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November 16, 2009

MEMORANDUM

TO: Legislative Education Study Committee

FR: Pamela Herman *PH*

RE: STAFF REPORT: PROPOSED AGENCY RULE REGARDING ELIGIBILITY FOR DRIVING INSTRUCTION PERMITS

On November 4, 2009, the Public Education Department (PED) issued a news release containing a notice of proposed rule-making regarding a rule to tie academic proficiency in math and reading, as demonstrated on the 8th grade state standards-based assessment, and 9th grade attendance (see Attachment 1). According to the notice, the department will hold a public hearing on the proposed rule at Mabry Hall, Jerry Apodaca Education Building, in Santa Fe, New Mexico, on December 14, 2009 from 10:00 a.m. to 12:00 p.m. The proposed rule describes how proficiency and attendance can be demonstrated and verified, for public school students; non-public school students; and home school students.

The proposed PED rule states that it must be read in conjunction with Section 118 of 18.19.5 of the *New Mexico Administrative Code*, adopted by the Taxation and Revenue Department (TRD) to require minor applicants for an instruction permit to provide proof of identity, completion of a driver education course, 90 percent attendance in the 9th grade, and demonstrated achievement of nearing academic proficiency in the 8th grade in reading and mathematics. That rule includes a subsection making special provision for students with disabilities not included in the proposed PED rule. That rule became effective on January 30, 2009 (see Attachment 2).

The PED notice of proposed rule-making indicates that, although the TRD rule will only apply to minors submitting applications for instruction permits on or after September 1, 2011, because it looks at academic proficiency in 8th grade and attendance in 9th grade, it could affect students who are in the 8th grade in school year 2009-2010.



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NEWS RELEASE

For Immediate Release: November 4, 2009

Public Hearing Set for PED Rule That Ties 8th Grade Student Proficiency and 9th Grade School Attendance to New Mexico Driving Instruction Permits

SANTA FE – The Public Education Department will conduct a public hearing at Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico, 87501-2786, on December 14, 2009, from 10 a.m. to 12:00 p.m. The Department is canceling the previously noticed public hearing that was scheduled for November 18, 2009.

The purpose of the rescheduled public hearing will be to obtain input on the PED rule that ties a student's academic proficiency in math and reading and school attendance to whether that student may receive a New Mexico driving instruction permit. The related New Mexico Motor Vehicle Division (MVD) rule can be found at: <http://www.nmcpr.state.nm.us/nmac/parts/title18/18.019.0005.pdf> The applicable language pertaining to students receiving driving instruction permit is contained in Section 18.19.5.118 ("Instruction Permit") on pages 19 and 20 of the MVD rule.

Under the MVD's rule, driving instruction permits can be requested between the ages 15 through 17. Although this rule will go into effect on December 31, 2009, the requirements for meeting proficiency and attendance will only apply to those minors submitting applications to the MVD for driving instruction permits on or after September 1, 2011.

However, because the proposed rule looks at academic proficiency in the 8th grade, this requirement could apply to students who are currently in the 8th grade during the 2009-2010 school year and who later request a driving instruction permit on or after September 1, 2011. Additionally, because the rule also requires meeting a 90% attendance rate in the 9th grade, this requirement will first apply to students in the 9th grade in the 2010-2011 school year who then request a driving instruction permit on or after September 1, 2011.

To repeat, this proposed rule does not apply to any minor student requesting an instruction permit at any time prior to September 1, 2011. The proposed rule describes how proficiency and attendance can be demonstrated and verified.

Proposed Rule Number	Proposed Rule Name	Proposed Action
6.30.11 NMAC	ACADEMIC PROFICIENCY AND ATTENDANCE TIED TO INSTRUCTION PERMITS	Adopt new rule to establish requirements effective on 9/1/2011 for demonstrating 8th grade math & reading proficiency and meeting school attendance standards prior to receiving an MVD driving instruction permit.

