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State Capitol North, 325 Don Gaspar, Suite 200
Santa Fe, New Mexico 87501
Phone: (505) 986-4591 Fax: (505) 986-4338
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November 13, 2012

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force

RE: STAFF BRIEF: ADMINISTRATIVE RULEMAKING

Adopted Rules

2.82.2 NMAC, Membership

2.82.3 NMAC, Member and Administrative Unit Contributions

The May 31, 2012 issue of the *New Mexico Register* contained changes to certain sections of the Educational Retirement Board’s (ERB) rules on membership and contribution, including:

- the repeal of 2.82.3 NMAC (see Attachment 1, *Repeal 2.82.3 NMAC, “Membership and Administrative Unit Contributions,” 5/31/12*);
- the immediately subsequent adoption of a new section 2.82.3 NMAC, which became effective July 1, 2012 (see Attachment 2, *Adopted Rule 2.82.3 NMAC, “Membership and Administrative Unit Contributions,” 5/31/12*); and
- minor clarifying and technical amendments to 2.82.2 NMAC (see Attachment 3, *Adopted Rule 2.82.2, “Membership,” 5/31/12*).

The new rule on “Member and Administrative Unit Contributions” included several substantive changes to the prior version, as well as reorganization of language from its original structure:

- Definitions.¹ In addition to those definitions already included in the rule by cross-reference to the *Educational Retirement Act*, the rulemaking adopted new definitions for:
 - “Non-reported service,” which means service for which contributions should have been made by both a member and a local administrative unit, but were not;
 - “Refund rate” which means the rates at which interest is calculated for refunds to a member² or to the beneficiary or estate of a member³ for refunds, according to the provisions of the *Educational Retirement Act*⁴; and
 - “Student teacher” means a person engaged in classroom teaching as part of a teacher education or training program whose employment in a local administrative unit is incidental to that person’s status as a student, as opposed to a regular employee of a unit who also happens to be enrolled in classes⁵.

- Earnings covered or excluded.⁶ This section was reorganized so that salary that is included or excluded for purposes of fund contribution has been divided into two subparagraphs, with additional revisions:
 - Covered earnings include:
 - base salary, compensation, or wages;
 - compensation for additional services such as teaching courses in addition to the full teaching load in an academic year;
 - compensation based on professional certification or qualifications, such as multilingualism;
 - overtime, shift differential, and call-back pay;
 - compensation paid to a member under a school bus owner-driver contract, where the member drives a single school bus, owned by that person, over a regularly established route, under a contract made with the administrative unit in that person’s name; and
 - tips or other compensation paid to a member by a third party to the extent that the local administrative unit reports that income for tax purposes.

 - Non-covered earnings include:
 - bonuses, prizes, pay supplements, or other one-time payments that do not increase a member’s annual base pay;
 - reimbursements for travel, lodging, food, and the like;
 - lump-sum payments for accrued sick leave;
 - lump-sum payments for accrued annual leave, made after July 1, 2010⁷; and

¹ 2.82.3.7 NMAC

² 22-11-15 NMSA 1978, “Definitions”

³ 22-11-29 NMSA 1978, “Retirement Benefit Options”

⁴ The refund rate shall be calculated based upon the process adopted by the board in its resolution entitled “The educational retirement board of trustees’ adoption of a revised process for calculating and credit interest for refunds”, June 4, 2010, or by a superseding resolution.

⁵ For example, a student in a teacher training program who receives a stipend, salary, or other compensation while student teaching is a “student teacher.”

⁶ 2.82.3.8 NMAC “Earnings Covered”

as if initially becoming a member on or before July 1, 2010, if they return to employment or return the withdrawn contributions and interest on or after July 1, 2010.

- When a terminated member leaves a balance of \$500 or less in their account, the account shall be closed into “unallocated income” after the member has been terminated for at least two years. If the member returns to employment, the balance shall be restored to that member’s account. If the member later claims a refund the amount shall be restored to the terminated member’s account from “unallocated income” and refunded.
- When a terminated member receives a refund in excess of the amount due, the excess may be “closed out” into “unallocated income” after being outstanding for at least two years, if it does not exceed \$1,000, and staff have made at least two attempts to contact the member and collect the excess. If the member returns to employment, the excess shall be charged to their contribution account.
- When a member receives a refund in excess of \$1,000 over the amount due, and at least two attempts have been made to contact them to collect the excess refund, the director may pursue legal action for recovery.

➤ Refunds in the Event of Death:

- If a member dies without having vested, member contributions together with interest shall be refunded to the member’s beneficiary or estate.
- In the event of the death of a vested member who did not select Option B¹² benefits prior to the date of retirement, the member’s beneficiary may elect to receive a refund of the member’s contributions or to receive Option B benefits. Refunds and interest shall be paid to the beneficiary or the member’s estate.
- If a beneficiary defers payment after the member dies and requests a lump sum payment¹³ in lieu of Option B benefits, interest shall be calculated through the end of the calendar quarter prior to the completed request.
- Under Options B and C¹⁴, if both the member and the beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference shall be paid to the member’s or the beneficiary’s estate.
- If a deceased member’s contribution is less than \$1,000 and the beneficiary or member’s estate makes no written claim for it within one year from the date of the member’s death, payment may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.

¹² Option B "Joint 100% Survivor" Benefit. Under Option B, the monthly benefit is reduced to provide a designated beneficiary with a 100% survivor's benefit for the rest of his or her life. The amount of the monthly benefit is based on the respective ages of the member and their beneficiary age at the time of retirement. Members may not name a non-spouse beneficiary who is more than 10 years younger. They may not change their beneficiary after the effective date of retirement. If the beneficiary dies before the member, monthly benefits will be adjusted up to the amount you would have received under the Option A "Straight Life" Benefit.

¹³ See Section 22-11-29(F) NMSA 1978

¹⁴ Option C "Joint 50% Survivor" Benefit. Monthly benefit is reduced to provide a beneficiary with a 50% survivor's benefit for the rest of his or her life. The beneficiary may not be changed after the effective date of retirement. Like Option B, if the beneficiary dies before the member, monthly benefits will be adjusted up to the amount you would have received under the Option A "Straight Life" Benefit.

- Return of Refunded Contributions and Retirement Eligibility.¹⁵ Revisions to this section of the rule include:
 - Contributions which have been withdrawn by a member who terminated their employment may be returned to the fund with interest, without the member being required to return to employment, if:
 - employment was terminated for reasons other than retirement, death, or disability;
 - the member exempted himself or herself from the *Educational Retirement Act*; or
 - the member has not been reemployed following a period of disability during which the member received disability benefits.
 - Effective July 1, 2011, a member who has had all of their contributions refunded on or before June 30, 2010, is eligible to retire as if they became a member on or after July 1, 2010, if:
 - they were a member before July 1, 2010; or
 - returns to employment or returns the refunded contributions with interest, on or after July 1, 2010.

The October 15, 2012 issue of the *Register* included the final adoption of amendments to the recently adopted “Member and Administrative Unit Contribution” rules, 2.82.3 NMAC (see Attachment 4, *Adopted Rule 2.82.3, “Membership and Administrative Unit Contributions,” 10/31/12*).

The adopted rule contains minor amendments to:

- 2.82.3.2, Scope:
 - Prior to this amendment, this section of the rule, in its entirety, read, “This rule defines member contributions, refund of contributions, purchase of contributory service, and the payment of interest on refunds.”
 - The newly amended section now reads, “This rule defines earnings on which member contributions shall be made, refund of contributions, purchase of contributory employment and non-reported service, and the payment of interest on refunds.”
- Several amendments to subsection headings of the rule, to better reflect the new version of the rule, adopted in the May31, 2012 issue of the *Register*, including:
 - 2.82.3.8, previously entitled, “Earnings Covered” and now entitled, “Salary Covered; Salary Excluded”;
 - 2.82.3.10, previously entitled, “Purchase of Contributory Employment,” and now entitled, “Refunds of Contributions in the Event of Death of Member or Beneficiary;” and

¹⁵ 2.82.3.11 NMAC

- 2.82.3.11, previously entitled, “Interest Credits and Payments on Member Contributions,” and now entitled, “Return of Refunded Contributions and Retirement Eligibility.”

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2.82.3 NMAC. Member and Administrative Unit Contributions, filed 11-16-2001 is repealed and replaced by 2.82.3 NMAC.
Member and Administrative Unit Contributions, effective 7-1-2012.

New Mexico Register / Volume XXIII, Number 10 / May 31, 2012

TITLE 2 PUBLIC FINANCE
CHAPTER 82 EDUCATIONAL RETIREMENT
PART 3 MEMBER AND ADMINISTRATIVE UNIT CONTRIBUTIONS

2.82.3.1 ISSUING AGENCY: Educational Retirement Board, P. O. Box 26129, Santa Fe, New Mexico
87502-0129
[2.82.3.1 NMAC - Rp, 2.82.3.1 NMAC, 7-1-2012]

2.82.3.2 SCOPE: This rule defines member contributions, refund of contributions, purchase of contributory service, and the payment of interest on refunds.
[2.82.3.2 NMAC - Rp, 2.82.3.2 NMAC, 7-1-2012]

2.82.3.3 STATUTORY AUTHORITY: The Educational Retirement Act, Section 22-11-1 to 22-11-55, NMSA 1978.
[2.82.3.3 NMAC - Rp, 2.82.3.3 NMAC, 7-1-2012]

2.82.3.4 DURATION: Permanent
[2.82.3.4 NMAC - Rp, 2.82.3.4 NMAC, 7-1-2012]

2.82.3.5 EFFECTIVE DATE: July 1, 2012, unless a later date is cited at the end of a section.
[2.82.3.5 NMAC - Rp, 2.82.3.5 NMAC, 7-1-2012]

2.82.3.6 OBJECTIVE: Clarification of the definition of earnings on which member contributions shall be made, the process to obtain refunds and to purchase contributory employment and non-reported service and the calculation of interest on such refunds and purchases.
[2.82.3.6 NMAC - Rp, 2.82.3.6 NMAC, 7-1-2012]

2.82.3.7 DEFINITIONS:

A. Terms used herein shall have the definitions as set forth in the Educational Retirement Act. Additional definitions used in this regulation are set forth below.

