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May 28, 2015

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force

RE: ADMINISTRATIVE RULEMAKING: (1) NUTRITION: IMPLEMENTATION OF FEDERAL REQUIREMENTS FOR COMPETITIVE FOODS; AND (2) SCHOOL DISTRICT WELLNESS POLICY

Adopted Rules:

- (1) **6.12.5 NMAC, Nutrition: Implementation of Federal Requirements for Competitive Foods**
- (2) **6.12.6 NMAC, School District Wellness Policy**

The December 15, 2014 issue of the *New Mexico Register* contained the final adoption of rules implementing federal requirements for competitive food sales and school district wellness policies. The Notice of Proposed Rulemaking was published in the *Register* on July 15, 2014 and, soliciting comments on the proposed rules, noted that the Public Education Department (PED) was to have conducted a public hearing August 15, 2014 in Santa Fe.

6.12.5 NMAC, Nutrition: Implementation of Federal Requirements for Competitive Foods

This rulemaking repeals the previous Section 6.12.5 NMAC, Nutrition: Competitive Food Sales (see **Attachment 1, Notice of Repeal: 6.12.5 NMAC, 12/30/14**), and replaces it with the new rule (see **Attachment 2, Adopted Rule, Nutrition: Implementation of Federal Requirements for Competitive Foods, 12/30/14**). Among its provisions, the rulemaking includes:

- the scope of the new rules, which includes all schools that participate in programs authorized by the *Richard B. Russell National School Lunch Act* and the *Child Nutrition Act of 1966*;
- the rule’s objective, which is to address the sale of competitive food to children attending New Mexico schools that participate in a United States Department of Agriculture (USDA) school meal program;
- the actual implementation of the federal requirements, including:
 - terms defined in federal regulations at 7 CFR 210.11a, including:
 - “combination foods,” which means products that contain two or more components representing two or more of the recommended food groups (fruit, vegetable, dairy, protein, or grains);
 - “competitive food,” which means all food and beverages other than meals reimbursed under programs authorized by the *Richard B. Russell National School Lunch Act* and the *Child Nutrition Act of 1966* that are available for sale to students on the school campus during the school day; and
 - “Entrée item,” which means an item that is either:
 - ✓ a combination food of meat or meat alternative and whole grain rich food;
 - ✓ a combination food of vegetable or fruit and meat or meat alternative; or
 - ✓ a meat or meat alternative, except for yogurt, low- or reduced fat cheese, nuts, seeds, nut and seed butters, and meat snacks; and
 - all federal rule, law, and guidance limitations governing sale of foods in schools under school meal programs authorized by the *Richard B. Russell National School Lunch Act* and the *Child Nutrition Act of 1966*;
- the establishment by PED of limits on the number of fundraisers permitted on school grounds during the school term, such as:
 - prohibitions on conducting fundraisers in competition with school meals in the food service area during meal service; and
 - allowing fundraisers only for up to one school day on two occasions per semester or trimester; and
- the implementation of a wellness policy, according to 6.12.6 NMAC, that incorporates those limitations on fundraisers noted above, in annual assurances by a school district or charter school to PED.

It should be noted that the adopted rule for 6.12.5 NMAC differs from the rule as proposed, which merely offered certain amendments to the then-current rule regarding specific quantities and ingredients of foods sold in competitive sales and fundraisers. As indicated above, this adopted rule repealed that prior version of 6.12.5 NMAC, replacing it with this rule that, essentially, incorporates federal requirements and limitations by reference.

6.12.6 NMAC, School District Wellness Policy

This adopted rule (see **Attachment 3, Adopted Rule, School District Wellness Policy, 12/30/14**) contains several amendments, including:

- a definition for “fundraiser,” which means the on-campus sale, to benefit a school or school organization, of beverage or food products limited by a USDA school meal program for use, consumption, or sale during the school day in competition with school meals. (A fundraiser may be conducted only for up to one school day on two occasions per semester or trimester term in a school that participates in USDA school meal programs. School wellness policies shall include annual assurances to PED of compliance with limitations on “fund raisers” under this rule, and subject to review as part of the administrative review of a school food authority); and
- elements to be included in a school district’s wellness policy:
 - nutritional guidelines that meet the standards imposed by federal regulations at 7 CFR 210.11 and 7 CFR 210.11(a), as well as in the *Healthy Hunger-Free Kids Act of 2010*, the *Richard B. Russell National School Lunch Act*, and the *Child Nutrition Act of 1966*; and
 - guidelines for fundraisers established by PED rule at 6.12.5 NMAC, “Nutrition: Implementation of Federal Requirements for Competitive Foods,” as well as annual assurances of compliance with those limitations.

