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August 24, 2011

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Kevin Force, J.D.

**RE: STAFF BRIEF: PUBLIC EDUCATION DEPARTMENT (PED) ADOPTED  
RULES: CHILDREN WITH DISABILITIES/GIFTED CHILDREN  
(6.31.2 NMAC)**

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The July 29, 2011 issue of the *New Mexico Register* included the final adoption of the Public Education Department’s (PED) amendments to the “Children with Disabilities/Gifted Children” rule. (See 14 *New Mexico Register* 532, July 29, 2011.) This rule became effective on July 29, 2011. (Attachment 1, *Adopted Rules: Children with Disabilities/Gifted Children*)

**NOTICE OF PROPOSED RULEMAKING**

The Notice of Proposed Rulemaking was published May 31, 2011. (See 10 *New Mexico Register* 340, May 31, 2011.) (Attachment 2, *NPRM: Children with Disabilities/Gifted Children*)

PED solicited public comment and held a public hearing on July 5 from 9:00 am to 12:00 pm in Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe.

The Department disclosed the reasons behind the rulemaking in a news release dated May 31, 2011 (see Attachment 3, *News Release: Public Hearing Scheduled to Amend Rules on Special Education for Students with Disabilities*):

- Under federal law, each state that receives funds under Part B of the *Individuals with Disabilities Education Act (IDEA)* is required to ensure that any state rule conforms to IDEA. Several of the changes would align PED rules with IDEA, as required.
- House Bill 230, enacted during the 2010 legislative session, adopted requirements relating to interventions for students displaying signs of dyslexia. The rulemaking was required to implement those provisions.
- Governor Martinez’ veto message for SB 314 on autism strategies also required rulemaking (see Attachment 4, *Governor Martinez Veto Message SB 314*).

The rationale for each proposed amendment was examined in greater detail in a memorandum to district school, charter school, special education administrators, and other interested persons, published on the PED website (see Attachment 5, Memorandum, *RE: Proposed Amendments to State Special Education Rules (6.31.2 NMAC)*).

### SYNOPSIS OF ADOPTED RULES

These rules are amendments to **Sections 7, 9, 10, 11, and 13** of **6.31.2 NMAC** (Children with Disabilities/Gifted Children), effective July 29, 2011:

- **Section 7** (Definitions) **Subsection B** is amended to:
  - change the reference from “mental retardation” to “intellectual disability” in the definition of “Child with a disability;” and
  - add a definition for “dyslexia” with the following paragraphs renumbered accordingly;
- **Section 7 Subsection C** is amended to delete the definition of “Complaint assistance IEP (CAIEP) meeting” and to renumber the succeeding paragraphs accordingly;
- **Section 9** (Public Agency Responsibilities) is amended to:
  - add a new **subparagraph (b)** to **paragraph (8)** of **Subsection B** regarding providing training for research-based interventions for students with dyslexia;
  - correct a citation to the federal regulations in **paragraph (1)** of **subsection D**; and
  - add a new **Subsection J** regarding prohibition on mandatory medication;
- **Section 10** (Identification, Evaluations and Eligibility Determinations) is amended to:
  - change “multi-disciplinary team or IEP team” to “eligibility team” throughout the section; and
  - add a **new subparagraph (c)(iv)** to **paragraph (1)** of **Subsection D** regarding a parent being allowed to request an initial evaluation at any time;

- **Section 11** (Educational Services for Children with Disabilities) is amended to:
  - delete the reference to “ninety days” in **paragraph (4)** of **Subsection A**; and
  - add a new **paragraph (5)** of **Subsection B** regarding requiring IEP teams to consider eleven strategies in developing IEPs for students with autism spectrum disorders; and
  
- **Section 13** (Additional Rights of Parents, Students and Public Agencies) is amended to:
  - delete references to CAIEP meetings in **Subsections G and H**;
  - delete **paragraphs (28)** and **(29)** of **Subsection I**;
  - change a reference to a state rule in **paragraph (6)** of **Subsection L**; and
  - add a new **Subsection M** regarding computation of time.

