

B. For ease of reference, the following parts of the federal regulatory definitions are restated here:

(1) 34 CFR Sec. 300.7, Child with a disability -- (a) General -- (1) As used in this part, the term **child with a disability** means a child evaluated in accordance with Secs. 300.530-300.536 as having mental retardation, a hearing impairment including deafness, a speech or language impairment, a visual impairment including blindness, serious emotional disturbance (hereafter referred to as emotional disturbance), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2) 34 CFR Sec. 300.500(b), Consent -- As used in this part -- (1) **Consent** means that -- (i) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; (ii) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and (iii) (A) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time. (B) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(3) 34 CFR Sec. 300.560(b) -- **Education records** means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974) [FERPA]. [The FERPA regulations at 34 CFR Sec. 99.3 define education records, with some exceptions, as "those records that are (1) directly related to a student; and (2) maintained by an educational agency or institution or by a party acting for the agency or institution."]

(4) 34 CFR Sec. 300.10, Educational service agency -- As used in this part, the term **educational service agency [or ESA]** --

(a) means a regional public multiservice agency-- (1) authorized by state law to develop, manage, and provide services or programs to LEAs; and (2) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary and secondary schools of the state;

(b) includes any other public institution or agency having administrative control and direction over a public elementary or secondary school.

(5) 34 CFR Sec. 300.13, Free appropriate public education -- As used in this part, the term **free appropriate public education** or **FAPE** means special education and related services that --

(a) are provided at public expense, under public supervision and direction, and without charge;

(b) meet the standards of the [state educational agency], including the requirements of this part;

(c) include preschool, elementary school, or secondary school education in the state; and

(d) are provided in conformity with an individualized education program (IEP) that meets the requirements of Secs. 300.340-300.350.

(6) 34 CFR Sec. 300.18(a), Local educational agency -- As used in this part, the term **local educational agency [or LEA]** means a public board of education or other public authority legally constituted within a state for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a state, or for a combination of school districts or counties as are recognized in a state as an administrative agency for its public elementary or secondary schools.

(7) 34 CFR Sec. 300.20, Parent

(a) General -- As used in this part, the term parent means -- (1) a natural or adoptive parent of a child; (2) a guardian but not the state if the child is a ward of the state; (3) a person acting in the place of a parent (such as a grandparent or stepparent with whom the child lives, or a person who is legally responsible for the child's welfare); or (4) a surrogate parent who has been appointed in accordance with Sec. 300.515.

(b) Foster parent -- [See paragraph C(12) of 6.31.2.7 NMAC for state provisions regarding foster parents.]

(8) 34 CFR Sec. 300.22, Public agency -- As used in this part, the term **public agency** includes the [state educational agency], LEAs, ESAs . . . and any other political subdivisions of the state that are responsible for providing education to children with disabilities.

C. Additional definitions. The following terms shall have the following meanings for purposes of these rules:

- (1) **“Board”** means the public education department;
- (2) **“CFR”** means the code of federal regulations, including future amendments;
- (3) **“Child with a disability”** means a child who meets all requirements of 34 CFR Sec.

300.7 and who:

- (a) is aged 3 through 21 or will turn 3 at any time during the school year;
- (b) has been evaluated in accordance with 34 CFR Secs. 300-530-300.536 and any

additional requirements of these or other SBE rules and standards (i) as having one or more of the disabilities specified in 34 CFR Sec. 300.7, or (ii) as being developmentally delayed as defined in paragraph (5) below; and

- (c) has not received a high school diploma or equivalent.

(d) At the discretion of each local educational agency and subject to the additional requirements of Paragraph F(2) of 6.31.2.10 NMAC, the term “child with a disability” may include a child aged 3 through 9 who is evaluated as being developmentally delayed and who because of that condition needs special education and related services.

- (4) **“Department”** means the public education department;

(5) **“Developmentally delayed”** means a child aged 3 through 9 or who will turn 3 at any time during the school year: (i) with documented delays in development which are at least two standard deviations or 30 per cent below chronological age; or (ii) who in the professional judgment of the IEP team and one or more qualified evaluators needs special education or related services in at least one of the following five areas: receptive or expressive language, cognitive abilities, gross and/or fine motor functioning, social or emotional development or self-help/adaptive functioning. Use of the developmentally delayed option by individual local educational agencies is subject to the further requirements of Paragraph F(2) of 6.31.2.10 NMAC.

