[EXT] RM Comments

Jerri Katzerman <jerri@pegasuslaw.org>

Wed 7/8/2020 12:45 PM

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

1 attachment

Pegasus.Comments on RM.07.08.2020.pdf;

Dear Mr. Sena:

On behalf of Pegasus Legal Services for Children, attached please find our comments in support of Proposed Rulemaking 6.11.2 NMAC, Rights and Responsibilities.

Thank you for your kind consideration.

Jerri Katzerman, Esq.

Pegasus Legal Services for Children

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[EXT] 6.11.2 NMAC Rulemaking Comments

Heather Hoechst <hhoechst@natividisabilitylaw.org>

Thu 7/9/2020 5:59 PM

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

1 attachment

2020 07 10 NMAC 6.11.2 Public Comment Native American Disability Law Center.pdf;

Dear Mr. Sena,

On behalf of the Native American Disability Law Center, please see the attached comments and request to suspend rulemaking re: 6.11.2. We appreciate the opportunity to provide feedback on this important regulation.

Thank you,

Heather Hoechst
Staff Attorney
Native American Disability Law Center, Inc.
905 W. Apache St.
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505-566-5880/800-862-7271 (office)
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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 email daily. I will continue to participate in as many client meetings and appointments as possible using phone calls or virtual conferencing. 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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Heather Hoechst
Attorney at Law

July 10, 2020

Mr. John Sena
Policy Division
New Mexico Public Education Department
300 Don Gaspar Ave.
Room 121
Santa Fe, NM 87501

SUBMITTED VIA EMAIL AS PDF ATTACHMENT TO: *Rule.Feedback@state.nm.us*

RE: Request to Suspend Proposed Rulemaking 6.11.2 NMAC

Dear Mr. Sena:

This letter is submitted on behalf of the Native American Disability Law Center (Law Center), a non-profit organization serving Native Americans with disabilities in northwest New Mexico. The Law Center is a part of the federal Protection & Advocacy system developed to ensure the rights of peoples with disabilities are recognized and protected. A significant portion of the Law Center's work involves advocacy for Native American students with disabilities in New Mexico public schools. Additionally, the Law Center receives a grant from the Access to Justice Commission to address the needs of Native American students with disabilities in the juvenile justice system and facing exclusionary discipline in schools. In this role, the Law Center submits the following comments regarding the proposed ammendment to Title 6, Chapter 11, Part 2 (Rights and Responsibilities of Public Schools and Public School Students) of the New Mexico Administrative Code (NMAC) and requests the New Mexico Public Education Department suspend rulemaking to take into consideration the following:

Notice of Rulemaking
As a preliminary matter, the Law Center has concerns with the adequacy of the Notice of Proposed Rulemaking to Repeal and Replace 6.11.2 NMAC, Rights and Responsibilities of Public Schools and Public School Students (Notice) issued by the New Mexico Public Education Department (NMPED). The stated purpose of the amendments is:

> "to provide a comprehensive framework within which school districts, local school boards, locally chartered charter schools, state-chartered charter schools, and governing bodies of charter schools [can] may carry out their educational mission and exercise their authority and responsibility to provide a safe environment for student learning and [further to] provide students and parents with an understanding of the basic rights and requirements necessary to effectively function in the educational community."

This stated purpose may properly describe the existing regulation at 6.11.2 NMAC, but does not inform the public as to the purpose of the amendments. Further, the Proposed Strikethrough is actually a strikethrough of the entirety of 6.11.2 NMAC, despite the fact that some of the sections remain intact in the proposed amendments. Because NMPED chose to engage in an entire repeal and replace rather than to plainly illuminate what was actually removed and replaced, it is difficult to ascertain precisely what NMPED is proposing in its amendments.

Promulgation of agency rules is governed by the New Mexico Administrative Procedures Act (APA). *See* NMSA 1978 § 12-8-1 *et seq.* State agencies, including the NMPED, 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). In the instant case, the NMPED's Notice and Proposed Strikethrough and Proposed Integrated documents fail to adequately describe the substance of the proposed action. As such, the Law Center urges NMPED to suspend rulemaking until it provides adequate notice that complies with the New Mexico APA such that the public can provide informed comments on the proposed amendments.

Discipline for Students with Disabilities

The Law Center appreciates NMPED's efforts to clarify the proper procedure, as required by the Individuals with Disabilities in Education Act (IDEA), in disciplining a student with a disability. Specifically, the amended rule clarifies the requirement that a manifestation determination review (MDR) take place prior to any disciplinary action that constitutes a change in placement under IDEA. This is an important clarification that will ensure uniformity in school district policy and clear guidance to parents and guardians of students with disabilities. However, the Law Center suggests the following changes to the proposed amendments to further reduce confusion:

> **Current proposed language**: 6.11.2.11(C). Determination that behavior is manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine the conduct was a manifestation of the child's disability, the IEP team must take immediate steps to comply with 34 CFR Sec. 530(f) and remedy any deficiencies.
>
> **Law Center proposed language**: 6.11.2.11(C). Determination that behavior is *a* manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine that the condition in Subparagraph (a) of Paragraph (2) of Subsection B of 6.11.2.11 NMAC is met, the IEP team must take immediate steps to comply with 34 CFR Sec. 300.530(b). If the administrative authority, the parent, and relevant members of the IEP team determine that the condition in Subparagraph (b) of Paragraph (2) of Subsection B of 6.11.2.11 NMAC is met, immediate action must be taken to remedy those deficiencies.
>
> **Current proposed langauge**: 6.11.2.11(F). Determination of setting. The student's IEP team determines the interim alternative educational setting for services under Subsection C and D of this section.
>
> **Law Center proposed language**: 6.11.2.11(F). Determination of setting. The student's IEP team determines the interim alternative education setting for service under Subsection D and E of this section.

Section 504 and Student Discipline

In the course of our advocacy, the Law Center has encountered various interpretations across school districts concerning discipline of students who are protected by Section 504 of the Rehabilitation Act, but not identified as a student with a disability for the purposes of IDEA. Section 504 states in relevant part, "no otherwise qualified individual with a disability…shall, solely by reason of his or her disability, be excluded from the participation in,

be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…" (29 U.S.C. § 794(a)). Because Section 504 defines disability more broadly than the IDEA, some students may be eligible for its protections even if they are not eligible for special education services under the limited eligibility categories laid out in the IDEA.[1] While the statute and its implementing regulations do not provide the detailed guidance provided in the IDEA, the regulations discuss school discipline in the context of changing a student's placement. Specifically, a school must conduct evaluations of a student protected under Section 504 whenever the school is considering a significant change of placement (34 C.F.R. § 104.35). While not defined in the statute, the U.S. Department of Education Office of Civil Rights (OCR) suggests that a "significant change of placement" includes suspensions of 10 consecutive days or more, or a pattern of shorter removals that total more than 10 days (Office of Civil Rights, 2018). OCR further interprets the regulations to require an MDR for students protected by Section 504 prior to imposition of long-term suspension or expulsion. Thus, all students with disabilities as defined by federal law should receive additional protections before being subjected to long-term exclusionary discipline.

The Law Center urges the NMPED to add language to 6.11.2.11 NMAC to ensure the rights of students with disabilities are protected under Section 504. Specifically, NMPED should add a section to 6.11.2.11 NMAC defining the steps a school must take to comply with Section 504 and 34 C.F.R. § 104.35.

Mitigating Harmful Effects of Exclusionary Discipline

The Law Center urges NMPED to recognize and take action to mitigate the harmful effects of exclusionary discipline on all students, particularly Native American students with disabilities. While 6.11.2 NMAC purports to ensure that the due process rights of students are protected prior to being subjected to long term suspension or expulsion, the current proposed rulemaking presents an opportunity to encourage school districts to use alternatives to exclusionary discipline, such as positive behavioral interventions and supports, culturally appropriate conflict resolution techniques, and trauma-informed practices.

Despite additional protections guaranteed by federal and state law, students with disabilities are disproportionately subjected to exclusionary discipline as compared to their non-disabled peers.[2] Evidence, practical experience, and scholarly research concludes that removal of children from the classroom does not improve their academics nor their behavior. Alternatives to removal models like Positive Behavior Interventions and Supports (PBIS) demonstrate that the consistent application of these and similar principles results in improved behavior for students across the school setting, both with and without disabilities, without removing them from the classroom.[3]

NMPED should include regulatory language in these promulgated rules encouraging school districts to utilize alternatives to exclusionary discipline whenever possible with long-term suspension and expulsion being implemented only in the most serious of infractions threatening the immediate safety of a student or others.

Indian Education Act

In recognition of the unique needs facing Native American students in New Mexico, the state legislature enacted the Indian Education Act (IEA) with the purpose of, *inter alia*, ensuring "equitable and culturally relevant learning environments, educational opportunities and culturally relevant instructional materials for American Indian students enrolled in public schools" and to "provide for the study, development and implementation of educational systems that positively affect the educational success of American Indian students." S*ee* NMAC 1978 §§ 22-23A-

[1] To qualify under Section 504, a student must have a physical or mental impairment that substantially limits one or more major life activities; or have a record of such impairment; or be regarded as having such an impairment (42 U.S.C. §12102).

[2] *See* https://www2.ed.gov/about/offices/list/ocr/docs/school-climate-and-safety.pdf.

[3] *See* pbis.org.

2(A) and (C). To further the goals of the IEA, NMPED should include culturally relevant and appropriate behavior interventions into 6.11.2 NMAC.

Across the country, American Indian and Alaska Native students are more likely to be suspended than any other racial group, with the exception of African American students. According to a 2015 report by the University of California at Los Angeles's Center for Civil Rights Remedies, Native American students are disciplined at roughly two times the rate of their white peers."[4] These statistics highlight the need to promulgate regulations that mitigate the disproportionate impact of exclusionary discipline on Native American students and students with disabilities. Because students who experience exclusionary discipline are more likely to drop out of school and have future involvement with the criminal justice system, the disparate impact of discipline on students of color and students with disabilities is long lasting.[5] (Fabelo et al., 2011). These outcomes are contrary to the stated purpose of the IEA.

The Law Center recommends that NMPED delay rulemaking to consult with New Mexico's Native American communities on culturally appropriate school discipline, such as restorative justice and trauma-informed practices. Upon consultation, section 6.11.2 NMAC should be amended to provide guidance to school districts on including these practices prior or as an alternative to long term suspension and expulsion.

Conclusion

The Law Center appreciates NMPED's attempts to clarify and bolster student rights in the school discipline process. However, we urge NMPED to take advantage of this opportunity to ensure ALL students with disabilities, including those protected by Section 504 of the Rehabilitation Act, are provided with the procedural protections and safeguards to which they are entitled under the law. Further, today's climate is ripe for a shift away from punitive exclusionary discipline practices and to incorporate positive behavioral interventions and supports, as well as culturally relevant practices into state regulations. To this end, the Law Center requests NMPED suspend rulemaking to provide an opportunity for these critical changes to be incorporated for the benefit of our most vulnerable students.

Sincerely,

Heather Hoechst
Attorney at Law
Native American Disability Law Center

[4] *See* https://www.civilrightsproject.ucla.edu/resources/projects/center-for-civil-rights-remedies/school-to-prison-folder/state-reports/disturbing-inequities-exploring-the-relationship-between-racial-disparities-in-special-education-identification-and-discipline/losen-et-al-disturbing-inequities-2014.pdf.

[5] Fabelo, T., Thompson, M., Plotkin, M., Carmichael, D., Marchbanks, M., & Booth, E. (2011). *Breaking schools' rules: A statewide study of how school discipline relates to students' success and juvenile justice involvement*. Retrieved from The Council of State Governments Justice Center website: https://csgjusticecenter.org/wpcontent/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf.

[EXT] Public Comment on proposed changes to New Mexico regulations §6.11.2.10(E) NMAC

Elise Ipock <eliseipock@gmail.com>

Thu 7/9/2020 8:33 PM

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

7/9/2020

John Sena
Policy Division, New Mexico Public Education Department
rule.feedback@state.nm.us

I am writing in support of the proposed regulations (6.11.2.10(E) NMAC) which expands the rules stating when restraint or seclusion can be utilized, the less restrictive measures that must be implemented before restraint or seclusion can be considered, and the requirements of documenting, reporting to parents and the NMPED, and analyzing incidents of school staff using restraint or seclusion on students.

These regulations not only increase accountability in regards to public schools using restraint and seclusion, they also increase the ability of staff, parents, and counselors to discover and solve the problems that have resulted in using restrictive measures. Without information about the precursors (including the people, locations, and activities that preceded an incident) and what less restrictive methods were used before restraint or seclusion were implemented, schools will not be able to sufficiently analyze why the incidents occurred and how to avoid them in the future. There should also be an oversight mechanism at the state level which monitors schools to make sure restraint and seclusion are being accurately reported; if they are not, a corrective action plan must be implemented.

Let us be clear, I am against any use of physical restraint and seclusion because it is dangerous and unnecessary. Countless children have been needlessly killed, injured, or at the very least left traumatized by the use of physical restraint and seclusion. I am an active participant in OPEN (Organizing Parents Education Network) and know many parents and professionals who oppose these restrictive measures.

Until state law is changed to ban restraint and seclusion, I am in favor of these proposed regulations (6.11.2.10(E) NMAC) that require school districts to report the number of times restraint and seclusion is being used, who is being impacted, and the NMPED and schools to analyze the data. This data should be used to reduce and eventually eliminate the use of restraint and seclusion in our public schools.

Sincerely,

Elise L. Ipock, M.S.