## New Mexico Register / Volume XXII, Number 14 / July 29, 2011

**Explanatory paragraph:** This is an amendment to Sections 7, 9, 10, 11 and 13 of 6.31.2 NMAC (CHILDREN WITH DISABILITIES/GIFTED CHILDREN), effective July 29, 2011. Subsection B of Section 7 (DEFINITIONS) is amended to change the reference from “mental retardation” to “intellectual disability” in the definition of “Child with a disability” and to add a definition for “dyslexia” with the following paragraphs renumbered accordingly. Subsection C of Section 7 is amended to delete the definition of “Complaint assistance IEP (CAIEP) meeting” and to renumber the succeeding paragraphs accordingly. Section 9 (PUBLIC AGENCY RESPONSIBILITIES) is amended to add a new subparagraph (b) to paragraph (8) of Subsection B regarding providing training for research-based interventions for students with dyslexia, to correct a citation to the federal regulations in paragraph (1) of subsection D, and to add a new Subsection J regarding prohibition on mandatory medication. Section 10 (IDENTIFICATION, EVALUATIONS AND ELIGIBILITY DETERMINATIONS) is amended to change “multi-disciplinary team or IEP team” to “eligibility team” throughout the section and to add a new subparagraph (c)(iv) to paragraph (1) of Subsection D regarding a parent being allowed to request an initial evaluation at any time. Section 11 (EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES) is amended to delete the reference to “ninety days” in paragraph (4) of Subsection A and to add a new paragraph (5) of Subsection B regarding requiring IEP teams to consider eleven strategies in developing IEPs for students with autism spectrum disorders. Section 13 (ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES) is amended to delete references to CAIEP meetings in Subsections G and H, to delete paragraphs (28) and (29) of Subsection I, to change a reference to a state rule in paragraph (6) of Subsection L and to add a new Subsection M regarding computation of time.

**6.31.2.7 DEFINITIONS:**

**B.** The following terms shall have the following meanings for purposes of these rules.

(2) **“Child with a disability”** means a child who meets all requirements of 34 CFR Sec. 300.8 and who:

(b) has been evaluated in accordance with 34 CFR Secs. 300.304-300.311 and any additional requirements of these or other public education department rules and standards and as having one or more of the disabilities specified in 34 CFR Sec. 300.8 including ~~mental retardation~~ intellectual disability, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, emotional disturbance, orthopedic impairment, autism, traumatic brain injury, and other health impairment, a specific learning disability, deaf-blindness, or being developmentally delayed as defined in paragraph (4) below; and who has not received a high school diploma; and

(6) **“Dyslexia”** means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.

~~(7)~~(7) The **“educational jurisdiction”** of a public agency includes the geographic area, age range and all facilities including residential treatment centers, day treatment centers, hospitals, mental health institutions, juvenile justice facilities, state supported schools, or programs within which the agency is obligated under state laws, rules or regulations or by enforceable agreements including joint powers agreements (JPA) or memoranda of understanding (MOU) to provide educational services for children with disabilities. In situations such as transitions, transfers and special placements, the educational jurisdiction of two or more agencies may overlap and result in a shared obligation to ensure that a particular child receives all the services to which the child is entitled.

~~(8)~~(8) A **“free appropriate public education (FAPE)”** means special education and related services which meet all requirements of 34 CFR Sec. 300.17 and which, pursuant to Sec. 300.17(b), meet all applicable department rules and standards, including but not limited to these rules (6.31.2 NMAC), the Standards for Excellence (6.29.1 NMAC) and department rules governing school personnel preparation, licensure and performance (6.60 NMAC through 6.64 NMAC), student rights and responsibilities (6.11.2 NMAC) and student transportation (6.41.3 and 6.41.4 NMAC).

~~(9)~~(9) The **“general education curriculum”** pursuant to 34 CFR Sec. 300.320, means the same curriculum that a public agency offers for nondisabled children. For New Mexico public agencies whose non-special education programs are subject to department rules, the general curriculum includes the content standards, benchmarks and all other applicable requirements of the Standards for Excellence (Chapter 29 of Title 6 of the NMAC) and any other department rules defining curricular requirements.

~~(10)~~(10) **“LEA”** means a local educational agency as defined in 34 CFR Sec. 300.28.

~~(11)~~(11) **“Individualized education program”** or IEP means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with 34 CFR Secs. 300.320 through 300.324.