(6) The **“educational jurisdiction”** of a public agency includes the geographic area, age range and all facilities or programs within which the agency is obligated under state laws, rules or regulations or by enforceable agreements to provide educational services for children with disabilities. In situations such as transitions, transfers and special placements, the educational jurisdiction of two or more agencies may overlap and result in a shared obligation to ensure that a particular child receives all the services to which the child is entitled.

(7) A **“free appropriate public education (FAPE)”** means special education and related services which meet all requirements of 34 CFR Sec. 300.13 and which, pursuant to Sec. 300.13(b), meet all applicable department rules and standards, including but not limited to these rules (6.31.2 NMAC), the Standards for Excellence (6.30.2 NMAC) and department rules governing school personnel preparation, licensure and performance (6.60 NMAC through 6.64 NMAC), student rights and responsibilities (6.11.2 NMAC) and student transportation (6.41.3 and 6.41.4 NMAC).

(8) The **“general curriculum”** pursuant to 34 CFR Sec. 347(a), means the same curriculum that a public agency offers for nondisabled children. For New Mexico public agencies whose non-special education programs are subject to SBE rules, the general curriculum includes the content standards, benchmarks and all other applicable requirements of the Standards for Excellence (6.30.2 NMAC) and any other SBE rules defining curricular requirements.

(9) The **“IDEA”** means the federal Individuals with Disabilities Education Act, 20 USC Secs. 1401 and following, including future amendments;

- (10) **“NMAC”** means the New Mexico Administrative Code, including future amendments;

(11) **“NMSA 1978”** means the 1978 Compilation of New Mexico Statutes Annotated, including future amendments;

(12) **“Parent”** includes, in addition to the persons specified in 34 CFR Sec. 300.20, a child with a disability who has reached age 18 and for whom there is no court-appointed general guardian, limited guardian or other court-appointed person who has legal custody or has otherwise been authorized by a court to make educational decisions on the child’s behalf. Pursuant to 34 CFR Sec. 300.20(b) and SBE policy, a foster parent of a child with a disability may act as a parent under Part B of the IDEA if -- (i) the foster parent or the state children, youth and families department (CYFD) provides appropriate

documentation to establish that CYFD has legal custody and has designated the person in question as the child's foster parent; and (ii) the foster parent has an ongoing, long-term parental relationship with the child; is willing to make the educational decisions required of parents under the IDEA; and has no interest that would conflict with the interests of the child. A foster parent who does not qualify under the above requirements but who meets all requirements for a surrogate parent under 34 CFR Sec. 300.515 may be appointed as a surrogate if the public agency responsible for making the appointment deems such action appropriate. [See Subsection J of 6.31.2.13 NMAC.]

(13) "PED" means the public education department;

(14) "SBE" or "state board" means the public education department (per N.M. Laws 2004, Chapter 27, Section 27);

(15) "SDE" means the public education department (per N.M. Laws 2004, Chapter 27, Section 27);

(16) "SEB" means the special education bureau of the public education department;

(17) As authorized by 34 CFR Sec. 300.7(a)(2)(ii) and 300.26(a)(2)(i), "special education" in New Mexico may include speech-language pathology services or any other related service that meets the following standards:

(a) the service is provided to a child who has received appropriate prereferral interventions under subsection C of 6.31.2.10 NMAC before being properly evaluated under 34 CFR Secs. 300.530-300.536 and subsection D of 6.31.2.10 NMAC;

(b) the multidisciplinary team that makes the eligibility determination finds that: (i) the child has one or more IDEA-recognized disabilities but is not a child with a disability under 34 CFR Sec. 300.7(a)(2) because he or she does not need special education; and (ii) the child needs one or more related services to address the unique educational needs that result from his or her disability;

(c) the related service consists of specially designed instruction that is provided to enable the child to have access to the general curriculum and meet the educational standards of the public agency that apply to all children; and

(d) the service is provided at no cost to the parents under a properly developed individualized education program (IEP) that (i) includes measurable annual goals and benchmarks or short-term objectives for the service that relate to the child's ability to be involved in and progress in the general curriculum; and (ii) is reviewed and revised at least annually and at other times if indicated under 34 CFR Sec. 300.343(c).