[EXT] PUBLIC COMMENT PED

Gabrielle Heisey <gabby1730@gmail.com>

Fri 7/10/2020 10:14 AM

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

HI there,

I would like to submit a public comment. see below

In the many years my children have been going to public schools in Bernalillo County, my son who has Autism Spectrum Disorder and Dyslexia has been subject to no less than hundreds of restraints and seclusion. The use of this practice is dangerous and has left a long lasting impact on my son and our family. My son has issues with trusting adults due to the over use of restraint.

At no point should an adult put hands on a child unless that child is in imminent danger of running in traffic. Instead of restraining and secluding a child, schools can focus on using positive behaviour reinforcement as well as prevention of the non-conforming behaviour of the child.

Given our current situation which we are all living through the COVID-19 Pandemic restraint and seclusion on any child would only further have the drastic potential for staff and students to be unnecessarily exposed to the Coronavirus-19. Since there is no current effective treatment, I would ask that all restraint and seclusion cease. If a restraint or seclusion were to happen I would ask that all instances would be heavily documented. When every restraint or seclusion happens there needs to invoke an action plan since these instances are traumatic for the child, please include a school task force team which includes a social worker and a psychologist to professionally address the short and long term needs individual children may need.

for any further questions please feel free to contact me via email.

thank you,

Gabrielle Heisey

[EXT] Comments 6.11.2 NMAC

Jesse Clifton <jclifton@drnm.org>

Fri 7/10/2020 3:52 PM

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

Cc:Don Priola <dpriola@drnm.org>; Jason Gordon <jgordon@drnm.org>; Laurel Nesbitt <lnesbitt@drnm.org>; Joan Curtiss <jcurtiss@drnm.org>; Katie Gordon <kgordon@drnm.org>;

1 attachment

DRNM Comments 6.11.2 Final_7.10.2020.pdf;

Please see the attached pdf document with Disability Rights New Mexico's comments for proposed 6.11.2 NMAC. Please contact our office if you have any questions or concerns.

Best,

Jesse D. Clifton
Attorney and Corinne Wolfe Fellow for Transformative Advocacy
Disability Rights New Mexico
3916 Juan Tabo Blvd. NE
Albuquerque NM 87111
(505) 256-3100

July 10, 2020

Mr. John Sena
Policy Division
New Mexico Public Education Department
300 Don Gaspar Ave.
Room 121
Santa Fe, NM 87501

SUBMITTED VIA EMAIL AS PDF ATTACHMENT TO: *Rule.Feedback@state.nm.us*

RE: Proposed Rulemaking 6.11.2 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 regulations to repeal and replace 6.11.2 NMAC by the New Mexico Public Education Department ("NMPED" or "the Department").

Notice and Purpose

There are only a few significant proposed revisions to 6.11.2 NMAC, the most substantive changes being made in reference to restraint and seclusion under 6.11.2.10 NMAC. Despite the vast majority of the current regulation remaining exactly the same, NMPED determined a complete repeal and replacement was necessary for 6.11.2 NMAC.

DRNM echoes concerns about inadequate and imprecise notice which other organizations have already brought to the attention of the Department. Notice and Comment periods are intended to allow citizens a meaningful opportunity to voice their opinions and perspectives on the

government's proposed course of action (i.e. regulatory change). DRNM staff have spent extensive time combing through the proposed regulation replacement, in an effort to locate the specific language that is to be revised, deleted, or replaced.

If DRNM's trained attorneys and advocates find it unwieldy to navigate NMPED's suggested regulatory revisions, consider the difficulty and impracticability this poses for individuals in the community, many of whom have a strong interest in the changes that impact (for example) enforcement of disciplinary measures and the use of restraint or seclusion.

NMPED circumvents its obligations to the community by summarily repealing 14 pages of regulations- nearly all of which is reincorporated verbatim in its proposed replacement regulations. DRNM urges the Department to change this practice in proposed rulemaking going forward, to ensure meaningful opportunity for public comment.

NMAC 6.11.2.7: Definitions

DRNM is glad to see multiple revisions in this section of the proposed version of 6.11.2 NMAC. DRNM appreciates that NMPED has specifically included charter schools in this regulation's stated objective and also in the definition of "administrative authorities." Our agency also applauds the addition of the term "child with a disability" (or "student with a disability") in the definitions section of the proposed replacement regulations.

DRNM is very pleased that the Department has deleted the term "gang-related activity" from the proposed replacement regulations. Formerly, "gang-related activity" was defined simply as "disruptive conduct." The application and use of this term has negatively impacted students across the state because it allowed school disciplinary action to be assigned to students in an arbitrary and unfair manner. It was a subjective standard as to what activities *seemed* like gang-related activities to school staff. NMPED's decision to delete the term from the regulation serves New Mexico's students, many of whom already face increased scrutiny, bias, and discrimination because of the color of their skin.

However, NMPED has not gone far enough. While the term "gang-related activity" has been appropriately removed from these proposed regulations, the term "disruptive conduct" remains unrevised. "Disruptive conduct" is defined as:

> *[W]illful conduct which: (1) materially and in fact disrupts or interferes with the operation of the public schools or the orderly conduct of any public school activity, including individual classes; or (2) leads an administrative authority reasonably to forecast that much disruption or interference is likely to occur unless preemptive action is taken.*

DRNM asserts that NMPED should limit this definition. As it is currently written, nearly any typical student behavior could be considered "disruptive conduct." In fact, this overly-broad application of the term is what made including "gang-related activity" as a prohibited activity under the repealed 6.11.2.9(A) NMAC so inappropriate. NMPED should delete the portion of the definition which reads "including individual classes." School rules and local policies can approve student code of conduct requirements which allow for appropriate student discipline for disruptive conduct, including assignment of detention. Even with a more restrictive definition of

"disruptive conduct," the objectives of school and student safety can still be met. However, by leaving such vague and overly-broad language in the regulations, the Department is maintaining a "catch-all" classification for student discipline where students are subjected to exclusionary discipline for engaging in any behavior that is perceived as "disruptive conduct." This perpetuates a system that we know results in unjust outcomes for students with disabilities and students of color who are already under increased observation and scrutiny by school staff, either implicitly or explicitly.[1] Naturally, these students are cited more frequently for "disruptive conduct" than their neuro-typically developed, white peers.

NMPED needs to include a definition for "threat" or "threatening to commit...violence." *(See 6.11.2.9 NMAC)*. When the Department eliminated "gang-related activity" in 6.11.2.9 NMAC, it replaced it with a different prohibited activity: "committing, threatening to commit, or inciting others to commit or threaten to commit any act of violence, directly or indirectly, in person or through electronic means, against a public school, student, or school personnel or official." DRNM has significant concerns about how schools have interpreted "threaten to commit violence," which are shared in more detail in our comments under 6.11.2.9 NMAC.

DRNM also asserts that NMPED needs to include a definition for "imminent danger of serious physical harm" because this is the standard for when restraint or seclusion are permissible emergency safety interventions. DRNM suggests examples of potential definitions. In June 2020, the Illinois State Board of Education supplied the following as their definition in non-regulatory guidance on the use of restraint, time out, and isolated time out:[2]

> *Imminent Danger*: A situation when the life or health of the child or another person is knowingly or blatantly disregarded through a real, significant, or impending risk of harm permitting the life or health of the child or others to be threatened. Imminent danger also refers to causing or permitting a child or others to be placed in circumstances that endanger the child's or others' health or safety.
>
> *Serious Physical Harm*: Physical pain or injury which causes permanent or temporary impairment to a bodily function or member.

Although Illinois distinguishes the "serious physical harm" standard from the Individuals with Disabilities Education Act's (IDEA) "serious bodily injury" standard for purposes of placement of students with disabilities in interim alternative educational settings, the Maryland State Department of Education regards the terms as synonymous, according to July 2019 guidance:[3]

[1] U.S. Commission on Civil Rights, Beyond Suspensions: Examining School Discipline Policies and Connections to the School-to-Prison-Pipeline for Students of Color with Disabilities. July 2019, 5, 7; citing Sarah E. Redfield and Jason P. Nance, School-to-Prison Pipeline, American Bar Association, Joint Task Force on Reversing the School-to-Prison Pipeline, 2016, 7, https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1765&context=facultypub.
[2] Illinois State Board of Education, Special Education Department, Permanent Regulations for the Use of Time Out, Isolated Time Out, and Physical Restraint: Guidance and Frequently Asked Questions (June 2020), available at: https://www.isbe.net/Documents/Guidance-FAQs-Time-out-Restraint.pdf.
[3] Maryland State Department of Education, Division of Student Support Academic Enrichment, and Education Policy, "Student Behavior Interventions: Restraint and Seclusion" (July 22, 2019), available at: http://marylandpublicschools.org/about/Documents/DSFSS/SSSP/TA/GuidanceStudentBehaviorInterventionsRestraintSeclusion.pdf.

Imminent, serious physical harm refers to bodily injury involving:

1. A substantial risk of death;
2. Extreme physical pain;
3. Protracted and obvious disfigurement; or
4. Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

NMAC 6.11.2.9: Rules of Conduct for New Mexico Public Schools

As previously mentioned, DRNM approves of the deletion of "gang related activity" in the proposed regulations, both as a definition for the regulation and its designation as a "prohibited activity" under 6.11.2.9. However, NMPED has replaced "gang-related activity" with a different prohibited activity described as "committing, threatening to commit, or inciting others to commit or threaten to commit any act of violence, directly or indirectly, in person or through electronic means, against a public school, student, or school personnel or official."

NMPED should remove this definition from these regulations. First, this definition is too vague to impart any real understanding to parents and students of their rights and responsibilities. Second, this definition is already served under the overly-broad definition of "disruptive conduct."[4]

The deletion of "gang-related activity" was necessary because the overly-broad definition of that term led to abuses in its application. Likewise, the overly-broad description of what constitutes a threat of violence poses concerns for future abuses as well. DRNM has seen "threats of violence" claims against young students with disabilities attending elementary school. In many of those situations, "indirect threats" are derived from things like student drawings, doodles, and artwork. One grade schooler's picture, drawn in crayon, included a green dinosaur being shot. The student was accused of threatening violence against a staff member. Another "indirect threat" our office has encountered multiple times has been students guilty of using finger-guns at each other. Students who play videogames have been disciplined and issued formal threat assessments by their school for talking about the type of grenade their character used.

In practice, there is not enough consideration given to whether the student (1) intended to convey a threat or (2) is factually capable of carrying it out. When formal threat assessments are conducted, they are typically extremely subjective to the perceptions of the person conducting the "assessment."

DRNM does not condone student threats against the safety of another. However, it is a fact that schools often over-exert and misuse their discretion in determining what constitutes an "indirect threat of violence". This impacts students with disabilities disproportionately because there remains a readiness within the school systems in New Mexico to assume the worst from students who have disabilities that are unfamiliar or uncomfortable to staff. NMPED should not incorporate this new prohibited and overly broad activity into the final publication of 6.11.2 NMAC.

[4] See comments for "disruptive conduct" under 6.11.2.7 Definitions section

NMAC 6.11.2.10: Enforcing Rules of Conduct

Section 6.11.2.10(D)(2): Selection of Disciplinary Sanctions, Nondiscriminatory Enforcement

No changes are proposed to this section, which provides protections from discriminatory enforcement of school rules or imposition of disciplinary punishments on the basis of race, religion, color, national origin, sex, ancestry or disability. The first five of these categories are identical to those protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2.

On June 15th of this year, the United States Supreme Court in *Bostock v. Clayton Cty., Georgia*, clarified that Title VII's protections based on "sex" extend to the categories of "homosexuality" and "transgender status," on the premise that discrimination on those two bases "necessarily entails discrimination based on sex." 140 S.Ct. 1731, 1746-47 (2020).

In light of the *Bostock* decision, NMPED should revise 6.11.2.10(D)(2) to include specific language protecting students from discriminatory discipline on the bases of sexual orientation and transgender status. Such a revision could read:

> ***Nondiscriminatory enforcement. Local school boards and administrative authorities shall not enforce school rules or impose disciplinary punishments in a manner which discriminates against any student on the basis of race, religion, color, national origin, ancestry, sex (including sexual orientation and transgender status), or disability, except to the extent otherwise permitted or required by law or regulation. This statement shall not be construed as requiring identical treatment of students for violation of the same rule; it shall be read as prohibiting differential treatment which is based on race, religion, color, national origin, ancestry, sex (including sexual orientation and transgender status), or disability rather than on other differences in individual cases or students***

Section 6.11.2.10(E): Restraint or Seclusion

A large majority of the proposed changes to the current 6.11.2 NMAC regulations are regarding Section E of 6.11.2.10 NMAC, which discusses the use of restraint or seclusion on students. The use of restraint and seclusion as behavior management tools in school settings has increasingly come under scrutiny and criticism, both nationally and locally. For example, in October 2019, *Searchlight New Mexico* published a piece of investigative journalism on this issue focused on the widespread use of restraint and seclusion by New Mexico's largest school district, Albuquerque Public Schools (APS).[5]

[5] Ed Williams, "Restraint, Seclusion, Deception," Searchlight New Mexico (Oct. 8, 2019), available at, https://searchlightnm.org/restraint-seclusion-deception/.

Although APS had at least 4,600 *documented* instances of restraint since 2014, the district's documentation was not an accurate reflection of the number of restraints used on students. The investigative journalist, Ed Williams, conducted a 10-month-long investigation where he reviewed thousands of pages of educational and legal records, U.S. Department of Education data, and conducted interviews with parents, teachers, and educational assistants. The article serves to illustrate the failure of districts to fully and adequately report incidents of the use of restraint on a student.