B. "Non-reported service" means service for which contributions should have been made by both a member and a local administrative unit pursuant to the Educational Retirement Act, but which were not made.

C. "Refund rate" means the rates at which interest is calculated for refunds to a member pursuant to Section 22-11-15 NMSA 1978, or to the beneficiary or estate of a member for refunds pursuant to Section 22-11-29 NMSA 1978. The refund rate shall be calculated based upon the process adopted by the board in its resolution entitled "the educational retirement board of trustees' adoption of a revised process for calculating and credit interest for refunds", June 4, 2010, or by a superseding resolution.

D. "Student teacher" means a person engaged in classroom teaching as part of a teacher education or training program whose employment in a local administrative unit is incidental to that person's status as a student. For purposes of example, a student in a teacher training program who receives a stipend, salary or other compensation while student teaching is a "student teacher"; a regular employee of a local administrative unit who also is enrolled in classes, possibly related to that employee's employment, in that or another local administrative unit, is not a student teacher.
[2.82.3.7 NMAC - N, 7-1-2012]

2.82.3.8 EARNINGS COVERED:

A. Except as otherwise set forth herein and subject to the limitations set forth in Section 22-11-21.2, a member's annual salary for the purpose of contributions to the fund and computation of the member's benefit shall consist of total compensation or wages paid to the member for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30, excluding any salary earned while employed under the return to work program of the Educational Retirement Act.

(1) Salary includes payments made directly to the member or to a third party on behalf of or for the benefit of the member. Salary includes, without limitation:

(a) base salary, compensation, or wages;

(b) salary, compensation or wages for additional services rendered; examples include: teaching courses in addition to or above a full teaching load during the September to May academic year; teaching courses or performing research during summer (e.g., June through August) where such courses or research are not included in the duties on which the member's salary is based; and, performing work in addition to that specified in the employee's job description; performing

administrative duties, such as serving as a department head, head of a faculty or staff group, or for providing other additional services;

(c) salary, compensation or wages based on professional certifications or qualifications, or skills such as being bilingual or multilingual;

(d) overtime, shift differential, and 'on-call' or call back pay.

(2) Retirement contributions shall be made by a local administrative unit and a member on base salary earnings before the salary is reduced due to the local administrative unit and member entering into a voluntary "cafeteria" plan.

(3) The salary or compensation paid to a member under a school bus owner-driver contract shall be covered for contributions and benefit calculation purposes. Contributions for compensation paid under a school bus owner-driver contract shall be based upon and limited to the compensation amount paid to a person who drives a single school bus owned by that person over a regularly established route under a regular contract in that person's name with a local administrative unit.

(4) Tips or other remuneration paid to a member by a third party are considered salary to the extent that a local administrative unit reports such amounts as the member's income for tax purposes.

B. The following items shall not be considered annual salary for the purposes of contributions to the fund and computation of the member's annual benefit:

(1) Bonuses, awards and prizes, pay supplements or salary supplements or other "one-time" payments which do not increase an employee's annual base pay or which are made in lieu of an increase in base pay, and similar additional payments, as well as allowances or reimbursements for travel, housing, food, equipment or similar items.

(2) Lump-sum payments to the member for accrued sick leave made at any time, and lump-sum payments of accrued annual leave (also referred to as "vacation leave") made after July 1, 2010. Lump-sum payments for accrued annual leave made on or before July 1, 2010 shall be includable as annual salary only to the extent that it does not include payment for more than thirty (30) days of such leave.

(3) Payments made by a local administrative unit to a member where services are not rendered. By way of example, and with limitation to such examples: (a) payments by an employer to "buy-out" the remaining term of a member's employment contract or in connection with an early retirement program are not payments for services rendered, irrespective of whether payment is made in a lump-sum or distributed over a period of time, and (b) payments as a result of a legal settlement, whether related to the member's employment or otherwise, are not payments for services rendered, unless such payments are specifically made for salary that was not previously paid.

(4) Stipends, salary, or other compensation paid to student teachers.

(5) Stipends or one-time payments for attending training sessions where such payments are not reimbursements for travel expenses.

(6) Allowances or reimbursements for, or expenses related to, travel, housing, food, equipment, cars, or similar items.

(7) After July 1, 2012, additional pay or a pay differential that is based solely on a member performing duties at (a) a location that is different than the location at which the member regularly performs his or her job duties or (b) that is based on the member performing duties outside of the United States and its insular areas, territories, and possessions (e.g., a location differential or hazard or hazardous duty pay).

[2.82.3.8 NMAC - Rp, 2.82.3.8 NMAC, 7-1-2012]

2.82.3.9 REFUNDS OF CONTRIBUTIONS:

A. In the event that a member should terminate employment for reasons other than retirement, disability, or death, the member shall be entitled to a refund of the member's contributions, plus interest calculated at the refund rate, reduced by the sum of any disability benefits which that member might have previously received. Contributions made by an employer on behalf of an employee (also referred to as a "member") pursuant to Section 22-11-21(A) are "employee contributions" and are subject to refund. A member is not entitled to a refund of any "employer contributions" (also referred to as "local administrative unit contributions") made pursuant to Section 22-11-21(B) NMSA 1978.

B. Any employee who was retired pursuant to the Public Employees Retirement Act (Chapter 10, Article 11 NMSA 1978) and who had made contributions to the fund prior to July 1, 2003, shall be entitled to a refund of such contributions, with interest calculated at the refund rate upon a bona fide termination of employment with the local administrative unit.

C. In order to obtain a refund of contributions, the eligible member must file a written request with the director on forms provided by the board.

D. A refund of a terminated member's contributions shall be made as soon as practical after receipt of a fully executed refund request form in the office of the board. If the terminated member's last employer has certified the member's termination on the last employer report filed with the board, or if the member's record has been inactive for a full calendar quarter, the refund may be processed without further certification of termination by the last employer. If the member requesting a refund has an active record (i.e., a record reflecting contributions made in the preceding completed calendar quarter), and is not certified to be terminated on the last monthly report filed by the member's employer, the refund request cannot be processed without the last employer's certification of termination on the refund request form.

E. Whenever a member's refund request is properly filed, with the appropriate certification of termination, if

required, and the member's termination date has passed, the director shall refund the amount of contributions on deposit with the board through the date of the last quarterly reporting period, if the member desires, and any balance owing to the member shall be paid when received by the board.

F. Refund of contributions for any period of service performed subsequent to July 1, 1957, will cancel all "prior service" credit which may have been credited to the member at the time of the refund. Restoration of all contributions withdrawn, together with interest calculated at the refund rate, will cause the prior service to be restored; provided, however, that as set forth Subsection C of 2.82.3.10 NMAC, effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

G. Whenever a terminated member leaves a balance of \$500.00 or less in the member's account, the account shall be closed into "unallocated income" after the member has been terminated for a period of not less than two years. The record of the terminated member's contribution balance at the time that it was closed into "unallocated income" shall be maintained. If the terminated member subsequently returns to employment, the balance shall be restored to that member's account. Alternatively, if the terminated member should later claim or request a refund of the amount transferred to unallocated income, such amount shall be restored to the terminated member's account and refunded.

H. Whenever a terminated member has received a refund in excess of the amount due the member, such excess may be "closed out" into unallocated income by the director if it does not exceed \$1,000.00 after the excess refund has been outstanding for a period of not less than two years, provided that staff has first made two or more separate attempts to contact the terminated member in writing and collect the excess refund. All such attempts must be documented by staff. All such "close out" actions shall be reported to the board in writing at its first regular meeting following that action. If a terminated member who received an excess refund that was closed into "unallocated income" should return to employment, such excess refund shall be charged to the member's contribution account.

I. If a terminated member shall have received a refund in excess of \$1,000.00 over the amount due that member, and two or more separate attempts have been made to contact the terminated member and collect the excess refund, the director may, after taking into account the costs of doing so, direct staff to pursue legal action to recover the excess. If the amount is deemed uncollectible by the director, the matter shall be brought before the board to determine any further action.

J. Member contributions which have been withheld and paid to the educational retirement fund in error for a member who is not eligible to receive service credit for the time covered by the withholding, shall be returned to the employer, without interest, upon the member's written request or upon the board learning that the member was not eligible to receive service credit for the time covered. The employer shall be responsible for returning such contributions to the member.
[2.82.3.9 NMAC - Rp, 2.82.3.9 NMAC, 7-1-2012]

2.82.3.10 PURCHASE OF CONTRIBUTORY EMPLOYMENT:

A. In the event of the death of an active member who is not vested, member contributions together with interest calculated at the refund rate shall be refunded to the member's beneficiary or to the member's estate upon completion of the proper refund forms as provided for herein.

B. In the event of the death of a vested member who did not select Option B benefits prior to the effective date of retirement, the deceased member's beneficiary shall be have the option of electing to receive a refund of the member's contributions or receiving benefits in the form of Option B as provided in Section 22-11-29 NMSA 1978. Refunds, together with interest calculated at the refund rate and reduced by the sum of any disability benefits which that member might have previously received, shall be paid to the member's surviving beneficiary or estate. If a beneficiary defers payment after the member dies as described in Section 22-11-29 NMSA 1978 and requests a lump sum payment in lieu of benefit under Option B, interest shall be calculated at the refund rate though the end of the calendar quarter prior to the date on which the completed refund request is received by the ERB. Under the provisions of Options B and C, if both the member and the designated beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference, less any disability benefits previously paid to the member, shall be paid to the member's or the beneficiary's estate.

C. In order to obtain a refund of contributions after the death of a member, the member's beneficiary must notify the director of the member's death and furnish a copy of the death certificate or other proof of death acceptable to the director, whereupon the director shall furnish the beneficiary the proper forms to request a refund.

