

November 21, 2019

MEMORANDUM

TO: Representative Christine Trujillo, Chair, Senator Mimi Stewart, Vice Chair,
and LESC members

FR: Denise Terrazas

RE: 6.12.9 NMAC Breakfast Program

The November 12, 2019 issue of the New Mexico Register contained the Public Education Department's (PED) proposed repeal of 6.12.9 NMAC, "Elementary School Free Breakfast Program During Instructional Time" and replacement with 6.12.9 NMAC, "Breakfast Program." See **Attachment 1, Proposed Rule 6.12.9 Breakfast Program**. The purpose of the proposed rule is to establish the standards and waiver and funding procedures to implement the breakfast program established in Section 22-13-13.2 NMSA 1978, "Breakfast program required; waiver; distribution of funds." The breakfast program requires school districts and charter schools to provide free breakfast to all students attending a school in which 85 percent or more of enrolled students were eligible for free- or reduced-fee lunch under the National School Lunch Act during the prior school year. The proposed rule is the first amendment since the rule was promulgated in 2011 and since statute was amended in 2014 and 2016 – to allow schools to serve breakfast before the start of the instructional day and to expand the program to include middle and high school students after the Legislature provides funding for that portion of the program. The proposed rule aligns with statute by removing the existing rule's requirement that instruction occur at the same time breakfast is served or consumed.

Additionally, the proposed rule forces PED to grant funds for the breakfast program, but the Legislature has to appropriate those funds first. The proposed rule should include language that states the program will be established "contingent on available funding." The proposed rule aligns with statute by specifically noting that PED, upon availability of funding, would be required to award eligible and voluntary schools serving seventh through 12th grade students. Finally, statute says disbursements for the breakfast program have to be paid in "sequential order," until the program funds are exhausted. School districts and charter schools whose schools have the highest percentage of enrolled students eligible for free or reduced-fee lunches should be paid before school districts and charter schools whose public schools have the lowest percentage of enrolled students eligible for free or reduced-fee lunches. The proposed rule includes a sequential order for voluntary schools participating in the breakfast program, but not for eligible schools, which should be given priority.

Statutory Authority

- PED cites Sections 9-24-8 and 22-2-1 NMSA 1978, which grant the department general rulemaking authority, as statutory authority for the proposed rulemaking. PED also cites Section 22-13-13.2 NMSA 1978 (Breakfast program required; waiver; distribution of funds).

Breakfast Program Requirements

- The proposed rule requires eligible schools serving prekindergarten through sixth grade students to establish a breakfast program.
- Voluntary schools would be allowed to establish a breakfast program if funding is available and the school complies with rule and applicable state and federal laws.
- Unlike the existing rule, eligible and voluntary schools participating in the breakfast program would be required to offer breakfast to students arriving as much as two hours after the start of the instructional day.
- Unlike the existing rule, eligible and voluntary schools would be able to offer breakfast service before the start of the instructional day, provided that the schools also serve breakfast after the beginning of the instructional day, and may choose the location of breakfast delivery, including the cafeteria, classroom, bus, or by providing a hand-carried breakfast.
- Unlike the existing rule, the proposed rule aligns with statute by not requiring instruction to occur simultaneously while breakfast is served or consumed. Statute states nothing prohibits a school to establish a breakfast program from beginning breakfast services before the start of the instructional day, provided breakfast is also served after the beginning of the instructional day in a location of its choice, including the cafeteria, classroom, on the bus, or by providing a hand-carried breakfast.
- Unlike the existing rule, eligible and voluntary schools serving prekindergarten through sixth grade students would be required to serve breakfast to all students by congregate feeding, while eligible and voluntary schools serving seventh through 12th grade students would not have to serve breakfast by congregate feeding.

Breakfast Program Waiver

- Eligible schools would be able to apply for a waiver from participating in the breakfast program if the school can demonstrate that implementation of the program will result in financial hardship.
- Waiver request forms would have to be posted on PED's website and would need to be submitted no later than 30 days after receiving a breakfast award.