The article also attempts to convey the trauma and injury experienced by both students and teachers as a result of restraint and seclusion incidents. It discussed futility and frustration felt by teachers and educational assistants who lack the support and the training needed to avoid the use of these practices except in the most severe and necessary of circumstances. Some students were subjected to near daily restraints. One such student had been physically restrained 150 times in less than four years. According to school records, 13 of those physical restraints took place in a single school day.

In 2017, New Mexico joined 29 other states in passing statutory limitations on the use of restraint and seclusion.[6] New Mexico's statute (Section 22-5-4.12(A)(1)-(2) NMSA (2017)) permits use of restraint or seclusion techniques *only* where:

> (1) the student's behavior presents an imminent danger of serious physical harm to the student or others; and
> (2) less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm.

The statute further provides that any use of restraint or seclusion must involve "continuous visual observation and monitoring" (*Id.* at §22-5-4.12(B)(1)), must end when the imminent danger is no longer present (*Id.* at §22-5-4.12(B)(2), must be done only by school employees properly trained unless time does not allow (*Id.* at §22-5-4.12(B)(3)), must not impede the ability to breathe or speak (*Id.* at §22-5-4.12(B)(4), and must not "be out of proportion to the student's age or physical condition" (*Id.* at §22-5-4.12(B)(5)).

NMPED's proposed revisions to Section 6.11.2.10(E) NMAC are steps in the right direction. Specifically, DRNM appreciates NMPED's incorporation of statutory language and a closer alignment to the narrow and restrictive standard for permissible use of restraint or seclusion. NMPED has made clear efforts to develop needed detail in training and documentation and has added new regulatory requirements for review procedures and reintegration of students into the educational setting after the use of restraint or seclusion.

Despite these efforts, the proposed rule loses focus on the need to limit use of restraint or seclusion to rare cases involving "imminent danger of serious physical harm." The proposed language deviates from this essential principle—that restraint and seclusion techniques are emergency safety interventions of last resort that should be avoided. As discussed more thoroughly below, this is particularly true where the rule addresses training, reporting, and

[6] *Ibid*.

review requirements. On this last point, the proposed review procedures in both statute and the proposed regulations create an unacceptable risk of repeated incidence of restraint or seclusion.

DRNM suggests revisions in NMPED's proposed regulations that further align with the essential principle that restraint or seclusion are interventions of last resort, to be used only under the narrow and restrictive standard articulated in NMSA 1979 Section 22-5-4.12(A)(1)-(2).

I. Threshold Issues, Restraint or Seclusion

A. Seclusion and restraint techniques are not forms of discipline, and they should not be included in 6.11.2.10 NMAC, "Enforcing Rules of Conduct."

In 2018, DRNM submitted comments to NMPED regarding the promulgation of regulations under 6.11.2 NMAC. Our agency stated then what it is repeating to NMPED now: it is inappropriate for NMPED to incorporate these regulations on the use of restraint or seclusion under a section titled "Enforcing Rules of Conduct." It conflates concepts of student discipline and the use of restraint or seclusion, and this perpetuates the continued misuse of these narrow and restrictive emergency intervention techniques. NMPED needs to find a more appropriate place for these regulations because restraint or seclusion are not acceptable methods to enforce student conduct. By definition, they are not disciplinary interventions but emergency safety interventions employed only in situations involving imminent danger of serious physical harm. DRNM asserts that the Section 6.11.2.10(E) (Restraint or seclusion) be removed from 6.11.2.10 NMAC and be moved to the end of 6.11.2 NMAC, (proposing new Subsection as 6.11.2.13 NMAC) to remedy the implication that restraint or seclusion are appropriately used as disciplinary tools to "enforce" the rules of conduct.

Similarly, in 6.11.2.10(C) NMAC (Basis for disciplinary action), the phrase "...or for conduct that reasonably appears to threaten such dangers if not restrained…" ought to be amended. DRNM suggests that the word "restrained" be replaced with the word "stopped" to avoid improperly linking the term "restrained" as used in that sentence (meaning "stopped") to the section on Restraint or Seclusion under 6.11.2.10(E) NMAC.

B. By definition, there is no way to safely use restraint and seclusion under school conditions requiring social distancing. There should be a moratorium on restraint and seclusion during any period in which social distancing public health orders are in place.

In writing these comments, DRNM is keenly aware of New Mexico's current guidance on school re-entry for the fall, under which strict 6-foot social distancing and other safety precautions will be in place for any in-person instruction in the brick-and-mortar setting. For the foreseeable future, the public health orders now in place will govern in-person, student-to-student and student-to-staff (school personnel) contact.

Under these public health orders, there is simply no way to safely lay hands on a student, place a student in a hold, employ mechanical restraints, or even use seclusion (which in practice very often requires close physical contact to get and keep a student in a secluded space).

Accordingly, DRNM asks NMPED to put in place, in this rule or elsewhere, a moratorium on both restraint and seclusion during this and any other periods when social distancing requirements are imposed by public health orders. Without such a moratorium, there is no way to protect students and school personnel from the high risk of COVID-19 transmission in any incidence of restraint or seclusion.

II. Section 6.11.2.10(E)(1): Policies and Procedures

This section requires districts to establish policies and procedures governing the use of restraint and seclusion techniques, and to review them every 3 years before submitting their safety plan. Subsection A articulates the "imminent danger of serious physical harm" standard required by the statute, which is merely cited generally in the current version of the rule. However, in rewriting the section to articulate the standard explicitly, the rule as proposed omits important language that previously required implementation of less restrictive interventions before using restraint or seclusion. DRNM proposes that this language, which is consistent with the statutory language, be added back into Section 6.11.2.10(E)(1)(a) to clarify that restraint or seclusion techniques are emergency interventions to be implemented only after other less restrictive interventions have been employed. DRNM proposes the following to be re-integrated into 6.11.2.10(E)(1)(a)***:"Less restrictive interventions, including positive behavioral intervention supports or other comparable behavior management techniques, shall be implemented prior to the use of restraint or seclusion techniques."***

Relatedly, the training described in the proposed Section 6.11.2.10(E)(1)(b) does not do enough to emphasize and ensure that educators need to be trained to avoid restraint and seclusion techniques as tools for behavioral intervention. Designated school personnel, who are tasked with executing restraint or seclusion techniques in emergencies involving imminent danger of serious physical harm, must be trained to avoid causing physical or psychological injury to the student. While DRNM does not disagree with this premise in the rare instance where an emergency restraint is necessary, we argue that the primary focus should be on preventing restraint or seclusion in the first place through methods that are evidence-based, trauma-informed, and are centered on solving the problems that manifest such challenging student behavior rather than attempting to manage student behavior with a reward or punishment model.

For example, a better alternative can be found in a review of clinical child psychologist Ross Greene's Collaborative & Proactive Solutions (CPS) model.[7] CPS attempts to equip educators to understand challenging behaviors as signals or communications of "lagging skills" of students rather than on motivational or performance deficits. Functional Behavioral Assessments (FBAs) routinely conclude that challenging behaviors are the result of performance or motivational deficits, finding purposes in the behaviors like attention-seeking, limit-testing, or manipulating. Conversely, Greene's model starts from the premise that challenging behaviors are much more indicative of deficits in the adaptive and functional skills that are required for the student to be able to meet certain demands and expectations. This model empowers educators to use

[7] *See* Lives in the Balance website, www.livesinthebalance.org, particularly, Collaborative and Proactive Solutions (one-page information sheet), https://www.livesinthebalance.org/sites/default/files/FAQ%20020816.pdf; Ross Greene, "Ending the Cycle of Restraint and Seclusion in Schools," https://www.livesinthebalance.org/restraint-and-seclusion-in-schools.

knowledge they have or can be trained in, to build the skills students lack, rather than to operate in the realm of behavior management, imposing systems of reward and punishment (including, at its extreme, restraint or seclusion) instead of teaching.

Where the revisions to this rule detail training requirements, DRNM urges NMPED to emphasize the primacy of approaches like Dr. Greene's, which aim to eliminate or certainly minimize the use of restraint or seclusion techniques. To the extent other models contemplated by the proposed rule involve training in positive behavioral intervention supports and de-escalation techniques, the rule should lead with that emphasis, rather than pointing up the importance of training "designated school personnel" in "safe and effective use of restraint and seclusion techniques." Again, such techniques are disfavored and are emergency interventions of last resort. Without emphasis on the primacy of positive behavioral interventions or problem-solving elements of training, districts will train more school personnel in restraint and seclusion techniques, but that alone will do nothing but yield an increase in incidents of restraint and seclusion, which is contrary to the stated purpose of the statute and this rule. Any approach to training requirements for the use of restraint or seclusion must be a Positive Behavior Intervention First (PBIS First) approach.

DRNM suggests the following revision to 6.11.2.10(E)(1)(b) to reflect a PBIS First approach:

> ***The restraint or seclusion techniques shall be used only by school employees who are trained in positive behavioral intervention supports, de-escalation strategies, and the safe and effective use of restraint and seclusion techniques, including trauma-informed response, unless an emergency does not allow sufficient time to summon those trained school employees.***

III. Section 6.11.2.10(E)(2): School Safety Plan

This section sets out minimum requirements for districts' school safety plans. DRNM suggests the following revisions to reflect **(a)** the emphasis on avoiding restraint and seclusion, **(b)** the IDEA's requirements that the educational programs of students with disabilities be individualized, **(c)** the need for all members of the school safety planning team to have appropriate training, and **(d)** an emphasis on the PBIS First approach to training requirements.

(a) Emphasis on Avoiding Restraint or Seclusion. A new subsection 6.11.2.10(E)(2)(a)(i) should be inserted, which requires districts to articulate clearly in their safety plans that restraint and seclusion are emergency safety interventions of last resort, as required by the general standard. DRNM proposes that a new subsection reading as follows be incorporated into NMPED regulations under 6.11.2.10(E)(2)(a)(i) NMAC:

> ***The school safety plan must state clearly that restraint and seclusion are emergency safety measures which may be used only where a student's behavior presents an imminent danger of serious physical harm to the student or others, and where less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm.***

(b) Individualization. While DRNM agrees with the general proposition that school safety plans should not target specific students or be designed with individual students in mind, it is also true that students with disabilities have a right under the IDEA to individualized determinations of appropriate interventions and instruction under their Individualized Educational Programs (IEPs). Accordingly, DRNM proposes the following revision to NMPED's proposed 6.11.2.10(E)(2)(a)(i):

> ***The school safety plan shall not be specific to any individual student. However, this section does not limit the rights of students with disabilities to individualized determination of appropriate special education and related services, as well as accommodations, modifications, and positive behavioral interventions planning, by the student's Individualized Educational Program (IEP) team.***

(c) Training Required for All Safety Planning Team Members. As it is currently proposed, 6.11.2.10(E)(2)(a)(ii) only requires that the team include staff who are trained as *designated school personnel* in restraint and seclusion. However, all members of that team should be properly trained, both in positive behavioral intervention supports (see DRNM proposed revision for 6.11.2.10(E)(2)(a)(ii), following (d) below) and in the techniques of restraint and seclusion, including trauma-informed response. Moreover, a counselor or social worker should be a required member of the planning team, and other professionals with relevant knowledge (like speech and language pathologists and occupational therapists) should be considered as possible members particularly because of the nature of their experiences with students with disabilities.

(d) Positive Behavioral Intervention Supports First. In addition, the language of NMPED's proposed 6.11.2.10(E)(2)(a)(ii) should reflect the PBIS First approach to training requirements.

DRNM proposes NMPED incorporate PBIS First language, the requirement that *all* members of the team must be appropriately trained in accordance with 6.11.2.10(E)(2)(a)(ii), and the optional inclusion of speech and language pathologist or occupational therapist on the team. The following language is suggested for 6.11.2.10(E)(2)(a)(ii):

> ***The school safety planning team shall include at least one administrator, one educator, one special educator, and one counselor or social worker, and may include a nurse, speech and language pathologist, occupational therapist and school resource officer or security staff. The school safety planning team shall be composed only of personnel trained in accordance with Section 6.11.2.10(E)(3) NMAC as designated school personnel in positive behavioral intervention supports, de-escalation strategies, and safe and effective use of restraint and seclusion techniques, including trauma-informed response.***

IV. Section 6.11.2.10(E)(3): Appropriate Training for School Personnel

Predictably, DRNM's comments in this section are driven by the PBIS First approach to training requirements. DRNM maintains that *all* staff (special education teachers, regular education

teachers, and educational assistants), and not merely "designated school personnel" (those "trained as designated school personnel in restraint and seclusion") must be trained in positive behavioral intervention supports and related problem solving to prevent challenging behaviors and avoid/minimize the use of restraint and seclusion.

Moreover, re-certification or demonstration of competency for this and other training requirements addressed in this proposed rule should be required annually rather than every two years, as protocols for many of these training programs are updated each year, and refresher courses are available.

Finally, there should be no "other comparable demonstration of competency" language, since personnel who are adequately trained would by definition have completed "a certification course or exam," and it is important for personnel to have consistent training and a shared knowledge base.

DRNM proposes that the regulation under 6.11.2.10(E)(3) delete the reference of "*...designated* school personnel" (*emphasis added*) and simply require that "[p]olicies and procedures for the use of restraint and seclusion techniques shall require and describe appropriate training for school personnel."

