

## [EXT] Public Comments re: Repeal and Replace 6.31.2 NMAC

Jerri Katzerman <[jerri@pegasuslaw.org](mailto:jerri@pegasuslaw.org)>

Fri 5/8/2020 12:05 PM

To:FeedBack, Rule, PED <[Rule.FeedBack@state.nm.us](mailto:Rule.FeedBack@state.nm.us)>;

Cc:Lily Hofstra <[lily@pegasuslaw.org](mailto:lily@pegasuslaw.org)>; Poulin, Debra, PED <[Debra.Poulin@state.nm.us](mailto:Debra.Poulin@state.nm.us)>;

 1 attachment

Pegasus.Comments.Rule Making.5.8.2020.pdf;

Dear Mr. Sena:

On behalf of Pegasus Legal Services for Children, attached please find our comments in opposition to Notice of Proposed Rulemaking to Repeal and Replace 6.31.2 NMAC, Children with Disabilities/Gifted Children.

Thank you for your kind consideration.

Jerri Katzerman, Esq.

Education Director

Pegasus Legal Services for Children

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May 8, 2020

VIA EMAIL ONLY to [rule.feedback@state.nm.us](mailto:rule.feedback@state.nm.us)

John Sena  
Policy Division  
New Mexico Public Education Department  
300 Don Gaspar Avenue, Room 121  
Santa Fe, New Mexico 87501

Re: Notice of Proposed Rulemaking to Repeal and Replace 6.31.2 NMAC,  
Children with Disabilities/Gifted Children

Dear Mr. Sena:

I am an attorney with Pegasus Legal Services for Children. Pegasus is a nonprofit public interest law firm dedicated to improving the life outcomes of New Mexico's most vulnerable children and youth. As part of our core mission, we work to ensure that students with disabilities receive a free appropriate public education as required by state and federal law.

Please consider the following comments in response to the New Mexico Public Education Department's ("the Department") "Notice of Proposed Rulemaking to Repeal and Replace 6.31.2 NMAC, Children with Disabilities/Gifted Children." New Mexico Register/ Volume XXXI, Issue 7/ April 7, 2020. For the reasons set forth below, we maintain that the Department has failed to provide adequate notice of rulemaking in violation of the New Mexico Administrative Procedures Act. We would therefore respectfully request that the current rulemaking process be suspended until such time as the Department provides adequate notice as required by law.

Promulgation of state agency rules must comply with the New Mexico Administrative Procedures Act ("NMAPA)." NMSA 1978, §12-8-1 *et seq.* State agencies must adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available. NMSA 1978 § 12-8-3(A). The statute further demands that an agency "either state the express terms or adequately describe the substance of the proposed action, or adequately state the

subjects and issues involved” as a prerequisite to rulemaking. NMSA. 1978, §12-8-4(A)(2)(b). In this case, the Department’s notice of rulemaking neither expressly states, nor adequately describes, the substance of the proposed action.

The official record of rulemaking consists of three specific documents which are labeled as follows: “Notice of Rulemaking,” “Proposed Strikethrough,” and “Proposed Integrated.” <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rule-notification/>. The “Notice of Rulemaking” contains a brief description of the purpose of the proposed rule which “is to provide public agencies with the requirements for serving students with disabilities, the composition of the individualized education program (IEP) team and providing information on the full continuum of services.”<sup>1</sup> Other than this brief statement of *purpose*, the Notice of Rulemaking does not state or adequately describe the *substance* of the proposed action.

The failure of the “Notice of Rulemaking” is not cured by either of the other two documents put forth -- the “Proposed Strikethrough” and the “Proposed Integrated.” Those documents contain 79 and 41 single-spaced pages, respectively. Nowhere in the combined 120 single-spaced pages, with scores of regulatory paragraphs and subparagraphs, does the Department identify the language slated for revision. Instead, the Department relies on a complete repeal and replace in order to make changes to limited, albeit unidentified, provisions of the existing regulation. However unintentional, the Department has nonetheless buried its proposed revisions in a ream of paper without any signposts for the reviewing public.