As with the adopted rule for 6.12.5, detailed above, this rule also differs from the proposed version in several respects, emphasizing the federal guidelines with which these rules would now require compliance:

- the definition for “fundraiser” has been altered to render it more parallel with federal requirements at 7 CFR 210.11;¹
- the proposed definition for “school hours” is no longer included; and
- proposed requirements that guidelines for fundraisers meet the requirements listed in 6.12.5.8 NMAC, have been changed to refer directly to the federal requirements found in 7 CFR 210.11, and to the requirements of 6.12.5 NMAC, generally, as much of that rule, (including 6.12.5.8) has been stricken in favor of reference to the federal requirements, as noted above.

¹ 7 CFR 210.11(b)(4), *Fundraiser restrictions* (Competitive food and beverage items sold during the school day must meet the nutrition standards for competitive food as required in this section. A special exemption is allowed for the sale of food and/or beverages that do not meet the competitive food standards as required in this section for the purpose of conducting an infrequent school-sponsored fundraiser. Such specially exempted fundraisers must not take place more than the frequency specified by the State agency during such periods that schools are in session. No specially exempted fundraiser foods or beverages may be sold in competition with school meals in the food service area during the meal service.) <https://www.law.cornell.edu/cfr/text/7/210.11>.

Notice of Repeal: 6.12.5 NMAC, 12/30/14**ATTACHMENT 1****New Mexico Register / Volume XXV, Number 24 / December 30, 2014**

The Public Education Department repeals its rule entitled Nutrition: Competitive Food Sales, 6.12.5 NMAC (filed 02/14/2006), and is replacing it with Nutrition: Implementation of Federal Requirements for Competitive Foods, 6.12.5 NMAC, effective 12/30/2014.

SOURCE: New Mexico Register and New Mexico Public Education Department

**Nutrition: Implementation of Federal Requirements for
Competitive Foods, 12/30/14**

ATTACHMENT 2

New Mexico Register / Volume XXV, Number 24 / December 30, 2014

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 12 PUBLIC SCHOOL ADMINISTRATION - HEALTH AND SAFETY
PART 5 NUTRITION: IMPLEMENTATION OF FEDERAL REQUIREMENTS FOR
COMPETITIVE FOODS

6.12.5.1 ISSUING AGENCY: Public Education Department.

[6.12.5.1 NMAC - Rp, 6.12.5.1 NMAC, 12-30-14]

6.12.5.2 SCOPE: This rule applies to New Mexico schools that participate in programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 unless otherwise expressly limited.

[6.12.5.2 NMAC - Rp, 6.12.5.2 NMAC, 12-30-14]

6.12.5.3 STATUTORY AUTHORITY: This rule is adopted pursuant to Sections 22-2-1 and 9-24-8, NMSA 1978.

[6.12.5.3 NMAC - Rp, 6.12.5.3 NMAC, 12-30-14]

6.12.5.4 DURATION: Permanent.

[6.12.5.4 NMAC - Rp, 6.12.5.4 NMAC, 12-30-14]

6.12.5.5 EFFECTIVE DATE: December 30, 2014, unless a later date is cited at the end of a section.

[6.12.5.5 NMAC - Rp, 6.12.5.5 NMAC, 12-30-14]

6.12.5.6 OBJECTIVE: This rule addresses the sale of competitive food sold to children attending New Mexico schools that participate in a United States department of agriculture school meal program.

[6.12.5.6 NMAC - Rp, 6.12.5.6 NMAC, 12-30-14]

6.12.5.7 DEFINITIONS: [RESERVED]

[6.12.5.7 NMAC - Rp, 6.12.5.7 NMAC, 12-30-14]

6.12.5.8 IMPLEMENTATION OF FEDERAL REQUIREMENTS FOR COMPETITIVE FOODS

A. Terms defined by federal laws and regulations. Terms defined in United States agriculture department competitive foods rules at 7 CFR 210.11 and 7 CFR 210.11a implementing the all foods sold in schools and smart snacks provisions of the Healthy, Hunger-Free Kids Act of 2010, the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966 are incorporated for purposes of these rules.