To further clarify this point, DRNM also proposes the following language be incorporated into NMPED's regulations under 6.11.2.10(E)(3)(a):

> ***School districts and charter schools shall provide training for all school personnel regarding de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques which are evidence-based, trauma-informed, and aimed at preventing or minimizing the use of restraint or seclusion techniques. All school personnel shall attend training at least every year or complete a certification course or exam that provides evidence that the individual has up-to-date knowledge of de-escalation strategies, positive behavioral supports, or other comparable behavior management techniques as described in this subsection.***

This would shift NMPED's proposed 6.11.2.10(E)(3)(a) NMAC regulation to 6.11.2.10(E)(3)(b), which should also be revised to identify "designated school personnel" as persons trained in "safe and effective use of restraint and seclusion techniques." Appropriate training for designated school personnel should include knowledge of trauma-informed response. As with the previous subsection, training updates should be required annually rather than every two years. DRNM suggests that the current proposed regulation at 6.11.2.10(E)(3)(a) be moved to 6.11.2.10(E)(3)(b) and read:

> ***In addition to the training required by 6.11.2.10(E)(3)(a) for all school personnel, school districts and charter schools shall provide training for designated school personnel regarding safe and effective use of restraint and seclusion techniques, including trauma-informed response. Designated school personnel shall attend training at least every year***

V. Section 6.11.2.10(E)(4): Reintegration following restraint or seclusion

Section 6.11.2.10(E)(4) NMAC are new regulations being proposed by NMPED for the first time, and they address the need for school restraint or seclusion policies to contemplate strategies for reintegration of students into the school or classroom environment following incidents of restraint or seclusion. Although this is generally a positive addition, it lacks adequate explanation or suggestion of effective reintegration strategies that would provide meaningful guidance to school districts and district personnel. DRNM suggests that the section reference "trauma-informed response" strategies, and include elements of reintegration strategies set forth in the Children's Code. *See* NMSA 1979 Section 32A-6A-10(F). DRNM suggests the following language:

> ***Policies regarding restraint or seclusion shall consider school district support and trauma-informed response strategies for school employees to successfully reintegrate a student who has been restrained or secluded back into the school or classroom environment, including debriefing with a social worker, nurse, or other appropriate school personnel, with the intent of reducing or eliminating the need for future restraint or seclusion.***

VI. Section 6.11.2.10(E)(5): Review Procedures

It is commendable that NMPED will require districts to adhere to procedures for review of incidents involving the use of restraint and seclusion. It is also clear that these procedures arise from and elaborate on NMSA Section 22-5-4.12(D)(3) 1978. However, both the review provisions as written and the statutory language on which they are based fail to honor the strict standard limiting the use of restraint and seclusion. Instead they give the impression that a single student may be permissibly restrained more frequently than is justifiable if the practice were truly being limited to emergency situations of imminent serious physical harm.

For example, as 6.11.2.10(E)(5) NMAC is currently proposed, a district could seemingly start the clock over each month for a given student, meaning districts get a fresh slate for incidents of restraint or seclusion that require reporting to NMPED. It will be permissible for districts to repeatedly utilize restraint or seclusion techniques on a student as often as once a month without review. There is no check on the number of months this could be repeated, and the result could be as many as 10-12 unreviewed, traumatic, and repeated incidents of restraint or seclusion on a student. NMPED must impose better reporting requirements upon districts.

This approach is clearly not trauma-informed, and it is at odds with the central purpose of the statute- limiting restraint or seclusion to emergency situations where "the student's behavior presents an imminent danger of serious physical harm to the student or others" and "less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm."

Although this understanding of restraint or seclusion is understood in other areas of State government, its use in the educational setting is still lacking. George Davis, former Director of Psychiatry for New Mexico's Children Youth and Families Department (CYFD), was quoted in

the *Searchlight* investigative article as saying: "There might be a rare emergency circumstance where restraint could be necessary…[b]ut if the same emergency happens over and over again, it's not just an emergency—it's poor planning, and its failure to respond to the kid's needs."[8]

Similarly, Dr. Ross Greene emphasizes the predictable nature of challenging behaviors and the unsolved problems that precipitate them: "Because unsolved problems tend to be highly predictable, the problem-solving should be proactive most of the time."[9] To repeatedly *react* to a highly predictable challenging behavior, rather than proactively planning and tackling established "unsolved problems" to avoid or prevent the behavior, creates a risk of injury and trauma that is irresponsible, unnecessary and unacceptable.

Accordingly, it is important that New Mexico impose review standards and timelines that are more protective of student safety, and which encourage districts to be proactive in addressing unsolved problems and skill deficits of students who exhibit challenging behaviors that place them at risk of repeated restraint or seclusion. This understanding and application of restraint or seclusion techniques has been accomplished in other areas of New Mexico state government such as when students are in the residential, therapeutic, or detention contexts. The physical restraint and seclusion provision of the Children's Code, NMSA 1979 Section 32A-6A-10(G), requires review procedures be followed after every incident of restraint or seclusion:

> *G. As promptly as possible, but under no circumstances later than five calendar days after a child has been subject to restraint or seclusion, the treatment team shall meet to review the incident and revise the treatment plan as appropriate. The treatment team shall identify any known triggers to the behavior that necessitated the use of restraint or seclusion and recommend preventive measures that may be used to calm the child and eliminate the need for restraint or seclusion. In a subsequent review of the treatment plan, the treatment team shall review the success or failure of preventive measures and revise the plan, if necessary, based on such review.*

Although DRNM understands the Department is limited in its ability to make substantial changes in this regard without legislative intervention, we hope that such changes can be implemented moving forward, including requirements that:

- Review procedures be followed after a student is subject to any single incident of restraint or seclusion (rather than two more more);
- The 30-day window providing a monthly reset be removed;
- Any incident of restraint or seclusion be reviewed as promptly as possible, but under no circumstances later than seven (7) calendar days after the incident occurred;
- Review include antecedents or causes of behavior, as well as de-escalation strategies and positive behavioral intervention supports used by school personnel involved;
- A student's IEP team, behavioral intervention plan team, or student assistance team meet within fourteen (14) calendar days of the incident to conduct a review that includes

[8] Williams, supra note 5.

[9] "Collaborative & Proactive Solutions" (one-page information sheet), https://www.livesinthebalance.org/sites/default/files/FAQ%20020816.pdf; Ross Greene, "Ending the Cycle of Restraint and Seclusion in Schools," https://www.livesinthebalance.org/restraint-and-seclusion-in-schools.

antecedents or causes of behavior, de-escalation strategies and positive behavioral intervention supports used, and provide recommendations for avoiding future incidents requiring use of restraint or seclusion;

- Include limiting language which prevents students' being subject to repeated incidents of restraint or seclusion (two or more incidents in a school year) without conducting a new functional behavior assessment or making changes to an existing behavioral intervention plan (no later than fourteen (14) calendar days following the second incident; and
- Include as additional items for schools' annual review of incidents of restraint or seclusion: antecedents, context or causes for the student's behavior, as well as de-escalation strategies and positive behavioral intervention supports used by school personnel involved.

VII. Section 6.11.2.10(E)(6): Documentation and Reporting Procedures

The proposed rule creates detailed requirements for documentation and reporting procedures for districts. Although it is helpful to have this greater level of detail in the rule, there are other important details that have yet to be included. Specifically, the proposed version of 6.11.2.10(E)(6)(b) NMAC does not require that the school provide documentation to the parent of either (1) the names of school personnel who implemented or monitored the use of restraint or seclusion, or (2) any less intrusive interventions that were attempted or determined to be inappropriate prior to the incident. Both of these are required elements of reporting instances involving restraint or seclusion under the New Mexico Children's Code. *See* Section 32A-6A-10(C)(1) and (5). DRNM suggests that these two items be added to 6.11.2.10(E)(6)(b) NMAC, as well as the need to record specific beginning and ending times of any incident involving restraint or seclusion. DRNM proposes the following language be incorporated in 6.11.2.10(E)(6)(b) NMAC:

> ***Within a reasonable time following the incident, no longer than two school days, a school employee shall provide the student's parent with written documentation that includes information about any persons, locations, or activities that may have triggered the behavior, if known, the names of any school personnel who implemented or monitored the use of restraint or seclusion, any less intrusive interventions that were attempted or determined to be inappropriate prior to the incident, and specific information about the behavior and its precursors, the type of restraint or seclusion technique used, and the duration of its use, including specific beginning and ending times. Such information, and other information determined by the department, shall be entered into the department's data collection and reporting system once the student's parent is notified and provided with written documentation.***

NMPED should also specify what "other information determined by [it]" must be entered in the Department's data collection and reporting system. These proposed regulations codify the legal requirements that school districts in New Mexico must meet. Further, the public has an interest in knowing what information is collected by NMPED to better protect and serve their vulnerable children. How will NMPED share its expectations of what "other information" is required? Will this also be shared with the communities where they are situated?

Similarly, the NMPED does not specify in 6.11.2.10(E)(6)(c) what "timeline and reporting frequency" it has established for schools' reporting of all instances of restraint and seclusion. DRNM suggests that the data be reported no fewer than once every twelve week period, and our agency proposes NMPED utilize the following language: "Schools shall report to the department, through the department's data collection and reporting system, the following information on a timeline and reporting frequency established by the department, but no fewer than one time every twelve week period."

Moreover, DRNM suggests two new subsections that would increase transparency around instances of restraint or seclusion and create consequences for districts that either fail to report or are reporting inappropriate use of restraint and seclusion- at odds with the statute and this rule.

First, there should be an additional subsection incorporated as 6.11.2.10(E)(6)(e), which would require that NMPED make restraint and seclusion data public after removing all personal identifying information (PII) of both students and school personnel. DRNM suggests the following language: "At least once a year, the department shall report publicly on its website data documenting districts' use of restraint and seclusion, without revealing protected personally identifiable information of students or school personnel."

Second, if a district fails to report as required under 6.11.2.10(E)(6)(d), or if the district's data shows high numbers of incidents of seclusion or restraint or repeated incidents for particular students, NMPED should monitor that district's use of restraint and seclusion as safety interventions, offer supports and training to ensure that restraint and seclusion are not being used too frequently or implemented incorrectly, and, where appropriate, issue and make public a corrective action plan requiring compliance. DRNM suggests the inclusion of a new subsection 6.11.2.10(E)(6)(f) to articulate that monitoring requirement:

> ***If a district fails to report as required under Subsection 6.11.2.10(E)(6)(d), or if the district's data shows high numbers of incidents of seclusion or restraint or repeated incidents for particular students, the department shall (1) monitor that district's use of restraint and seclusion and provide supports and training to reinforce the requirement that restraint or seclusion be limited to emergency interventions of last resort, and (2) where appropriate, issue and make public a corrective action plan requiring the district's compliance with Section 22-5-4.12 NMSA 1978 and this rule.***

NMAC 6.11.2.11: Disciplinary Removals of Students with Disabilities

DRNM supports NMPED's decision to revise 6.11.2.11 NMAC to clarify the requirement that students with disabilities are afforded the procedural safeguard of a Manifestation Determination Review (MDR) before being subject to the proceedings of a long-term suspension or expulsion hearing. The MDR must be afforded to students with disabilities before the regular school discipline procedures take effect. It is paramount that relevant members of the student's IEP team meet to give important consideration to the role, if any, of the student's disability in the alleged conduct before further discipline is assigned to the student. This is accomplished through the MDR process where the team gives due consideration to whether the conduct in question was either "caused by or had a direct and substantial relationship to their disability" or else was a

"direct result of the school's failure to implement the IEP." DRNM thanks NMPED for the critical clarification in New Mexico's regulations that students with disabilities must be afforded a MDR before being subjected to long-term suspension or expulsion.

NMAC 6.11.2.12: Procedure for Detentions, Suspensions, and Expulsions

There are only a few changes being proposed under 6.11.2.12 NMAC, all of which appear to clarify the existing regulations. These subtle changes are appreciated, but they also illustrate the problem with NMPED's total repeal and replace of 6.11.2 NMAC. Changes in regulations matter, and NMPED needlessly created barriers for greater public input and informed opinion by striking the entirety of 6.11.2.12 when only a handful of deletions and revisions were made. DRNM strongly suggests that NMPED consider strikethrough format of their rule promulgation rather than blanket repeal and replace proposals.

Conclusion

DRNM appreciates the opportunity to participate in the comment period for this proposed regulation. It is our hope that the Department will meaningfully consider the input provided during this period.

Sincerely,

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July 10, 2020

New Mexico Public Education Department
Policy Division
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Santa Fe, NM 87501
Via electronic mail: rule.feedback@state.nm.us

RE: DDPC Comments on Proposed 6.11.2 NMAC & 6.12.12 NMAC

Dear NMPED Policy Division:

The New Mexico Developmental Disabilities Planning Council (DDPC) is a federally mandated state agency tasked with advocating for systemic change on behalf of New Mexicans living with developmental disabilities, from birth to end of life. Last fall, DDPC formed its Education Committee to problem solve the many issues school districts across the state continually face. The Education Committee specifically focuses on improving and reforming the education services provided to children living with disabilities and their families.

It is undisputable that the vast majority of children in the juvenile justice system live with a disability or multiple disabilities, including developmental and intellectual disabilities. Many of these children never receive special education services and instead are thrust into the juvenile justice system (and often, later, the criminal justice system). Once they have entered the juvenile justice system, it is extraordinarily difficult for children to recover and reclaim their education and their lives.

DDPC strives to combat the criminalization and traumatizing of children in schools by holding schools accountable for the actions taken against children who do not yet have the adequate tools to self-regulate consistently. To that end, DDPC submits the following comments for proposed rules 6.11.2 NMAC, Rights and Responsibilities of the Public Schools and Public School Students, and 6.12.12 NMAC, Armed Public School Security Personnel:

Determining and Reviewing Use of Restraint or Seclusion

PED's proposed rule change in 6.11.2.10(E) NMAC is a positive step in the rights direction; however, it does not go far enough to protect children from unwarranted use of restraint or seclusion (R/S).