D. If the amount of a deceased member's contribution does not exceed the sum of \$1,000.00 and no written claim is made to the board for it within one year from the date of the member's death, by the member's surviving beneficiary or estate, payment thereof may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.
[2.82.3.10 NMAC - Rp, 2.82.3.10 NMAC, 7-1-2012]

2.82.3.11 INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS:

A. Member contributions which have been withdrawn from the fund by a member who has terminated

employment may be returned to the fund, together with interest at the rate set by the board, without the member being required to return to employment if the termination was under one of the following circumstances:

- (1) the member terminated employment for reasons other than by retirement, disability or death;
- (2) the member exempted himself or herself from the Educational Retirement Act; or
- (3) the member has not been reemployed following a period of disability during which the member received disability benefits.

B. Contributions restored to the fund after having been withdrawn by a member that were originally made prior to July 1, 1971 shall not be considered as having been paid to the fund after July 1, 1971 for the purpose of earning interest and no interest shall be paid on such restored contributions.

C. Effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

[2.82.3.11 NMAC - Rp, 2.82.3.11 NMAC, 7-1-2012]

2.82.3.12 PURCHASE OF NON-REPORTED SERVICE: Non-reported service must be purchased at the time it is discovered at a rate adopted by the board.

[2.82.3.12 NMAC - N, 7-1-2012]

2.82.3.13 INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS: At the time of refund of a member's contributory balance, interest shall be paid at the refund rate through the end of the calendar quarter preceding the date of the refund; except that no interest shall be paid on contributions credited to a member's account for any period prior to July 1, 1971, nor shall interest be paid on contributions on deposit for less than one year.

[2.82.3.13 NMAC - N, 7-1-2012]

HISTORY OF 2.82.3 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under:

ERB 67-3, Rules and Procedures, filed 6-30-67.

ERB 78-1, Rules and Procedures, filed 8-7-78.

ERB Rule III, Member and Administrative Unit Contributions, filed 7-2-82.

History of Repealed Material:

2.82.3 NMAC, Member and Administrative Unit Contributions, filed 11-16-2001 - Repealed effective 7-1-2012.

New Mexico Register / Volume XXIII, Number 10 / May 31, 2012

This is an amendment to 2.82.2 NMAC, Sections 2, 3, 8-11 and 13, effective 5/31/2012

2.82.2.2 SCOPE: This rule defines membership status and processes within the Educational Retirement Act, Section 22-11-1 to ~~[22-11-53]~~ 22-11-55, NMSA 1978. [6-30-99; 2.82.2.2 NMAC - Rn, 2 NMAC 82.2.2, 11-30-2001; A, 5-31-2012]

2.82.2.3 STATUTORY AUTHORITY: The Educational Retirement Act Section 22-11-1 to ~~[22-11-52]~~ 22-11-53, NMSA 1978. [6-30-99; 2.82.2.3 NMAC - Rn, 2 NMAC 82.2.3, 11-30-2001; A, 5-31-2012]

2.82.2.8 EMPLOYEES AND EMPLOYERS COVERED BY THE EDUCATIONAL RETIREMENT ACT:

A. Employers who are designated by statute as "local administrative units" shall be the following schools, institutions, and agencies:

- (1) all public school districts in New Mexico;
- (2) ~~[the]~~ educational institutions enumerated in Article XII, Section 11 of the Constitution of New Mexico;
- (3) ~~[state department of education]~~ public education department;
- (4) ~~[the]~~ educational retirement board;
- (5) ~~[the New Mexico school for the visually handicapped at Alamogordo]~~ New Mexico girls' school;
- ~~[(6) the girls' welfare home;~~
- ~~[(7)]~~ (6) ~~[the]~~ New Mexico boys' school [at Springer];
- ~~[(8)]~~ (7) ~~[the Los Lunas hospital and training school]~~ Los Lunas medical center;
- ~~[(9)]~~ (8) technical and vocational institutes created pursuant to the Technical and Vocational Institute Act;
- ~~[(10)]~~ (9) community colleges (also known as "junior colleges") created pursuant to [the Junior Colleges Act] Chapter 21, Article 13 NMSA 1978 (the "Community College Act"); and
- ~~[(11)]~~ (10) ~~[and the]~~ New Mexico activities association [(The NMAA was added to the statute effective July 1, 1982)].

B. In addition to the local administrative units enumerated in Subsection A of this section, any state institution or agency providing an educational program and employing certified school instructors shall be ~~[an]~~ a local administrative unit with coverage in such unit limited to certified school instructors.

C. All employees of the schools, institutions and agencies enumerated in Subsection A of this section, except for those employees enumerated in Section 11 of this rule, are either "regular" "retired" or "provisional" members under the "Educational Retirement Act."

[6-30-99; 2.82.2.8 NMAC - Rn & A, 2 NMAC 82.2.8, 11-30-2001; A, 5-31-2012]

2.82.2.9 REGULAR MEMBERS:

A. In ~~[the institutions of higher learning]~~ four year colleges, technical and vocational institutes and community or junior colleges, "regular members" shall be all regularly employed teaching staff, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule); all regularly employed administrators, whether full-time or part-time, who hold a bachelor's degree ~~[of]~~ or the professional equivalent thereof and who have managerial and supervisory responsibilities, (except retired members participating in the return to work program and exclusions under Section 11 of this rule); and all regularly employed nurses, whether full-time or part-time (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

B. In the public school districts and state operated schools other than ~~[colleges]~~ those listed in Subsection A above, "regular members" shall be all regularly employed teachers, administrators, and nurses who are holders of appropriate certificates issued by the ~~[state department of education]~~ public education department, regardless of whether employed full-time or part-time, (except retired members participating in the return to work program and exclusions under Section 11 of this rule).

C. Any member except a retired member participating in the return to work program, who is regularly employed in any of the following local administrative units, shall be a "regular member" if he holds a teacher's, nurse's or administrator's certificate (which is issued by the ~~[state department of education]~~ public education department) at the time of commencement of employment in such local administrative units:

- (1) northern New Mexico state school;
- (2) ~~[N.M. boys' school]~~ New Mexico boys' school;
- (3) ~~[girls' welfare home]~~ New Mexico girls' school;
- (4) Los Lunas ~~[hospital and training school]~~ medical center;
- (5) ~~[state department of education]~~ public education department;
- (6) educational retirement board;
- (7) New Mexico school for the blind and visually [handicapped] impaired;

- (8) New Mexico school for the deaf; and
- (9) New Mexico activities association [~~was added to the statute effective July 1, 1982~~].

D. Except retired members participating in the return to work program, regular membership is a condition of employment and all local administrative unit employees who qualify as "regular members" must be covered under [ERA] the Educational Retirement Act, commencing with the first day of employment.

E. Except retired members participating in the return to work program, any person regularly employed, whether full-time or part-time, in any state institution or agency described in Subsection B of 2.82.2.8 NMAC, shall be a regular member if he is employed in an educational program and if he holds a certified school instructor's certificate issued by the [state board] public education department.
[6-30-99; 2.82.2.9 NMAC - Rn & A, 2 NMAC 82.2.9, 11-30-2001; A, 5-31-2012]

2.82.2.10 PROVISIONAL MEMBERS:

A. All persons regularly employed by the schools, institutions, and agencies outlined in Section 8 of this rule who are not "regular members" are "provisional members" and if employed or re-employed after July 1, 1971 must be covered under [ERA] the Educational Retirement Act beginning with the first day of employment or re-employment, as a condition of employment, or if employed by [an] a local administrative unit set forth in Subsection E of 2.82.2.10 NMAC, such provisional member may make the election provided therein.

B. Provisional members who entered employment prior to July 1, 1971 could exempt themselves from coverage under [ERA] the Educational Retirement Act in the manner provided in Section 22-11-17 NMSA 1978 Compilation, as that section existed prior to July 1, 1971. If such provisional member did not exempt [himself, he] him- or herself, that provisional member must be covered under the provisions of the Educational Retirement Act beginning with the first day of his employment.

C. For the purpose of coverage under the [ERA] Educational Retirement Act, school bus owner-drivers shall be considered as provisional members. The term "owner-driver" shall be taken to mean the person who drives a school bus owned by [him] the person, over a regularly established route, under a regular contract in [his] that person's name, approved by the state director of school transportation, and using equipment approved by the state director of school transportation for the regular transportation of children.

D. Any provisional member who has exempted [himself] him- or herself may, at any future date, revoke such exemption and commence coverage under [ERA] the Educational Retirement Act on the first day of the month following his revocation.

E. Any provisional member employed by any of the following local administrative units may elect to be covered under the public employees' retirement association in lieu of coverage under the Educational Retirement Act within the first 6 months of his employment or re-employment, but may not exempt himself.

- (1) [N.M. boys' school] New Mexico boys' school;
- (2) [girls' welfare home] New Mexico girls' school;
- (3) [N.M.] New Mexico school for the deaf;
- (4) educational retirement board
- (5) [state department of education] public education department;
- (6) northern New Mexico state school;
- (7) Los Lunas [hospital & training school] medical center;
- (8) [N.M.] New Mexico school for the blind and visually [handicapped] impaired;
- (9) until or unless such provisional member does elect coverage under [PERA, he] the Public Employees Retirement Act that provisional member must be covered under the Educational Retirement Act commencing with the first day of his employment, or re-employment in any of the local administrative units enumerated in this section. Likewise, the [selection of PERA requires the continued PERA coverage] election of coverage under the Public Employees Retirement Act requires continued coverage under that act for the duration of employment or re-employment in any of the units specified in this section.

(10) It shall be the policy of the board, in cooperation with [PERA] the Public Employees Retirement Association ("PERA"), to determine annually if there are provisional members employed by these local administrative units who are retired from one system while having elected to participate in the second system.