Pegasus has attempted both a computerized and a line-by-line comparison of the existing regulation to the proposed rule. While these extreme steps should not be required, they were nonetheless unsuccessful. We cannot say with any confidence that we understand what the Department is proposing. Nor does the preparatory “purpose” articulated in the Notice of Rulemaking provide sufficient guidance to meet the statutory requirement that the Department state or adequately describe the substance of the proposed action.

<sup>1</sup> The notice reads in full: “The purpose of the proposed repeal and replace of 6.31.2 NMAC, Children with Disabilities/Gifted Children is to provide public agencies with the requirements for serving students with disabilities, including composition of the individualized education program (IEP) team and providing information on the full continuum of services. The full continuum of services may include placement and educational services provided at the New Mexico School for the Deaf (NMSD) and the New Mexico School for the Blind and Visually Impaired (NMSBVI) or in conjunction between the public agency and NMSD or NMSBVI. The proposed repeal and replace also includes requirements a public agency, including NMSD and NMSBVI, is obliged to do if a student is deaf, blind, deafblind, or has a hearing or visual impairment.”

Because of the presentation and format of the proposed rule, we have been effectively prevented from commenting on the substance of the revision in violation of state law. We respectfully request that you consider our comments and take all necessary steps to ensure that the Department's proposed rulemaking complies with the directives of the New Mexico Administrative Procedures Act.

Thank you for your kind attention.

Very truly yours,

/s/ Jerri Katzerman  
Jerri Katzerman  
Education Director

/s/ Lily Hofstra  
Lily Hofstra  
Staff Attorney

Cc: Debra D. Poulin

# [EXT] NADLC Comment and Request to Suspend Rulemaking

Alexis Delacruz <adelacruz@natedisabilitylaw.org>

Mon 5/18/2020 1:26 PM

To: FeedBack, Rule, PED <Rule.FeedBack@state.nm.us>;

 1 attachment

2020 05 18 NADLC Request to Suspend Rulemaking re 6.31.2 NMAC.pdf;

To Whom It May Concern:

On behalf of the Native American Disability Law Center, please find the attached letter comment to and request that the PED suspend its current proposed rulemaking to 6.31.2 NMAC.

Thank you for your consideration.

Sincerely,  
Alexis M. DeLaCruz

**Alexis M. DeLaCruz**  
Attorney at Law

Native American Disability Law Center  
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### **Current NADLC Work Related Response to COVID 19**

Starting on March 23, 2020 and until at least May 31, 2020, I will be working from home. During this time while I am working remotely, I will continue to be available by email during regular work hours and will be checking voicemail and mail daily. Our staff will continue to participate in as many client meetings and appointments as possible using phone calls, conference calls and Zoom technology. If meetings are unable to be hosted through technology, we will work to reschedule after social distancing protocols have been lifted. Please contact me ahead of time if you need to make arrangements to deliver documents or speak with me before coming to our office location, as staff will not be available to receive walk-in's at the office.

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Alexis DeLaCruz  
Attorney at Law

May 18, 2020

*Via E-mail to: [rule.feedback@state.nm.us](mailto:rule.feedback@state.nm.us)*

John Sena, Policy Division  
New Mexico Public Education Department  
300 Don Gaspar Avenue, Room 121  
Santa Fe, New Mexico 87501

Re: Request to Suspend Current Rulemaking

Dear Mr. Sena:

I am writing to provide public comment on behalf of the Native American Disability Law Center (Law Center), a private non-profit Protection & Advocacy program that protects and promotes the rights of Native Americans with disabilities including the education civil rights of Native American students with disabilities and their families living in and attending public schools in northwest New Mexico.