Specifically, the proposed changes do not explicitly require schools to use the ***least*** restrictive intervention that mitigates the imminent danger of serious physical harm to the student or others. While the rule changes require training in de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques, the rule does not require that school personnel utilize these techniques prior to resorting to R/S. In a situation where these techniques are not required and used consistently, the student is far more likely to face a situation, whether or not it is a true emergency, in which school personnel may determine that any intervention short of R/S is insufficient.

The rule only provides behavioral assistance to the student if they are subject to R/S two or more times within 30 days. The 30-day time period is far too short. Under the rule, the child may experience as many as 3-4 R/S interventions per semester (or 6-8 per school year) without any support or assistance—an unacceptable number. The rule should provide, at a minimum, a time period of one semester.

Further, the rule allows two R/S interventions within 30 days before a student's pre-existing IEP/BIP/support team is required to meet. If the student has a team, the school has already determined that the student has a disability that requires additional support. The team should be required to meet after every use of R/S to provide recommendations to avoid future R/S/ interventions.

Transparency of Restraint/Seclusion Reporting

DDPC commends the proposed rule additions in 6.11.2.10(E)(6) NMAC requiring notice and reporting of R/S incidents. DDPC urges the Department make the R/S data reported by schools readily available to the public, such as on the Sunshine Portal, removing any protected identifying information.

Disciplining Students with Disabilities

The proposed changes do not adequately address the particular problems students with disabilities face in disciplinary proceedings. DDPC has attached to this letter the Council Chair's integrated comments on rule 6.11.2 NMAC that detail some of these problems. Ultimately, when students with disabilities face behavioral health challenges, they are typically approached and treated first as delinquents subject to disciplinary and criminal consequences. The rule itself demonstrates that consideration of students' disabilities is an afterthought, if considered at all.

Yet, behavioral health research on children's development provide tremendous amounts of evidence that a child's behavioral health challenges are strong indicators that the child is grappling with their disabilities, whether diagnosed or undiagnosed. Instead of providing assistance to the child as the primary approach in dealing with behavioral challenges, schools default to discipline. The rule states clearly in 6.11.2.10(I) NMAC that students with disabilities "are not immune from school disciplinary processes, nor are they entitled to remain in a particular educational program when their behavior substantially impairs the education of other children in the program." The rule does not provide, however, adequate requirements to ensure students with disabilities receive appropriate support and assistance from schools to avoid drastic disciplinary measures as much as possible.

In another example demonstrating inadequate consideration of students' disabilities and the many challenges their families face, under the proposed rule, schools have the discretion to call law enforcement for ***any*** "criminal or delinquent act," which is broadly defined. If a student with a disability is immediately arrested after law enforcement is called and a subsequent manifestation determination deems the student's conduct a manifestation of their disability, the student and their family is then left to deal with the substantial fallout of the initial arrest—including court proceedings, legal fees, and any number of inappropriate, extraordinary burdens placed on the student and their family. The rule should explicitly state that when the school takes any action to notify law enforcement in response to a student's behavior, the school has the duty to remediate any harm resulting from the school's action when it is determined that the student's behavior is a manifestation of their disability.

Armed Law Enforcement in Schools

DDPC deeply understands the concerns schools have in protecting students and school staff from lethal harm. The continual presence of armed law enforcement in schools, however, will inevitably lead to increased criminalization of children's behaviors and the damaging growth of the school to jail pipeline.

It our responsibility to ensure students receive the services and supports to develop into contributing members of our communities. Behavioral challenges are often cries for help and indicators of underlying disabilities. The school's first response should be to support the student, not to punish them. The rules should reflect that priority.

DDPC appreciates the opportunity to provide comments on the above-mentioned rules. Please do not hesitate to contact us with any questions regarding our comments. We welcome further discussions with the Department on the issues we have raised.

Sincerely,

Alice Liu McCoy
Executive Director

John Arango
Council Chair

Enclosure

CC:
Secretary Ryan Stewart, PED
Stephanie Rodriguez, Office of the Governor
Mariana Padilla, Office of the Governor
Katie Stone, DDPC Vice Chair

Rule Comments
John Arango, DDPC Chair

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 11 PUBLIC SCHOOL ADMINISTRATION - STUDENT RIGHTS AND RESPONSIBILITIES
PART 2 RIGHTS AND RESPONSIBILITIES OF PUBLIC SCHOOLS AND PUBLIC SCHOOL STUDENTS

6.11.2.1 ISSUING AGENCY: Public Education Department, hereinafter the department.
[6.11.2.1 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.2 SCOPE: This rule applies to public schools and public school students.
[6.11.2.2 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.3 STATUTORY AUTHORITY: This rule is being promulgated pursuant to Sections 22-2-1, 22-2-2, and 22-5-4.12 NMSA 1978 and 42 U.S.C. 11431 et seq., the McKinney-Vento Homelessness Assistance Act.
[6.11.2.3 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.4 DURATION: Permanent.
[6.11.2.4 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.5 EFFECTIVE DATE: July 28, 2020, unless a later date is cited at the end of a section.
[6.11.2.5 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.6 OBJECTIVE: To provide a comprehensive framework within which school districts, local school boards, locally chartered charter schools, state-chartered charter schools, and governing bodies of charter schools may carry out their educational mission and exercise their authority and responsibility to provide a safe environment for student learning and provide students and parents with an understanding of the basic rights and requirements necessary to effectively function in the educational community.
[6.11.2.6 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.7 DEFINITIONS:

A. "Administrative authority" means the school district superintendent, the head administrator of a state-chartered charter school, a principal, or their delegate to act officially in a matter involving school discipline or the maintenance of order. The term may include school security officers, but only to the extent of their authority as established under written local school board policies.

B. "Child with a disability" or "student with a disability" means a child who meets all requirements of 34 CFR Sec. 300.8 and:

(1) is age three through 21 or who will turn age three at any time during the school year;

(2) has been evaluated in accordance with 34 CFR Secs. 300.304 through 300.311 and any additional requirements of these or other department rules and standards as having one or more of the disabilities specified in 34 CFR Sec. 300.8, including an intellectual disability; a hearing impairment, including deafness, speech or language impairment; a visual impairment, including blindness; emotional disturbance; orthopedic impairment; autism; traumatic brain injury; other health impairment; a specific learning disability; deaf-blindness; or being developmentally delayed as defined in Paragraph (4) of Subsection B of 6.31.2.7 NMAC; and who has not received a high school diploma; and

(3) at the discretion of each local educational agency and subject to the additional requirements of Paragraph (2) of Subsection F of 6.31.2.10 NMAC, may include a child age three through nine who is evaluated as being developmentally delayed and who, because of that condition, needs special education and related services.

C. "Criminal acts" means acts defined as criminal under federal and state law, and any applicable municipal or county criminal ordinances.

D. "Delinquent acts" means acts as defined in Subsection A of Section 32A-2-3 NMSA 1978, the Delinquency Act.

E. **"Detention"** means requiring a student to remain in a designated area in the student's school outside of instructional time, such as before school, during recess, during lunch, or after school. No detained student shall be denied an opportunity to eat lunch or reasonable opportunities to go to the restroom.

F. **"Disciplinarian"** means a person or group authorized to impose consequence(s) after the facts of a case have been determined by a hearing authority.

G. **"Disruptive conduct"** means willful conduct which:

(1) materially and in fact disrupts or interferes with the operation of a public school or the orderly conduct of any public school activity, including individual classes; or

(2) leads an administrative authority reasonably to forecast that such disruption or interference is likely to occur unless preventive action is taken.

H. **"Expulsion"** means the removal of a student from school either permanently or for an indefinite time exceeding 10 school days or a locally established shorter period.

I. **"Hearing authority"** means a person or group designated to hear evidence and determine the facts of a case at a required formal hearing.

J. **"Immediate removal"** means the removal of a student from school for one school day or less under emergency conditions and without a prior hearing.

K. **"In-school suspension"** means requiring a student to spend time in a designated area at the same school or in an environment where the student is allowed to continue with their academic learning.

L. **"Legal limits"** include the requirements of the federal and state constitutions and governing statutes, standards, and regulations, and also include the fundamental common-law requirement that rules of student conduct be reasonable exercises of the schools' authority in pursuance of legitimate educational and related functions. There are special limitations arising from constitutional guarantees of protected free speech and expression which shall be balanced against the schools need to foster an educational atmosphere free from undue disruptions to appropriate discipline.

M. **"Local school board"** includes the governing body of a charter school.

N. **"Local school district" or "school district"** includes a state-chartered charter school.

O. **"Long-term suspension"** means the removal of a student from school for a specified time exceeding either 10 school days or a locally established shorter period.

P. **"Mechanical restraint"** means the use of any device or material attached or adjacent to the student's body that restricts freedom of movement or normal access to any portion of the student's body and that the student cannot easily remove, but "mechanical restraint" does not include mechanical supports or protective devices**.**

R. **"Parent"** means the natural parent, legal guardian, or other person having custody and control of a student who is subject to Section 22-12A-1 et seq. NMSA 1978, the Attendance for Success Act, or the student if the student is not subject to compulsory attendance.

S. **"Physical restraint"** means the use of physical force without the use of any device or material that restricts the free movement of all or a portion of a student's body, but "physical restraint" does not include physical escort.

T. **"Public school"** means the campus and any building, facility, vehicle, or other item of property owned, operated, controlled by or in the possession of a local school district. For purposes of student discipline, the term also includes any non-school premises being used for school-sponsored activities.

U. **"Refusal to cooperate with school personnel"** means a student's willful refusal to obey the lawful instructions or orders of school personnel whose responsibilities include supervision of students.

V. **"Refusal to identify self"** means a person's willful refusal, upon request from school personnel known or identified as such to the person, to identify themselves accurately.

W. **"Restraint"** when not otherwise modified means mechanical or physical restraint.

X. **"Review authority"** means a person or group authorized by the local school board to review a disciplinarian's final decision to impose a long-term suspension or expulsion.

Y. **"Seclusion"** means the involuntary confinement of a student alone in a room from which egress is prevented. "Seclusion" does not mean the use of a voluntary behavior management technique, including a timeout location, as part of a student's education plan, individual safety plan, behavioral plan or individualized education program that involves the student's separation from a larger group for purposes of calming.

Z. **"Sexual harassment,"** regarding students, means unwelcome or unwanted conduct of a sexual nature (verbal, non-verbal or physical) when:

(1) submission to such conduct is made either explicitly or implicitly a term or condition of the advancement of a student in school programs or activities;

(2) submission to or rejection of such conduct by a student is used as the basis for decisions or opportunities affecting the student; or

(3) such conduct substantially interferes with a student's learning or creates an intimidating, hostile, or offensive learning environment.

AA. **"School personnel"** means all members of the staff, faculty, and administration employed by the local school board. The term includes school security officers, school bus drivers, and their aides, and also authorized agents of the schools, such as volunteers or chaperones, whose responsibilities include supervision of students.

BB. **"Student"** means a person who is enrolled in one or more classes at a public school.

CC. **"Student experiencing homelessness"** means children and youth as defined by Section 725(2) of the federal McKinney-Vento Homeless Assistance Act.

DD. **"Superintendent of a school district"** includes the head administrator of a state-chartered charter school.

EE. **"Temporary suspension"** means the removal of a student from school for a specified period of 10 or fewer school days after a rudimentary hearing.

FF. **"Weapon,"** as set forth in Section 22-5-4.7 NMSA 1978, means:

(1) any firearm that is designed to, may readily be converted to, or will expel a projectile by the action of an explosion; and

(2) any destructive device that is an explosive or incendiary device, bomb, grenade, rocket having a propellant charge of more than four ounces, missile having an explosive or incendiary charge of more than one-quarter-ounce, mine or similar device.

[6.11.2.7 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.8 GENERAL PROVISIONS:

A. Jurisdiction over students. Public school authorities, which include all officials, employees and authorized agents of public schools, whose responsibilities include supervision of students shall have comprehensive authority within constitutional bounds to maintain order and discipline in school. In exercising this authority, such officials, employees, and authorized agents of public schools may exercise such powers of control, supervision, and correction over students as may be reasonably necessary to enable them to properly perform their duties and accomplish the purposes of education. This authority applies whenever students are lawfully subject to the schools' control, regardless of place. During such periods, public school authorities shall have the right to supervise and control the conduct of students, and students shall have the duty to submit to the schools' authority. The foregoing is intended to reflect the common law regarding the rights, duties, and liabilities of public school authorities in supervising, controlling and disciplining students. Nothing herein shall be construed as enlarging the liability of public school authorities beyond that imposed by statute, common law, or department rule.

B. School authority over non-students. In furtherance of the state's compelling interest in the orderly operation of public schools and school activities, school officials have the following forms of authority over non-students whose actions adversely affect school operations or activities.

(1) On school property: Local school boards may prohibit entry to and provide for the removal from any public school building or grounds any person who refuses to identify themselves and state a lawful purpose for entering. Any person who refuses to identify themselves may be removed by school authorities, who may use reasonable physical force to accomplish the removal. Alternately, a person who refuses to identify themselves and who refuses a lawful request to leave school premises may be subject to arrest by law enforcement officers for criminal offenses including but not limited to criminal trespass, interference with the educational process, or disorderly conduct. A person who identifies themselves and states a lawful purpose may nevertheless be subject to removal by school officials for engaging in activities prohibited by this rule. The person may also be subject to arrest by law enforcement officers if the person is committing any crime.

(2) Off school property: Public school authorities have indirect and limited authority over the activities of non-students off school property. To the extent that non-students' conduct at or near schools or school-sponsored activities may constitute a criminal offense, including the crimes of interference with the educational process, disorderly conduct or criminal trespass after refusing a lawful request to leave, school authorities may request law enforcement agencies to arrest the offenders.