~~(12)~~(12) The **“IDEA”** means the federal Individuals with Disabilities Education Improvement Act of 2004, 20 USC Secs. 1401 and following, including future amendments.

~~(13)~~(13) **“NMAC”** means the New Mexico administrative code, including future amendments.

~~(14)~~(14) **“NMSA 1978”** means the 1978 Compilation of New Mexico Statutes Annotated, including future amendments.

~~(15)~~(15) **“Parent”** includes, in addition to the persons specified in 34 CFR Sec. 300.30, a child with a

disability who has reached age 18 and for whom there is no court-appointed general guardian, limited guardian or other court-appointed person who has legal custody or has otherwise been authorized by a court to make educational decisions on the child's behalf as provided in Subsection K of 6.31.2.13 NMAC. Pursuant to 34 CFR Sec. 300.519 and department policy, a foster parent of a child with a disability may act as a parent under Part B of the IDEA if: (i) the foster parent or the state children, youth and families department (CYFD) provides appropriate documentation to establish that CYFD has legal custody and has designated the person in question as the child's foster parent; and (ii) the foster parent is willing to make the educational decisions required of parents under the IDEA; and has no interest that would conflict with the interests of the child. A foster parent who does not qualify under the above requirements but who meets all requirements for a surrogate parent under 34 CFR Sec. 300.519 may be appointed as a surrogate if the public agency responsible for making the appointment deems such action appropriate. (See Subsection J of 6.31.2.13 NMAC.)

~~[(15)]~~**(16)** **“Puente para los niños fund”** in New Mexico means a risk pool fund to support high cost students with disabilities identified by LEAs pursuant to 34 CFR Sec. 300.704(c)(3)(i).

~~[(16)]~~**(17)** **“SAT”** means the student assistance team, which is a school-based group of people whose purpose is to provide additional educational support to students who are experiencing difficulties that are preventing them from benefiting from general education.

~~[(17)]~~**(18)** **“SEB”** means the special education bureau of the public education department.

~~[(18)]~~**(19)** **“Special education”** means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.

(a) As authorized by 34 CFR Sec. 300.8(a)(2)(ii) and 300.39(a)(2)(i), “special education” in New Mexico may include speech-language pathology services.

(b) Speech-language pathology services must meet the following standards to be considered special education:

(i) the service is provided to a child who has received appropriate tier I universal screening under Subsection D of 6.29.1.9 NMAC as it may be amended from time to time, before being properly evaluated under 34 CFR Secs. 300.301-300.306 and Subsection D of 6.31.2.10 NMAC;

(ii) the IEP team that makes the eligibility determination finds that the child has a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance; and

(iii) the speech language pathology service consists of specially designed instruction that is provided to enable the child to have access to the general curriculum and meet the educational standards of the public agency that apply to all children; and

(iv) the service is provided at no cost to the parents under a properly developed IEP that meets the requirements of Subsection B of 6.31.2.11 NMAC.

(c) If all of the above standards are met, the service will be considered as special education rather than a related service.

(d) Student/staff caseloads shall meet the requirements of Paragraphs (1) and (2) of Subsection H of 6.29.1.9 NMAC.

~~[(19)]~~**(20)** A **“state-supported educational program”** means a publicly funded program that:

(a) provides special education and related services to children with disabilities who come within the program's educational jurisdiction;

(b) is operated by, or under contractual arrangements for, a state school, state educational institution or other state institution, state hospital or state agency; and

(c) is primarily funded through direct legislative appropriations or other direct state support to a public agency other than a local school district.

~~[(20)]~~**(21)** **“USC”** means the United States code, including future amendments.

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.

~~[(1) “Complaint assistance IEP (CAIEP) meeting” means an IEP meeting that is facilitated by the representative of the public agency who directs special education programs within the public agency, and who has decision-making authority on behalf of such agency.]~~

~~[(2)]~~**(1)** **“Facilitated IEP (FIEP) meeting”** means an IEP meeting that utilizes an independent, state-approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.

~~[(3)]~~**(2)** **“Mediation”** means a meeting or series of meetings that utilizes an independent, state-approved, state-funded, trained mediator to assist parties to reconcile disputed matters related to a student's IEP or other educational, non-IEP-related issues.