The Law Center is concerned about the adequacy of the Notice of Proposed Rulemaking to Repeal and Replace 6.31.2 NMAC, Children with Disabilities/ Gifted Children (Notice)<sup>1</sup> issued by the New Mexico Public Education Department (PED). Based on the documents the PED provided, it is virtually impossible to determine what precisely the PED is proposing.<sup>2</sup> Given these concerns, and for the reasons set forth below, the Law Center respectfully requests the PED suspend its proposed rulemaking until it provides adequate notice that comports with New Mexico state law and allows for meaningful public comment.

*First*, in its Notice, the PED's stated purpose<sup>3</sup> of the proposed repeal and replace is overly broad and vague. For example, while the PED states the purpose relates to the "composition of the individualized education program (IEP) team and providing information on the full continuum of services," there is no more specific

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<sup>1</sup> New Mexico Register/ Volume XXXI, Issue 7/ April 7, 2020.

<sup>2</sup> Along with its Notice, the PED provided two additional documents: "Proposed Strikethrough" and "Proposed Integrated."

<sup>3</sup> The full purpose states: "The purpose of the proposed repeal and replace of 6.31.2 NMAC, Children with Disabilities/Gifted Children is to provide public agencies with the requirements for serving students with disabilities, including composition of the individualized education program (IEP) team and providing information on the full continuum of services. The full continuum of services may include placement and educational services provided at the New Mexico School for the Deaf (NMSD) and the New Mexico School for the Blind and Visually Impaired (NMSBVI) or in conjunction between the public agency and NMSD or NMSBVI. The proposed repeal and replace also includes requirements a public agency, including NMSD and NMSBVI, is obliged to do if a student is deaf, blind, deafblind, or has a hearing or visual impairment."

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*The Protection & Advocacy System for Native Americans with Disabilities.*

information provided that would allow for meaningful public comment. This preparatory language is insufficient to meet the clear directive that the PED state or adequately describe the *substance* of the proposed action.

*Second*, the Proposed Strikethrough is just that, pages and pages of regulatory language that has been completely struck through. Concomitantly, the Proposed Integrated is pages and pages of language that is meant to replace the struck through language; however, there is no redlining, underlining or otherwise easily identifiable means of determining what deleted, amended or new language the PED is proposing. Further, on May 15, 2020<sup>4</sup>, the PED provided an additional document titled “Highlights of the Repeal and Replace of 6.31.2 NMAC, Children with Disabilities/Gifted Children,” that unfortunately does nothing to further illuminate what language specifically is being proposed. Instead, the document states that “there are changes based on technical and grammatical concerns as well as just general clean up.” It further provides bullet points that puts the onus on the reader to search through the Proposed Integrated to find what language was either repealed and replaced, “cleaned up,” or added. Combined, these documents effectively preclude the Law Center, and the public, from commenting on the substance of the revision. It is not clear from the Notice the PED provided what precisely it is proposing. This is not contemplated by New Mexico state law.

As you are aware, promulgation of state agency rules is governed by the New Mexico Administrative Procedures Act (APA). *See* NMSA 1978, § 12-8-1 *et seq.* Accordingly, state agencies, including the PED, are required to “either state the express terms or adequately describe the substance of the proposed action, or adequately state the subjects and issues involved” as a prerequisite to rulemaking. NMSA 1978 § 12-8-4(A)(2)(b). Here, and as described above, the PED’s Notice and combined supporting documents fail to expressly state or adequately describe the *substance* of the proposed action, and therefore, do not comport with the clear mandates of the New Mexico APA.

The PED has failed to provide adequate notice of rulemaking in violation of the New Mexico APA because of the inaccessible format of the proposed rule. We urge the PED to suspend its current rulemaking process until the PED provides adequate notice that complies with the directives of the New Mexico APA.

Thank you for considering this comment and taking the necessary steps to cure the deficiencies in the current Notice.

Sincerely,

/s/ Alexis M. DeLaCruz

Alexis M. DeLaCruz, Staff Attorney  
Native American Disability Law Center

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<sup>4</sup> As of May 18, 2020, the “Highlights” documents was not made publicly available on the PED’s Web site. *See* <http://webnew.ped.state.nm.us/bureaus/policy-innovation-measurement/rule-notification/>.

