

# Concise Explanatory Statement For Rulemaking Adoption:

## Findings required for rulemaking adoption:

### Findings MUST include:

- Reasons for adopting rule, including any findings otherwise required by law of the agency, and a summary of any independent analysis done by the agency;
- Reasons for any change between the published proposed rule and the final rule; and
- Reasons for not accepting substantive arguments made through public comment.

Specific statutory or other authority authorizing rulemaking:  
Sections 22-2-1, 22-2-2, 22-13-5 and 22-13-6.1 NMSA 1978.

Rule adoption date:  
January 5, 2023

Rule effective date:  
July 1, 2023

Reasons for adopting rule:  
The purpose of the proposed rulemaking is to provide more definite timelines and requirements for public educational agencies throughout the identification, initial evaluation, and reevaluation procedures for children with disabilities from the use of the multi-layered system of supports (MLSS) and initial evaluation to the eligibility determination and initial individualized education program (IEP) meetings. Additionally, the rule was amended to explicitly include current Individuals with Disabilities Education Improvement Act (IDEA) requirements; address requirements when a student receives a regular high school diploma or exceeds the age of eligibility for special education services; and preclude the use of the severe discrepancy model as a method of evaluating for specific learning disabilities. The subsection regarding initial evaluations and reevaluations was also reorganized and amended to better clarify the requirements for evaluation and reevaluation.

The proposed amendment to 6.31.2 NMAC, Children with Disabilities/Gifted Children, primarily amends section 6.31.2.10, Identification, Evaluation, and Eligibility Determination by:

1. providing that the parent requests for evaluations and the evaluation process can commence while MLSS interventions are provided to a student;
2. providing public agency requirements when a student receives a regular high school diploma or exceeds the age of eligibility;
3. explicitly requiring that written informed consent be obtained before conducting an initial evaluation or reevaluation;
4. explicitly permitting public agencies to utilize the consent override provisions when a parent does not provide consent to evaluate a student;
5. providing requirements of the public agency when it receives a parent request for evaluation, including a 15 school-day prior written notice deadline with considerations for school breaks;
6. providing requirements of the public agency when it receives a referral for evaluation without a parent request including a 15 school-day deadline after the referral to request parent consent to evaluate with consideration for school breaks;
7. explicitly permitting parents to utilize mediation, state complaint, and due process hearing procedures to challenge the public agencies' response or lack of response to a request to evaluate;
8. requiring that the evaluation and written evaluation report be completed within 60 days of parental consent to evaluate;
9. providing additional and clarified requirements for evaluation and reevaluation procedures including that the parent be provided the written evaluation or reevaluation reports at least two calendar days before the eligibility determination team meeting;
10. adding explicit requirements regarding requests for independent education evaluations already included in the IDEA regulations;
11. providing 15 school-day deadlines for the eligibility determination team meeting with considerations for school breaks;
12. precluding the use of the severe discrepancy model as a method of evaluating for specific learning disabilities;
13. requiring that public agencies use the dual discrepancy model to identify specific learning disabilities for students in kindergarten through grade 12.

The proposed rule changes also significantly reorganize current provisions of 6.31.2.10 to improve construction and readability and include minor technical changes throughout the rule.

Reasons for any change between the published proposed rule and the final rule:  
The department reviewed and considered all written and oral feedback received during the public comment period. Changes between the published proposed rule and the adopted rule include technical cleanup. For more detail on the changes between the proposed rule and the rule as adopted, reasons for changes, and information as to why the Department may not have accepted comments or suggested changes, please see "6.31.2 NMAC, Response to Public Comment," attached.

### Issuing authority (If delegated, authority letter must be on file with ALD):

Name:

Jacqueline Costales, Ed.S.

Check if authority has been delegated

Title:

Deputy Secretary of Teaching, Learning, and Assessment

Signature: (BLACK ink only OR Digital Signature)

Date signed:

DocuSigned by:  
*Jacqueline Costales*  
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01/05/2023

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

**Public Comment Period:** November 29, 2022, to January 3, 2023.

The New Mexico Public Education Department (PED) received 24 public comments for the following proposed rulemaking:

- Amendment to 6.31.2 NMAC, Children with Disabilities/Gifted Children

### Changes between the proposed and adopted rules, by proposed rule.

RULE CHANGES		
No.	Section	Change
<b>1</b>	<b>6.31.2.10 B. (2)</b>	<ul style="list-style-type: none"> <li>• Replaced, “A parent may request an evaluation <u>or</u> special education...” with, “A parent may request an evaluation <u>for</u> special education...”</li> </ul>
<b>2</b>	<b>6.31.2.10 D. and 6.31.2.10 E.</b>	<ul style="list-style-type: none"> <li>• Entirely swapped the location of text in Subsection D with the location of text in Subsection E. In other words, Subsection D became Subsection E and Subsection E became Subsection D. Updated references to these subsections throughout the rule.</li> </ul>
<b>3</b>	<b>6.31.2.10 D. (2)*</b>	<ul style="list-style-type: none"> <li>*This was part of Section E in the proposed rule. See Rule Change No. 2.</li> <li>• In response to public comment, added that a request for initial evaluation or reevaluation by a parent may be made in writing or orally, “to any licensed personnel of the school in which the student attends.” In the following sentence, deleted, “made to any employee of the school in which the student attends...”</li> </ul>
<b>4</b>	<b>6.31.2.10 G. (1)</b>	<ul style="list-style-type: none"> <li>• Lower-cased “Technical Evaluation and Assessment Manual.”</li> </ul>
<b>5</b>	<b>6.31.2.10 I.</b>	<ul style="list-style-type: none"> <li>• Deleted Paragraph (1) as it was redundant with Paragraph (2). Renumbered Section I.</li> </ul>
<b>6</b>	<b>6.31.2.10 I. (1)*</b>	<ul style="list-style-type: none"> <li>*This was Paragraph (2) in the proposed rule; it became Paragraph (1) after the Department deleted the proposed Paragraph (1). See Rule Change No. 5.</li> <li>• Deleted “with a disability” after, “The parents of a child,” and added, “or reevaluation of their child,” after, “...who disagree with an evaluation.” Changed the term “have” to has” accordingly.</li> </ul>
<b>7</b>	<b>6.31.2.10 I. (1)*</b>	<ul style="list-style-type: none"> <li>*This was Paragraph (2) in the proposed rule; it became Paragraph (1) after the Department deleted the proposed Paragraph (1). See Rule Change No. 5.</li> <li>• Replaced, “the parents of a child who disagree,” with, “the parent of a child who disagrees.”</li> </ul>
<b>8</b>	<b>6.31.2.10 J. (2)(a)</b>	<ul style="list-style-type: none"> <li>• Replaced, “children who do not qualify,” with, “children who are not eligible...”</li> </ul>

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

**Response to public comment. All substantive comments have been summarized below. Comments that are not substantive in nature or fall outside the scope of the rule have not been included.**

Deadlines for Consent, Responses, and Eligibility Determinations	
Summary of Comments	PED Response
Concern with the time a school or school district would be given to meet the proposed required deadlines for consent, and whether this could result in over-identification of students who need special education services. Comments included concern on whether they have enough time or staff to satisfy the timelines, despite some of the considerations given for when school is not in session.	The primary purpose of this rulemaking was to outline the timely implementation of an evaluation. In fact, the IDEA and current state rules require prompt requests for consent and responses to parent requests and referrals. The Department believes a minimum of 75 days from parent request to completion of the evaluation is appropriate. This timeline can be extended if consent is not immediately provided to the school. Furthermore, the LEAs have the ability to decline a parent request for an evaluation if it is determined that it is not appropriate at the time of the request.
Question whether the same deadlines should be given to re-evaluations.	Reevaluations are not subject to the 60-day deadline requirement applied to initial evaluations. Reevaluations must be conducted at least every three years, but there is no deadline for completion after the LEA obtains consent to conduct the reevaluation. However, the LEAs will still be required to respond to a request for reevaluation of a student within the identified timeframes. LEAs may have reason to deny such requests if a recent evaluation was conducted.
Concern with whether an initial evaluation report should be completed within the 60-day deadline provided by rule and the IDEA.	The Department’s proposed amendment regarding the completion of an evaluation report within 60 days was meant to clarify what was in the existing rule. The existing rule already required that an evaluation and report be completed within 60 days of obtaining consent.
Concern with whether the deadline for consent should apply to oral requests.	The Department believes that requiring a written form to request consent would create a barrier for parents. Once the rule is effective, the deadline to respond and potentially request consent will begin when an oral request is made. Oral requests are not prohibited by the IDEA.

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

Deadlines for Consent, Responses, and Eligibility Determinations	
Summary of Comments	PED Response
Concern with whom should receive the request for an evaluation, and suggestion for it to be a building, campus, or school district administrator. The existing language implies the request can be made to, for example, cafeteria staff.	Access to administrators is limited and requiring that request be made directly to administrators would only lead to further delay in a potentially necessary evaluation. The Department has updated the language to clarify that a request can be made to “licensed personnel of the school in which the student attends.” See Paragraph 2 of Subsection D of Section 10.
Concern with determination of when a request is “actually” received.	A request is received when a parent submits a request to licensed personnel. The rule requires that all requests be provided to licensed personnel as soon as possible after receiving the request.
Suggestion to provide 30 days to conduct an eligibility meeting after the completion of an evaluation report.	The primary purpose of this rulemaking was to provide timely determination of eligibility. Extending the time for the eligibility determination would ultimately delay the provision of services if a student was determined to be eligible.
Suggestion to change 6.31.2.10(C)(1)(a) to “conduct and <u>complete</u> a full and individual evaluation.”	The rule already requires that an evaluation be "complete" within 60 days at 6.31.2.10(F)(2).
Suggestion to shorten deadline to respond to a parental request for an evaluation to 10 days.	The primary purpose of this rulemaking was to outline the timely implementation of an evaluation. In fact, the IDEA and current state rules require prompt requests for consent and responses to parent requests and referrals. The Department believes a maximum of 15 days from parent request to the LEAs response provides sufficient time for the LEA to review and meaningfully consider the request.
Suggestion that “written informed parental consent” be required to conduct an evaluation.	The rule as proposed requires written informed consent prior to conducting an evaluation of a student.
Suggestion that it be permissible to obtain consent through electronic communication such as email.	The rule does not prohibit an LEA from obtaining written informed consent via electronic communication such as email. The IDEA does permit email communication when the parent agrees to this form of communication. However, LEAs should ensure that consent and electronic signatures are obtained in accordance with state law.
Concern that there will be no opportunity for LEAs to clarify with parents whether they are requesting an evaluation or some other support with academics or behaviors.	The rule only requires that an LEA respond to a request for an evaluation or reevaluation through a prior written notice. LEAs are encouraged to communicate with parents if their oral or written communication does not clearly articulate a request for an evaluation.