(e) If all of the above standards are met, the service will be considered as special education rather than a related service.

(18) A "state-supported educational program" means a publicly funded program that

(a) provides special education and related services to children with disabilities who come within the program's educational jurisdiction;

(b) is operated by, or under contractual arrangements for, a state school, state educational institution or other state institution, state hospital or state agency; and

(c) is primarily funded through direct legislative appropriations or other direct state support to a public agency other than a local school district.

(19) "USC" means the United States Code, including future amendments.

D. Definitions related to dispute resolution. Dispute resolution is a broad continuum of strategies that focuses on conflict resolution between families and public agencies, and which ranges from informal preventive processes to more formal hearing procedures. The following terms, which are listed in the order that reflects a continuum of dispute resolution options, shall have the following meanings for the purposes of these rules:

(1) "Complaint assistance IEP (CAIEP) meeting" means an IEP meeting that is facilitated by the representative of the public agency who directs special education programs within the public agency, and who has decision-making authority on behalf of such agency. Once a state-level complaint has been filed, the responding public agency must offer to convene a CAIEP meeting with the parent(s) and relevant members of the IEP team, as described at Paragraph (3) of Subsection H of 6.31.2.13 NMAC. This meeting is intended to provide parents with an opportunity to discuss disputed IEP-related matters, and to provide the public agency with an opportunity to address and resolve these concerns.

(2) "Facilitated IEP (FIEP) meeting" means an IEP meeting that utilizes an independent, state-approved, state-funded, trained mediator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP. It is intended to result in the

development of a revised IEP for the student which resolves the parties' concerns. As with any IEP meeting, discussion between IEP team members at a FIEP meeting may be used as evidence in any subsequent due process hearing or civil proceeding.

(3) "Mediation" means a meeting or series of meetings that utilizes an independent, state-approved, state-funded, trained mediator to assist parties to reconcile disputed matters related to a student's IEP or other educational, non-IEP-related issues. It is intended to result in the development of a legally binding written agreement that describes the settlement reached by the parties. As described at Subparagraph (c) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC, discussion that occurs during mediation must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

[6.31.2.7 NMAC - Rp 6 NMAC 5.2.7, 8/14/2000; A, 8/15/2003; A, 8/31/2004; A, 7/29/2005]

6.31.2.8 RIGHT TO A FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

A. All children with disabilities aged 3 through 21 or who will turn 3 at any time during the school year who reside in New Mexico, including children with disabilities who have been suspended or expelled from school, have the right to a free appropriate public education that is made available by one or more public agencies in compliance with all applicable requirements of 34 CFR Part 300 (especially Secs. 300.121, 300.300-300.313, 300-340-300.350 and 300.550-300.556) and these or other SBE rules and standards. Children with disabilities who are enrolled in private schools or facilities or are schooled at home have the rights provided by 34 CFR Secs. 300.400-300.461 and Subsection L of 6.31.2.11 NMAC.

B. Nothing in these rules shall preclude a public agency from offering additional services for children who do not meet the criteria of these rules. However, only children who meet the criteria in these rules may be included in calculating special education program units for state funding and counted as eligible children for federal flow-through funds under Part B of the IDEA.

[6.31.2.8 NMAC - Rp 6 NMAC 5.2.11.1, 8/14/2000; A, 7/29/2005]

6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:

A. Compliance with applicable laws and regulations. Each New Mexico public agency, within the scope of its authority, shall develop and implement appropriate policies, procedures, programs and services to ensure that all children with disabilities who reside within the agency's educational jurisdiction, including children who are enrolled in private schools or facilities or are schooled at home, are identified and evaluated and have access to a free appropriate public education (FAPE) in compliance with all applicable requirements of state and federal laws and regulations. This obligation applies to all New Mexico public agencies that are responsible under laws, rules, regulations or consensual arrangements for providing educational services for children with disabilities, regardless of whether that agency receives funds under the IDEA and regardless of whether it provides special education and related services directly, by contract, by referrals to private schools or facilities or through other arrangements.

B. Public agency funding and staffing

(1) Each public agency that provides special education or related services to children with disabilities shall allocate sufficient funds, staff, facilities and equipment to ensure that the requirements of the IDEA and all PED rules and standards that apply to programs for children with disabilities are met.