[6.31.2.7 NMAC - Rp, 6.31.2.7 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11]

### 6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:

B. Public agency funding and staffing.

(8) 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.

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

(1) Pursuant to 34 CFR Secs. 300.208(a)(2) and ~~300.266~~ 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.

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]

**6.31.2.10 IDENTIFICATION, EVALUATIONS AND ELIGIBILITY DETERMINATIONS:**

D. Evaluations and reevaluations.

(1) Initial evaluations.

(c) Procedures for initial evaluation.

(iii) Each public agency shall maintain a record of the receipt, processing and disposition of any referral for an individualized evaluation. All appropriate evaluation data, including complete SAT file documentation and summary reports from all individuals evaluating the child shall be reported in writing for presentation to the ~~[multi-disciplinary team or IEP team]~~ eligibility determination team.

(iv) A parent may request an initial special education evaluation at any time during the SAT process. If the public agency agrees with the parent that the child may be a child who is eligible for special education services, the public agency must evaluate the child. If the public agency declines the parent's request for an evaluation, the public agency must issue prior written notice in accordance with 34 CFR Sec. 300.503. The parent can challenge this decision by requesting a due process hearing.

(f) The ~~[multi-disciplinary]~~ eligibility determination team including the parent and child, if appropriate, must meet to determine if the child is a child with a disability and requires an IEP upon completion of the initial evaluation.

(2) Reevaluations.

(e) Each public agency shall maintain a record of the receipt, processing, and disposition of any referral for an individualized reevaluation. Reevaluation shall be completed on or before the three year anniversary date. All appropriate reevaluation data and summary reports from all individuals evaluating the child shall be reported in writing for presentation to the ~~[multi-disciplinary]~~ eligibility determination team or IEP team.

[6.31.2.10 NMAC - Rp, 6.31.2.10 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11]

**6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:**

A. Preschool programs for children aged 2 through 5.

(4) Each public agency shall develop and implement appropriate policies and procedures to ensure a smooth and effective transition from Part C to Part B programs for preschool children with disabilities within the agency's educational jurisdiction, in compliance with 34 CFR Sec. 300.124. Each LEA and other public agencies as appropriate shall make reasonable efforts to establish productive working relations with local Part C programs and when given reasonable notice shall participate in the ~~[ninety day]~~ transition planning conferences arranged by local Part C providers.

B. Individualized education programs (IEPs).

(5) For students with autism spectrum disorders (ASD) eligible for special education services under 34 CFR Sec. 300.8(c)(1), the strategies described in Subparagraphs (a)-(k) of this paragraph shall be considered by the IEP team in developing the IEP for the student. The IEP team shall document consideration of the strategies. The strategies must be based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed to provide FAPE, addressed in the IEP:

(a) extended educational programming, including, for example, extended day or extended school year services that consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills;

(b) daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including, for example, lunch, snack, and recess periods that provide flexibility within routines, adapt to individual

skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities;

(c) in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including, for example, strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;

(d) positive behavior support strategies based on relevant information, including, for example:

(i) antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and

(ii) a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;

(e) futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;

(f) parent or family training and support, provided by qualified personnel with experience in ASD, that, for example:

(i) provides a family with skills necessary for a child to succeed in the home or community setting;

(ii) includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching and management techniques related to the child's curriculum; and

(iii) facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;

(g) suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by, for example:

(i) adaptive behavior evaluation results;

(ii) behavioral accommodation needs across settings; and

(iii) transitions within the school day;

(h) communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;

(i) social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing;

(j) professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP; and

(k) teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training.

