provided that, the student achievement growth component of the effectiveness evaluation shall be based on the change in the school's A through F letter grade pursuant to 6.19.8 NMAC.

[6.69.8.10 NMAC - N, 08-30-12; A, xx-xx-13]

[The department maintains a list of leadership standards on its website, which can be accessed at <http://ped.state.nm.us/> and used by school districts in establishing indicators for conducting effectiveness evaluation of school leaders.]

### **6.69.8.11 EVALUATIONS, OBSERVATIONS, REPORTS AND POST-EVALUATION CONFERENCES:**

A. ~~[A classroom teacher whose previous annual effectiveness evaluation rating was either highly effective or exemplary shall continue to be observed four separate times a year by their school principal or other qualified external observers. The principal rating this classroom teacher shall have no role in selecting nor be related by blood or marriage to the external observer.]~~ During the 2013-2014 school year, every classroom teacher must be observed using one of the following options:

- (1) three observations conducted by the same approved observer; or
- (2) two observations, consisting of one observation by each of two different approved observers; or
- (3) two observations consisting of one observation by an approved observer and one observation by a certified observer.

## PED Proposed Amendments 6.69.8 NMAC, 6/28/13

~~B.~~ [All external observers shall receive training provided by either their school district or the PED. School districts may train their own external observers provided they develop mandatory written guidelines and those guidelines at a minimum require:

- ~~(1) that the external observers possess current New Mexico educator licensure and that they have at least five years of verifiable consecutive classroom teaching experience;~~
- ~~(2) that the external observers be provided with a district or PED developed form that contains at a minimum their name, the classroom teacher's name, the date, the start and stop time of their observation, the number of students present, space for subjective and objective observation, and a total point score of that teacher;~~
- ~~(3) that the external observers complete one actual training session of a classroom teacher who consents to such an observation solely for training purposes;~~
- ~~(4) that the external observers complete their written evaluation of a classroom teacher before leaving the school on the day of the observation; and~~
- ~~(5) that the external observers maintain confidentiality of their observations and written evaluations and do not discuss with anyone except the principal their observations or evaluations, nor may they retain or remove any copies of their evaluations or field notes from school premises.]~~ During the 2014-2015 school year and during each succeeding school year, every classroom teacher must be observed using one of the following options:

- (1) three observations conducted by the same certified observer; or
- (2) two observations, consisting of one observation by each of two different certified observers.

C. For the 2014-2015 school year and succeeding school years, districts may propose alternative plans for observing teachers who have highly effective and exemplary performance ratings. The plans must be submitted to the PED for approval.

D. An approved or certified observer must use a PED-developed protocol and form that contains at a minimum the observer's name, the classroom teacher's name, the date, the start and stop time of the observation, the number of students present, space for subjective and objective observation, and a total point score for that teacher. An external observer must further:

- (1) complete the written observation of a classroom teacher before leaving the school on the day of the observation;
- (2) agree to maintain confidentiality of the observation and agree not to discuss the observations with anyone except the principal; and
- (3) verify that the observer has not retained or removed a copy of the observation or field notes from school premises.

~~[C.]~~ E. Written feedback from [school leaders and external observers] a school leader and an approved or certified observer shall be provided to an observed classroom [teachers] teacher within ten calendar days after observation is completed, which observation can occur over more than one day, provided that a school district's EES permits this.

~~[D.]~~ F. Upon approval by the department, multiple measures adopted by a school district for use in their EES by the school districts shall constitute 25% of their teacher and school leader EES, provided that:

- (1) the multiple measures align with improved student achievement; and
- (2) each school district adopts at least two multiple measures which shall be used district-wide.

~~[E.]~~ G. The school leader responsible for supervising a licensed school employee shall be the one who evaluates that employee's performance. The school district's EES:

- (1) may provide for the supervisor to consider input from other trained evaluators and observers provided that they are not also supervised by the supervisor nor are related by blood or marriage to the supervisor; and
- (2) shall provide for contingencies if a supervisor leaves a school district for any reason prior to completing the required effectiveness evaluations of all teachers within that supervisor's responsibilities.

~~[F.]~~ H. Every person who evaluates a licensed school employee under this rule shall submit an original written report to the school district superintendent and an exact copy to the licensed school employee being evaluated. The effectiveness evaluation shall not be changed once each component is completed and it has been delivered to either the school district superintendent or the licensed school employee being evaluated.

~~[G.]~~ I. A licensed school employee rated minimally effective or ineffective may provide a written statement in response to their effectiveness evaluation and that statement shall become a permanent attachment to that employee's evaluation file.