Funding of Breakfast Programs

- School districts and schools in low-income areas that adopt a non-pricing meal service option with a post-multiplier amount of 100 percent would not be eligible to receive a breakfast program award.
- School districts and schools with a post-multiplier amount greater than 85 percent but less than 100 percent would be required to be considered an eligible school and would have to receive an award for the amount calculated by subtracting the school's post-multiplier amount from 100 percent.
- Provision 1, 2, and 3 schools would be eligible for the breakfast program and would have to be reimbursed at the federal reduced and free paid rates. A "Provision 1" school would be allowed free eligibility to be certified for a two-year period and there would be no requirement to offer meals at no charge to all students. A "Provision 2" school would be allowed to establish claiming percentages and to serve meals at no charge to all participating children for a four-year period. A "Provision 3" school would be allowed to receive the same level of federal cash and commodity assistance each year, with some adjustments, for a four-year period and to serve meals at no charge to all participating children for a four-year period.
- PED would be required to award eligible schools serving seventh through 12th grade students based on availability of funding.

- PED would be required to award voluntary schools after all funds for eligible schools have been disbursed, giving priority to voluntary schools with the highest percentage of enrolled students eligible for free- and reduced-fee lunch.
- PED would be required to provide voluntary schools a preliminary estimate of funding to be used for planning purposes within 30 calendar days of the release of the federal reimbursement rate.
- PED would be required to reimburse eligible and voluntary schools participating in the breakfast program for students eligible for free or reduced-fee lunch on a per meal basis at the federal reimbursement rate and, for students not eligible for free- or reduced-fee lunch, on a per meal basis at a rate calculated by subtracting the school's post-multiplier amount from 100 percent.

Technical Issues

- The proposed rule repeats the word “in” in Subsection A of Section 6.12.9.8, “Breakfast Program Requirements.”
- The proposed rule lists “prekindergarten” and “preschool” as eligible schools in Subsection A and Subsection E of Section 6.12.9.8, “Breakfast Program Requirements.” The proposed rule should remove “preschool” because “prekindergarten” is the same.
- The proposed rule misspells “purposes” in Paragraph 2 of Subsection E of Section 6.12.9.10, “Funding of Breakfast Programs.”
- When referring to grade levels, the proposed rule spells out “seven” in Subsection E of Section 6.12.9.8, “Breakfast Program Requirements,” and uses the number “7” in Subsection D of Section 6.12.9.10. For consistency, PED should spell out the second reference to seventh grade.

Public Comment Period and Public Rule Hearing

- Information on the rule can be obtained from the New Mexico Public Education Department, 300 Don Gaspar Avenue, Room 101, Santa Fe, NM 87501 or at rule.feedback@state.nm.us. The comment period for the rule is from November 12 to December 16 at 5:00 PM. The public rule hearing will be conducted Monday, December 16 from 10:00 a.m. to 12:00 p.m. in Mabry Hall, located at the Jerry Apodaca Education Building, 300 Don Gaspar Avenue, Santa Fe, NM 87501.

~~TITLE 6 — PRIMARY AND SECONDARY EDUCATION~~
~~CHAPTER 12 — PUBLIC SCHOOL ADMINISTRATION — HEALTH AND SAFETY~~
~~PART 9 — ELEMENTARY SCHOOL FREE BREAKFAST PROGRAM DURING INSTRUCTIONAL TIME~~

~~6.12.9.1 — ISSUING AGENCY:~~ Public Education Department
[6.12.9.1 NMAC — N, 10/31/2011]

~~6.12.9.2 — SCOPE:~~ All public schools, including charter schools.
[6.12.9.2 NMAC — N, 10/31/2011]

~~6.12.9.3 — STATUTORY AUTHORITY:~~ This regulation is adopted pursuant to Sections 22-2-1 and 9-24-8 NMSA 1978.
[6.12.9.3 NMAC — N, 10/31/2011]

~~6.12.9.4 — DURATION:~~ Permanent
[6.12.9.4 NMAC — N, 10/31/2011]

~~6.12.9.5 — EFFECTIVE DATE:~~ October 31, 2011, unless a later date is cited in the history note at the end of a section.
[6.12.9.5 NMAC — N, 10/31/2011]

~~6.12.9.6 — OBJECTIVE:~~ This rule establishes requirements for districts and charter schools to establish a school breakfast program providing free breakfast after the instructional day has begun, in all districts in which eighty-five percent or more of the enrolled students at the elementary school were eligible for free or reduced lunch during the prior school year.
[6.12.9.6 NMAC — N, 10/31/2011]