[6.31.2.11 NMAC - Rp, 6.31.2.11 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11]

### **6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:**

#### **G. Conflict management and resolution.**

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

##### **(c) Formal dispute resolution.**

(i) A state-level complaint may be filed with the SEB of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, ~~[the responding public agency must offer in writing to convene a CAIEP meeting with the parents(s) and other relevant members of the IEP team to address any IEP-related issues raised in the complaint. The parent may accept or decline this offer, or]~~ the parties may agree to convene a FIEP meeting or mediation ~~[instead,]~~ as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

#### **H. State complaint procedures.**

##### **(3) Preliminary meeting.**

~~[(a) CAIEP meeting. Upon receipt of a complaint that meets the requirements of Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the SEB of the department shall acknowledge receipt of the complaint in writing and notify the public agency against which the violation has been alleged. Once a state-level complaint has been filed, the public agency shall offer in writing to convene a CAIEP meeting to address IEP-related issues raised in the complaint. The parent(s) may accept or decline this offer, or the parties may agree in writing instead to convene a FIEP meeting or mediation, as described in Subparagraph (b) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC. The public agency must (and the parent(s) may) notify the SEB within one business day of agreeing to convene (or not to convene) one~~

~~of these alternative dispute resolution (ADR) options. If the parties agree to convene a CAIEP meeting, as described at Paragraph D(1) of 6.31.2.7 NMAC, the following requirements apply:~~

- ~~(i) it must take place within 14 days of the date of the SEB's receipt of the complaint;~~
- ~~(ii) it must include the relevant members of the IEP team who have specific knowledge of the facts identified in the complaint; and~~
- ~~(iii) it may not include an attorney of the public agency unless the parent is accompanied by an attorney.]~~

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

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

- (i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.
- (ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.
- (iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.
- (iv) The mediator shall transmit a copy of the written mediation agreement to each party within 7 days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.
- (v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
- (vi) Any other requirement provided in 34 CFR 300.506(b) that is not otherwise provided herein.

**(5) Complaints against public agencies.**

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

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

**I. Due process hearings.**

~~(28) Computation of time.~~ In computing any period of time prescribed or allowed by Subsection I of 6.31.2.13 NMAC, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. As used in this rule, "legal holiday" includes any day designated as a state holiday.

~~(29) Effective date and transitional provisions:~~

~~(a) The procedures in this Subsection I of 6.31.2.13 NMAC shall govern due process requests received by the SEB after July 29, 2005.~~

~~(b) The provisions of the IDEA 2004 that took effect on July 1, 2005, shall apply to due process cases filed between July 1 and July 29, 2005, in the event of irreconcilable conflicts with the state rules as they existed during that time.~~

~~(c) The parties to due process cases that were pending on July 29, 2005, may enter into a written agreement to waive the administrative review process that would otherwise be available under the former state rules and proceed directly from a final decision by a hearing officer to a civil action in a state or federal district court. The parties to cases in which administrative appeals were pending on July 29, 2005, and in which the administrative appeal officer has not yet ruled on the merits of any substantive issue may likewise agree to waive the administrative review process but shall decide whether to do so within a reasonable time to be established by the administrative appeal officer.~~

~~(d) The parties to cases pending on July 29, 2005, may likewise enter into a written agreement to~~

~~dismiss any claims under Section 504 of the federal Rehabilitation Act that would otherwise be hearable or administratively reviewable under the former state rules, provided that the hearing or appeal officer has not yet ruled on the merits of any substantive issue raised under an affected Section 504 claim.~~

~~(c) Upon receipt of a timely and sufficient motion incorporating an agreement under Subparagraphs (c) or (d) of Paragraph (29) of Subsection I of 6.31.2.13 NMAC above, the authority before whom the case is pending shall enter an appropriate order to implement the agreement.]~~

~~L. Confidentiality of information.~~

~~(6) Educational records retention and disposition schedules.~~

~~(c) Federal regulation and department rules require public agencies to inform parents of proposed destruction of special education records (34 CFR Sec. 300.624 and [6.29.1 NMAC] Paragraph (5) of this subsection).~~

~~M. Computation of time.~~

~~(1) In computing any period of time prescribed or allowed by 6.31.2.13 NMAC, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday in which case the last day shall be the next business day. As used in this rule, "legal holiday" includes any day designated as a state holiday.~~

~~(2) Notwithstanding Paragraph (1) of this subsection, if the due date of a decision referenced in Subsection H of 6.31.2.13 NMAC falls on a Saturday, a Sunday or a legal holiday, the decision will be due on the previous business day. [6.31.2.13 NMAC - Rp, 6.31.2.13 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11]~~

**New Mexico Register / Volume XXII, Number 10 / May 31, 2011**

**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 Tuesday, July 5, 2011, from 9:00 A.M. to 12:00 P.M. The purpose of the public hearing will be to obtain input on the proposed amendments to 6.31.2 NMAC (Children with Disabilities/Gifted Children).