F. To elect [membership under PERA, a provisional member must complete ERA Form 44, "election of coverage under PERA," in triplicate. The administrative unit shall obtain all three copies from the member and forward them to the educational retirement board. The director of the educational retirement shall approve the election if it is in order, and forward one copy to the executive secretary of the public employees' retirement association which shall serve as the employees' notice to said association of his election to be covered by PERA. One copy of the election shall be returned to the administrative unit as evidence of approval of the member's election to be covered under PERA, and the original copy shall be a permanent record on file with the educational retirement board] coverage under the Public Employees Retirement Act, a provisional member must complete a form provided by the board for that purpose. The local administrative unit shall forward the completed form to the director. The director shall approve the election of such coverage if it is in order and forward a copy of the approved form to PERA and to the local administrative unit as notice that the employee's election to be covered

under the Public Employees Retirement Act has been approved. The director shall retain the original approved election form as the board's record of the approved election.

G. ~~No provisional member may be covered under the [public employees' retirement association in lieu of ERA unless a properly executed "election of coverage under PERA," Form 44, is filed with the director of educational retirement]~~ Public Employees Retirement Act in lieu of the Educational Retirement Act unless a properly approved form electing such coverage is on file with the director.

H. All employees of the public schools who are engaged as teacher aides or classroom aides but who do not teach shall be classified as provisional members even though such employees may hold certificates in some form issued by the [department of education] public education department.

I. There shall be no provisional membership extended to employees of the local administrative units described in Subsection B of 2.82.2.8 NMAC. [6-30-99; 2.82.2.10 NMAC - Rn, 2 NMAC 82.2.10, 11-30-2001; A, 5-31-2012]

2.82.2.11 EMPLOYEES EXCLUDED FROM COVERAGE:

A. Any person enrolled as a student in any of the local administrative units outlined in Subsection A of 2.82.2.8 NMAC, and who is also employed by the local administrative unit in which he is enrolled, shall be considered a student and not eligible for either "regular" or "provisional" membership under the [ERA] Educational Retirement Act, except that members of the faculty or full-time staff, who may be incidentally enrolled in classes, shall not be affected by this rule. Under no circumstances shall graduate assistants, teaching fellows, or students in positions of similar nature, be considered eligible for coverage under the [ERA] Educational Retirement Act. This includes any and all participation in the teacher enhancement program or participation in similar graduate programs.

B. Any person whose full time equivalency ("FTE") is .25 or less, and who is not a covered employee of another local administrative unit, shall not be covered for contribution purposes. Any person employed on [the effective date of this rule and who is currently] July 1, 1994 who was then covered under the [aet] Educational Retirement Act shall continue to be covered for the duration of that employment.

(1) ~~[An ERA retiree]~~ A retired member may return to employment (includes "substitution") and earn up to \$15,000 per fiscal year or the amount possible under the .25 or less FTE provision, whichever is greater, without [effect to the retirement benefit if] effecting the retired member's retirement benefit:

(2) In the event ~~that~~ a retired member enters into an agreement which provides for [or actually has earnings in excess of the above limits, the] earnings in excess of the above limits or the retired member actually has earnings in excess of the above limits, the retired member's retirement benefit will be suspended for the duration of the employment, and the ~~retired~~ member will be returned to an active status.

C. Any employee engaged on a day-to-day basis to replace another employee who is temporarily absent shall be considered a "substitute" and shall not be covered under the [ERA] Educational Retirement Act. An employee engaged to fill a vacant position (including a position vacated by an extended leave of absence) is not considered a "substitute" and must be covered under [ERA] the Educational Retirement Act.

D. Independent contractors who perform services for local administrative units on a fee basis are not eligible for membership under the [ERA] Educational Retirement Act as a result of having performed such service, and sums paid for such service shall not be covered for [contributory purposes. To be classified as an independent contractor a person must meet at least the following criteria] purposes of contributions. The following factors shall be considered in determining whether an individual qualifies as an independent contractor:

(1) ~~[registered]~~ registration with the New Mexico department of taxation and revenue to pay gross receipts tax;

(2) ~~[contract must have been bid in accordance with the State Procurement Code]~~ the existence of a written contract with the local administrative unit setting forth the services to be provided and the compensation to be paid;

(3) ~~[the person is not eligible for fringe benefits afforded regular employees of the local administrative unit and is not paid through the unit's payroll system]~~ whether the person receives benefits such as paid annual or sick leave, health insurance and other benefits that the local administrative unit provides its regular employees or is paid as an employee by the local administrative unit;

(4) ~~[consultants must meet the criteria for an independent contractor established by FICA;]~~ whether the person satisfies internal revenue service guidelines for determining that an individual is an independent contractor rather than an employee;

~~[(5)]~~ (a) [the board shall provide each local administrative unit with employee vs. independent contractor (IC) determination form for their use] as necessary, the director shall make available forms for use by local administrative units for use in making this determination;

~~[(6)]~~ (b) [the board shall further reserve the right to examine such completed forms and copies of contracts or other agreements that exist between employers and individuals for the purpose of determining the relationship] the board reserves the right to examine the complete forms, contracts and other agreements, and any other materials as may be necessary for the purpose of determining whether an individual is an independent contractor or employee.

E. All students enrolled in any public school, grade 1-12.

F. Employees who have a portion of their salaries paid through the Comprehensive Employment and Training

Act (Public Law 95-524), shall not be covered for contributions on that portion except those employees who have vested.
[6-30-99; 2.82.2.11 NMAC - Rn, 2 NMAC 82.2.11, 11-30-2001; A, 10-31-2002; A, 9-15-2006; A, 5-31-2012]

2.82.2.13 MEMBERSHIP ENROLLMENT; RECORDS:

A. Enrollment; changes in contact information.

(1) Members are required to complete a new employment form each time that they are hired or rehired by a local administrative unit and to provide the board with contact information, including their mailing address and e-mail address.

(2) Active members and retirees are responsible for providing the board notice in writing of any change of their mailing address or e-mail address on forms made available for this purpose by the director.

B. Local administrative units. For the purposes of providing members information regarding the board and the members' accounts, local administrative units are required to provide the educational retirement board the e-mail addresses assigned to members by a local administrative unit upon the board's request.

[2.82.2.12 NMAC - N, 5-31-2012]

Adopted Rule 2.82.3 NMAC, "Membership and Administrative Unit Contributions," 10/31/2012

New Mexico Register / Volume XXIII, Number 19 / October 15, 2012

This is an amendment to 2.82.3 NMAC, Sections 2, 8, 10 and 11, effective 10-15-2012.

2.82.3.2 SCOPE: This rule defines earnings on which member contributions shall be made, refund of contributions, purchase of contributory employment and non-reported service, and the payment of interest on refunds. [2.82.3.2 NMAC - Rp, 2.82.3.2 NMAC, 7-1-2012; A, 10-15-2012]

2.82.3.8 [EARNINGS] SALARY COVERED; SALARY EXCLUDED:

A. Except as otherwise set forth herein and subject to the limitations set forth in Section 22-11-21.2, a member's annual salary for the purpose of contributions to the fund and computation of the member's benefit shall consist of total compensation or wages paid to the member for services rendered during each of the four calendar quarters of a fiscal year, beginning July 1 and ending June 30, excluding any salary earned while employed under the return to work program of the Educational Retirement Act.

(1) Salary includes payments made directly to the member or to a third party on behalf of or for the benefit of the member. Salary includes, without limitation:

(a) base salary, compensation, or wages;
 (b) salary, compensation or wages for additional services rendered; examples include: teaching courses in addition to or above a full teaching load during the September to May academic year; teaching courses or performing research during summer (e.g., June through August) where such courses or research are not included in the duties on which the member's salary is based; and, performing work in addition to that specified in the employee's job description; performing administrative duties, such as serving as a department head, head of a faculty or staff group, or for providing other additional services;

(c) salary, compensation or wages based on professional certifications or qualifications, or skills such as being bilingual or multilingual;

(d) overtime, shift differential, and 'on-call' or call back pay.

(2) Retirement contributions shall be made by a local administrative unit and a member on base salary earnings before the salary is reduced due to the local administrative unit and member entering into a voluntary "cafeteria" plan.

(3) The salary or compensation paid to a member under a school bus owner-driver contract shall be covered for contributions and benefit calculation purposes. Contributions for compensation paid under a school bus owner-driver contract shall be based upon and limited to the compensation amount paid to a person who drives a single school bus owned by that person over a regularly established route under a regular contract in that person's name with a local administrative unit.

(4) Tips or other remuneration paid to a member by a third party are considered salary to the extent that a local administrative unit reports such amounts as the member's income for tax purposes.

B. The following items shall not be considered annual salary for the purposes of contributions to the fund and computation of the member's annual benefit:

(1) Bonuses, awards and prizes, pay supplements or salary supplements or other "one-time" payments which do not increase an employee's annual base pay or which are made in lieu of an increase in base pay, and similar additional payments, as well as allowances or reimbursements for travel, housing, food, equipment or similar items.

(2) Lump-sum payments to the member for accrued sick leave made at any time, and lump-sum payments of accrued annual leave (also referred to as "vacation leave") made after July 1, 2010. Lump-sum payments for accrued annual leave made on or before July 1, 2010 shall be includable as annual salary only to the extent that it does not include payment for more than thirty (30) days of such leave.

(3) Payments made by a local administrative unit to a member where services are not rendered. By way of example, and with limitation to such examples: (a) payments by an employer to "buy-out" the remaining term of a member's employment contract or in connection with an early retirement program are not payments for services rendered, irrespective of whether payment is made in a lump-sum or distributed over a period of time, and (b) payments as a result of a legal settlement, whether related to the member's employment or otherwise, are not payments for services rendered, unless such payments are specifically made for salary that was not previously paid.

(4) Stipends, salary, or other compensation paid to student teachers.

(5) Stipends or one-time payments for attending training sessions where such payments are not reimbursements for travel expenses.

(6) Allowances or reimbursements for, or expenses related to, travel, housing, food, equipment, cars, or similar items.