(2) The public agency with primary responsibility for ensuring that FAPE is available to a child with a disability on the date set by the PED for a child count or other report shall include that child in its report for that date. Public agencies with shared or successive responsibilities for serving a particular child during a single fiscal year are encouraged to negotiate equitable arrangements for sharing the funding and other resources available for that child.

(3) Educational agencies may seek payment or reimbursement from noneducational agencies or public or private insurance for services or devices covered by those agencies that are necessary to ensure FAPE to children with disabilities. Claims for payment or reimbursement shall be subject to the procedures and limitations established in 34 CFR Secs. 300.142(b) and 300.142(e) through -(h), and any laws, regulations, executive orders, contractual arrangements or other requirements governing the noneducational payor's obligations.

(4) Pursuant to 34 CFR Sec. 300.142 (e), a public agency may use the medicaid or other public insurance benefits programs in which a child participates to provide or pay for services required under the IDEA Part B regulations, as permitted under the public insurance program, except as provided in (a) below:

(a) With regard to services required to provide FAPE to an eligible child, the public agency:

(i) may not require parents to sign up for or enroll in public insurance programs in order for their child to receive FAPE under Part B of the IDEA;

(ii) may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to the IDEA Part B regulations, but pursuant to 34 CFR Sec. 300.142 (g)(2), may pay the cost that the parent otherwise would be required to pay; and

(iii) may not use a child's benefits under a public insurance program if that use would: (A) decrease available lifetime coverage or any other insured benefit; (B) result in the family paying for services that would otherwise be covered by the public insurance program and that are required for the child outside of the time the child is in school; (C) increase premiums or lead to the discontinuation of insurance; or (D) risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures.

(b) Pursuant to 34 CFR Sec. 300.142 (f), an educational agency must obtain a parent's informed written consent for each proposed use of private insurance benefits and must inform parents that their refusal to permit the use of their private insurance will not relieve the educational agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(c) Pursuant to 34 CFR Sec. 300.142(g):

(i) if a public agency is unable to obtain parental consent to use the parent's private insurance, or public insurance when the parent would incur a cost for a specified service required under the IDEA Part B regulations, to ensure FAPE the public agency may use its Part B funds to pay for the service; and

(ii) to avoid financial cost to parents who otherwise would consent to use private insurance, or public insurance if the parent would incur a cost, the public agency may use its Part B funds to pay the cost the parents otherwise would have to pay to use the parent's insurance (e.g., the deductible or co-pay amounts).

(5) Each public agency is responsible for ensuring that personnel serving children with disabilities are qualified under state licensure requirements and are adequately prepared for their assigned responsibilities, pursuant to 34 CFR Sec. 300.221. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with applicable PED licensure rules or written PED policy may be used to assist in the provision of special education and related services to children with disabilities under Part B of the IDEA. A public agency that is unable to recruit and hire enough qualified personnel despite ongoing good-faith efforts may apply to the department case by case for authorization to fill positions with the most qualified individuals who are making satisfactory progress toward completing the applicable licensure requirements, pursuant to 34 CFR Sec. 300.136(g).

C. IDEA applications and assurances. Each New Mexico public agency that desires to receive IDEA flow-through funds shall file an annual application with the department in the form prescribed by the department. Each application shall:

(1) provide all information requested by the department;

(2) demonstrate to the department's satisfaction that the agency is in compliance with all applicable requirements of 34 CFR Secs. 300.180-300.192 and 300.220-300.250 and these or other PED rules and standards;

(3) include an agreement that the agency upon request will provide any further information the department requires to determine the agency's initial or continued compliance with all applicable requirements; and

(4) include assurances satisfactory to the department that the public agency does and will continue to operate its programs in compliance with all applicable federal and state programmatic, fiscal and procedural requirements.

D. Notification of public agency in case of ineligibility. Pursuant to 34 CFR Sec. 300.196, if the department determines that a public agency is not eligible under Part B of the Act, the department shall notify the affected agency of that determination and provide the agency with reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d).

E. Withholding of funds for noncompliance. Pursuant to 34 CFR Sec. 300.197, if the department, after reasonable notice and an opportunity for a hearing under 34 CFR Sec. 76.401(d), finds that a public agency that has previously been determined to be eligible is failing to comply with any

requirement described in Secs. 300.220-300.250, the department must reduce or may not provide any further Part B payments to the agency until the department is satisfied that the agency is complying with that requirement.