Interested individuals may testify either at the public hearing or submit written comments to Leah Erickson, Executive Secretary Administrative Assistant, Special Education Bureau, Public Education Department, 120 South Federal Place, Room 206, Santa Fe, New Mexico 87501, via email at ([spedfeedback@state.nm.us](mailto:spedfeedback@state.nm.us)), or fax (505) 954-0001. Copies of the proposed amendments and the rationale for the changes may be accessed on the Department’s website (<http://ped.state.nm.us/>) or obtained from Ms. Erickson. 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.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Ms. Erickson as soon as possible at (505) 827-1458. The Department requires at least ten (10) days advance notice to provide requested special accommodations.



Hanna Skandera  
Secretary-Designate

## New Mexico Public Education Department

300 Don Gaspar  
Santa Fe, New Mexico 87501-2786  
ped.state.nm.us

Larry Behrens  
Public Information Officer  
505-476-0393  
[Larry.Behrens2@state.nm.us](mailto:Larry.Behrens2@state.nm.us)

# NEWS RELEASE

For Immediate Release: May 31, 2011

## Public Hearing Scheduled to Amend Rules on Special Education for Students With Disabilities

**Santa Fe** – The Public Education Department will conduct a public hearing on July 5 from 9:00 am to 12:00 pm in Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, in Santa Fe for the purpose of obtaining input on suggested amendments to the 6.31.2 NMAC rule on children with disabilities/gifted.

The Special Education Bureau of the New Mexico Public Education Department (NMPED) is proposing amendments to several sections of 6.31.2 NMAC relating to the special education of children with disabilities. Pursuant to 20 U.S.C. § 1407(a), each state that receives funds under Part B of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) is required to ensure that any state rule conforms to the IDEA. Several of the proposed changes will align our state rules with the IDEA. House Bill 230, enacted during the 2010 Legislative Session, adopted requirements relating to interventions for students displaying characteristics of dyslexia. Rulemaking is required to implement these provisions. In addition, the Governor's veto message with respect to SB 314 on autism strategies also requires rulemaking on the part of the SEB.

Below are links to the electronic copies of both the proposed amendments and the rationale for rulemaking.

The NMPED invites comments on the proposed changes from interested individuals and organizations. Interested parties may testify at the public hearing or submit written comments by email to [spedfeedback@ped.state.nm.us](mailto:spedfeedback@ped.state.nm.us), by regular mail to the Special Education Bureau, Public Education Department, 120 South Federal Place, Room 206, Santa Fe, NM 87501, or by fax to (505) 954-0001. Written comments must be received no later than 5:00 P.M. Tuesday, July 5, 2011.

Please see links for additional information regarding public hearing and proposed rules.

- [Rationale for Rulemaking](#)
- [6.31.2 NMAC Proposed Amendments](#)

The proposed rule may be accessed on the Department's website <http://ped.state.nm.us/seb/>.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in this meeting are asked to contact Leah Erickson at 505-827-1458

or [Jennifer.Erickson@state.nm.us](mailto:Jennifer.Erickson@state.nm.us) soon as possible. The Department requests at least ten (10) days advance notice to provide requested special accommodations.

Following the hearings, the Secretary of Education will review comments from the public and make a decision on the rules. The rules will be formally filed with the State Records and Archives Center and become effective on the date published in the New Mexico Register

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April 8, 2011

SENATE EXECUTIVE MESSAGE NO. 54

The Honorable Timothy Z. Jennings, President Pro Tempore  
And Members of the New Mexico State Senate  
State Capitol Building  
Santa Fe, New Mexico 87501

Dear President Pro Tempore Jennings and Members of the Senate:

Pursuant to the Constitution of the State of New Mexico, Article IV, Section 22, I hereby VETO and am returning SENATE BILL 314, enacted by the Fiftieth Legislature, First Session, 2011.

In addition to requiring schools districts and state-chartered schools to use certain information (11 areas) when developing an education plan or evaluating a student with autism spectrum disorder, SB 314 changes the definition of “autism spectrum disorder” in Section 22-13-6 NMSA 1978.