C. Statement of policy. A primary responsibility of New Mexico public schools and their professional staff shall be to instill in students an appreciation of our representative form of government, the rights and responsibilities of the individual or group, and the legal processes whereby necessary changes are effected.

(1) The school is a community and the rules of a school are the laws of that community. All persons enjoying the rights of citizenship are subject to the laws of their community. Each right carries with it a corresponding obligation.

(2) The right to attend public school is not absolute. It is conditioned on each student's acceptance of the obligation to abide by the lawful rules of the school community until and unless the rules are changed through lawful processes.

(3) Teachers, administrators, and other school employees also have rights and duties. Teachers are required by law to maintain a suitable environment for learning in their classes and to assist in maintaining school order and discipline. Administrators are responsible for maintaining and facilitating the educational program by ensuring an orderly and safe environment in public schools. In discharging their duties, all school employees have the right to be free from intimidation or abuse and to have their lawful requests and instructions followed.

(4) Nothing in this rule shall be held to affect the due process rights of school employees or their use of any local school district grievance procedure. This rule does not address employment disputes.

D. Local school board authority: Local school boards have the authority and responsibility to ensure that suitable rules of student conduct and appropriate disciplinary processes are established within their school districts. Within legal limits as defined in Subsection L. of 6.11.2.7 NMAC, and subject to the minimums prescribed in this rule, local school boards have discretion to develop such rules, policies, and procedures as they deem appropriate to local conditions, including policies which afford students more protection than the minimums established here. Local school boards and administrative authorities which deem it appropriate may provide for student, community or appropriate state and local agency participation in the formulation and enforcement of school rules.

E. Severability. Any part of this rule found by adjudication before a competent tribunal to be contrary to law shall be stricken without effect to the remainder.

[6.11.2.8 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.9 RULES OF CONDUCT FOR NEW MEXICO PUBLIC SCHOOLS: The acts specified in Subsection A of 6.11.2.9 NMAC are prohibited in all public schools in New Mexico. Within legal limits as defined in Subsection L of 6.11.2.7 NMAC, local school boards have discretion to develop rules of conduct governing all others area of student and school activity.

A. Prohibited activities: The commission of or participation in the activities designated below is prohibited in all public schools and is prohibited for students whenever they are subject to school control. The following acts are prohibited by this rule:

(1) criminal or delinquent acts; I understand the intent, but this is awfully broad language.

(2) committing, threatening to commit, or inciting others to commit or threaten to commit any act of violence, directly or indirectly, in person or through electronic means, against a public school, student, or school personnel or official; This is better and removes the implied obligation that, if the act is thought to be criminal, the police should be called.

(3) sexual harassment;

(4) disruptive conduct;

(5) refusal to identify self; and

(6) refusal to cooperate with school personnel.

B. Regulated activities: Beyond those activities designated as prohibited in Subsection A of 6.11.2.9 NMAC, all other areas of student conduct may be regulated within legal limits by local school boards as they deem appropriate to local conditions. Conduct by non-students which affects school operations may be regulated within legal limits pursuant to any of the forms of authority described in Subsection B. of 6.11.2.8 NMAC. Activities subject to local school board regulation within legal limits include:

(1) school attendance;

(2) use of and access to public schools, including:

(a) restrictions on vehicular traffic on school property;

(b) prohibition of, or conditions on, the presence of non-school persons on school grounds or in school buildings while school is in session; and

(c) reasonable standards of conduct for all persons attending school-sponsored activities or other activities on school property;

(3) students' dress and personal appearance;

(4) use of controlled substances, alcohol and tobacco in public schools;

(5) speech and assembly within public schools;

(6) publications distributed in public schools;

(7) the existence, scope, and conditions of availability of student privileges, including extracurricular activities and rules governing participation;

(8) per Section 22-5-4.7 NMSA 1978, each school district is required to adopt a policy providing for the expulsion from school, for a period of not less than one year, any student who is determined to have knowingly brought a weapon to a public school under the jurisdiction of the local school board. The local school board or the superintendent of the school district may modify the expulsion requirement on a case-by-case basis; the special rule provisions of Subsection D of 6.11.2.11 NMAC, apply to students with disabilities; and

(9) the discipline of students for out-of-school conduct having a direct and immediate effect on school discipline or the general safety and welfare of the school.

[6.11.2.9 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.10 ENFORCING RULES OF CONDUCT:

A. Enforcing attendance requirements. Local school districts and public schools shall establish, maintain, and enforce attendance policies and requirements set forth in Section 22-12A-1 et seq. NMSA 1978, the Attendance for Success Act, and Section 32A-3A-1 et seq. NMSA 1978, the Family Services Act.

B. Search and seizure. School property assigned to a student and a student's person or property while under the authority of a public school are subject to search, and items found are subject to seizure, in accordance with the following requirements:

(1) Notice of search policy. Students shall be given reasonable notice, through distribution of written policies or otherwise, of each school's policy on searches at the beginning of each school year or upon admission for students entering during the school year.

(2) Who may search. Certified school personnel, school security personnel and school bus drivers are "authorized persons" to conduct searches when a search is permissible as set forth in Subsection B of 6.11.2.10 NMAC. An authorized person who is conducting a search may request the assistance of one or more people, who upon consent become authorized to search for the purpose of that search only.

(3) When a search is permissible. Unless local school board policy provides otherwise, an authorized person may conduct a search when the authorized person has a reasonable suspicion that a crime or other breach of disciplinary rules is occurring or has occurred. An administrative authority may direct or conduct a search under the same conditions and also when the administrative authority has reasonable cause to believe that a search is necessary to help maintain school discipline.

(4) Conduct of searches and witnesses. The following requirements govern the conduct of permissible searches by authorized persons.

(a) School property, including lockers and school buses, may be searched with or without students present unless a local school board or administrative authority provides otherwise. When students are not present for locker searches, another authorized person shall serve as a witness whenever possible. Locks furnished by students should not be destroyed unless a student refuses to open one or circumstances otherwise render such action necessary in the judgment of the administrative authority.

(b) Student vehicles when on campus or otherwise under school control and students' personal effects, which are not within their immediate physical possession, may be searched in accordance with the requirements for locker searches in Subparagraph (a) of Paragraph (4) of Subsection B of 6.11.2.10 NMAC.

(c) Physical searches of a student's person may be conducted only by an authorized person of the same sex as the student and, except when circumstances render it impossible, may be conducted only in the presence of another authorized person of the same sex. The extent of the search must be reasonably related to the infraction, and the search shall not be excessively intrusive in light of the student's age and sex, and the nature of the infraction.

(5) Seizure of items. Illegal items, legal items which threaten the safety or security of others and items which are used to disrupt or interfere with the educational process may be seized by authorized persons. Seized items shall be released to appropriate authorities or a student's parent or returned to the student when and if the administrative authority deems appropriate.

(6) Notification of law enforcement authorities. Unless a local school board policy provides otherwise, an administrative authority shall have discretion to notify the local children's court attorney, district attorney, or other law enforcement officers when a search discloses illegally possessed contraband material or evidence of some other crime or delinquent act. Any limits on what the school board decides? Suppose that it

decides that any violation should be referred to the police or district attorney for action? Even if the student is in special education?

C. Basis for disciplinary action. A student may appropriately be disciplined by administrative authorities in the following circumstances:

(1) for committing any act that endangers the health or safety of students, school personnel, or others for whose safety the public school is responsible, or for conduct that reasonably appears to threaten such dangers if not restrained, regardless of whether an established rule of conduct has been violated;

(2) for violating valid rules of student conduct established by the local school board or by an administrative authority to whom the local school board has delegated rulemaking authority, when the student knew or should have known of the rule in question or that the conduct was prohibited; or Application of this standard to special education students with an intellectual disability is likely to be very problematic.

(3) for committing acts prohibited by this rule, when the student knew or should have known that the conduct was prohibited.

D. Selection of disciplinary sanctions. Within legal limits as defined in Subsection L of 6.11.2.7 NMAC, local school boards have discretion to determine the appropriate sanction(s) to be imposed for violations of rules of student conduct or to authorize appropriate administrative authorities to make such determinations.

(1) School discipline and criminal charges. Appropriate disciplinary actions may be taken against students regardless of whether criminal charges are also filed in connection with an incident.

(2) Nondiscriminatory enforcement. Local school boards and administrative authorities shall not enforce school rules or impose disciplinary punishments in a manner which discriminates against any student on the basis of race, religion, color, national origin, ancestry, sex, or disability, except to the extent otherwise permitted or required by law or regulation. This statement shall not be construed as requiring identical treatment of students for violation of the same rule; it shall be read as prohibiting differential treatment which is based on race, religion, color, national origin, ancestry, sex, or disability rather than on other differences in individual cases or students.

E. Restraint or seclusion. In accordance with Section 22-5-4.12 NMSA 1978, each school shall establish requirements for the use of restraint and seclusion techniques.

(1) Schools shall establish policies and procedures, as approved by the local school board or governing body, for the use of restraint and seclusion techniques. Schools shall review such policies and procedures on a triennial basis, before submitting the school safety plan.

(a) A school may permit the use of restraint or seclusion techniques on any student only if the student's behavior presents an imminent danger of serious physical harm to the student or others and only if less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm. Less restrictive interventions include de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques.

(b) The restraint or seclusion techniques shall be used only by school employees who are trained in the safe and effective use of restraint and seclusion techniques unless an emergency does not allow sufficient time to summon those trained school employees.

(c) The restraint or seclusion techniques shall not impede the student's ability to breathe or speak, shall be in proportion to a student's age and physical condition, and shall end when the student's behavior no longer presents an imminent danger of serious physical harm to the student or others.

(d) If a restraint or seclusion technique is used on a student, trained and authorized school employees shall maintain continuous visual observation and monitoring of the student while the restraint or seclusion technique is in use.

(2) In accordance with Section 22-5-4.12 NMSA 1978, schools shall establish policies and procedures for the use of restraint and seclusion techniques in a school safety plan.

(a) A school safety plan, pursuant to requirements of Paragraph (7) of Subsection (D) of 6.12.6.8 NMAC, shall include the following minimum requirements:

(i) The school safety plan shall not be specific to any individual student; and

(ii) The school safety planning team shall include at least one administrator, one educator, and one special education expert and may include a counselor or social worker, nurse, and school resource officer or security staff. The school safety planning team shall include personnel who are trained as designated school personnel in restraint and seclusion.

(b) A school safety plan, pursuant to requirements of Paragraph (7) of Subsection (D) of 6.12.6.8 NMAC, shall be submitted to the department on a triennial basis, on a schedule determined by the

department. The department will provide local education agencies notice of a deadline to submit a school safety plan 90 days prior to the due date.

(3) Policies and procedures for the use of restraint and seclusion techniques shall require and describe appropriate training for designated school personnel.

(a) School districts and charter schools shall provide training for designated school personnel regarding de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques and the use of restraint or seclusion techniques. Designated school personnel shall attend training at least every two years or complete a certification course, exam, or other comparable demonstration of competency that provides evidence that the individual has up-to-date knowledge of proper restraint and seclusion techniques.

(**b)** In the event that new designated school personnel are identified within the school after the provision of the training, certification course, exam, or other comparable demonstration of competency, the school district or charter school shall ensure that a training or other competency demonstration is provided to new designated school personnel within 60 days of being designated.

(4) Policies regarding restraint or seclusion shall consider school district support and strategies for school employees to successfully reintegrate a student who has been restrained or secluded back into the school or classroom environment.

(5) Schools shall implement the following review procedures for incidents in which restraint or seclusion techniques are used.

(a) If a student has been restrained or secluded two or more times within 30 calendar days, the school shall review strategies used to address the student's behavior and determine whether the student needs a functional behavior assessment or referral to a student assistance team, behavioral intervention plan team, or, if a student has an individualized education program, a referral to the student's individualized education program team.

(b) If a student has been restrained or secluded two or more times within 30 calendar days, the student's individualized education program team, behavioral intervention plan team, or student assistance team shall meet within two weeks of each subsequent use to provide recommendations for avoiding future incidents requiring the use of restraint or seclusion.

(c) The review shall include whether school personnel involved in the incidents were trained in the use of de-escalation strategies, positive behavioral intervention supports, or restraint and seclusion techniques. Additionally, the review shall consider whether the individual who restrained or secluded a student needs additional training.

(d) To improve internal practices relative to incidents of restraint or seclusion, schools shall conduct an annual review and analysis of all incidents in which restraint or seclusion techniques were used, including the number of incidents, the type of incident, personnel involved, the need for additional training, and student demographics.

(6) Schools shall establish documentation and reporting procedures pursuant to the requirements listed in Section 22-5-4.12 NMSA 1978. In addition, schools shall provide written or oral assurance of secure storage and access to written documentation in accordance with this rule, 20 USC. Section 1232(g), 34 CFR Part 99, the Family Educational Rights and Privacy Act, and any other applicable federal or state laws or rules governing the privacy of such documents.

(a) A school employee shall provide the student's parent with written or oral notice on the same day the incident occurred, unless circumstances prevent same-day notification. If notice is not provided on the same day of the incident, notice shall be given within 24 hours after the incident.

(b) Within a reasonable time following the incident, no longer than two school days, a school employee shall provide the student's parent with written documentation that includes information about any persons, locations, or activities that may have triggered the behavior, if known, and specific information about the behavior and its precursors, the type of restraint or seclusion technique used, and the duration of its use. Such information, and other information determined by the department, shall be entered into the department's data collection and reporting system once the student's parent is notified and provided with written documentation.