B. Federal law, rule and guidance limitations regarding beverages and foods sold in schools shall govern the participation in and implementation of New Mexico school meal programs authorized by the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966, except that the public education department shall set a limit on the number of fundraisers permitted on a school campus during each school term. A fundraiser is a sale on a school campus to benefit a school or school organization of beverage or food products limited by a United States department of agriculture school meal program for use, consumption or sale during the school day. No fundraiser may be conducted in competition with school meals in the food service area during meal service. A fundraiser may be conducted only for up to one school day on two occasions per semester or trimester term in a school that participates in United States department of agriculture school meal programs.

C. A wellness policy created pursuant to requirements of 6.12.6 NMAC shall incorporate the limitations stated in Subsection B of this section in annual assurances by a school district or a charter school to the New Mexico public education department. Such assurances shall be reviewed in conjunction with the administrative review of a school food authority.

[6.12.5.8 NMAC - Rp, 6.12.5.8 NMAC, 12-30-14]

HISTORY OF 6.12.5 NMAC:

History of Repealed Material:

6.12.5 NMAC, Nutrition: Competitive Food Sales (filed 02-14-2006) repealed 12-30-14.

SOURCE: New Mexico Public Education Department

**Adopted Rule
School District Wellness Policy, 12/30/14**

ATTACHMENT 3

New Mexico Register / Volume XXV, Number 24 / December 30, 2014

This is an amendment to 6.12.6 NMAC, Sections 7 and 8, effective 12/30/14.

6.12.6.7 DEFINITIONS:

A. “Coordinated school health approach” means the framework for linking health and education. The focus is healthy and successful students. There are eight interactive components of coordinated school health: health education; physical education and activity; nutrition; social and emotional well-being; healthy and safe environment; health services; staff wellness; and family, school and community involvement.

B. “Family, school and community involvement” means an integrated family, school and community approach for enhancing the health and well-being of students by establishing a district school health advisory council that has the responsibility to make recommendations to the local school board in the development or revision, implementation, and evaluation of the wellness policy.

C. “Fund raiser” means a sale or sales on a school campus to benefit a school or school organization of beverage or food products limited by a United States department of agriculture school meal program for use, consumption or sale during the school day in competition with school meals. A fundraiser may be conducted only for up to one school day on two occasions per semester or trimester term in a school that participates in United States department of agriculture school meal programs. The wellness policy implemented through 6.12.6 NMAC shall include annual assurances to the New Mexico public education department of compliance with limitations on “fund raisers” pursuant to this subsection and subject to review as part of the administrative review of a school food authority.

~~[C.]~~ D. “Health education” means the instructional program that provides the opportunity to motivate and assist all students to maintain and improve their health, prevent disease, and reduce health-related risk behaviors. It allows students to develop and demonstrate increasingly sophisticated health-related knowledge, attitudes, skills, and practices. It meets the content standards with benchmarks and performance standards as set forth in 6.30.2.19 NMAC.

~~[D.]~~ E. “Health services” means services provided for students to appraise, protect, and promote health. These services are designed to ensure access or referral to primary health care or behavioral health services or both, foster appropriate use of primary health care services, behavioral health services, prevent and control communicable diseases and other health problems, provide emergency care for illness or injury, promote and provide optimum sanitary conditions for a safe school facility and school environment, and provide educational and counseling opportunities for promoting and maintaining individual, family, and community health.

~~[E.]~~ F. “Healthy and safe environment” means the physical and aesthetic surroundings and the psychosocial climate and culture of the school. It supports a total learning experience that promotes personal growth, healthy interpersonal relationships, wellness, and freedom from discrimination and abuse.

~~[F.]~~ G. “Nutrition” means programs that provide access to a variety of nutritious and appealing meals and snacks that accommodate the health and nutrition needs of all students.

~~[G.]~~ H. “Physical activity” means body movement of any type which include recreational, fitness, and sport activities.

~~[H.]~~ I. “Physical education” means the instructional program that provides cognitive content and learning experiences in a variety of activity areas. It provides the opportunity for all students to learn and develop the skills, knowledge and attitudes necessary to personally decide to participate in a lifetime of healthful physical activity. It meets the content standards with benchmarks and performance standards as set forth in Section 6.30.2.20 NMAC.

~~[I.]~~ J. “Social and emotional wellbeing” means services provided to maintain or improve students’ mental, emotional, behavioral, and social health.

~~[J.]~~ K. “Staff wellness” means opportunities for school staff to improve their health status through activities such as health assessments, health education and health-related fitness activities. These opportunities encourage school staff to pursue a healthy lifestyle that contributes to their improved health status, improved morale, and a greater personal commitment to the school's overall coordinated school health approach.