I am committed to ensuring that all New Mexico students have full access to an education that meets their individual needs and allows them to experience academic success. As such, I am committing today to codify in rule that school districts and state-chartered schools use the information (11 areas) outlined in SB 314 when developing an education plan or evaluating a student with autism spectrum disorder. These 11 areas represent best practices when it comes to meeting the educational needs of students with autism. I have asked the Public Education Department to work swiftly to codify this rule by July 2011.

I applaud Senator Harden and Senator Papen’s commitment to students with autism and look forward to working with them to ensure that the needs of students with autism are met. In the next session, I will work collaboratively to develop legislation that: 1) ensures our definition for autism spectrum disorder aligns with the federal definition; and 2) ensures our definition is broad enough to ensure that students with autism are diagnosed properly and receive the education services they need to be successful in school.

## SENATE EXECUTIVE MESSAGE NO. 54

The Honorable Timothy Z. Jennings

April 8, 2011

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On an annual basis, the Public Education Department must provide assurances to the U.S. Department of Education that our definitions for special education and the 13 categories of disability – including autism – identified under the Individuals with Disabilities Education Act (IDEA) align to the federal definitions in order to receive our annual allocation of approximately \$90 million. The definition in the implementing regulations of the IDEA defines “autism” as follows: “*Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child’s educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” This is the definition currently used by the Public Education Department.

The definition of autism provided in SB 314 is from the Diagnostic and Statistical Manual of Mental Health Disorders, Fourth Edition (“DSM-IV”), which provides that the condition known as “autism spectrum disorder” must meet specific diagnostic criteria. The definition in the bill states as follows: “‘autism spectrum disorder’ means a condition that meets the diagnostic criteria for the pervasive developmental disorders published in the Diagnostic and Statistical Manual of Mental Disorders, fourth edition, text revision, also known as DSM-IV-TR, published by the American psychiatric association, including autistic disorder; Asperger's disorder; pervasive development disorder not otherwise specified; Rett's disorder; and childhood disintegrative disorder.”

If New Mexico changes its definition of autism spectrum disorder, it would no longer be able to show alignment with the federal definition. Further, a medical diagnosis of autism alone will not in itself qualify a student for special education and related services. The United States Department of Education has indicated that the definition in SB 314 could result in conditions placed on New Mexico’s IDEA Part B funding. As a result, SB 314 raises compliance issues for New Mexico.

Respectfully yours,

Susana Martinez  
Governor

SENATE EXECUTIVE MESSAGE NO. 54

The Honorable Timothy Z. Jennings

April 8, 2011

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RECEIVED FROM THE OFFICE OF THE GOVERNOR

Time: \_\_\_\_\_ a.m. p.m.

Date: \_\_\_\_\_ 2011

By \_\_\_\_\_  
Secretary of State

Time: \_\_\_\_\_ a.m. p.m.

Date: \_\_\_\_\_ 2011

By \_\_\_\_\_  
Chief Clerk of the Senate



STATE OF NEW MEXICO  
PUBLIC EDUCATION DEPARTMENT  
300 DON GASPAR  
SANTA FE, NEW MEXICO 87501-2786  
Telephone (505) 827-5800  
[www.ped.state.nm.us](http://www.ped.state.nm.us)

HANNA SKANDERA  
SECRETARY OF EDUCATION

SUSANA MARTINEZ  
Governor

**NMPED Special Education Bureau**  
**Phone (505) 827-1457**      **Fax (505) 954-0001**

May 31, 2011

**MEMORANDUM**

**TO:** School District Superintendents  
Charter School Administrators  
Special Education Directors  
Regional Education Cooperatives  
State Advisory Panel  
Advocacy Groups  
Interested Parties

**FROM:** Denise Koscielniak  
Special Education Director, Special Education Bureau

**RE:** **Proposed Amendments to State Special Education Rules (6.31.2 NMAC)**

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On this date, the Special Education Bureau (SEB) of the New Mexico Public Education Department (NMPED) has issued a Notice of Proposed Rulemaking, proposing to amend the state special education rules as discussed below. Electronic copies of this document, together with the proposed amendments, may be downloaded from the SEB page of the NMPED website at [www.ped.state.nm.us/seb/](http://www.ped.state.nm.us/seb/).