(c) Schools shall report to the department, through the department's data collection and reporting system, the following information on a timeline and reporting frequency established by the department:

(i) the names, professional license numbers, and positions of school personnel trained in de-escalation strategies, positive behavioral intervention supports, or other comparable behavior management techniques, the date of the training, and the source of training;

(ii) all instances in which a restraint or seclusion technique is used;

(iii) all instances in which law enforcement is summoned instead of using a restraint or seclusion technique;

(iv) the names of the students and school personnel involved in an incident in which restraint or seclusion was used; and

(v) if a student was restrained, the type of restraint, including mechanical restraint or physical restraint, that was used.

(d) If a school summons law enforcement instead of using a restraint or seclusion technique on a student, the school shall comply with the reporting, documentation, and review procedures established pursuant to this rule and Section 22-5-4.12 NMSA 1978.

F. Corporal punishment. Corporal punishment shall be prohibited by each local school board pursuant to Subsection B of Section 22-5-4.3 NMSA 1978. Restraint or seclusion techniques used in compliance with Subsection E of 6.11.2.10 NMAC shall not be deemed to be corporal punishment.

G. Detention, suspension and expulsion. Where detention, suspension, or expulsion is determined to be the appropriate penalty, it may be imposed only in accordance with procedures that provide at least the minimum safeguards prescribed in 6.11.2.12 NMAC. Suspensions or expulsions of students with disabilities shall be subject to the further requirements of Subsection I of 6.11.2.10 NMAC and 6.11.2.11 NMAC.

H. Discipline of students experiencing homelessness. Removing students experiencing homelessness from school shall be used only as a last resort, pursuant to the requirements in 42 USC Sec. 11431 et seq., the McKinney-Vento Homelessness Assistance Act.

(1) Public schools shall develop discipline policies and procedures that are reviewed at least annually and align with local school board policies. Policies and procedures shall:

(a) through professional development activities, create an awareness among educators and administrators of the types of behaviors that students experiencing homelessness may exhibit due to homelessness and provide strategies and supports to address the behaviors through the student assistance team process in accordance with Subsection D of 6.29.1.9 NMAC;

(b) take into account the issues related to a student’s homelessness by talking with the student and applicable staff and families prior to taking disciplinary action;

(c) consult with school behavior response teams or other applicable personnel to assign appropriate discipline related to the behavior;

(d) implement discipline alternatives to temporary or long-term suspensions or expulsions or classroom removals, if possible; and

(e) connect students with mental health services as needed.

(2) Public schools shall review school discipline records and data of students experiencing homelessness in order to identify any patterns in disciplinary actions that indicate an unfair bias against the students. The collection and review of such records shall be in compliance with the Family Educational Rights and Privacy Act, as well as any other applicable federal or state laws or rules governing the privacy of such documents.

I. Discipline of students with disabilities. Students with disabilities are not immune from school disciplinary processes, nor are they entitled to remain in a particular educational program when their behavior substantially impairs the education of other children in the program. However, public schools are required by state law and rule to meet the individual educational needs of students with disabilities to the extent that current educational expertise permits. Public school personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement, consistent with the other requirements of 6.11.2.11 NMAC, is appropriate for a student with a disability who violates a code of conduct as provided in 34 CFR Sec. 300.530.

(1) Long-term suspensions or expulsions of students with disabilities shall be governed by the procedures set forth in 6.11.2.11 NMAC.

(2) Temporary suspensions of students with disabilities may be imposed in accordance with the normal procedures prescribed in Subsection D of 6.11.2.12 NMAC, provided that the student is returned to the same educational placement after the temporary suspension and unless a temporary suspension is prohibited under the provisions of Paragraph (3) of Subsection I of 6.11.2.10 NMAC.

(3) Program prescriptions. A student with a disability's individualized education program (IEP), under the Individuals with Disabilities Education Improvement Act (IDEA), need not affirmatively authorize disciplinary actions which are not otherwise in conflict with this rule. However, the IEP team may prescribe or prohibit specified disciplinary measures for an individual student with a disability by including appropriate provisions in the student's IEP. Administrative authorities shall adhere to any such provisions contained in a student

with a disability's IEP, except that an IEP team may not prohibit the initiation of proceedings for long-term suspension or expulsion which are conducted in accordance with this rule.

(4) Immediate removal. Immediate removal of students with disabilities may be done in accordance with the procedures of Subsection C of 6.11.2.12 NMAC.

(5) A student who has not been determined to be eligible for special education and related services under 6.31.2 NMAC and who has engaged in behavior that violated a code of student conduct may assert any of the protections provided for in this subsection if the conditions set forth in 34 CFR Sec. 300.534 have been met.

(6) Referral to and action by law enforcement and judicial authorities.

(a) Nothing in these rules of conduct prohibits an administrative authority from reporting a crime committed by a student with a disability to appropriate authorities or prevents state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

(b) Transmittal of records.

(i) An administrative authority reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted, for consideration by the appropriate authorities, to whom the administrative authority reports the crime.

(ii) An administrative authority reporting a crime under this section may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

[6.11.2.10 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.11 DISCIPLINARY REMOVALS OF STUDENTS WITH DISABILITIES:

A. General. The following rules shall apply when a student with a disability under IDEA violates a rule of conduct as set forth in this rule which may result in:

(1) long-term suspension or expulsion; or

(2) any other disciplinary change of the student's current educational placement as specified in the federal regulations implementing IDEA at 34 CFR Secs. 300.530 through 300.536 and these or other department rules and standards.

B. Manifestation determination.

(1) For disciplinary removals of students with disabilities that exceed 10 consecutive school days or result in a disciplinary change of placement as defined by 34 CFR 300.536, the administrative authority must conduct a manifestation determination to determine whether the conduct was a manifestation of the child's disability pursuant to this Subsection. I'd recommend requiring the manifestation determination for *any* violation that normally produces a suspension or expulsion. And/or the second and subsequent times a suspension of any length is proposed.

(2) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a rule of student conduct, the administrative authority, the parent, and relevant members of the child's IEP team (as determined by the parent and the administrative authority) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(a) if the conduct in question was caused by or had a direct and substantial relationship to, the child's disability; or It is therefore essential that the IEP list all potentially disruptive or criminal activities that could result from the disability so the issue of what behavior is related to the child's disability is settled before any violation can occur.

(b) if the conduct in question was the direct result of the administrative authority's failure to implement the IEP. Within 10 days is reasonable for setting up a meeting. But suppose that after the violation the police were called. At that point, the student is in the juvenile justice system. A determination that the violation had a relationship to the student's disability 10 days or more later is too late—the child and family have been penalized for something that resulted from the child's disability. There needs to be: 1) much more specific rules about who can call the police under what circumstances, and 2) the school must be required to take responsibility for extracting the child from the juvenile justice system if it is determined that the violation was related to the child's disability.

(3) If the administrative authority, the parent, and relevant members of the child's IEP team determine the condition in either Subparagraph (a) or (b) of Paragraph (2) of Subsection B of 6.11.2.11 NMAC is met, the conduct must be determined to be a manifestation of the child's disability.

C. Determination that behavior is manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine the conduct was a manifestation of the child's disability, the IEP team must take immediate steps to comply with 34 CFR Sec. 300.530(f) and remedy any deficiencies. This could be interpreted to mean that the authority must remedy any juvenile justice issues, but I'd make that responsibility explicit somewhere in this section.

D. Determination that behavior is not a manifestation of disability. If the administrative authority, the parent, and relevant members of the IEP team determine the conduct was not a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to a child with a disability in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in Subsection I of this section. How is the determination made? Suppose the parents and the IEP team decide the violation was a manifestation, but the administrative authority concludes it was not. What then?

E. Special circumstances. School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child's behavior involves one of the special circumstances listed in 34 CFR Sec. 300.530(g). For purposes of this subsection, the definitions provided in 34 CFR Sec. 300.530(i) shall apply. Someone needs to look at the reference to see what violations permits a 9-week alternative education setting. Note that the term "alternative educational setting" is not defined.

F. Determination of setting. The student's IEP team determines the interim alternative educational setting for services under Subsections C and D of this section. The parent must participate in the determination.

G. Change of placement because of disciplinary removals. For purposes of removals of a student with a disability from the child's current educational placement under 6.11.2.11 NMAC and 6.11.2.12 NMAC, a change of placement occurs if the conditions provided in 34 CFR Sec. 300.536 are met.

H. Parental notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the administrative authority must notify the parents of that decision, and provide the parents the procedural safeguards notice described in 34 CFR Sec. 300.504. Notification of a decision once it is made is way too late. The parent must be involved in the manifestation determination. They also ought to be involved in the change of placement decision.

I. Services. A student with a disability who is removed from the student's current placement pursuant to this section must continue to receive special education and related services as provided in 34 CFR Sec. 300.530(d).

J. Appeal.

(1) The parent of a student with a disability who disagrees with any decision regarding the placement or the manifestation determination under this section, or an administrative authority that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to Subsection I of 6.31.2.13 NMAC.

(2) A hearing officer who hears a matter under Paragraph (1) of Subsection J of 6.11.2.11 NMAC, has the authority provided in 34 CFR Sec. 300.532(b).

(3) When an appeal under this subsection has been made by the parent or the administrative authority, the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in Subsections D or E of this section, whichever occurs first, unless the parent and the administrative authority agree otherwise.

[6.11.2.11 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

6.11.2.12 PROCEDURE FOR DETENTIONS, SUSPENSIONS, AND EXPULSIONS: The authority of the state and of local school boards to prescribe and enforce standards of conduct for public school students must be exercised consistently with constitutional safeguards of individual student rights. The right to a public education is not absolute; it may be taken away, temporarily or permanently, for violations of school rules. The right to a public education is a property right which may only be denied where school authorities have adhered to the minimum procedural safeguards required to afford the student due process of law. This section prescribes minimum requirements for detention, in-school suspension, and temporary, long-term or permanent removal of students from public schools. Local school boards may adopt procedures which afford students more protection than this rule requires. The procedures in this section apply only to disciplinary detentions, suspensions, and expulsions. They do not apply to disenrollment of students who fail to meet immunization, age, residence, or other requirements for valid enrollment, nor to the removal from school membership reports of students who have been absent from school for

10 consecutive school days in accordance with Subsection B of Section 22-8-2 NMSA 1978. Nothing in this section shall be construed as prohibiting school boards or administrative authorities from involving other school staff, students, and members of the community in the enforcement of rules of student conduct to the extent they believe is appropriate.

A. Post-suspension placement of students. Any student suspended from school shall be delivered directly by a school official to the student's parent(s) or an adult designated by the parent(s) or kept on school grounds until the usual end of the school day.

B. Students with disabilities. This section does not apply to long-term suspension or expulsion of students with disabilities pursuant to the IDEA or Section 504. The procedures for long-term suspension or expulsion of students with disabilities are set forth in Section 6.11.2.11 NMAC. School personnel under this section may remove a student with a disability who violates a rule of student conduct from the student's current placement to an appropriate interim alternative educational setting, another setting, or suspension, for no more than 10 consecutive school days to the extent those alternatives are applied to students without disabilities, and for additional removals of no more than 10 consecutive school days in the same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under Subsection G of 6.11.2.11 NMAC. This may be in conflict with the above rule that allows placement in an alternative setting for 45 days.

C. Immediate removal. Students whose presence poses a continuing danger to persons or property or an ongoing threat of interfering with the educational process may be immediately removed from school, subject to the following rules:

(1) A rudimentary hearing, as required for temporary suspensions, shall follow as soon as possible; "Rudimentary hearing" is not defined. May the student be represented? May the parent attend? Give testimony? What are the consequences of a rudimentary hearing that results in a suspension that is later determined to be incorrect?

(2) Students shall be reinstated after no more than one school day unless within that time a temporary suspension is also imposed after the required rudimentary hearing. In such circumstances, a single hearing will support both the immediate removal and a temporary suspension imposed in connection with the same incident(s); and

(3) The school shall exert reasonable efforts to inform the student's parent of the charges against the student and the action taken as soon as practicable. If the school has not communicated with the parent by telephone or in person by the end of the school day following the immediate removal, the school shall on that day mail a written notice with the required information to the parent's address of record.

D. Temporary suspension.

(1) A local school board may limit temporary suspensions to periods shorter than 10 school days.

(2) A student facing temporary suspension shall be granted a rudimentary hearing in which the student shall first be informed of the charges against the student and, if the student denies them, shall be told what evidence supports the charge(s) and be given an opportunity to present the student's version of the facts. The following rules apply:

(a) the hearing may be an informal discussion and may follow immediately after the notice of the charges is given;

(b) unless the administrative authority decides a delay is essential to permit a fuller exploration of the facts, informal discussion may take place and a temporary suspension may be imposed within minutes after the alleged misconduct has occurred;

(c) a student who denies a charge of misconduct shall be told what act(s) the student is accused of committing, shall be given an explanation of the evidence supporting the accusation(s), and shall be given the opportunity to explain the student's version of the facts. The administrative authority is not required to divulge the identity of informants, although the administrative authority should not withhold such information without good cause. The administrative authority is required to disclose the substance of all evidence on which the administrative authority proposes to base a decision in the matter; I get the point, but it clearly disadvantages a child who is not verbal or should be in special ed but is not. (70% of students in the juvenile center in Farmington were found eligible for special ed by experts diagnosticians but were not in special ed).

(d) the administrative authority is not required to allow the student to secure counsel, to confront or cross-examine witnesses supporting the charge(s), or to call witnesses to verify the student's version of the incident, but none of these is prohibited; and (But the administration can do all these things?)

(e) the school shall exert reasonable efforts to inform the student's parent(s) of the charges against the student and the possible or actual consequence as soon as practicable. If the school has not

communicated with the parent(s) by telephone or in person by the end of the first full day of suspension, the school shall on that day mail a written notice with the required information to the parent's address of record.

