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November 16, 2009

**MEMORANDUM**

**TO:** Legislative Education Study Committee

**FR:** Pamela Herman *PH*

**RE: STAFF REPORT: PROPOSED AMENDMENT TO AGENCY RULE  
REGARDING RESIDENTIAL TREATMENT CENTERS**

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In September 2009, the Legislative Education Study Committee (LESC) heard a presentation regarding the status of implementation of Laws 2009, Chapter 162 (HB 199, *School District and Training Center Agreements*) (see Attachment), a bill endorsed by the LESL and enacted to clarify the responsibility of local school districts and other parties for planning, providing, and paying the costs of free, appropriate public education (FAPE) of students in Residential Treatment Centers (RTCs).

The presentation included a memorandum from the Office of General Counsel, Public Education Department (PED), stating that PED was in the process of amending its special education rule to implement the new law, among other changes. At that time, the committee requested an opportunity to review the proposed rule at its October meeting in order to consider whether the rule-making clarified aspects of the law about which committee members had questions. On September 30, 2009, PED published the proposed amendments to the special education rule. Because of the timing of the First Special Session of the 49<sup>th</sup> Legislature, the October LESL meeting was cancelled. On November 2, PED held a public hearing on the proposed rule.

This memorandum addresses provisions of the proposed PED rule, including summaries of:

- the duties imposed on PED in the new law;
- questions raised by the committee about the application of the statute;
- provisions in proposed rule to determine school district responsibility for costs; and
- LESC staff recommendations for consideration by the committee regarding implementation of the statute.

### **Duties Imposed on the Public Education Department in the New Law**

The legislation imposed new duties on or added specificity to existing duties of PED concerning students in private RTCs in New Mexico. These include:

- ensuring that the school district in which an RTC is located is allocating and distributing to the RTC the proportionate share of federal *Individuals with Disabilities Education Improvement Act* (IDEA) Part B funds for a school-age person (as defined in the statute) placed in an RTC by a parent who assumes responsibility for the placement;
- determining which school district is responsible for the cost of providing a FAPE to a qualified student (as defined in the statute) in need of special education who was placed in an RTC other than by a school district or a due process decision;
- determining the reasonable reimbursement owed to a receiving school district;
- reviewing and approving all agreements between local school boards and RTCs for educating qualified students in need of special education for whom the local school district is responsible to provide a FAPE, to ensure they contain the provisions specified in the law;<sup>1</sup>
- ensuring that agreements with RTCs acknowledge the authority and responsibility of the local school board and PED to conduct on-site evaluations of RTC programs and student progress, to ensure that the education provided meets state standards;
- adopting a format to report individual student data and costs for qualified students or school-age persons attending a public or private RTC, and including those reports in the Student Teacher Accountability Reporting System, or STARS using a unique student identifier issued to the student by PED; and
- promulgating rules to carry out the provisions of the section.

### **Questions Raised by the Committee about the Application of the Statute**

At the September 2009 LESC meeting, committee members raised questions about the statute, its implementation, and whether the proposed PED rules would address aspects of the statute that

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<sup>1</sup> Although the statute provides that local school boards *may*, in consultation with PED, enter into agreements with RTCs for educating *qualified students for whom the district is responsible*, it also requires that agreements ensure that *all* qualified students placed in the RTC receive the education to which they are entitled by state and federal law; and further states that states that *all* financial agreements between local school boards and RTCs must be negotiated in accordance with PED rules.

were potentially unclear. Some of their questions, as well as relevant provisions of law, proposed PED rule, and PED staff testimony, are as follows:

- Committee discussion raised questions about how, in practice, a school district where an RTC is located could or should serve students from outside that district. Committee discussion made clear that, for practical reasons, school districts where RTCs are located (receiving districts) often provide educational services to all students placed at the RTC, regardless of where those students originated. These students may be:
  - special education students from other school districts in the state, placed in an RTC by their resident or sending districts or by due process decisions, regarding whom:
    - the statute and the proposed PED rule make the resident, or sending, district responsible for the educational, nonmedical care and room and board *costs*;
    - the proposed PED rule states that the sending school shall be responsible for the *provision* of special education and related services; and
    - the proposed PED rule may only govern agreements between resident, or *sending*, school districts and the RTCs where such students are placed;
  - school-age persons (that is, special education students who are not qualified New Mexico students) placed in an RTC by parents who assume responsibility for the placement, regarding whom:
    - the statute and proposed PED rule state that a school district in which the RTC is located shall not be considered the resident school district of a school-age person if residency is based solely on the person's enrollment at the facility and the school-age person would not otherwise be considered a resident of the state;
    - the statute and the proposed PED rule require the district where the RTC is located to allocate and distribute the student's proportionate share of IDEA Part B funds, but not state funds, for the student's education;
    - existing PED rule sets forth how the proportionate share must be calculated;
    - existing PED rule states that a public agency shall not use IDEA funds to benefit private schools, as provided in federal regulation; and further states that the Constitution and laws of New Mexico prohibit public agencies from spending state funds to assist private schools or facilities or their students; and
    - existing PED rule states that, where the provision of FAPE is at issue, determination of the availability of an appropriate program for a student and the question of financial responsibility are subject to due process procedures in PED rule;
  - students in need of special education placed in the RTC by a New Mexico non-educational agency or court of competent jurisdiction with custody of the student, regarding whom:
    - the statute and the proposed PED rule state that the school district where the RTC is located is responsible for *planning and delivery* of special education and related services, unless the student's resident school district has an agreement with the facility to provide such services; and