(7) After July 1, 2012, additional pay or a pay differential that is based solely on a member performing duties at (a) a location that is different than the location at which the member regularly performs his or her job duties or (b) that is based on the member performing duties outside of the United States and its insular areas, territories, and possessions (e.g., a location differential or hazard or hazardous duty pay).

[2.82.3.8 NMAC - Rp, 2.82.3.8 NMAC, 7-1-2012; A, 10-15-2012]

2.82.3.10 ~~[PURCHASE OF CONTRIBUTORY EMPLOYMENT]~~ REFUNDS OF CONTRIBUTIONS IN THE EVENT OF DEATH OF MEMBER OR BENEFICIARY:

A. In the event of the death of an active member who is not vested, member contributions together with interest calculated at the refund rate shall be refunded to the member's beneficiary or to the member's estate upon completion of the proper refund forms as provided for herein.

B. In the event of the death of a vested member who did not select Option B benefits prior to the effective date of retirement, the deceased member's beneficiary shall have the option of electing to receive a refund of the member's contributions or receiving benefits in the form of Option B as provided in Section 22-11-29 NMSA 1978. Refunds, together with interest calculated at the refund rate and reduced by the sum of any disability benefits which that member might have previously received, shall be paid to the member's surviving beneficiary or estate. If a beneficiary defers payment after the member dies as described in Section 22-11-29 NMSA 1978 and requests a lump sum payment in lieu of benefit under Option B, interest shall be calculated at the refund rate though the end of the calendar quarter prior to the date on which the completed refund request is received by the ERB. Under the provisions of Options B and C, if both the member and the designated beneficiary die before the total of the retirement benefits received by the member and the beneficiary equal the total contributions made by the member, the difference, less any disability benefits previously paid to the member, shall be paid to the member's or the beneficiary's estate.

C. In order to obtain a refund of contributions after the death of a member, the member's beneficiary must notify the director of the member's death and furnish a copy of the death certificate or other proof of death acceptable to the director, whereupon the director shall furnish the beneficiary the proper forms to request a refund.

D. If the amount of a deceased member's contribution does not exceed the sum of \$1,000.00 and no written claim is made to the board for it within one year from the date of the member's death, by the member's surviving beneficiary or estate, payment thereof may be made to the named beneficiary or, if none is named, to the person that the board determines to be entitled to the contribution under the laws of New Mexico.

[2.82.3.10 NMAC - Rp, 2.82.3.10 NMAC, 7-1-2012; A, 10-15-2012]

2.82.3.11 ~~[INTEREST CREDITS AND PAYMENTS ON MEMBER CONTRIBUTIONS]~~ RETURN OF REFUNDED CONTRIBUTIONS AND RETIREMENT ELIGIBILITY:

A. Member contributions which have been withdrawn from the fund by a member who has terminated employment may be returned to the fund, together with interest at the rate set by the board, without the member being required to return to employment if the termination was under one of the following circumstances:

- (1) the member terminated employment for reasons other than by retirement, disability or death;
- (2) the member exempted himself or herself from the Educational Retirement Act; or
- (3) the member has not been reemployed following a period of disability during which the member received disability benefits.

B. Contributions restored to the fund after having been withdrawn by a member that were originally made prior to July 1, 1971 shall not be considered as having been paid to the fund after July 1, 1971 for the purpose of earning interest and no interest shall be paid on such restored contributions.

C. Effective July 1, 2011, a member who was a member at any time prior to July 1, 2010 and who, on or before June 30, 2010, had all of his or her member contributions refunded pursuant to Section 22-11-15 NMSA 1978, and who, on or after July 1, 2010, returns to employment or returns the withdrawn contributions to the fund together with interest at the rate set by the board, is eligible to retire as if initially becoming a member on or after July 1, 2010.

[2.82.3.11 NMAC - Rp, 2.82.3.11 NMAC, 7-1-2012, A, 10-15-2012]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
November 9, 2012

1 NO. 33,893

RECEIVED
NOV 13 2012

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3 STATE OF NEW MEXICO, ex rel.,
4 HON. LINDA M. LOPEZ, .
5 HON. SHERYL WILLIAMS STAPLETON,
6 AMERICAN FEDERATION OF TEACHERS-NEW MEXICO,
7 ALBUQUERQUE TEACHERS FEDERATION, AFT LOCAL 1420,
8 SARA ATTLESON, STEPHANIE DEBELLIS, ROBIN GIBSON,
9 PAT HALAMA, PAMELA IRVIN, MIRIAM MARTINEZ, MARY
10 MERCIER, RYAN ROSS, and CAMERON SCHAFFER,

11 Petitioners,

12 v.

13 HANNA SKANDERA, Secretary-Designate of the
14 PUBLIC EDUCATION DEPARTMENT of the
15 STATE OF NEW MEXICO,

16 Respondent.

17 ORDER

18 WHEREAS, this matter came on for consideration upon the Court's own
19 motion to request a response to the Petition for Writ of Mandamus, and the Court
20 having considered said motion and being sufficiently advised, Justice Richard
21 C. Bosson, Justice Edward L. Chávez, and Justice Paul J. Kennedy concurring;

22 NOW, THEREFORE, IT IS ORDERED that response to the petition shall
23 be timely filed on or before November 27, 2012.

24 IT IS SO ORDERED.

25 WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of
26 the Supreme Court of the State of New Mexico, and the
27 seal of said Court this 9th day of November, 2012.

28 (SEAL)

Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY
Madeline Garcia
Clerk of the Supreme Court
of the State of New Mexico

COPY

IN THE NEW MEXICO SUPREME COURT

No. _____

12 / 33893

**STATE OF NEW MEXICO EX REL.
THE HONORABLE LINDA M. LOPEZ,
THE HONORABLE SHERYL WILLIAMS STAPLETON,
AMERICAN FEDERATION OF TEACHERS-NEW MEXICO,
ALBUQUERQUE TEACHERS FEDERATION, AFT LOCAL 1420,
SARA ATTLESON, STEPHANIE DeBELLIS,
ROBIN GIBSON, PAT HALAMA, PAMELA IRVIN,
MIRIAM MARTINEZ, MARY MERCIER, RYAN ROSS,
and CAMERON SCHAFFER,**

Petitioners,

v.

**HANNA SKANDERA, Secretary-Designate
of the PUBLIC EDUCATION DEPARTMENT
of the STATE OF NEW MEXICO,**

Respondent.

VERIFIED PETITION FOR WRIT OF MANDAMUS

Submitted by:

Shane Youtz
Stephen Curtice
YOUTZ & VALDEZ, P.C.
900 Gold Avenue S.W.
Albuquerque, NM 87102
(505) 244-1200 – Telephone
(505) 244-9700 – Fax
Counsel for Petitioners

SUPREME COURT OF NEW MEXICO
FILED

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16, 23, 24

COME NOW, Petitioners, by and through the undersigned, and pursuant to Rule 12-504 NMRA, file this Verified Petition for Writ of Mandamus.

INTRODUCTION

The Public Education Department (“PED”) desires to change fundamental education policy in New Mexico as it relates to the evaluation of teachers. In its own words, it wants “to *change the dynamic* of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, *thereby replacing the binary system* that emphasizes years of experience and credentials.” A major component of this policy shift is the use of student performance, rather than teacher competencies, as the basis of the evaluation.

However, the current teacher evaluation system based on teacher competencies that PED wants to replace is provided for in duly-enacted statutes and previous regulations PED was required to enact pursuant to those statutes. For this reason—as it indicated it would in its “No Child Left Behind” waiver request filed with the U.S. Department of Education—PED introduced legislation that would have authorized it to issue regulations making this policy shift. That legislation failed. Undaunted, PED issued regulations making the very change for which it sought legislative authorization.

Clear, indistinguishable precedent from this Court establishes: (1) that PED violated the law and the constitutional provision for separation of powers by

attempting to make substantive law and policy through regulation, and (2) mandamus is an appropriate remedy to halt this usurpation of power. Based on that clear precedent, Petitioners seek a writ of mandamus precluding PED from implementing the regulations it issued without legislative authorization.

Petitioners and Respondent obviously do not agree on the proper public policy as it relates to teacher evaluations. That dispute, however, is not cognizable in this Court. It should be left for the Legislature. As this Court has noted, "The case before us does not concern the merits of [teacher evaluation systems] or conflicts of political ideology. Rather, it concerns only the sanctity of the New Mexico Constitution and the judiciary's obligation to uphold the principles therein." *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 1,125 N.M. 343, 961 P.2d 768. Based on those principles, Petitioners respectfully request this Court to issue the writ.

GENERAL FACTUAL ALLEGATIONS

1. Petitioner the Honorable Linda M. Lopez is a Senator in the New Mexico Legislature, representing the 11th District (in Bernalillo County) since 1997. She is an advisory member of the Legislative Education Study Committee.

2. Petitioner the Honorable Sheryl Williams Stapleton is a Representative in the New Mexico Legislature, representing the 19th District (in Bernalillo County) since 1995. She is an educator by trade, and is an advisory

member of the interim Legislative Education Study Committee. She is also a member of the House Education Committee and the House Labor & Human Resources Committee.

3. Petitioner American Federation of Teachers New Mexico ("AFT") is a labor organization and the exclusive bargaining representative for over 23,000 teachers and other educational employees in New Mexico. Petitioner has 30 local affiliates throughout the State of New Mexico.

4. Petitioner Albuquerque Teacher Federation, AFT Local 1420 ("ATF"), is the largest local member of the American Federation of Teachers, New Mexico, and is the duly designated exclusive bargaining representative for approximately 4,000 teachers and other educational employees in Albuquerque.

5. Petitioners Sara Attleson, Stephanie DeBellis, Robin Gibson, Pat Halama, Pamela Irvin, Miriam Martinez, Mary Mercier, Ryan Ross and Cameron Schafer are teachers and other education employees in the State of New Mexico, represented by the ATF and AFT, whose tenures will be directly affected by the regulations at issue.

6. Respondent Hanna Skandera is the Secretary-Designate (having not been confirmed by the Senate) of the PED. In that capacity, she has the authority to approve and issue regulations relating to public education.

