

# 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 9-24-8, 22-2-1, 22-2-2, 22-13-6, and 22-13-6.1 NMSA 1978.

Rule adoption date:  
July 20, 2023

Rule effective date:  
July 31, 2023

Reasons for adopting rule:  
The purpose of the rulemaking is to establish new standards for identification and service for gifted students that will promote best practices for equity and diversity in gifted education.

Rule information:  
The new rule requires local education agencies to submit gifted education program plans to the Department, report gifted funding revenue and expenses in the Education Plan, follow more inclusive identification procedures, provide for annual review of gifted students' needs and programming on a gifted individual education plan (GIEP), and ensure the individual needs of gifted students are met with dispute resolution processes.

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. For more detail on the changes between the proposed rule and the rule as adopted, reasons for changes, or information as to why the Department may not have accepted comments or suggested changes, please see "6.31.3 NMAC\_Response to Public Comment," attached.

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

Name:

Gregory Frostad

Check if authority has been delegated



Title:

Assistant Secretary of Policy, Research and Technology

Signature: (BLACK ink only OR Digital Signature)

Date signed:

DocuSigned by:  
  
96DA8683D92942F...

07/20/2023

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<b>RULE CHANGES</b>	
<b>Section</b>	<b>Change to the proposed rule</b>
<b>6.31.3.3</b> Statutory Authority	<ul style="list-style-type: none"> <li>• Delete “This rule is being promulgated pursuant to.”</li> <li>• Replace “Section” with “Sections 22-13-6 and” after “pursuant to”</li> <li>• Insert “9-24-8,” after “Sections”</li> </ul>
<b>6.31.3.7(R)</b> Definitions	<ul style="list-style-type: none"> <li>• Replace “content areas” with “a subject area” after “exceptional capability in”.</li> <li>• Delete “that is demonstrated by” before “achievement at an advanced level”.</li> <li>• Insert “Specific aptitude subject areas include all subject areas for which educational standards for students have been adopted in Chapter 29 of Title 6 NMAC.</li> </ul>
<b>6.31.3.9</b> LEA Gifted Education Program Plan	<ul style="list-style-type: none"> <li>• Delete “LEA” from the section title.</li> <li>• Replace “on a biannual basis by April 30” with “every other year by a department-assigned date” in the first sentence of Subsection A.</li> <li>• Replace “of” with “and timeline for” in Subparagraph (f) of Paragraph (2) of Subsection B.</li> <li>• Insert “use evidence-based programs and service models to produce advanced outcomes” after “Programming components shall” in Paragraph 3 of Subsection B.</li> <li>• Insert as 6.31.3.9(B)(3)(i) “whole-grade and single-subject acceleration policy or procedures” and renumerate the subsequent subparagraphs.</li> <li>• Replace “of” with “for” before “gifted education teachers” in Paragraph (8) of Subsection (B).</li> <li>• Insert as Subsection C “Department approval or disapproval of a gifted education program plan shall remain in effect for two years or until a revised gifted education program plan is evaluated by the department.”</li> <li>• Insert as Subsection D “Nothing in this section shall preclude a school district or charter school from offering additional gifted programs for students who fail to meet the eligibility criteria. However, the state will only provide state funds for department-approved gifted programs for those students who meet the established criteria.”</li> </ul>
<b>6.31.3.11</b> Evaluation for Gifted Students	<ul style="list-style-type: none"> <li>• Delete “academic” before “aptitude” in Paragraph (4) of Subsection A.</li> <li>• Insert “creativity, problem solving, or achievement” after “artistic ability” in Paragraph (5) and after “leadership ability” in Paragraph (6).</li> <li>• Delete Subsection C – which required a receiving LEA to screen incoming students for gifted identification – and renumerate the subsequent subsection as C-E.</li> <li>• Insert “qualification” before “data” in the new Subsection C.</li> <li>• Replace “The identification of a student as gifted shall include” with “Prior to determination of eligibility by the GIEP team, district or charter school personnel determining a student’s qualification for gifted education shall consider” in the new Subsection C.</li> </ul>

## Response to Public Comment

### 6.31.3 NMAC, Gifted and Talented Students

**Public Comment Period:** May 31, 2023 - July 6, 2023

The New Mexico Public Education Department (PED) received 29 public comments for 6.31.3 NMAC, Gifted and Talented Students. 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.