Interested individuals may testify at the public hearing and/or submit written comments regarding the proposed rulemaking to Willie Brown, Office of General Counsel, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786; email: Willie.Brown1@state.nm.us (505) 827-6641 (telefax (505) 827-6681).

Written comments must be received no later than 5:00 pm on December 14, 2009. However, the submission of written comments as soon as possible is encouraged.

The proposed rule may be accessed on the Department's website (<http://ped.state.nm.us/>) or obtained from Willie Brown, Office of General Counsel, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 (Willie.Brown1@state.nm.us) (505) 827-6641 (telefax (505) 827-6681). The proposed rule will be made available at least thirty days prior to the hearing.

INDIVIDUALS WITH DISABILITIES WHO REQUIRE THIS INFORMATION IN AN ALTERNATIVE FORMAT OR NEED ANY FORM OF AUXILIARY AID TO ATTEND OR PARTICIPATE IN THE PUBLIC HEARING ARE ASKED TO CONTACT WILLIE BROWN AS SOON AS POSSIBLE, AT (505) 827-6641). THE DEPARTMENT REQUESTS AT LEAST TEN (10) DAYS ADVANCE NOTICE TO PROVIDE REQUESTED SPECIAL ACCOMMODATIONS.

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TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 30 EDUCATIONAL STANDARDS - GENERAL REQUIREMENTS
PART 11 ACADEMIC PROFICIENCY AND ATTENDANCE TIED TO INSTRUCTION PERMITS

6.30.11.1 ISSUING AGENCY: Public Education Department
[6.30.11 .1 NMAC - N, Y-YY-09]

6.30.11.2 SCOPE: This rule shall apply to all minors in the state seeking to apply for instruction permits from the motor vehicle division.
[6.30.11 .2 NMAC - N, Y-YY-09]

6.30.11.3 STATUTORY AUTHORITY: Sections 22-2-1 and 22-2-2, NMSA 1978.
[6.30.11 .3 NMAC - N, Y-YY-09]

6.30.11.4 DURATION: Permanent.
[6.30.11 .4 NMAC - N, Y-YY-09]

6.30.11.5 EFFECTIVE DATE: Y-YY, 2009, unless a later date is cited at the end of a section.
[6.30.11 .5 NMAC - N, Y-YY-09]

6.30.11.6 OBJECTIVE: The underlying objective of this rule is to motivate minors to attend school and succeed in their studies, regardless of whether they are enrolled in a public school, non-public school or home school, by establishing uniform requirements and procedures for determining whether they have demonstrated a certain level of academic proficiency or school attendance, the demonstration of which can be used in determining the issuance or rejection of an instruction permit by the motor vehicle division.
[6.30.11 .6 NMAC - N, Y-YY-09]

6.30.11.7 DEFINITIONS:

- A. "alternative test" means a test other than the New Mexico standards based assessment, that is administered in a non-public school or by a home school operator, or provided by the department;
- B. "department" means the New Mexico public education department ("PED");
- C. "home school" means the operation by the parent or legal guardian of a school-age person of a home study program of instruction that provides a basic academic educational program, including reading, language arts, mathematics, social studies and science;
- D. "motor vehicle division" means a division of the New Mexico taxation and revenue department ("MVD") that is responsible for administering the New Mexico Motor Vehicle Code which includes the issuance of instruction permits and drivers' licenses to those submitting an application;
- E. "nearing academic proficiency" means attaining a minimum score in reading and mathematics during a student's eighth grade as established by the laws, rules or procedures of the PED governing the New Mexico standards based assessment;
- F. "New Mexico standards based assessment" ("SBA") means a system for testing students in various grades for their proficiency in the subject areas of mathematics, reading and language arts, writing, science and social studies, pursuant to the Assessment and Accountability Act [22-2C-1 to 22-2C-11 NMSA 1978]. The SBA is administered annually to students in different grades in public schools and voluntarily to other students attending certain non-public schools and educational institutions in the state.
- G. "non-public school" means a school, other than a home school, that offers on-site programs of instruction and is not under the control, supervision or management of a local school board or the department and includes schools operated by or under a grant or contract from the bureau of Indian education of the United States department of the interior;
- H. "secretary" means the secretary of the public education department.