[6.31.2.9 NMAC - Rp 6 NMAC 5.2.8, 8/14/2000; A, 8/15/2003; A, 8/31/2004]

6.31.2.10 IDENTIFICATION, EVALUATIONS AND ELIGIBILITY DETERMINATIONS:

A. Child find. Each public agency shall adopt and implement policies and procedures to ensure that all children with disabilities who reside within the agency's educational jurisdiction, including children with disabilities attending private schools or facilities, children who are schooled at home, highly mobile children and children who are advancing from grade to grade, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated in compliance with all applicable requirements of 34 CFR Secs. 300.125-126, 300.320, 300.451, 300.530-536 and these or other SBE rules and standards. For preschool children, child find screenings shall serve as interventions under Subsection C of 6.31.2.10 NMAC.

B. General screening for student needs. Pursuant to the SBE Standards for Excellence at 6.30.2 NMAC, each local school district shall conduct general screening as part of its Educational Plan for Student Success (EPSS) to identify student needs in all educational and related areas, including potential needs for special education and related services. Public agencies that are not local school districts shall develop and implement analogous screening procedures to identify possible children with disabilities.

C. The three-tiered model of student intervention

(1) If general screening, a referral from a parent, a school staff member or other information available to a public agency suggests that a particular student may be a child with a disability, a properly constituted student assistance team (SAT) in the agency shall:

(a) ensure that adequate screening in the areas of general health and well-being, language proficiency status, and academic levels of proficiency has been completed, in addition to addressing culture and acculturation, socioeconomic status, possible lack of instruction, and teaching and learning styles in order to rule out other possible causes of the child's educational difficulties; and

(b) conduct the SAT child study process and consider, implement and document the effectiveness of appropriate interventions through curriculum-based measures;

(c) if, however, a student has an obvious disability or a serious and urgent problem, the SAT shall address the student's needs promptly on an individualized basis.

(2) If curriculum-based progress monitoring demonstrates that the student's response to intervention has not been positive and significant after no more than 18 weeks, the SAT may refer the child for a full special education evaluation, or it may resume the child study process to implement additional tier two interventions.

(3) If curriculum-based progress monitoring demonstrates that the student's response to intervention has been positive and significant after no more than 18 weeks, the SAT may continue to require the implementation of those interventions until the student no longer requires the interventions.

(4) Local school districts shall provide for interventions through a properly constituted SAT pursuant to the district's educational plan for student success (EPSS) as required by the PED Standards for Excellence at 6.30.2.9 NMAC. Public agencies other than local school districts shall develop and implement appropriate processes for providing interventions pursuant to the EPSS required of those agencies under 6.30.2.9 NMAC. All such processes in all public agencies shall include provisions for participation by the student's parents and, as appropriate, the student.

D. Evaluations and reevaluations

(1) Each public agency shall conduct a full and individual initial evaluation at no cost to parents and in compliance with all applicable requirements of 34 CFR Secs. 300.532-533 and these or other SBE rules and standards before the initial provision of special education and related services to a child with a disability.

(2) Pursuant to 34 CFR Sec. 300.536, a reevaluation of each child in compliance with all applicable requirements of 34 CFR Secs. 300.532-300.535 and any other applicable SBE rules and standards shall be conducted at least once every three years or more often if conditions warrant or if the child's parent or teacher requests a reevaluation.

(3) Pursuant to 34 CFR Sec. 300.533, the evaluation or reevaluation process begins with a review of existing information by a group that includes the parents, the other members of a child's prospective IEP team and other professionals, as appropriate, to determine what further evaluations and

information are needed to decide whether the child is (or continues to be) a child with a disability and, if so, to identify the child's educational needs and the appropriate combination of services to meet those needs.

(4) If the child's primary disability is a speech-language impairment, a complete battery of assessments (e.g., psychological, physical, adaptive behavior) may not be necessary. In such cases, a qualified speech-language pathologist evaluates the child using appropriate procedures and makes referrals for additional assessments deemed necessary to make an appropriate decision regarding delivery of services to the child.