# [EXT] Comments from DRNM on proposed rule changes

Katie Gordon <kgordon.nm@gmail.com>

Mon 5/18/2020 1:39 PM

To:FeedBack, Rule, PED <Rule.FeedBack@state.nm.us>; Katie Gordon <kgordon@drnm.org>;

 2 attachments

DRNM on proposed changes to 6.31.2 NMAC.pdf; DRNM on proposed changes to 6.30.12 NMAC.pdf;

Dear Mr. Sena,

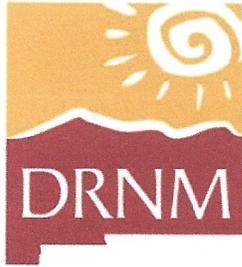
Please find attached to this email comments from Disability Rights New Mexico (DRNM) regarding the proposed changes to the following regulations:

6.31.2 NMAC  
6.30.12 NMAC

Thank you very much for your consideration of our feedback.

Sincerely,

Katie Gordon, M.Div., M.A.  
Advocate  
Disability Rights New Mexico



## DISABILITY RIGHTS NEW MEXICO

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WEBSITE: [www.drn.org](http://www.drn.org) • EMAIL: [info@drnm.org](mailto:info@drnm.org)

Gary Housepian, Chief Executive Officer

*Promoting and Protecting the Rights of Persons with Disabilities*

May 19, 2020

Mr. John Sena  
Policy Division  
New Mexico Public Education Department  
300 Don Gaspar Avenue  
Room 121  
Santa Fe, NM 87501  
*Sent via e-mail as PDF attachment to [Rule.Feedback@state.nm.us](mailto:Rule.Feedback@state.nm.us)*

Re: proposed changes to 6.31.2 NMAC

Dear Mr. Sena,

Disability Rights New Mexico (DRNM) is the designated protection and advocacy agency in New Mexico whose purpose is to promote, protect, and expand the rights of individuals with disabilities. As part of that mission, DRNM advocates on behalf of students with disabilities across the state. In fulfilling that objective, DRNM is submitting the written comments below regarding the proposed changes to 6.31.2 NMAC.

DRNM appreciates several changes that are proposed for the revision of rules in 6.31.2 NMAC. First, we are glad to see the added definition of an "IEP Team" which provides clarification about the roles and responsibilities that each team member bears (proposed 6.31.2.7(B)(11) NMAC). This is particularly helpful for parents and students who may not feel as though their opinions hold equal weight to those of their fellow IEP Team members. The language also illuminates the fact that parents may bring to IEP meetings others with "knowledge or special expertise", which may include advocates or outside service providers.

Secondly, DRNM is pleased to see the new timelines that require detention or correctional facilities to attempt to retrieve records from a student's former LEA within

two business days (proposed 6.31.2.11(M)). The addition of this timeline signals the commitment of NMPED to ensure that students in these facilities receive appropriate special education services.

### **Areas of Concern to DRNM in the Proposed Changes to 6.31.2 NMAC**

DRNM finds that there are several areas of the proposed regulations that may have profoundly detrimental impacts on students with disabilities. These areas include:

1. Initial evaluations.
2. Admission requirements to the New Mexico School for the Deaf.
3. Admission requirements to the New Mexico School for the Blind and Visually Impaired.

We will review these issues in detail below.

#### **Initial Evaluations**

In regard to initial evaluations, the proposed regulations state that “A parent may request an initial special education evaluation at any time during the public agency’s implementation of layers 1 and 2 of the three-layer model of student intervention” (proposed 6.31.2.10(C)(1)(d)). Although this may be true, this statement implies that a parent may *only* request an initial evaluation if the student is already participating in the three-layer (formerly RTI or SAT) process. This is inaccurate. According to 34 CFR 300.301, there is *no* requirement that the student must be under the observation of the three-layer team in order for the public agency to process a parent’s request for a special education evaluation.