~~[H.]~~ J. Every person who rates a licensed school employee minimally effective or ineffective shall describe in detail the minimally effective or ineffective performance and inform the licensee in writing:

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(1) of a right to a post-evaluation conference which the evaluator must convene and which shall occur no later than ten days after the evaluation is completed unless the employee agrees to an extension;

(2) that during the conference the evaluator will make recommendations to the employee with respect to specific areas of unsatisfactory performance and provide feedback that lays the initial framework for an individual professional growth plan;

(3) that the evaluator will provide assistance in helping the employee correct unsatisfactory performance and that the district will extend strategic support aligned to best practices identified by the department to assist the employee to correct unsatisfactory performance;

(4) that if the employee has an employment contract, the employee shall be placed on a performance growth plan for 90 school days from receipt of the notice of minimally effective or ineffective performance, provided that:

(a) the 90 days shall not include weekends, school holidays or school vacation periods, declared snow days, and approved employee leave days;

(b) during the 90 days the licensed school employee shall be observed and evaluated periodically, that is, more than four times in writing and shall be informed of the results of those observations; and

(c) the evaluator shall maintain documentation of having provided assistance and notification of in-service training opportunities to help correct the performance deficiencies noted of the licensed school employee; and

(5) that receipt of the notice shall constitute notice of uncorrected unsatisfactory work performance pursuant to Section 22-10A-3 NMSA 1978 and 6.69.2 NMAC.

~~[I.]~~ K. Within five school days after the expiration of the 90-day performance growth plan, the evaluator shall determine whether the performance deficiencies have been corrected and forward a written recommendation to the school district superintendent.

~~[J.]~~ L. Within 10 school days after receipt of that written recommendation, the school district superintendent shall in writing notify the licensed school employee who has an employment contract with the school district whether the performance deficiencies have been satisfactorily corrected. A copy of the evaluator's recommendation shall accompany that notice.

~~[K.]~~ M. If satisfactory progress has not been made, the local superintendent shall determine whether to discharge or terminate the employee pursuant to Sections 22-10A-27 or 22-10A-24, NMSA 1978.

~~[L.]~~ N. An employee who has been placed on a 90-day performance growth plan because of minimally effective or ineffective performance and who has not been employed by a school district for three consecutive years, shall have no reasonable expectation of continued employment beyond the end of the contract year by reason of being on a growth plan.

~~[M.]~~ O. The school district superintendent shall provide written notice to the educator quality division of the department of the name and licensure file number of all licensed school employees who have received two consecutive minimally effective or ineffective performance ratings and who have been given a written notice of proposed discharge or of proposed termination, or who have resigned their employment after receiving either of these ratings.

[6.69.8.11 NMAC - N, 08-30-12; A, xx-xx-13]

### **6.69.8.12 APPEAL OF EFFECTIVENESS EVALUATIONS:**

A. A school district shall adopt procedures for permitting expedited review for the purpose of a licensed school employee requesting an exemption from being rated during a given school year under the school district's EES based only upon extraordinary circumstances.

B. The procedures shall require a written appeal to be submitted to the appellate reviewer within no more than 15 calendar days of receipt of a written notice that the licensed employee's performances deficiencies have not been satisfactorily corrected.

C. Appeals shall be received in a manner that permits verification of the date of receipt.

D. The person who evaluated the licensed school employee shall not be same person who receives and determines the appeal.

E. An exemption from the provisions of this rule can only be granted for one school year based upon extraordinary circumstances, which shall consist of:

(1) a licensed school employee's not having performed services during an entire school year, excluding days out for approved leave and school holidays or closure days, for reasons beyond the employee's control;

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(2) a licensed school employee's not being able to perform services for extended periods during a school year due to documented medical reasons of the employee or of the employee's spouse, live-in partner or a child;

(3) a licensed school employee's not being able to perform services for extended periods during a school year due to the death of the employee's spouse, live-in partner or a child; or

(4) a licensed school employee's not having been afforded a full 90 days to demonstrate growth in performance for any reason including the employee's own illness, provided that it shall be the employee's burden to provide verification of not being afforded the full 90 days.

F. All decisions on appeals rendered under this section shall be final and not further reviewable by anyone else at the school district or by the PED.

[6.69.8.12 NMAC - N, 08-30-12]

**6.69.8.13 TEACHERS AND ADMINISTRATORS IN NON-PUBLIC SCHOOLS:**

A. Only licensed teachers and school leaders employed in schools subject to the A-B-C-D-F Schools Rating Act [Sections 22-2E-1 to 22-2E-4 NMSA 1978] shall be governed by any requirement or provision of this rule.

B. Specifically, neither licensed teachers nor administrators employed in private schools, BIE schools or state agencies shall be governed by any requirement or provision of this rule.

[6.69.8.13 NMAC - N, 08-30-12]

**HISTORY OF 6.69.8 NMAC: [Reserved]**