Requiring universal screening and gifted programming	
Summary of Comments	PED Response
Public comment included concern about imposing requirements on LEAs to have gifted programs, when, it was believed, gifted programs have been optional for LEAs.	<p>Public comments reveal some confusion about gifted programs and about similarities and differences between gifted education and special education. The Department does not interpret the statutory language, “each school district offering a gifted education program” as allowing LEAs a choice about whether to offer gifted services to students with gifted IEPs. Gifted programs are required in schools where there are gifted students, as they respond to the individual needs of gifted students. It has been the case that many schools, especially schools with primarily economically disadvantaged students, have had no identified gifted students, and in their absence, have not yet developed gifted programs. However, the proposed new rule requires that even in the absence of identified gifted students, gifted education program plans must be developed by LEAs in order to identify gifted students and begin to provide appropriate services.</p> <p>Department has determined that disproportionate rates of gifted identification across groups by socioeconomic status, race, culture, and language, are not in keeping with the purpose of public schools stated in Section 22-1-1.2 NMSA 1978 of providing a system “sufficient for the education of all students.” All schools are required in the proposed new rule to seek out missing gifted students and develop individualized programming to meet their needs.</p> <p>The department concurs with comments that point out that gifted identification practices previously established in rule as 6.31.2.12 NMAC have resulted in inequitable identification of gifted students as shown in the report for House Memorial 33 of 2022 (HM33), including Native American students, a focus demographic group of the decision and order in the <i>Martinez</i> and <i>Yazzie</i> consolidated lawsuit.</p> <p>The department concurs with comments that underrepresentation of students by categories of race, ethnicity, disability, and English learner and socioeconomic status, as well as underrepresentation of students with artistic and leadership gifts, are pervasive in New Mexico public schools and are a priority to be addressed in the proposed rule through required universal screening and wider interpretation of domain-specific gifts.</p>
Public comment included support for identification practices required in proposed rule.	
Public comment included support for systems that will help identify as gifted students from groups named in the <i>Martinez</i> and <i>Yazzie</i> consolidated lawsuit court order.	

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<b>Identifying and developing talent in multiple domains</b>	
<b>Summary of Comment</b>	<b>PED Response</b>
Public comment included concern that additional evaluation areas for gifted students seem not to be supported by Section 22-13-6.1 NMSA 1978 or may be lowering standards for giftedness.	<p>Subsection D of Section 22-13-6.1 NMSA 1978 provides that “in determining whether a child is gifted, the multidisciplinary team shall consider diagnostic and other evidence of the child’s: (1) creativity or divergent-thinking ability; (2) critical-thinking or problem-solving ability; (3) intelligence; and (4) achievement.” Each one of these areas of evaluation may be considered as domain-general or domain-specific. When these evaluation areas are domain-specific, they relate to subjects that can be taught in school, such as mathematics, science, the arts, social studies, or leadership. For example, students identified for developing artistic talent with a gifted individualized education plan (GIEP) may present valid, quantitative and qualitative evidence of artistic creativity, problem-solving ability, intelligence, or achievement. To address the need for clarification presented by public comment, the Department will amend Subsection A of Section 11 of the proposed new rule to clarify that the four, statutorily defined areas of need occur within both artistic and leadership domains.</p> <p>The Department is tasked with adopting standards “pertaining to the determination of who is a gifted child,” pursuant to Subsection A of Section 22-13-6.1, which the Department does without statutory conflict in the proposed new rule, with the purpose of better identifying all students with gifts that may be developed with school-based educational programming. This purpose is aligned with the Department Strategic Plan, with ESEA section 2103(b)(3)(J) as amended by the Every Student Succeeds Act, regarding local use of federal funds, and with the stated purpose of this rulemaking to address longstanding issues of equity in gifted education.</p>
Public comment included support for expanding areas of evaluation, identification, and service to include the arts, leadership, and all school-based content areas.	
Public comment included support for the proposed rule as supporting the development of children’s potential for the benefit of society and individuals.	The Department concurs with public comment emphasizing the individuals’ development to their full potential in public schools, both for their own benefit, to avoid unnecessary struggles with unfulfilling educational programming, and for the benefit of society, what one public comment called “return on investment.”
Public comment mentioned the best practice recommendation to use local norms to “reduce inequitable and, ultimately, harmful practices.”	While the rule does not specifically address the use of local norms, it is a common practice in universal screening, and will be part of Department guidance forthcoming in August.