~~6.12.9.7 — DEFINITIONS:~~

~~A. — “Breakfast after the bell program” means an elementary school breakfast program in which food shall be served or consumed, at no charge, after the instructional day has begun, provided that instruction occurs simultaneously, to all students attending that elementary school through a school breakfast program that meets the federal school breakfast program standards as authorized by Section 4 of the Child Nutrition Act of 1966 and operated in accordance with all applicable policies, guidance, and law, including the requirements listed in 7 CFR Part 220.~~

~~B. — “Elementary school” means a public school providing instruction for grades kindergarten through eight, unless there is a junior high school program approved by the department, in which case it means a public school providing instruction for grades kindergarten through six (Section 22-1-3, NMSA 1978).~~

~~C. — “Federal reimbursement rate” means an amount prescribed annually by the United States secretary of agriculture for federal payments towards each meal served; this rate differs for free, reduced price and paid meals and depending upon whether the school is in “severe need,” as defined in 7 CFR Part 220.2 and according to the criteria in 7 CFR 220.9.~~

~~D. — “Financial hardship” means that if the school food services were to serve breakfast after the bell, it would operate at a loss such that cost would exceed revenue and funds from the school districts or charter schools state equalization guarantee would be required to cover the cost of serving breakfast after the bell.~~

~~E. — “Local school board” means the governing body of a school district or charter school.~~

~~F. — “School district” means an area of land established as a political subdivision of the state for the administration of public schools and segregated geographically for taxation and bonding purposes.~~

[6.12.9.7 NMAC — N, 10/31/2011]

~~6.12.9.8 — REQUIREMENTS:~~

~~A. — This section applies to local school boards, local school districts, and charter schools.~~

~~B. — An elementary school in which eighty-five percent or more of the enrolled students at the school are eligible for free or reduced price lunch under the National School Lunch Act of 1946 during the prior school year shall establish a breakfast after the bell program unless the school is granted a waiver by the department as per 6.12.9 NMAC.~~

~~C. An elementary school in which fewer than eighty five percent or more of the enrolled students at the school are eligible for free or reduced price lunch under the National School Lunch Act of 1946 during the prior school year and accepts state funding for the breakfast after the bell program shall establish a breakfast after the bell program.~~

~~D. Each school district and charter school that implements a breakfast after the bell program shall be reimbursed for students eligible for free or reduced price lunch under the National School Lunch Act of 1946 on a per meal basis as set forth by the federal Child Nutrition Act of 1966.~~

~~E. Each school district and charter school that implements a breakfast after the bell program and accepts a department award for state funds for the breakfast after the bell program shall be reimbursed by the department for students not eligible for free price or reduced priced lunch under the National School Lunch Act of 1946 on a per meal basis as set forth by the federal Child Nutrition Act of 1966 and shall be reimbursed by the department for students eligible for reduced priced lunch at a rate that reflects the difference between the federal established reduced meal rate and the free price meal rate under the National School Lunch Act of 1946.~~

~~F. Each school district and charter school that implements a breakfast after the bell program shall ensure that instruction occurs simultaneously when breakfast is served or consumed.
[6.12.9.8 NMAC – N, 10/31/2011]~~

6.12.9.9 BREAKFAST AFTER THE BELL PROGRAM WAIVER:

~~A. A school district or charter school may apply to the department for a waiver of the breakfast after the bell program requirements if the school district or charter school can demonstrate that the providing program will result in financial hardship for the school district or charter school.~~

~~B. Request for a breakfast after the bell program waiver shall be submitted using the department’s breakfast after the bell program waiver request form. This form shall include:~~

- ~~(1) name of superintendent or director of charter;~~
- ~~(2) district/school;~~
- ~~(3) mailing address;~~
- ~~(4) phone;~~
- ~~(5) fax;~~
- ~~(6) email;~~
- ~~(7) name of secondary contact person including the same information as identified in Paragraphs (1) through (6) of Subsection B;~~
- ~~(8) date of submission;~~
- ~~(9) statement district or charter school rationale for request; and~~
- ~~(10) the statement shall outline the financial hardship identifying how the breakfast after the bell program would operate at a loss such that cost would exceed revenue and funds from the school districts or charter schools state equalization guarantee would be required to cover the cost of serving breakfast after the bell.
[6.12.9.9 NMAC – N, 10/31/2011]~~