E. In-school suspension. "Reasonable efforts" is not defined.

(1) In-school suspension may be imposed with or without further restriction of student privileges. Any student who is placed in in-school suspension which exceeds 10 school days must be provided with an instructional program that meets state and local educational requirements. Student privileges, however, may be restricted for longer than 10 school days. They just sit there for 10 days?

(2) In-school suspensions of any length shall be accomplished according to the procedures for a temporary suspension as set forth in Subsection D of 6.11.2.12 NMAC. A local school board may limit the length of in-school suspensions which may be accomplished under temporary suspension procedures. No student in in-school suspension shall be denied an opportunity to eat lunch or reasonable opportunities to go to the restroom.

F. Detention.

(1) Detention may be imposed in connection with in-school suspension, but is distinct from in-school suspension in that detention does not entail removing the student from any of the student's regular classes.

(2) The authority of the schools to supervise and control the conduct of students includes the authority to impose reasonable periods of detention during the day or outside normal school hours as a disciplinary measure. Reasonable periods of detention may be imposed in accordance with the procedures for temporary suspension.

G. Long-term suspension and expulsion.

(1) Each local school board shall authorize appropriate administrative authorities to initiate procedures leading to long-term suspension or expulsion. Where prompt action to suspend a student long-term is deemed appropriate, a temporary suspension may be imposed while the procedures for long-term suspension or expulsion are activated. However, where a decision following the required formal hearing is delayed beyond the end of the temporary suspension, the student shall be returned to school pending the final outcome unless the provisions of Subparagraphs (j) and (k) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply.

(2) A student who has been validly expelled or suspended is not entitled to receive any educational services from the local school district during the period of the exclusion from school. A local school board may provide alternative arrangements, including correspondence courses at the expense of the student or parent(s) pursuant to department requirements, if the local school board deems such arrangements appropriate.

(3) Each local school board shall establish, or shall authorize appropriate administrative authorities to establish, appropriate processes for handling long-term suspensions and expulsions. Unless the terms expressly indicate otherwise, nothing in Paragraph (4) of Subsection G of 6.11.2.12 NMAC shall be construed as directing that any required decision be made by any particular person or body or at any particular level of administrative organization.

(4) The following rules shall govern the imposition of long-term suspensions or expulsions:

(a) Hearing authority and disciplinarian. The same person or group may perform the functions of hearing authority and disciplinarian. Where the functions are divided, the hearing authority's determination of the facts shall be conclusive to the disciplinarian, but the disciplinarian may reject any consequence(s) recommended by the hearing authority.

(b) Review authority. Unless the local school board provides otherwise, a review authority shall have discretion to modify or overrule the disciplinarian's decision, but may not impose harsher consequences. A review authority shall be bound by a hearing authority's factual determinations except as provided in Subparagraph (o) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(c) Disqualification. No person shall act as hearing authority, disciplinarian, or review authority in a case where the person was directly involved in or witnessed the incident(s) in question, or if the person has prejudged disputed facts or is biased for or against any person who will actively participate in the proceedings.

(d) Local school board participation. A local school board may act as hearing authority, disciplinarian, or review authority for any cases involving proposed long-term suspensions or expulsions. However, whenever a quorum of the local school board acts in any such capacity, Section 10-15-1 et seq., NMSA 1978, the Open Meetings Act, requires a public meeting.

(e) Initiation of procedures. An authorized administrative authority shall initiate procedures for long-term suspension or expulsion of a student by designating a hearing authority and disciplinarian in accordance with local school board policies, scheduling a formal hearing in consultation with the hearing authority, and preparing and serving a written notice meeting the requirements of Subparagraph (h) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(f) Service of notice. The written notice shall be addressed to the student, through the student's parent(s), and shall be served upon the parent(s) personally or by mail.

(g) Timing of hearing. The hearing shall be scheduled no sooner than five nor later than 10 school days from the date of receipt of the notice by the parent(s). The hearing authority may grant or deny a request to delay the hearing in accordance with the provisions of Subparagraph (i) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC.

(h) Contents of notice. The written notice must contain all of the following information, parts of which may be covered by appropriate reference to copies of any policies or regulations furnished with the notice:

(i) the school rule(s) alleged to have been violated, a concise statement of the alleged act(s) of the student on which the charge(s) are based, and a statement of the possible penalty;

(ii) the date, time, and place of the hearing, and a statement that both the student and parent(s) are entitled and urged to be present;

(iii) a clear statement that the hearing will take place as scheduled unless the hearing authority grants a delay or the student and parent(s) agree to waive the hearing and comply voluntarily with the proposed disciplinary action or with a negotiated penalty, and a clear and conspicuous warning that a failure to appear will not delay the hearing and may lead to the imposition of the proposed penalty by default;

(iv) a statement that the student has the right to be represented at the hearing by legal counsel, a parent or some other representative designated in a written notice filed at least 72 hours before the hearing with the contact person named pursuant to Item (vi) of Subparagraph (h) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC;

(v) a description of the procedures governing the hearing;

(vi) the name, business address, and telephone number of a contact person through whom the student, parent(s), or designated representative may request a delay or seek further information, including access to any documentary evidence or exhibits which the school proposes to introduce at the hearing; and

(vii) any other information, materials or instructions deemed appropriate by the administrative authority who prepares the notice.

(i) Delay of hearing. The hearing authority shall have discretion to grant or deny a request by the student or the appropriate administrative authority to postpone the hearing. Such discretion may be limited or guided by local school board policies not otherwise inconsistent with this rule.

(j) Student status pending hearing. Where a student has been suspended temporarily and a formal hearing on long-term suspension or expulsion will not occur until after the temporary suspension has expired, the student shall be returned to school at the end of the temporary suspension unless:

(i) the provisions of Subparagraph (k) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply, or

(ii) the student and parent(s) have knowingly and voluntarily waived the student's right to return to school pending the outcome of the formal proceedings; or

(iii) the appropriate administrative authority has conducted an interim hearing pursuant to a written local school board policy made available to the student which affords further due process protection sufficient to support the student's continued exclusion pending the outcome of the formal procedures.

(k) Waiver of hearing, voluntary compliance, or negotiated penalty. A student and the student's parent(s) may elect to waive the formal hearing and review procedures and comply voluntarily with the proposed penalty, or may waive the hearing and review and negotiate a mutually acceptable penalty with the designated disciplinarian. Such a waiver and compliance agreement shall be made voluntarily, with knowledge of the rights being relinquished, and shall be evidenced by a written document signed by the student, the parent(s), and the appropriate school official.

(l) Procedure for hearing and decision. The formal hearing is not a trial. The formal hearing is an administrative hearing designed to ensure a calm and orderly determination by an impartial hearing authority of the facts of a case of alleged serious misconduct. Technical rules of evidence and procedure do not apply. The following rules govern the conduct of the hearing and the ultimate decision:

(i) The school shall have the burden of proof of misconduct.

(ii) The student and the student's parent(s) shall have the following rights: The right to be represented by legal counsel or other designated representative, however, the school is not required to provide representation; the right to present evidence, subject to reasonable requirements of substantiation at the discretion of the hearing authority and subject to exclusion of evidence deemed irrelevant or redundant; the right to

confront and cross-examine adverse witnesses, subject to reasonable limitation by the hearing authority; the right to have a decision based solely on the evidence presented at the hearing and the applicable legal rules, including the governing rules of student conduct.

(iii) The hearing authority shall determine whether the alleged act(s) of misconduct have been proved by a preponderance of the evidence presented at a hearing at which the student or a designated representative have appeared.

(iv) If no one has appeared on the student's behalf within a reasonable time after the announced time for the hearing, the hearing authority shall determine whether the student, through the parent(s), received notice of the hearing. If so, the hearing authority shall review the schools' evidence to determine whether it is sufficient to support the charge(s) of misconduct.

(v) A hearing authority who is also a disciplinarian shall impose an appropriate sanction if the hearing authority finds that the allegations of misconduct have been proved under the standards of either Item (iii) or (iv) of Subparagraph (l) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC. A hearing authority who is not a disciplinarian shall report the findings, together with any recommended sanction, to the disciplinarian promptly after the hearing.

(vi) Arrangements to make a tape recording or keep minutes of the proceedings shall be made by the administrative authority who scheduled the hearing and prepared the written notice. A verbatim written transcript is not required, but any minutes or other written record shall fairly reflect the substance of the evidence presented.

(vii) The hearing authority may announce a decision on the question of whether the allegation(s) of misconduct have been proved at the close of the hearing. A hearing authority who is also a disciplinarian may also impose a penalty at the close of the hearing.

(viii) In any event, the hearing authority shall prepare and mail or deliver to the student, through the parent(s), a written decision within five working days after the hearing. The decision shall include a concise summary of the evidence upon which the hearing authority based its factual determinations. A hearing authority who is also a disciplinarian shall include in the report a statement of the penalty, if any, to be imposed, and shall state reasons for the chosen penalty. A hearing authority who is not a disciplinarian shall forward a copy of the hearing authority's written decision to the disciplinarian forthwith. The disciplinarian shall prepare a written decision, including reasons for choosing any penalty imposed, and mail or deliver it to the student, through the parent(s), within five working days of receipt of the hearing authority's report.

(ix) A disciplinarian who is not a hearing authority may observe but not participate in the proceedings at a formal hearing. If the disciplinarian is present at the formal hearing and if the hearing authority announces a decision at the close of the hearing, the disciplinarian may also announce the disciplinarian's decision at that time.

(x) The disciplinarian's decision shall take effect immediately upon initial notification to the parent(s), either at the close of the hearing or upon receipt of the written decision. If initial notification is by mail, the parent(s) shall be presumed to have received the notice on the fifth calendar day after the date of mailing unless a receipt for certified mail, if used, indicates a different date of receipt.

(m) Effect of decision. If the hearing authority decides that no allegation(s) of misconduct have been proved, or if the disciplinarian declines to impose a penalty despite a finding that an act or acts of misconduct have been proved, the matter shall be closed. If the disciplinarian imposes any sanction on the student, the decision shall take effect immediately upon notification to the parent and shall continue in force during any subsequent review.

(n) Right of review. Unless the local school board was the disciplinarian, a student aggrieved by a disciplinarian's decision after a formal hearing shall have the right to have the decision reviewed if the penalty imposed was at least as severe as a long-term suspension or expulsion, an in-school suspension exceeding one school semester, or a denial or restriction of student privileges for one semester or longer. A local school board may grant a right of review for less severe penalties. Local school boards shall establish appropriate mechanisms for review except where the local board was the disciplinarian, in which case the local school board decision is final and not reviewable administratively. A student request for review must be submitted to the review authority within 10 school days after the student is informed of the disciplinarian's decision.

(o) Conduct of review. Unless the local school board provides otherwise, a review authority shall have discretion to modify the disciplinarian's decision, including imposing any lesser sanction deemed appropriate. A review authority shall be bound by the hearing authority's factual determinations unless the student persuades the review authority that a finding of fact was arbitrary, capricious, or unsupported by substantial evidence or that new evidence, which has come to light since the hearing and which could not with reasonable

diligence have been discovered in time for the hearing, would manifestly change the factual determination. Upon any such finding, the review authority shall have discretion to receive new evidence, reconsider evidence introduced at the hearing, or conduct a de novo hearing. In the absence of any such finding, the review shall be limited to an inquiry into the appropriateness of the penalty imposed.

(p) Form of review. Unless the local school board provides otherwise, a review authority shall have discretion to conduct a review on the written record of the hearing and decision in the case, to limit new submissions by the aggrieved student and school authorities to written materials, or to grant a conference or hearing at which the student and the student's representative and school authorities may present their respective views in person. Where a conference or hearing is granted, the record-keeping requirements of Item (vi) of Subparagraph (l) of Paragraph (4) of Subsection G of 6.11.2.12 NMAC apply.

(q) Timing of review. Except in extraordinary circumstances, a review shall be concluded no later than 15 working days after a student's written request for review is received by the appropriate administrative authority.

(r) Decision. A review authority may announce a decision at the close of any conference or hearing held on review. In any event, the review authority shall prepare a written decision, including concise reasons, and mail or deliver it to the disciplinarian, the hearing authority and the student, through the parent(s), within 10 working days after the review is concluded.

(s) Effect of decision. Unless the local school board provides otherwise, a review authority's decision shall be the final administrative action to which a student is entitled.

[6.11.2.12 NMAC – Rp, 6.11.2.7 NMAC, 7/28/2020]

HISTORY OF 6.11.2 NMAC:

6.11.2 NMAC, Rights and Responsibilities of the Public Schools and Public School Students, filed 8/15/1997, was repealed and replaced by 6.11.2 NMAC, Rights and Responsibilities of Public Schools and Public School Students, effective 7/28/2020.

DDPC Comments - 6.11.2 & 6.12.12 NMAC

McCoy, AliceLiu, DDPC

Fri 7/10/2020 4:50 PM

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

Cc:Stewart, Ryan, PED <Ryan.Stewart@state.nm.us>; Rodriguez, Stephanie, GOV <Stephanie.Rodriguez3@state.nm.us>; Padilla, Mariana, GOV <Mariana.Padilla@state.nm.us>; Sena, John, PED <John.Sena@state.nm.us>; jarango@nmia.com <jarango@nmia.com>; Katie Stone <katie@stone.com>;

1 attachment

DDPC Comments - 6.11.2 & 6.12.12 NMAC.pdf;

NM PED Policy Division:

Attached please find DDPC's comments on the proposed rules 6.11.2 NMAC and 6.12.12 NMAC. Please do not hesitate to contact me with any questions regarding the comments.

Thank you,

Alice Liu McCoy
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