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<b>Dispute resolution procedure</b>	
<b>Summary of Comment</b>	<b>PED Response</b>
<p>Public comment included the claim that the dispute resolution process outside of an LEA is unnecessary, inconsistent with other non-IDEA educational programs, and costly, may divert financial and human resources from dispute resolution for students with disabilities, and should remain solely between LEA and family.</p>	<p>Both the alternative dispute resolution and formal review processes involving the Department are optional, and need not be invoked if the family chooses not to. The need for dispute resolution will be less likely in cases where LEAs document and respond to gifted students’ individual educational needs with appropriate programming. Districts that expend gifted operational funding from the state on appropriate gifted education services are less likely to have the need for dispute resolution and any relevant expenses.</p> <p>To address concern about how gifted education in New Mexico is distinct from other categories of educational programs, the Department distinguishes gifted education in New Mexico from general education programs based on the level of individualization they require. Individualization for each gifted child, pursuant to Sections 22-13-6 and 22-13-6.1 NMSA 1978, has for thirty years aligned gifted education with special education, although such provisions are in state statute, not in federal law (IDEA). The dispute resolution procedures in the proposed new rule are deemed by the Department to be warranted and necessary.</p> <p>Operational funding is provided to schools through the Statewide Equalization Guarantee to individualize gifted programming, which should preventatively minimize expenditures on resources for dispute resolution. For example, individuals with mild or moderate gifted education needs will garner the LEA an additional 0.7 special education program unit, valued at \$4,369.17 at of the start of the 2023-2024 school year to be expended on “Department-approved gifted education programs for students who meet the established criteria” pursuant to Subsection D of Section 22-13-6 NMSA 1978.</p>
<p>Public comment included support for dispute resolution procedures in proposed rule.</p>	<p>The Department’s findings from the 2020 Next Step Focus Discussions and the HM33 Report support statements in public comment that previous rule for gifted education, 6.31.2.12 NMAC has resulted in inequitable and inconsistent services for gifted students, which may be addressed and improved with the dispute resolution procedure in the proposed rule. Public comments addressing experience with previous rule that has been ignored by LEAs also show the need for establishing a dispute resolution procedure in the proposed rule.</p>

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<b>Gifted funding and program accountability</b>	
<b>Summary of Comment</b>	<b>PED Response</b>
Public comment included support for gifted funding reporting requirements	Appropriate use of gifted education funding will be essential to whole-school improvement and accountability. Reporting may reveal the impact of programming on achievement, growth, and engagement of gifted students, who make up a substantial proportion of the population of students in public schools. While special education programs must demonstrate through maintenance-of-effort that expenditures directly reach students with disabilities, no such accountability for expenditures of operational funding for gifted education has been required prior to the proposed rule, to the detriment of gifted students and the school as a whole.
Public comment included support for requirements, pursuant to Section 22-13-6 (D), that “the state shall only provide state funds for Department-approved gifted programs for those students who meet the established criteria”	Department will amend the proposed new rule to echo statutory language about funding only department-approved program plans as stated in Section 22-13-6 NMSA 1978.