**Public Comments and Hearing**

The NMPED invites comments on the proposed changes from interested individuals and organizations. Interested parties may testify at the public hearing or submit written comments by

Proposed Amendments to State Special Education Rules  
May 31, 2011  
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email to [spedfeedback@ped.state.nm.us](mailto:spedfeedback@ped.state.nm.us), by regular mail to the Special Education Bureau, Public Education Department, 120 South Federal Place, Room 206, Santa Fe, New Mexico 87501, or by fax to (505) 954-0001. **Written comments must be received no later than 5:00 P.M. Tuesday, July 5, 2011; however, the submission of written comments as soon as possible is encouraged.** All comments received by the deadline will be considered before the SEB presents final recommended changes to the Secretary of Education. It is anticipated that the amendments will be in effect on July 29, 2011.

**A public hearing on the proposed changes will be held in Santa Fe on Tuesday, July 5, 2011, from 9:00 A.M. to 12:00 P.M. in Mabry Hall at the Jerry Apodaca Education Building, 300 Don Gaspar Avenue, Santa Fe, New Mexico 87501.**

Individuals with disabilities who require information in an alternative format or need any form of auxiliary aid to attend or participate in this hearing are asked to contact the Special Education Bureau by phone at (505) 827-1458 or via email, regular mail, or fax at the addresses above as soon as possible. The SEB requests at least ten (10) days advance notice to provide requested special accommodations.

### **Overview of Proposed Changes**

The Special Education Bureau (SEB) proposes amendments to several sections of 6.31.2 NMAC relating to the special education of children with disabilities. The proposed changes are shown in the corresponding draft amendments.

Pursuant to 20 U.S.C. § 1407(a), each state that receives funds under Part B of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) is required to ensure that any state rule conforms to the IDEA. Several of the proposed changes will align our state rules with the IDEA.

House Bill 230, enacted during the 2010 Legislative Session, adopted requirements relating to interventions for students displaying characteristics of dyslexia. Rulemaking is required to implement these provisions. In addition, the Governor's veto message with respect to SB 314 on autism strategies also requires rulemaking on the part of the SEB.

### **Rationale for Changes to the Special Education Rules**

- 6.31.2.7 NMAC (Definitions) -- A definition of "dyslexia" is proposed as part of the implementation of HB 230. The definition of complaint assistance IEP (CAIEP) meeting was removed since CAIEPs are not required by federal regulation.
- 6.31.2.9 NMAC (Public Agency Responsibilities) -- Changes are being proposed to implement HB 230 [Section 22-13-32 NMSA 1978] regarding training to provide researched-based reading interventions for students with dyslexia, to correct a citation to the federal regulations, and to add a new subsection regarding prohibition on mandatory medication to align state rules with 34 CFR § 300.174.

Proposed Amendments to State Special Education Rules  
May 31, 2011  
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- 6.31.2.10 NMAC (Identification, Evaluations and Eligibility Determinations) – Changes are being proposed in Subsection D on evaluations to the term “multi-disciplinary team” which was changed to “eligibility determination team” to more accurately describe the function of the team in that context.
- 6.31.2.11 NMAC (Educational Services for Children with Disabilities) – Changes are being proposed to Subsection B on individualized education programs (IEP) to require IEP teams to consider the eleven strategies provided in HB 314 when developing IEPs for students with autism spectrum disorders when necessary to provide a free appropriate public education to such students.
- 6.31.2.13 NMAC (Additional Rights of Parents, Students and Public Agencies) – Changes are being proposed to remove provisions in Subsection H on state complaint procedures relating to CAIEP meetings since they are not required by federal regulation, to remove outdated provisions relating to the transition from the rules regarding due process requests filed prior to July 1, 2005 and those filed after that date, to correct a citation to a state rule, and to add a computation of time provision that covers all of Section 13 and not just Subsection I (due process).

The above summary description of the changes is not intended to describe in detail every change that is proposed to Chapter 31 of the New Mexico Administrative Code but rather to summarize the changes that are being proposed. The public is encouraged to review the proposed changes and to comment on the proposed changes to the rules relating to the education of children with disabilities.