[6.30.11 .7 NMAC - N, Y-YY-09]

6.30.11.8 GENERAL CONSIDERATIONS:

- A. This rule must be read in conjunction with Section 118 of 18.19.5 NMAC which was adopted by the tax and revenue department and requires minor applicants for an instruction permit to provide proof of identity,

completion of a driver education course, 90% school attendance in the ninth grade, and demonstrated achievement of nearing academic proficiency in the eighth grade in reading and mathematics.

B. Despite the effective date of this rule, it shall first apply only to those minors submitting applications to the MVD on or after September 1, 2011.

C. Alternative tests will be administered by the PED at least annually on dates and at locations established by the PED throughout the state.

D. Any minor, whether or not enrolled in a public school, who is in the eighth grade or is at least 13 years of age may take the alternative test.

E. A minor enrolled in a public school who is at least 13 years of age and has not for any reason demonstrated a "nearing academic proficiency" score in reading and mathematics during their eighth grade may take an alternative test.

F. A minor transferring from an out of state school may claim use of scores achieved in any eighth grade standards based assessment in reading and mathematics. School administrators shall verify that the student achieved a minimum score in reading and mathematics comparable to "nearing academic proficiency".

G. A minor transferring from a department of defense operated school may claim use of scores achieved in any eighth grade academic standards based assessment in reading and mathematics. If no such assessment was taken, the minor may take the alternative test offered by the PED. School administrators shall verify that the student who took an eighth grade academic standards based assessment in reading and mathematics at a department of defense operated school achieved a minimum score in reading and mathematics comparable to "nearing academic proficiency".

[6.30.11 .8 NMAC - N, Y-YY-09]

6.30.11.9 DEMONSTRATING ACADEMIC PROFICIENCY: In order to demonstrate academic proficiency that satisfies a condition for the issuance of an instruction permit:

A. A minor enrolled in a public school must take the New Mexico standards based assessment in the eighth grade and attain scores of "nearing academic proficiency" in both reading and mathematics.

B. A minor enrolled in a non-public school who has not taken the New Mexico standards based assessment in the eighth grade and attained scores of "nearing academic proficiency" in both reading and mathematics, may demonstrate academic proficiency by attaining a passing score in reading and mathematics as determined by the assessment used and administered by the non-public school in the eighth grade. A written certification from a non-public school of that minor having attained a passing score shall satisfy the requirement of demonstrating academic proficiency.

C. A minor attending a home school established pursuant to state law who has not taken the New Mexico standards based assessment in the eighth grade and attained scores of "nearing academic proficiency" in both reading and mathematics, may demonstrate academic proficiency by demonstrating grade-level proficiency in reading and mathematics as determined by the assessment used and administered by the home school operator. A written certification from a home school operator of that minor having attained a passing score shall satisfy the requirement of demonstrating academic proficiency.

[6.30.11 .9 NMAC - N, Y-YY-09]

6.30.11.10 DEMONSTRATING 90% SCHOOL ATTENDANCE: In order to demonstrate 90% school attendance that satisfies a condition for the issuance of an instruction permit:

A. Minors enrolled in a public school must obtain a certification of attaining 90% attendance in the ninth grade from the school in which they are enrolled.

B. Minors enrolled in a non-public school must obtain a certification from the school in which they are enrolled that they have met 90% attendance during their ninth grade at school.

C. Minors attending a home school established pursuant to state law must obtain a certification from their parent or guardian that they have met 90% attendance during their ninth grade in their home schooling.