(5) Each public agency shall maintain a record of the receipt, processing and disposition of any referral for an individualized evaluation or reevaluation. Each evaluation or reevaluation shall be completed within a reasonable time and all appropriate evaluation data, including summary reports from all individuals evaluating the child, shall be reported in writing for presentation to the IEP team.

(6) The parents of a child with a disability who disagree with an evaluation obtained by the public agency have the right to obtain an independent educational evaluation of the child at public expense pursuant to 34 CFR Sec. 300.502.

E. Assessment of culturally and linguistically diverse children

(1) Pursuant to 34 CFR Sec. 300.532(a)(1), each public agency must ensure that tests and other evaluation materials used to assess children are selected, provided and administered so as not to be discriminatory on a racial or cultural basis and are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so.

(2) Pursuant to 34 CFR Sec. 300.532(a)(2), each public agency must ensure that materials and procedures used to assess a child with limited English proficiency are selected and administered to ensure that they measure the extent to which the child has a disability and needs special education rather than measuring the child's English language skills.

(3) Pursuant to 34 CFR Sec. 300.533 and 300.534(b), information about a child's language proficiency must be considered in determining how to conduct the evaluation of the child to prevent misclassification. A child may not be determined to be a child with a disability if the determinant factor for that eligibility determination is limited English proficiency.

(4) Public agencies in New Mexico shall devote particular attention to the foregoing requirements in light of the state's cultural and linguistic diversity. Persons assessing culturally or linguistically diverse children shall consult appropriate professional standards to ensure that their evaluations are not impermissibly discriminatory and should include appropriate references to such standards and concerns in their written reports.

F. Eligibility determinations

(1) General rules regarding eligibility determinations

(a) Upon completing the administration of tests and other evaluation materials, a group of qualified professionals and the parent of the child must determine whether the child is a child with a disability, as defined in 34 CFR Sec. 300.7 and Paragraph B (1) of 6.31.2.7 NMAC. The determination shall be made in compliance with all applicable requirements of 34 CFR Secs. 300.534-300.535 and these or other SBE rules and standards and, for a child suspected of having a specific learning disability, in compliance with the additional procedures of Secs. 300.540-300.543 and these or other SBE rules and standards.

(b) The public agency must provide a copy of the evaluation report and the documentation of determination of eligibility to the parent.

(2) Optional use of developmentally delayed classification for children aged 3 through 9

(a) The developmentally delayed classification may be used at the option of individual local education agencies but may only be used for children who do not qualify for special education under any other available disability category.

(b) The addition of this classification for children aged 5 through 9 shall not affect its continued availability for preschool children with disabilities aged 3 and 4. However, its continued use for such children shall be subject to the diagnostic criteria in Paragraph (5) of Subsection C of 6.31.2.7 NMAC.

(c) The use of this classification by local education agencies which decide to use it for school-aged children will be phased in as follows: For school year 2000-01, any school-aged child ages five, six or seven who meets the diagnostic criteria is eligible for this classification. For school years 2001-02 and beyond, any school-aged child ages five through nine who meets the diagnostic criteria is eligible for this classification.

(d) Children who are classified as developmentally delayed must be reevaluated during the school year in which they turn 9 and will no longer be eligible in this category when they become 10. A student who does not qualify under any other available category at age 10 will no longer be eligible for special education and related services.
[6.31.2.10 NMAC - Rp 6 NMAC 5.2.8.1, 5.2.9.1.5, 5.2.9.2-9.3, 8/14/2000; A, 7/29/2005]

6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:

A. Preschool programs for children aged 3 and 4

(1) Each public agency shall ensure that a free appropriate public education is available for each preschool child with a disability within its educational jurisdiction no later than the child's third birthday and that an individualized education program (IEP) under Part B or an individual family services plan (IFSP) under Part C of the IDEA is in effect by that date in compliance with 34 CFR Secs. 300.121(c), 300.132 and 300.342(c). A child who will turn three at any time during the school year is eligible to enroll in a Part B preschool program at the beginning of the school year if the parent so chooses, whether or not the child has previously been receiving Part C services.

(2) Each public agency shall develop and implement appropriate policies and procedures to ensure a smooth and effective transition from Part C to Part B programs for preschool children with disabilities within the agency's educational jurisdiction, in compliance with 34 CFR Sec. 300.132. Each LEA and other public agencies as appropriate shall make reasonable efforts to establish productive working relations with local Part C programs and when given reasonable notice shall participate in transition planning conferences arranged by local Part C providers.