7. Currently, teachers are evaluated and licensed pursuant to the terms of a three-tier licensure system, as established by the New Mexico Legislature in 2003. In that year, the Legislature enacted comprehensive public education reform through the seventy-four sections of 2003 N.M. Laws Ch. 153. That Act was titled:

An Act Relating to Public Education; Providing Public School Reforms; Enacting the Assessment and Accountability Act; Creating an Assessment and Accountability System Based on Challenging Academic Content and Performance Standards and Rigorous Testing against those Standards To Determine Annual Yearly Progress of Students, Public Schools, School Districts and the State Department of Public Education; Providing for Sanctions and Rewards; Providing for Improvement Indicators in Addition to the Assessment and Accountability System; Providing for More Stringent Competency Requirements for Teachers and School Principals; Providing for Licensure of Certain School Employees; Changing Certain Governance Structures; Providing for School Councils; Providing Powers and Duties; Enacting the Family and Youth Resource Act; Amending, Repealing, Enacting and Recompiling Sections of the NMSA 1978; Declaring an Emergency

8. Sections 33 through 54 of that Act modified various provisions of the School Personnel Act to create the three-tier teacher licensing and evaluation system currently in place, relevant provisions of which are currently codified at NMSA 1978, §§ 22-10A-3 through -12 (as amended through 2011).

9. The existing statutory framework for teacher evaluations for licensure purposes requires that the teacher be evaluated for “competency” against a “highly

objective uniform statewide standard of evaluation” to be developed by the PED.

Relevant statutory provisions include:

a. NMSA 1978, § 22-10A-4(B) (2005): “The New Mexico licensure framework for teachers and school administrators is a progressive career system in which licensees are required to demonstrate increased competencies and undertake increased duties as they progress through the licensure levels. The minimum salary provided as part of the career system shall not take effect until the department has adopted increased competencies for the particular level of licensure and a high objective uniform statewide standard of evaluation.”

b. NMSA 1978, § 22-10A-6 (2009) (establishing educational requirements for licensure).

c. NMSA 1978, § 22-10A-7(B) (2011) (for level-one licenses, requiring the evaluation of the teacher at the end of the first year “for competency”); Section 22-10A-7(F) (requiring the department to establish “competencies and qualifications” for level one licensure at various grade levels); Section 22-10A-7(G) (establishing a minimum salary for level one teachers following the adoption of “highly objective uniform statewide standards of evaluation for level one teachers” which are found at 6.69.4 NMAC).

d. NMSA 1978, § 22-10A-10 (2005) (similar provisions for level-two licensure).

e. NMSA 1978, § 22-10A-11 (2009) (similar provisions for level-three licensure).

f. NMSA 1978, § 22-10A-19 (2010) (requiring PED to adopt criteria and “minimum highly objective uniform statewide standards of evaluation” for the annual performance evaluation of teachers, a portion of which must include principal evaluation of teachers’ classroom practice “to determine the teacher’s ability to demonstrate state-adopted competencies”).

10. As required by these provisions, the PED adopted regulations establishing the “highly objective uniform statewide standard of evaluation” which is the statutorily-required measure of teacher “competency.” Those regulations are found at 6.69.4 NMAC and remain in effect today. As required by statute, they measure teacher competency by reference to the teacher’s skills, training and knowledge, not student performance. 6.69.4.11 NMAC.

11. On or about February 15, 2012, Respondent submitted an “ESEA Flexibility Request” (colloquially referred to as a No Child Left Behind waiver request) (“Request”) to the United States Department of Education. Relevant excerpts from that 577-page Request are attached hereto as Exhibit 1.

12. In that Request, Respondent described the current three-tiered teacher licensure evaluation system in place (as described above). Ex. 1, at 110. Following that description, Respondent indicated: “In short, the current evaluation

system uses the same criteria for all teachers with varying levels of proficiency expectations. Evaluations are not required to include student achievement data as evidence of effectiveness.” *Id.* at 111.

13. In that Request, Respondent proposed radically changing this evaluation framework and acknowledged that such a change would require legislative action: “In order to improve the evaluation system, PED will propose legislation during the 2012 session to replace the current binary system of evaluation with a five tier system that identifies levels of effectiveness as a measure that determines targeted professional development, employment decisions and licensure status.” *Id.*

14. Also in that Request, PED proposed an timeline for the replacement of the existing evaluation system. That timeline *began* with the necessary legislative changes and, over the next couple of years, would result in the establishment of implementing regulations and standards after consultations with stakeholders. *Id.* at 116-18.

15. As it indicated it would in the Request, PED had the necessary legislation introduced in the 2012 Regulation Session of the Legislature. That legislation, titled the Teacher and School Leader Effectiveness Act, was introduced by Dennis J. Roch as HB 249. See http://www.nmlegis.gov/lcs/_session.aspx?Chamber=H&LegType=B&LegNo=249&year=12 (last visited

11/6/2012). A copy of the bill, as originally introduced, is attached hereto as Exhibit 2.

16. PED's proposed legislation did not get out of its first committee. Instead, the House Education Committee recommended passage of a committee substitute bill. A copy of that recommendation and the substitute bill is attached hereto as Exhibit 3.

17. That committee substitute bill did not get out of the next committee. Instead, the Labor and Human Resources Committee recommended passage of a different committee substitute bill. A copy of that recommendation and the substitute bill is attached hereto as Exhibit 4.

18. The final version of the bill differed from the initial PED version in several ways. Importantly, the final version created an "Effectiveness Evaluation Council" to develop recommendations from which the PED would develop regulations implementing the Act, whereas PED's proposal would simply allow PED to develop implementing regulations on its own. *Compare* Ex. 2, § 3 with Ex. 4, § 3. The final version also proposed differing criteria guidelines. *Compare* Ex. 2, § 4 with Ex. 4, § 5. What both have in common, however, is a fundamental change in public policy from evaluating teachers based solely on teacher competency (as measured by a "highly objective uniform statewide standard of

evaluation”) to including measures of student achievement as a component of teacher evaluations.

19. Ultimately, although the second committee substitute passed the House, it died in the Senate, and the Legislature did not pass any legislation altering the existing teacher evaluation framework as established by existing statutes.

20. Nonetheless, PED proposed, and ultimately promulgated, regulations which implement the new teacher evaluation program for which it sought—but did not receive—legislative authority. Those regulations were published in Volume XXIII, Number 16, page 623, of the New Mexico Register on August 30, 2012. See <http://www.nmcpr.state.nm.us/nmregister/xxiii/xxiii16/xxiii16.pdf>. They are currently codified at 6.69.8 NMAC, and a copy is attached hereto as Exhibit 5.

21. PED was not shy in claiming that these new regulations constitute a fundamental shift in public policy. Using language that echoed its previous description in of the *legislation* it would propose, PED indicated: “This rule also seeks to *change the dynamic* of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, *thereby replacing the binary system* that emphasizes years of experience and credentials.” 6.69.8.6 NMAC (emphasis added).

22. That “dynamic” or “binary system” of teacher evaluation, which the new regulations seek to replace, is that which was established by the 2003 legislative enactment and implementing regulations discussed above.

23. The new regulations require local school districts “not later than the commencement of the 2013-2014 school year” to develop and submit to PED for approval “an effectiveness evaluation system for measuring performance of licensed school employees” in accordance with the new regulations. 6.69.8.8(A) NMAC. However, “[s]chool districts may continue to use the highly objective uniform statewide standards of evaluation described in 6.69.4 NMAC for evaluating, promoting, terminating and discharging licensed school employees for performance during the 2012-2013 school year.” 6.69.8.8(B) NMAC.

24. As described above, the evaluation of teachers based on competency as measured against the “highly objective uniform statewide standards of evaluation described in 6.69.4 NMAC,” which these regulations would replace beginning in the 2013-2014 school year, is mandated by state statute. *See, e.g.*, NMSA 1978, § 22-10A-4(B) (2005).

ARGUMENT

I. Petitioners Have Standing to Seek this Writ of Mandamus.

Petitioners consist of Legislators, labor organizations and educational employees, all of whom have standing to bring this Petition. Ordinarily, “[t]o

acquire standing to litigate a particular issue, a party must demonstrate (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision.” *City of Sunland Park*, 2003-NMCA-106, ¶ 40, 134 N.M. 243, 75 P.3d 843 (internal quotation marks and citations omitted). The individual education employees—who are also members of the labor organizations—will be directly affected by the implementation of the challenged regulations in that those regulations can lead to the termination of their employment. 6.69.8.11(K) NMAC.

The labor organizations, moreover, clearly have associational standing to bring this action on behalf of their members. *New Mexico Gamefowl Ass'n, Inc. v. State ex rel. King*, 2009-NMCA-088, ¶ 30, 146 N.M. 758, 215 P.3d 67 (association has standing to sue on behalf of its members when “(1) the members would otherwise have standing to sue, (2) the interests that the association seeks to protect are germane to the association's purpose, and (3) the claim asserted and the relief requested do not require the individual members to participate in the lawsuit”). The labor organizations are the exclusive bargaining representatives for those employees within the appropriate bargaining units, NMSA 1978, § 10-7E-15 (2003), and are obligated to bargain on behalf of the unit for “wages, hours and other terms and conditions of employment.” NMSA 1978, § 10-7E-17(A)(1) (2003).

Lastly, the Legislators bring this action to protect the proper domain of the Legislature to establish the substantive law in New Mexico and set its public policy. In numerous instances, in challenges precisely like this, this Court has conferred standing where the constitutional claims present an issue of great public importance. *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974). In such cases, “[m]ore limited notions of standing are not acceptable.” *State ex rel. Clark v. Johnson*, 120 N.M. 562, 569, 904 P.2d 11, 18 (1995) (granting standing to two state Legislators and a voter/taxpayer). *See also State ex rel. Sandel v. New Mexico Pub. Utility Comm’n*, 1999-NMSC-019, ¶ 1, 127 N.M. 272, 980 P.2d 55 (allowing suit challenging regulations brought by “several members of the New Mexico Legislature, along with representatives from a labor union and a public utility shareholder”); *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶ 21, 128 N.M. 154, 990 P.2d 1277 (discussing “great public importance doctrine” of standing and recognizing application to cases bringing a separation of powers challenge).