The federal regulation reads: “Either the parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability...the initial evaluation must be conducted within 60 days of receiving parent consent for the evaluation” (34 CFR 300.301(b)-(c)(1)(i)). There is simply no language in the federal regulations that require for the student to have already participated in SAT, RTI, or the three-layer process.

The proposed language to 6.31.2.10(C)(1)(d) NMAC must clarify this point by removing the words “during the public agency’s implementation of layers 1 and 2 of the three-layer model of student intervention.”

This same problematic language appears again in the proposed 6.31.2.10(D)(1)(c)(iv): “A parent may request an initial special education evaluation at any time during the SAT process.” Again, in accordance with 34 CFR 300.301, there is *no* requirement that the student must be participating in the SAT process in order for the

public agency to process the parent's request for a special education evaluation. In order to make this point clear, the sentence should be changed to: "A parent may request an initial special education evaluation at any time."

#### Admission Requirements for the New Mexico School for the Deaf (NMSD)

It is encouraging that the NMPED recognizes the importance of including the NMSD on the spectrum of placement options available to students across the state. However, the proposed regulations seem to imply that students who have co-occurring disabilities in the areas of "emotional, behavioral, or cognitive disability" will immediately be barred from admission to NMSD (proposed 6.31.2.11(K)) with the statement that "the school serves students who require specialized or intensive educational service related to hearing impairments....the school is not intended to serve...students whose primary ongoing needs are related to a severe or profound emotional, behavioral, or cognitive disability."

DRNM asserts that if an IEP Team finds that the NMSD is the least restrictive environment and most appropriate placement option for a student, the presence of an emotional, behavioral, or cognitive disability should *not* preclude the student from attending NMSD. Rather, NMSD should recognize its obligation to provide *individualized* services to all students who qualify for NMSD on the basis of their hearing-related disability, rather than acting as a gatekeeper against students who may require services beyond those related to deafness or hearing impairment.

Moreover, it is simply unconscionable that NMSD would bar access to its services and unique deaf culture because a child may have intellectual disability marked by a "cognitive impairment," as stated in the proposed language.

DRNM strongly urges NMPED to remove these illegal admission requirements found in the proposed 6.31.2.11(K) and to recognize the obligation that NMSD has to provide unique, individualized instruction to every student who qualifies on the basis of his or her deafness or hearing impairment.

#### Admission Requirements for the New Mexico School for the Blind and Visually Impaired

Again, it is encouraging that the NMPED recognizes the significance of formally offering the NM School for the Blind and Visually Impaired (NMSBVI) as a placement option for students across the state. However, DRNM is again concerned with the prohibitive admission requirements placed into the proposed regulations found at 6.31.2.11(L).

The proposed regulations state that NMSBVI is "not intended to serve students whose primary needs are related to a severe or profound emotional or behavioral

disability.” (Proposed 6.31.2.11(L)(1).) DRNM finds this description problematic because it fails to recognize the obligation of NMSBVI to provide individualized services to each student in need. As the only school in the state that provides onsite, residential services to students who are blind or visually-impaired, NMSBVI must make its services available to all students who meet the threshold requirements based upon their visual needs. Again, the proposed language appears to set a standard stating that students with emotional or behavioral disorders are unwelcome at NMSBVI, and that the school may refuse to serve them, even if the child’s sending IEP Team deems NMSBVI to be the most appropriate placement.

**If NMSBVI and NMSB are to be included in the full spectrum of educational placements available to students across the state, then these two schools must also meet their obligation to provide individualized instruction to students regardless of co-existing disabilities such as emotional, behavioral, or cognitive disorders. DRNM strongly urges the NMPED to remove these restrictive admission criteria.**

DRNM appreciates the opportunity to provide feedback on these proposed changes to 6.31.2 NMAC. Thank you for your consideration of our comments.

Sincerely,



Katie Gordon, M.Div., M.A.  
Advocate