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<b>GIEP document components and GIEP team membership</b>	
<b>Summary of Comment</b>	<b>PED Response</b>
Public comment included request for clarification about the multidisciplinary team for determination of a gifted student, with concern expressed for the level of expertise represented and the role of the parent or guardian on the GIEP team in that function.	The role of the GIEP team, as defined in Section 7 of the proposed rule, includes serving as the eligibility determination team for a gifted student. This will be clarified by amending the subsection of Section 11 that describes the analysis of data for qualification. Qualification decisions are to be made prior to the eligibility determination, and are the responsibility of district personnel.
Public comment included support for the proposed requirements of the GIEP document, team, and meeting	The Department concurs with comments in support of the proposed rule’s GIEP document requirements in Section 12 to align documentation and services to individual needs for growth in areas of strength and other areas. These requirements are intended to be the essential components specifically for gifted students, eliminating irrelevant components to better communicate a program and involve family, the gifted child, and educators
Public comment included support for attending to gifted students’ commensurate growth as defined and supported in proposed rule, as well as for recommendation for specifically addressing advanced instruction and acceleration using research-based program and service models that produce advanced outcomes.	<p>The Department concurs with public comment in support of the principle of commensurate growth in gifted programming, challenging the message families may hear, as one commenter stated, that their students have no special programming needs because they are already achieving at or above the proficiency level for their grade. The intention should be to ensure students are growing through instruction in all needed affective, cognitive, and achievement areas.</p> <p>The Department will amend the proposed new rule to specifically mention acceleration and other research-based program and service models likely to produce advanced outcomes.</p>
Public comment included concern for the timeliness of response by LEAs to students transferring in with a GIEP, recommending a 10-day maximum for holding a GIEP review.	<p>The GIEP of a student newly transferred to a school shall serve as the educational program of the student until it is reviewed and revised on or before the annual review deadline.</p> <p>If a parent requests an IEP meeting at any time, it is customary for an LEA to respond and schedule within 10 days, however this requirement is not in the proposed rule. The proposed rule requires that LEAs develop policies in their Gifted Ed Plan to communicate with parents.</p> <p>The Department will amend the proposed new rule to require LEAs in their gifted program plan to establish a timeframe within which communication to and from parents must occur.</p>

**Response to Public Comment**  
**6.31.3 NMAC, Gifted and Talented Students**

<p>Public comment included support but also concern for clarification about program planning for twice-exceptional students.</p>	<p>Public comment indicated that “it is not altogether clear whether the more common practice would be to hold a GIEP team meeting separately from and IEP meeting in the case of twice exceptional students” and that “there may also be a risk of misunderstanding the fundamental fact that there still does need to be an IEP team meeting for twice exceptional students.” Department guidance forthcoming in August will clarify that there must be an IEP meeting for twice-exceptional students and will present a crosswalk of sections of the IEP that should cover requirements for the GIEP. Section 12 Subsection B of the proposed rule states that there shall be an IEP for twice-exceptional students.</p>
--	---

<b>Consideration of race in gifted identification and services</b>	
<b>Summary of Comment</b>	<b>PED Response</b>
<p>Public comment included opposition to any race-based considerations in gifted identification</p>	<p>The Court found, in the <i>Martinez</i> and <i>Yazzie</i> consolidated lawsuit, the state is in violation of the Equal Protection Clause of the 14th Amendment of the U.S. Constitution, failing to provide sufficient education for groups by categories of race, culture, language, and disability. 2023 Senate Memorial 60 (SM60) specifically resolved “that students identified in the <i>Martinez and Yazzie v. State of New Mexico</i> ruling be represented with greater equity and consistency as eligible for gifted education programs.”</p> <p>While nothing in the proposed rule requires race-based considerations for identification of gifted students, 6.31.3.9 NMAC as proposed does require reporting data by race and submitting to the Department a plan describing efforts “to identify gifted students from all demographic groups, including racially and ethnically diverse students.” The proposed rule imposes no limit to the number of gifted students identified, contrary to any claim that highly represented groups would be harmed by efforts to diversify identified gifted populations. Rather, educational systems that produce segregation by race, such as the systems of gifted identification and services in many New Mexico public schools, have been determined by courts to be unconstitutional and unlawful under the Equal Educational Opportunities Act of 1974. The proposed rulemaking is intended to support public schools in their efforts to desegregate access to gifted education.</p>