History of 6.12.9 NMAC: [RESERVED]

**TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 12 PUBLIC SCHOOL ADMINISTRATION - HEALTH AND SAFETY
PART 9 BREAKFAST PROGRAM**

6.12.9.1 ISSUING AGENCY: Public Education Department, hereinafter the department.
[6.12.9.1 NMAC – Rp, 6.12.9.1 NMAC, 12/31/2019]

6.12.9.2 SCOPE: All public schools, bureau of Indian education schools, state-supported schools, state-sponsored schools, and residential child care institutions eligible to participate in the breakfast program established by Section 22-13-13.2 NMSA 1978.
[6.12.9.2 NMAC – Rp, 6.12.9.2 NMAC, 12/31/2019]

6.12.9.3 STATUTORY AUTHORITY: Sections 22-2-1, 22-13-13.2, and 9-24-8 NMSA 1978.
[6.12.9.3 NMAC – Rp, 6.12.9.3 NMAC, 12/31/2019]

6.12.9.4 DURATION: Permanent.

[6.12.9.4 NMAC – Rp, 6.12.9.4 NMAC, 12/31/2019]

6.12.9.5 **EFFECTIVE DATE:** December 31, 2019 unless a later date is cited in the history note at the end of a section.

[6.12.9.5 NMAC – Rp, 6.12.9.5 NMAC, 12/31/2019]

6.12.9.6 **OBJECTIVE:** To establish the standards, procedures for waiver requests and the award of waivers, and procedures for funding necessary to implement the breakfast program established by Section 22-13-13.2 NMSA 1978.

[6.12.9.6 NMAC – Rp, 6.12.9.6 NMAC, 12/31/2019]

6.12.9.7 **DEFINITIONS:**

A. **“Breakfast program”** means the free breakfast program established by Section 22-13-13.2 NMSA 1978.

B. **“Community eligibility provision”** or **“CEP”** means a non-pricing meal service option for schools and school districts in low-income areas. Schools that adopt the CEP are reimbursed with federal USDA funds using a formula based on the percentage of students categorically eligible for free meals based on their participation in other means-tested programs such as the supplemental nutrition assistance program (SNAP) and temporary assistance for needy families (TANF).

C. **“Congregate feeding”** means all eligible students remain with their classmates for breakfast program service, and one or more students may not be separated from their classmates to access a meal.

D. **“Eligible school”** means a public school serving eligible students in which eighty-five percent or more of enrolled students were eligible for free or reduced-price lunch under the national school lunch act during the prior school year or a public school implementing the CEP or Provision 2. Eligible schools shall not include private, parochial, or home schools.

E. **“Eligible student”** means a student enrolled in an eligible school.

F. **“Federal reimbursement rate”** means an amount prescribed annually by the United States secretary of agriculture for federal payments toward each meal served. The federal reimbursement rate differs for free, reduced-price, and paid meals and whether the school is in “severe need,” as defined in 7 CFR Part 220.2 and according to the criteria in 7 CFR 220.9.

G. **“Financial hardship”** means the situation in which implementation of the breakfast program would cause a school to operate at a financial loss such that cost would exceed revenue and the use of funds from the state equalization guarantee would be required to cover the cost of serving breakfast. Financial hardship shall not include a school’s or staff’s non-interest or refusal to participate in the breakfast program.

H. **“Multiplier”** means the number established by the USDA to generate meal reimbursement rate percentages.

I. **“Provision 1”** means an alternative provision to the normal requirements for annual determinations of eligibility for free and reduced-price school meals, as defined in section 104(a) of the Healthy, Hunger Free Kids Act. Provision 1 allows free eligibility to be certified for a two-year period. There is no requirement to offer meals at no charge to all students.

J. **“Provision 2”** means an alternative provision to the normal requirements for annual determinations of eligibility for free and reduced-price school meals, as defined in section 104(a) of the Healthy, Hunger Free Kids Act. Provision 2 allows schools to establish claiming percentages and to serve meals at no charge to all participating children for a four-year period.