- the statute states that PED shall determine which school district is responsible for the *cost* of educating the student and the reasonable reimbursement owed to the receiving school district;
- students placed in or referred to a New Mexico RTC by public non-educational agencies other than New Mexico public agencies (which may include out-of-state courts), regarding whom:
  - the proposed PED rule reiterates that the school district in which the facility is located is not the resident district of the school-age person if residency is based solely on enrollment at the facility and the person would not otherwise be considered a state resident; and
- non-special education students placed in an RTC other than by a parent assuming responsibility for the costs of the placement (for instance, by a court order), regarding whom:
  - the section of law placing responsibility on PED to determine which school district is responsible, and the reasonable reimbursement owed to the receiving school district, may not apply since it refers specifically to *a qualified student in need of special education*, and
  - PED staff indicated that pre-existing New Mexico law may dictate that, if the student is disenrolled from the home district, the student could be considered “present” in the district where the RTC was located and thus the responsibility of that district.
- A committee member inquired who is responsible for recouping payment to a school district when it plans and delivers services to students placed in an RTC within its boundaries for whose educational costs it is not responsible. Neither the statute nor the rule appears to address this question.
- A committee member inquired how to handle allocation of costs when a school district provides its own licensed staff or contract personnel to serve students in an RTC, but the district is not responsible for providing a FAPE to all of those students, and whether that situation can it be addressed in the negotiated agreement between the district and the RTC.
  - Existing PED rule requires public agencies with shared responsibility for serving a particular child during a single fiscal year to negotiate equitable arrangements through joint powers agreements, memorandums of understanding, or interstate agreements for sharing the funding and other resources available to that child; such agreements shall include provisions for resolving disputes between the parties.
- A committee member suggested that if a school district provides educational services to a student residing at an RTC for whom another party, such as a parent or an insurer, is paying the RTC, the school district ought appropriately to be reimbursed for those costs;

- existing PED rule, noted above, prohibits a public agency from using IDEA funds to benefit private schools as provided in federal regulation; and states further that the Constitution and laws of New Mexico prohibit public agencies from spending state funds to assist private schools or facilities or their students.

### **Provisions in Proposed Rule to Determine School District Responsibility for Costs**

As noted above among the responsibilities of the department, the statute provides that, except where a qualified student in need of special education is placed in a private RTC by a school district or a due process decision, if student is placed in an RTC outside the district in which that student resides, the department shall determine which school district is responsible for the cost of the student's education, and the reasonable reimbursement owed to the receiving school district.

The proposed PED rule sets forth the following procedures for making those determinations:

- No later than 30 days after the receiving district receives notice of the placement, the receiving school district shall notify the Special Education Bureau (SEB) of PED in writing.
  - The notice, as prescribed on the PED website, must include the student's name, date of birth, date of placement, resident school district, documentation of placement including the Individualized Education Plan, or IEP, cost of placement and any other information deemed relevant by the SEB.
  - The receiving district must provide a copy of the notice to the resident, or sending, district.
- No later than 15 days after receiving the notice, the resident district may provide additional information it deems relevant.
- No later than 60 days after receipt of the notice, the SEB will issue its determination as to which district is responsible for the cost of education the student, together with the amount of any reasonable reimbursement owed to the receiving district. The 60 day decision period may be extended for good cause.

### **LESC Staff Recommendations**

On November 2, 2009, LESE staff responded to the proposed rule with the following recommendations:

- The PED rule regarding public agency responsibilities could provide a clearer process and framework for developing uniform negotiated agreements between RTCs and school districts, and among school districts, so as to support districts providing services to students and other persons in RTCs, to ensure consistency statewide in the allocation and reimbursement of costs for those services, and to ensure that all qualified students receive the services to which they are entitled.

- More generally, because the field of special education is so broadly pre-empted by federal law, in general the PED special education rule appears to implement federal rather than state requirements. State law does not incorporate federal law by reference; therefore, the scope of the PED rule may extend beyond that of state law. As PED staff suggested during the 2009 legislative session, a thorough review of state law and PED rule regarding special education may be appropriate during the interim preceding the next 60-day legislative session.

In the alternative, the committee may wish to request that PED provide more detailed guidance to school districts and RTCs regarding the negotiation of agreements; to clarify where longstanding practice may no longer be consonant with the law; and to ensure that services are planned and delivered efficiently and effectively when multiple school districts share responsibility for an individual student.