[6.30.11 .10 NMAC - N, Y-YY-09]

6.30.11.11 REVIEW OF ADVERSE DETERMINATIONS:

A. Any person aggrieved by a written decision or determination made by the PED under this rule related to a PED-administered alternative test result, may, pursuant to the procedures set forth in this section, seek administrative review by the secretary or the secretary's designee. Neither test results on an alternative test not administered by the PED nor denial of an MVD application for an instruction permit may be reviewed under this section.

B. A person aggrieved by the written decision or determination made by a public school under this rule to not-certify that the student has satisfied the ninth grade attendance or eighth grade reading and mathematics proficiency requirements, may, pursuant to the procedures set forth in this section, seek administrative review by the secretary or the secretary's designee.

C. All requests for review:

(1) shall be requested within fourteen (14) calendar days of issuance of a written decision or determination, signed by and contain the address and telephone number of the parent or legal guardian of the minor seeking review;

(2) shall describe in fewer than six (6) double-spaced pages why any decision or determination complained of was erroneous; and

(3) shall be accompanied by any supporting documents the requester believes will assist the secretary in rendering a final decision but in no event shall exceed a total of fifteen (15) pages of supporting documents.

D. The secretary or the secretary's designee shall:

(1) issue a written decision within thirty (30) calendar days of receiving a request unless, for good cause stated, the secretary or designee extends that period;

(2) after a review of the documents submitted by the students and their parents or legal guardians, determine if the decision or determination complained of was arbitrary, capricious, not supported by the facts or applicable law, or based upon fraud;

(3) rule on any requests to exceed the filing of the number of documents permitted or on filing a request for review late based upon good cause shown demonstrated by the parent or legal guardian seeking the exception; and

(4) not consider those documents submitted by the students and their parents or legal guardians that exceed the number of pages permitted.

E. A decision of the secretary or the secretary's designee issued under this section shall be final.

F. Any decision issued under this section that determines that a minor has satisfactorily demonstrated attendance or academic proficiency shall be notarized and issued in the form of a verified decision.
[6.30.11 .11 NMAC - N, Y-YY-09]

HISTORY OF 6.30.11 NMAC: [Reserved]

DRAFT

18.19.5.118 INSTRUCTION PERMIT - PURPOSE - CRITERIA:

A. For purposes of 18.19.5.118 NMAC:

(1) "alternative test" means a test provided by the PED or approved by the PED pursuant to its rules and procedures and administered in a public school, non-public school or by a home school operator to measure a student's proficiency in reading and math in the eighth grade;

(2) "IDEA" means the Individuals with Disabilities Education Improvement Act of 2004 [20 U.S. Code Sec. 1400 et seq.], which is a comprehensive federal law that addresses specially designed instruction, at no cost to the parent, to meet the unique needs of a child with disabilities;

(3) "IEP" means an individualized education program, which is a written statement designed to meet the unique educational needs of a child with a disability that is developed, reviewed, and revised in accordance with 34 CFR Sections 300.320 through 300.324;

(4) "minor" means a person under the age of eighteen (18) years, but at least fifteen (15) years old;

(5) "nearing an academic proficiency score in reading and math in the eighth grade" means attaining a minimum score in reading and math during a student's eighth grade as established by the laws, rules or procedures of the PED on the New Mexico standards based assessment;

(6) "New Mexico standards based assessment" means a system for testing students in various grades for their proficiency in the subject areas of mathematics, reading and language arts, writing, science and social studies; pursuant to the Assessment and Accountability Act [22-2C-1 to 22-2C-11 NMSA 1978] and procedures of the PED, assessments on various subject areas that include science, mathematics and reading are administered annually to students in different grades;

(7) "ninety percent school attendance" means one of several indicators used pursuant to the Assessment and Accountability Act [22-2C-1 to 22-2C-11 NMSA 1978] and procedures of the PED to measure public school improvement, but would not include excused absences;

(8) "PED" means the public education department;

(9) "Section 504" means Section 504 of the Rehabilitation Act of 1973 [29 U.S. Code Section 794] and its implementing regulations, which provide that "no otherwise qualified individual with a disability shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance; and

(10) "Section 504 plan" means the accommodation plan required if the individual has a mental or physical impairment that substantially limits one or more of the person's major life activities, including learning, but is not already receiving special education services under the eligibility requirements of the IDEA.