K. **“Provision 3”** means an alternative provision to the normal requirements for annual determinations of eligibility for free and reduced price school meals, as defined in section 104(a) of the Healthy, Hunger Free Kids Act. Provision 3 allows schools to receive the same level of federal cash and commodity assistance each year, with some adjustments, for a four-year period and to serve meals at no charge to all participating children for a four-year period.

L. **“United States Department of Agriculture”** or **“USDA”** means the federal agency that provides oversight and funding for school meal programs through food and nutrition service programs.

M. **“Voluntary school”** means a public school in which fewer than eighty-five percent of students were eligible for free or reduced-price lunch under the national school lunch act during the prior school year that selects to establish a breakfast program, so long as state funds exist.

[6.12.9.7 NMAC – Rp, 6.12.9.7 NMAC, 12/31/2019]

6.12.9.8 BREAKFAST PROGRAM REQUIREMENTS:

A. All eligible schools serving students in in pre-kindergarten, preschool, and grades kindergarten through six shall establish a breakfast program unless the school is granted a waiver by the department pursuant to 6.12.9.9 NMAC.

B. Voluntary schools may establish a breakfast program provided that state funding is available and the voluntary school complies with 6.12.9 NMAC and applicable state and federal laws.

C. Eligible and voluntary schools participating in the breakfast program shall offer breakfast to all eligible students, including to students arriving as much as two hours after the start of the instructional day.

D. Eligible and voluntary schools serving breakfast may:
(1) choose to offer breakfast service before the start of the instructional day, provided that the school also serves breakfast after the beginning of the instructional day;
(2) select the location of breakfast delivery, including the cafeteria, classroom, bus, or by providing a hand-carried breakfast; and
(3) determine whether or not instruction will occur simultaneously while breakfast is served or consumed.

E. Eligible schools and voluntary schools serving students in prekindergarten, preschool, and kindergarten through grade six shall serve breakfast to all students by congregate feeding. Eligible and voluntary schools serving students in grades seven through 12 may serve breakfast by congregate feeding.
 [6.12.9.8 NMAC – Rp, 6.12.9.8 NMAC, 12/31/2019]

6.12.9.9 BREAKFAST PROGRAM WAIVER:

A. Eligible schools may apply for a waiver of breakfast program participation if the eligible school can demonstrate that implementation of the breakfast program will result in financial hardship.

B. Waiver requests shall be submitted using the department’s breakfast program waiver request form no later than thirty calendar days after receiving a breakfast award.

C. Breakfast program waivers for eligible schools shall be posted on the department’s website.
 [6.12.9.9 NMAC – Rp, 6.12.9.9 NMAC, 12/31/2019]

6.12.9.10 FUNDING OF BREAKFAST PROGRAMS:

A. CEP schools with a post-multiplier amount of one-hundred percent or higher shall not be eligible to receive a breakfast program award.

B. CEP schools with a post-multiplier amount greater than eighty-five percent but less than one-hundred percent shall be considered an eligible school and shall receive a breakfast program award. The award shall be for the amount calculated by subtracting the school’s post-multiplier amount from one-hundred percent.

C. Provision 1, 2, and 3 schools may be eligible for the breakfast program and shall be reimbursed at the federal reduced and free paid rates.

D. The department shall award eligible public schools serving students in grades 7 through 12 based on availability of funding.

E. The department shall award voluntary schools funding after all funds for eligible schools have been disbursed.

(1) The department shall award voluntary schools with the highest percentage of enrolled students eligible for free and reduced-lunch first.

(2) The department shall provide voluntary schools a preliminary estimate of funding to be used for planning puRp, oses within 30 calendar days of the release of the federal reimbursement rate.

F. The department shall reimburse eligible and voluntary schools participating in the breakfast program:

(1) for students eligible for free or reduced-price lunch on a per meal basis at the federal reimbursement rate; and

(2) for students not eligible for free or reduced-price lunch on a per meal basis at a rate calculated by subtracting the school’s post-multiplier amount from one-hundred percent.

[6.12.9.10 NMAC – Rp, 6.12.9.10 NMAC, 12/31/2019]

HISTORY OF 6.12.9 NMAC: [RESERVED]

6.12.9 NMAC, Elementary School Free Breakfast Program During Instructional Time, filed 10/31/2011, was repealed and replaced by 6.12.9 NMAC, Breakfast Program, effective 12/31/2019.