~~[K.]~~ L. “Emergency Operation Plan (EOP)” means the document which outlines and explains functions, resources and coordination procedures for responding to and supporting crisis, emergency, terrorist-response, and disaster operations, and is that portion of a safe school plan that details risk assessments and establishes the plans or procedures to manage a crisis, emergency, terrorist or disaster event before, during and after it has occurred and includes, but is not limited to, emergency routes and staff assignments as they relate to immediate actions, delayed actions, mitigation actions, facility evacuations and facility reentry.

[6.12.6.7 NMAC - N, 02-28-06; A, 11-30-06; A, 05-15-14; A, 12-30-14]

6.12.6.8 REQUIREMENTS:

A. This section applies to local school boards, local school districts, and charter schools and governs policies to be implemented by local school districts with regards to student and school employee wellness.

B. Each school district and charter school shall develop and implement a policy that addresses student and school employee wellness through a coordinated school health approach.

C. Each school district and charter school shall submit the wellness policy to the public education department for

SOURCE: New Mexico Public Education Department

Adopted Rule
School District Wellness Policy, 12/30/14

approval.

(1) Sections of the wellness policy that meet the requirements set forth in Paragraphs (3), (4), (5) [~~(6) and (11)~~] and (10) of Subsection D and the requirements set forth in Subsection E of this section shall be submitted to the public education department on or before August 30, 2006.

(2) Sections of the wellness policy that meet the requirements set forth in Paragraphs (1), (2), [~~(7), (8), (9) and (10)~~] (6), (7), (8) and (9) of Subsection D of this section shall be submitted to the public education department on or before January 30, 2007.

D. The wellness policy shall include, but shall not be limited to:

(1) a planned, sequential, K-12 health education curriculum that addresses the physical, mental, emotional, and social dimensions of health and is aligned to the health education content standards with benchmarks and performance standards as set forth in 6.30.2.19 NMAC;

(2) a planned, sequential, K-12 physical education curriculum that provides the optimal opportunity for all students to learn and develop skills, knowledge and attitudes necessary to personally decide to participate in lifetime healthful physical activity and is aligned to the physical education content standards with benchmarks and performance standards as set forth in 6.30.2.20 NMAC;

(3) guidelines to provide physical activity opportunities to students before, during [~~and/or~~] and after school;

(4) nutrition guidelines [~~for a la carte offerings minimally meeting guidelines set forth in Subsection B of 6.12.5.8 NMAC~~] meeting standards established by federal rules at 7 CFR 210.11 and 7 CFR 210.11a, the Healthy Hunger-Free Kids Act of 2010, the Richard B. Russell National School Lunch Act and the Child Nutrition Act of 1966;

(5) guidelines for [~~school sponsored fund raisers during the normal school hours minimally meeting guidelines set forth in Paragraph (1) of Subsection C of 6.12.5.8 NMAC~~] fund raisers established at 6.12.5 NMAC and an annual assurance of compliance with limitations on fund raisers established at 6.12.5 NMAC;

(6) [~~guidelines for school sponsored fund raisers before and after schools hours ensuring that at least fifty percent of the offerings shall be healthy choices in accordance with the requirements set forth in Paragraph (2) of Subsection C of 6.12.5.8 NMAC;~~

~~_____~~ (7) a plan addressing the behavioral health needs of all students in the educational process by focusing on students' social and emotional wellbeing;

~~(8)~~ (7) school safety plans at each school building focused on supporting healthy and safe learning environments; the school safety plan must be submitted to the public education department for approval on a three-year cycle and must include the following minimum components:

- (a) introduction;
- (b) school policies and procedures;
- (c) prevention; and
- (d) a school EOP;

~~(9)~~ (8) a plan addressing the health services needs of students in the educational process;

~~(10)~~ (9) a plan addressing the staff wellness needs of all school staff that minimally ensures an equitable work environment and meets the American with Disabilities Act, Part III;

~~(11)~~ (10) a plan for measuring implementation and evaluation of the wellness policy, including the designation of one or more persons within the school district, or at each school, as appropriate, charged with operational responsibility for ensuring that each school fulfills the district's wellness policy.

E. Family, school and community involvement. Each local board of education shall establish a district school health advisory council that consists of parent(s), school food authority personnel, school board member(s), school administrator(s), school staff; student(s); and community member(s). The school health advisory council shall have the responsibility to make recommendations to the local school board in the development or revision, implementation, and evaluation of the wellness policy consistent with this rule. The school health advisory council shall meet for this purpose a minimum of two times annually.

[6.12.6.8 NMAC - N, 02-28-06; A, 11-30-06; A, 05-15-14; A, 12-30-14]