B. The director may issue an instruction permit to a minor under the provisions of Subsection D of Section 66-5-8 NMSA 1978. In order to motivate minors to attend school and succeed in their studies, beginning with applications submitted to the director on or after September 1, 2011, a minor applying for an instruction permit shall provide evidence of ninety percent school attendance during their ninth grade year and at least nearing an academic proficiency score in reading and math in the eighth grade on the New Mexico standards based assessment or on an alternative test.

C. A minor applying for an instruction permit must provide the following:

(1) satisfactory proof of identity number, identity and residency as set forth in 18.19.5.12 NMAC;

(2) proof of attendance in or completion of a driver education course that includes a DWI prevention and education program approved by the bureau or offered by a public school;

(3) a school compliance verification form approved by the director that shall include parental consent for the release of certain educational information to the director; the school compliance verification form shall be certified by a school official and signed by a parent to indicate consent to release the minor's student information to the director; the form shall certify that the applicant has:

(a) achieved ninety percent school attendance, not including excused absences, during the ninth grade year or portion of the ninth grade year prior to applying for the instructional permit; and

(b) demonstrated at least nearing an academic proficiency score in reading and math in the eighth grade on the New Mexico standards based assessment or on an alternative test.

D. The school compliance verification form shall permit children with disabilities as described in the IDEA and in federal and state regulations and children for whom Section 504 plans are in place to obtain certifications that consider the effect if any of their disabilities in meeting ninety percent school attendance during the ninth grade year or portion of the ninth grade year or demonstrating at least nearing an academic proficiency score in reading and math in the eighth grade. Any such certification must be based on a written IEP or Section 504 team recommendation contained in the IEP or Section 504 plan of a child with a disability. In making the recommendation to the person or official who enters the certification on the school compliance verification form where a child with a disability fails to satisfy the attendance or proficiency requirements discussed in this rule, the IEP or Section 504 team shall, pursuant to rules and procedures of the PED, consider whether a child's disability affected their ability to satisfy either or both the attendance or proficiency requirements.

E. In lieu of a school compliance verification form, an applicant may provide:

- (1) proof of graduation from a high school; or
- (2) proof of having received a general educational development certificate.

F. A minor enrolled in non-public school or in a home school shall submit satisfactory proof of identity number, identity and residency as set forth in 18.19.5.12 NMAC, proof of attendance, and proof of ninety percent school attendance and at least nearing an academic proficiency score in reading and math in the eighth grade New Mexico standards based assessment or on an alternative test, as established by the laws, rules or procedures of the PED. This evidence shall be submitted on a form approved by the director that shall include parental consent for the release of certain educational information to the director.

G. Failure to demonstrate ninety percent school attendance will result in the minor being ineligible to be issued an instruction permit until six months from the date of application, unless an administrator of a non-public school or operator of a home school certify to their non-maintenance of attendance records.

H. Failure to demonstrate nearing an academic proficiency score in reading and math in the eighth grade New Mexico standards based assessment or on an alternative test will result in the minor being ineligible to be issued an instruction permit until six months from the date of application.

I. Failure to demonstrate both ninety percent school attendance and nearing an academic proficiency score in reading and math in the eighth grade New Mexico standards based assessment or on an alternative test will result in the minor being ineligible to be issued an instruction permit until one year from the date of application, unless an administrator of a non-public school or operator of a home school certify to their non-maintenance of attendance records.

[18.19.5.118 NMAC - N, 1/30/09]