II. Issuance of the Writ is a Proper Exercise of this Court’s Original Jurisdiction.

“The supreme court shall have original jurisdiction in quo warranto and mandamus against all state officers, boards and commissions...” N.M. Const. art VI, § 3. Through a series of decisions, this Court has developed a three-part test to determine when it is appropriate for it to exercise this original jurisdiction in

mandamus. In *State ex rel. Sandel*, this Court indicated that original jurisdiction is appropriate when “the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal.” 1999-NMSC-019, ¶ 11.

Accordingly, this Court has granted the writ under its original jurisdiction: (1) to prevent the Governor from transferring the State Highway Engineer to a different department, in violation of statute, *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 573 P.2d 213 (1978); (2) to prevent the Governor from withholding monthly allotments to agencies of money appropriated by the Legislature, *State ex rel. Schwartz v. Johnson*, 120 N.M. 820, 907 P.2d 1001 (1995); (3) to prevent the Governor from executing Tribal Gaming Compacts without legislative approval, *State ex rel. Clark*, 120 N.M. at 562, 904 P.2d at 11; (4) to prevent the Governor from overhauling the public assistance program by regulation after the Legislature did not pass the Governor’s proposed legislation, *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 125 N.M. 343, 961 P.2d 768; (5) to prevent the Public Utility Commission from deregulating the electrical industry by regulation without proper authorizing legislation, *State ex rel. Sandel*, 1999-NMSC-019, 127 N.M. 272, 980

P.2d 55; (6) to prevent the Commissioner of Public Lands from engaging in land exchanges in violation of the Enabling Act, *State ex rel. King v. Lyons*, 2011-NMSC-004, 149 N.M. 330, 248 P.3d 878; and (7) to prevent the Governor from removing appointed members of the Public Employees Relations Board in violation of statute, *AFSCME v. Martinez*, 2011-NMSC-018, 150 N.M. 132, 257 P.3d 952.

As in all of those cases, this Petition raises a simple question of law which can be determined on undisputed facts: Does the PED have the authority, after proposed legislation which would have granted it such authority failed to pass, to implement the challenged regulations which seek, in its own words, “to **change the dynamic** of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, **thereby replacing the binary system** that emphasizes years of experience and credentials[?]” 6.69.8.6 NMAC. As described below, this issue of law raises questions of the authority of administrative agencies to adopt regulations in violation of statute and in violation of separation of powers principles, which this Court has on multiple occasions addressed in the mandamus context.

Moreover, although mandamus will not lie when Petitioners have “a plain, speedy and adequate remedy in the ordinary course of law” NMSA 1978, § 44-2-5 (1884), this Court’s precedent establishes that to be no bar to this Petition. In *State*

ex rel. King, this Court determined that exercise of its original mandamus jurisdiction was appropriate even though the Land Commissioner noted that the regulations and actions could have been challenged through an administrative contest, through a declaratory judgment action or pursuant to the Administrative Procedures Act. 2011-NMSC-004, ¶¶ 24-26. Further, where, as here, a purely legal question would likely reach this Court anyways, original jurisdiction is appropriate. *State ex rel. Taylor*, 1998-NMSC-015, ¶ 17; *see also State ex rel Cardenas v. Swope*, 58 N.M. 296, 302, 270 P.2d 708, 713 (1954) (granting mandamus relief because to do otherwise “would result in needless expense and delay, for as we construe the applicable statutes, a reversal would necessarily follow”); *Sender v. Montoya*, 73 N.M. 287, 291, 387 P.2d 860, 863 (1963) (allowing mandamus in part because “a refusal to do so would have required a reversal on appeal after trial”), *overruled on other grounds by State ex rel. Reynolds v. Molybdenum Corp. of Am.*, 83 N.M. 690, 496 P.2d 1086, 1092 (1972).

The regulations at issue direct local school districts to begin “[a]s soon as possible” preparing an “effectiveness evaluation system for measuring performance of licensed school employees” consistent with the new rules and acceptable to PED. 6.69.8.8(A) NMAC. Although school district “may continue to use the highly objective uniform statewide standards of evaluation described in 6.69.4 NMAC for evaluating, promoting, terminating and discharging licensed

school employees for performance during the 2012-2013 school year,” 6.69.8.8(B) NMAC, they are to use the new system upon approval, and the new system must be in place “for implementation during the 2013-2014 school year.” 6.69.8.8(A) NMAC. Because local school districts are already moving towards use of the new evaluation system, and given the time it would ordinarily take for these issues to make their way through the appellate process, Petitioners respectfully submit that this Court should exercise its original mandamus jurisdiction. “[W]hen issues of sufficient public importance are presented which involve a legal and not a factual determination,” this Court “will not hesitate to accept the responsibility of rendering a just and speedy disposition.” *State ex rel. Bird*, 91 N.M. at 282, 573 P.2d at 216.

III. Mandamus Will Lie to Prevent PED from Implementing Regulations Which are Ultra Vires and Represent an Unconstitutional Usurpation of the Legislature’s Exclusive Role in Developing New Mexico Public Policy.

As described in the following sections, the regulations at issue both violate PED’s statutory mandate—by replacing criteria mandated by statute with new provisions—and the separation of powers doctrine—by usurping the proper role of the Legislature in establishing or changing fundamental public policy. Under such circumstances, mandamus is appropriate. “This Court on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.” *State ex rel. Clark*, 120 N.M. at 570, 904 P.2d at

19. Mandamus will lie to preclude a public official from committing an illegal act. *State ex rel. Bird*, 91 N.M. at 282, 573 P.2d at 216 (“Public functionaries may be restrained by mandamus from doing what they know is an illegal act.” (quoting *Kiddy v. Bd. of County Com’rs*, 57 N.M. 145, 152, 255 P.2d 678, 683 (1953))).

IV. The Regulations at Issue Violate the New Mexico Statutes Requiring that Teacher Evaluations Be Based on “Competency” as Measured by the “Highly Objective Uniform Statewide Standards of Evaluation” PED Proposes Replacing.

By now it is axiomatic that “[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.”

Rivas v. Bd. of Cosmetologists, 101 N.M. 592, 593, 686 P.2d 934, 935 (1984).

Indeed, “[a]gencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes.” *Qwest Corp. v. N.M.*

Pub. Regulation Comm’n, 2006-NMSC-042, ¶ 20, 140 N.M. 440, 143 P.3d 478.

Where statutes define the applicable law, an agency may not by regulation nullify or expand the statutory provisions.

Thus, in *Rainbow Baking Co. v. Comm’r of Revenue*, 84 N.M. 303, 502 P.2d 406 (Ct. App. 1972), the Court of Appeals invalidated a Commissioner of Revenue regulation that required a taxpayer to have all nontaxable transaction certificates in his possession prior to the time an audit of the taxpayer began. The relevant statute imposed no such requirement, requiring only that the taxpayer had been delivered such a certificate at some point. The Court noted that the Legislature could not

have given the agency the power “to adopt rules or regulations which abridge, enlarge, extend or modify the statute creating the right or imposing the duty” because otherwise “regulations of administrative agencies could nullify laws enacted by the Legislature.” *Id.* at 306, 502 P.2d at 409 (quoting *State ex rel. McCulloch v. Ashby*, 73 N.M. 267, 387 P.2d 588 (1963)). *See also Chalamides v. Env’tl Improvement Bd.*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984) (“An agency cannot amend or enlarge its authority through rules and regulations. ... Nor may an agency, through the device of regulations, modify the statutory provision.” (citation omitted)).

Here, the PED’s authority to issue regulations governing teacher evaluations is confined by statute. The statutory provisions described above direct PED to establish teacher “competencies” which are the statutory basis for teacher evaluations and the three-tiered licensing scheme established in 2003. The PED was further directed to establish, through regulation, “minimum highly objective uniform statewide standards of evaluation” to evaluate those competencies. Consistent with this statutory mandate, PED had previously issued those regulations—found at 6.68.4 NMAC—which, as required by statute, focus on the teacher and his or her skills, training and knowledge. *See* 6.68.4.12 NMAC.

Now PED seeks, by regulation, to “*change the dynamic* of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence,

thereby replacing the binary system that emphasizes years of experience and credentials.” 6.69.8.6 NMAC (emphasis added). The regulations require school districts to establish an “effectiveness evaluation system for measuring performance of licensed school employees” acceptable to PED *to replace* the “minimum highly objective uniform statewide standards of evaluation” by the 2013-2014 school year. However, the “minimum highly objective uniform statewide standards of evaluation” PED seeks to replace are *required by statute*. The PED cannot, by regulation, negate the express statutory scheme instituted by the Legislature.

V. The Regulations Further Violate the New Mexico Constitution’s Separation of Powers Principle by Intruding on the Legislature’s Exclusive Role in Developing—or Changing—New Mexico Public Policy.

More importantly, the proposed regulations violate Article III, Section 1 of the New Mexico Constitution. That section provides, in relevant part: “The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted.” Pursuant to this section, “[t]he Legislature makes, the executive executes, and the judiciary construes, the law.” *State v. Fifth Judicial Dist. Ct.*, 36 N.M. 151, 9 P.2d 691, 692

(1932); *State ex rel. Sofeico v. Heffernan*, 41 N.M. 219, 67 P.2d 240, 247 (1937) (“The legislative branch, and it alone within the limitations of the Constitution, can create substantive law....”).