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

Deadlines for Consent, Responses, and Eligibility Determinations	
Summary of Comments	PED Response
Concern regarding the requirement that an IEP meeting also be held with a EDT meeting within 15 days or students' return to school after a break.	This provision is meant to account for potential breaks in which an evaluation is completed (namely summer break). This would allow the school to delay an EDT meeting until school resumes. It does not necessarily require that both meetings be held together, but does require that an EDT meeting and an IEP meeting be held no later than 15 days after school resumes. Under the current system, it is very common for the EDT and IEP meetings to be held on the same day, although this is not required.
Suggestion that all timelines be suspended during summer break.	The new provisions are meant to account for potential breaks in which an evaluation is completed, namely summer break. However, the IDEA does not provide an extension of the deadline for the 60 day initial evaluation or the three year reevaluation due to school breaks. The Department chose to provide extensions while still ensuring that evaluations and reevaluations are not unreasonably delayed.
Suggestion that an LEA should be able to deny an evaluation or reevaluation if the Review of Existing Evaluation Data (REED) does not support the need for an evaluation.	A determination that an evaluation is not necessary at the time of the request after a Review of Existing Evaluation Data may be a legitimate reason to deny a parent request for an initial evaluation, but LEAs should consider their Child Find obligations and determine whether an evaluation is appropriate and should not ignore apparent disabilities that create the need for special education. However, the IDEA requires that reevaluations be conducted every three years unless a parent and LEA agree that a reevaluation is unnecessary.
Suggestion that written informed consent not be required for reevaluations because a Review of Existing Evaluation Data can occur at any time.	Although a Review of Existing Evaluation Data can be conducted without parental consent, written informed consent is required to conduct a reevaluation. The IDEA requires that reevaluations be conducted every three years unless a parent and LEA agree that a reevaluation is unnecessary.
Recommendation to convene a committee to study current obstacles impeding the timely completion of evaluations.	The Department will continue to work with school districts in the implementation of the requirements of this rule.

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

Report to Parents	
Summary of Comments	PED Response
Concern with whether public agencies can meet the requirement to provide parents with a written report two days before the eligibility determination team meeting.	The requirement in the current proposed rules is that an evaluation report be provided at least two days before the EDT meeting for parents or guardians to have a meaningful opportunity to review prior to the eligibility determination meeting and participate in the meeting.

Interaction with the Multi-layered System of Supports	
Summary of Comments	PED Response
Concern with whether the new timelines will impede the use of MLSS as an initial intervention process.	The implementation of MLSS interventions may be a valid reason to deny a parent request, but LEAs should consider their Child Find obligations and determine whether an evaluation is appropriate despite the provision of other interventions and should not ignore apparent disabilities that create the need for special education.
Concern with whether schools will be required to document MLSS interventions to include this information in the evaluation and eligibility determinations.	While the Department does not offer or require specific or certain forms to be completed, LEAs are still required to do data tracking and progress monitoring as part of the MLSS process. Schools should schools should keep documentation or data related to MLSS interventions implemented for a particular student. This information should be included with other evaluation data when making evaluation or eligibility determinations.

## Changes Between the Proposed and Adopted Rule and Response to Public Comment

Technical Cleanup	
Summary of Comments	PED Response
Suggestion to align how the terms “New Mexico Technical Evaluation and Assessment Manual” are written.	PED edited the term to align with rule drafting guidelines.
Suggestion to change “children who do not qualify” to “children who are not eligible.”	PED made the change.
Suggestion to change 6.31.2.10(B)(2) to “A parent may request an evaluation <u>for</u> special education...” instead of, “A parent may request an evaluation <u>or</u> special education...”	PED made the change.
Suggestion to correct subject verb agreement in 6.31.2.10(I)(1) to “The parents have the right”	PED made the change.
Suggestion to change 6.31.2.10(C)(3)(b) to “ <u>standard</u> high school diploma” instead of “ <u>regular</u> high school diploma”	"Regular High School Diploma" is the term used in Federal Education laws including the Individuals with Disabilities Education Act.