Although there are times where the functions of one branch of government may bleed into another, certain bedrock principles are clear. One of those fundamental principles is that “it is the particular domain of the legislature, as the voice of the people, to make public policy....” *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995); *see also Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶¶ 7-12, 140 N.M. 16, 139 P.3d 176. “In order to carry out this constitution mandate, the Governor is required to apply his or her full energy and resources to ensure that the intended goals of duly enacted legislation are effectuated.” *AFSCME*, 2011-NMSC-018, ¶ 6. For that reason, this Court has “recognized the unique position of the Legislature in creating and developing public policy[,]” *State ex rel. Taylor*, 1998-NMSC-015, ¶ 21, and has not hesitated to exercise its original jurisdiction in mandamus to preserve the legislative role in our constitutional system.

In *State ex rel. Clark*, for example, this Court determined that the Governor, as the representative of the executive branch, lacked the constitutional authority to enter into Tribal Gaming Compacts without legislative approval. Recognizing that the legislative and executive powers are not “hermetically sealed” this Court concluded that they were nonetheless “functionally identifiable one from another.”

120 N.M. at 573, 904 P.2d at 22 (quotation marks and quoted authority omitted). Ultimately, this Court determined that “[t]he Governor may not exercise power that as a matter of state constitutional law infringes on the power properly belonging to the legislature. We have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is an attempt to create new law.” *Id.*

Likewise, in *State ex rel. Sandel*, this Court invalidated a rule adopted by the Public Utilities Commission (now the Public Regulation Commission) which “effectively deregulat[ed] the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the Legislature.” 1999-NMSC-019, ¶ 9. At the time, bills to accomplish that deregulation were pending in the Legislature, but had not passed. *Id.* ¶ 8. There, this Court determined that policymaking by administrative agencies will violate separation of powers principles if it “conflicts with or infringes upon what is the essence of legislative authority—the making of law.” *Id.* ¶ 12 (quoting *State ex rel. Clark*, 12 N.M. at 573, 904 P.2d at 22). “Such an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or create new law on its own.” *Id.* As evidence that the PUC had crossed the line from permissible rulemaking to impermissible legislation, this Court referred to

“sweeping pronouncements” which “make clear that the purpose of the [challenged order] is to carry out broad changes in public policy by replacing regulation under the ‘just and reasonable’ standard with competition in an open marketplace.” *Id.* ¶ 19.

Lastly, in *State ex rel. Taylor*, a case eerily similar to the instant matter, this Court invalidated regulations adopted by the Human Services Department intended to accommodate the state public assistance programs with recent federal changes in public assistance law. Following the federal changes, the Governor had proposed his public assistance reform legislation, but the bill died in committee. 1998-NMSC-015, ¶ 10. After vetoing the public assistance reform legislation that did pass the Legislature, the Governor announced, and HSD adopted, regulations to accomplish the changes that the Governor had previously proposed, but the Legislature did not enact. *Id.* ¶ 12. This Court rejected the claim that the HSD regulations were a proper exercise of the discretion entrusted to the department by the Legislature: “We have no doubt that Respondents’ program implements the type of substantive policy changes reserved to the Legislature. Their changes substantially altered, modified, and extended existing law governing the structure and provisions of public assistance in New Mexico.” *Id.* ¶ 25. This Court reached that conclusion after comparing existing standards with the changes brought by the

regulations, *id.* ¶¶ 27-31, and by looking at past practices of the New Mexico Legislature and Executive. *Id.* ¶ 32.

State ex rel. Sandel and *State ex rel. Taylor* are virtually indistinguishable from PED's attempts to modify existing public policy through regulation, and are outcome-determinative. As in both cases, the administrative agency (PED) attempted to accomplish major policy *changes* through regulation. That the regulations represent a major change in education policy cannot be doubted. Prior to the adoption of the new regulations, teacher evaluations were, as required by the Legislature since the reform package of 2003, focused on the teacher's competencies as measured against "minimum highly objective uniform statewide standards of evaluation." Following the regulations, "Teacher and school leader effectiveness evaluation procedures for licensed school employees shall be based on the performance of students assigned to their classrooms or public schools." 6.69.8.8(E) NMAC. It is difficult, if not impossible, to imagine that student performance will be "uniform statewide." Whether or not these policy changes are good or bad for New Mexico's education system is not the issue. The issue is whether an unelected administrative agency has the authority, in the absence of supporting legislation, to make these changes which "altered, modified, and extended existing law." *State ex rel. Taylor*, 1998-NMSC-015, ¶ 25.

As in *Sandel*, PED expressly indicated though “sweeping pronouncements” that the purpose of the regulation “is to carry out broad changes in public policy.” 1999-NMSC-019, ¶ 19. Indeed, using the same language it used in the waiver Request to describe the *legislation* it intended to introduce, the PED described the purpose of the new regulations: “This rule also seeks to *change the dynamic* of placing emphasis on teacher effectiveness and provide the opportunity to acknowledge excellence, *thereby replacing the binary system* that emphasizes years of experience and credentials.” 6.69.8.6 NMAC (emphasis added).

As in *Taylor*, PED only promulgated the regulations *after* the Legislature would not enact the same proposals through legislation. As PED represented to the federal government in the waiver Request, it knew that this shift in public policy required legislative approval: “In order to improve the evaluation system, PED will propose legislation during the 2012 session to replace the current binary system of evaluation with a five tier system that identifies levels of effectiveness as a measure that determines targeted professional development, employment decisions and licensure status.” That legislation, however, failed to pass. (Indeed, it is noteworthy that even had the second committee substitute bill for HB 249, which passed the House, had also passed the Senate and been signed by the Governor, it would not have allowed PED to issue the regulations directly. Instead, that bill would have required an “Effectiveness Evaluations Council” to

have developed “specific and comprehensive recommendations” on an evaluation system, including recommendations for the regulations ultimately to be adopted by PED.) As HSD attempted in *Taylor*, PED has tried through regulation to make the fundamental policy changes it wished the legislature would have enacted.

CONCLUSION

As previously noted, “The case before us does not concern the merits of [teacher evaluation systems] or conflicts of political ideology. Rather, it concerns only the sanctity of the New Mexico Constitution and the judiciary’s obligation to uphold the principles therein.” *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 1,125 N.M. 343, 961 P.2d 768. Those principles require that the elected Legislature, not an unelected administrative agency, debate and accomplish the major policy changes brought by PED’s new regulations. In order to uphold the proper balance of legislative and executive functions in this State, Petitioners respectfully request that this Court issue a writ of mandamus precluding the PED from further implementing the regulations adopted on August 30, 2012, and currently codified at 6.69.8 NMAC.

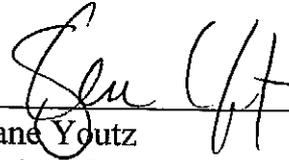
STATEMENT OF COMPLIANCE WITH NMRA 12-504(G)

Pursuant to NMRA 12-504(G), the foregoing Verified Petition for Writ of Mandamus consist of 5,487 words, as counted by the Word Count function of Microsoft Word 2007.

Dated: November 7, 2012

Respectfully submitted,

YOUTZ & VALDEZ, P.C.



Shane Youtz

Stephen Curtice

900 Gold Avenue S.W.

Albuquerque, NM 87102

(505) 244-1200 – Telephone

(505) 244-9700 – Facsimile

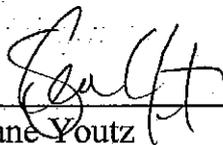
Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of November, 2012, a true and correct copy of the foregoing Verified Petition for Writ of Mandamus was hand-delivered and mailed, via regular US mail, postage pre-paid and affixed thereto, to the following:

Hanna Skandera
Secretary-Designate
Public Education Department
State of New Mexico
300 Don Gaspar Ave.
Santa Fe, NM 87501

Gary King
Attorney General
State of New Mexico
Attorney General's Office
408 Galisteo Street
Santa Fe, NM 87501



Shane Youtz

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

ELLEN BERNSTEIN, being of lawful age and being first duly sworn, upon her oath deposes and states:

That I am the Petitioner in the above styled cause; that I have read the foregoing Petition of Writ of Mandamus, and know and understand the contents thereof; and, that all statements therein are true and correct of my own personal knowledge, except those matters therein stated upon information and belief, and as to those matters, I honestly believe them to be true.



ELLEN BERNSTEIN,
President
ALBUQUERQUE TEACHERS
FEDERATION, AFT LOCAL 1420

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SARA ATTLESON, being of lawful age and being first duly sworn, upon her oath deposes and states:

That I am the Petitioner in the above styled cause; that I have read the foregoing Petition for Writ of Mandamus, and know and understand the contents thereof; and, that all statements therein are true and correct of my own personal knowledge, except those matters therein stated upon information and belief, and as to those matters, I honestly believe them to be true.



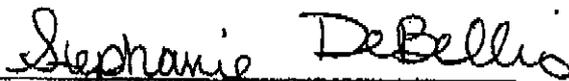
SARA ATTLESON

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

STEPHANIE DeBELLIS, being of lawful age and being first duly sworn,
upon her oath deposes and states:

That I am the Petitioner in the above styled cause; that I have read the
foregoing Petition for Writ of Mandamus, and know and understand the contents
thereof; and, that all statements therein are true and correct of my own personal
knowledge, except those matters therein stated upon information and belief, and as
to those matters, I honestly believe them to be true.


STEPHANIE DeBELLIS

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

ROBIN GIBSON, being of lawful age and being first duly sworn, upon her oath deposes and states:

That I am the Petitioner in the above styled cause; that I have read the foregoing Petition for Writ of Mandamus, and know and understand the contents thereof; and, that all statements therein are true and correct of my own personal knowledge, except those matters therein stated upon information and belief, and as to those matters, I honestly believe them to be true.



ROBIN GIBSON

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

MARY MERCIER, being of lawful age and being first duly sworn, upon her oath deposes and states:

That I am the Petitioner in the above styled cause; that I have read the foregoing Petition for Writ of Mandamus, and know and understand the contents thereof; and, that all statements therein are true and correct of my own personal knowledge, except those matters therein stated upon information and belief, and as to those matters, I honestly believe them to be true.

Mary A. Mercier
MARY MERCIER