(3) In particular:

(a) Each LEA shall survey Part C programs within its educational jurisdiction in its child find efforts to identify children who will be eligible to enter the LEA's Part B preschool program in future years.

(b) Each LEA shall promote parent and family involvement in transition planning with Part C programs, community programs and related services providers at least six months before the child is eligible to enter the LEA's Part B preschool program.

(c) Each LEA shall establish and implement procedures to support successful transitions including parent training, professional development for special educators and general educators, and student and parent self-advocacy training and education.

(d) Each LEA shall assist parents in becoming their child's advocates as the child makes the transition through systems.

(e) Each LEA shall participate in transition planning conferences arranged by the designated Part C lead agency no less than 90 days prior to the anticipated transition or the child's third birthday, whichever occurs first, to facilitate informed choices for all families.

(f) Each LEA shall designate a team including parents and qualified professionals to review existing evaluation data for each child entering the LEA's preschool program in compliance with 34 CFR Sec. 300.533, and based on that review to identify what additional data, if any, are needed to determine the child's eligibility for Part B services or develop an appropriate program.

(g) Each LEA shall initiate a meeting to develop an eligible child's IFSP, IEP or IFSP-IEP no later than 15 days prior to the first day of the school year of the LEA where the child is enrolled or no later than 15 days prior to the child's entry into Part B preschool services if the transition process is initiated after the start of the school year, whichever is later, to ensure uninterrupted services. This IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.344 that includes parents and appropriate early intervention providers who are knowledgeable about the child.

B. Individualized education programs (IEPs)

(1) Except as provided in 34 CFR Secs. 300.450-300.462 for children enrolled by their parents in private schools, each public agency (1) shall develop, implement, review and revise an individualized education program (IEP) in compliance with all applicable requirements of 34 CFR Secs. 300.340-300.350 and these or other SBE rules and standards for each child with a disability served by that agency; and (2) shall ensure that an IEP is developed, implemented, reviewed and revised in compliance with all applicable requirements of 34 CFR Sec. 300.340-350 and these or other SBE rules and standards for each child with a disability who is placed in or referred to a private school or facility by the public agency.

(2) Each IEP or revision shall be developed at a properly convened IEP meeting for which the public agency has provided the parent and, as appropriate, the child with proper advance notice pursuant to 34 CFR Secs. 300.345 and paragraph D(1) of 6.31.2.13 NMAC and at which the parent and, as appropriate, the child have been afforded the opportunity to participate as members of the IEP team pursuant to 34 CFR Secs. 300.344, 300.345 and 300.501 and Subsection C of 6.31.2.13 NMAC.

(3) Each IEP or revision shall include the signature and position of each member of the IEP team and other participants in the IEP meeting to document their attendance. Written notice of actions proposed or refused by the public agency shall also be provided in compliance with 34 CFR Sec. 300.503 and paragraph D(2) of 6.31.2.13 NMAC and may be provided in whole or in part at the close of the IEP meeting. Informed written parental consent must also be obtained for actions for which consent is required under 34 CFR Sec. 300.505 and Subsection F of 6.31.2.13 NMAC.

C. Least restrictive environment

(1) Except as provided in 34 CFR Sec. 300.311(b)-(c) and Subsection K of 6.31.2.11 NMAC for students with disabilities who are convicted as adults under state law and incarcerated in adult prisons, all educational placements and services for children with disabilities must be provided in the least restrictive environment that is appropriate to each child's needs in compliance with 34 CFR Secs. 300.550-300.556.

(2) In determining the least restrictive environment for each child's needs, public agencies and their IEP teams shall devote particular attention to the following requirements:

(a) the requirements of 34 CFR Sec. 300.550(b) for each public agency to ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily;

(b) the required continuum of alternative placements as specified in 34 CFR Sec. 300.551;

(c) the requirement of 34 CFR Sec. 300.552(b) that each child with a disability be educated in the school that he or she would attend if nondisabled unless the child's IEP requires some other arrangement;

(d) the requirement of 34 CFR Sec. 300.552(e) that a child with a disability not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum;

(e) the requirements of 34 CFR Sec. 300.347(a)(3) that the IEP for each child with a disability include a statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to be involved and progress in the general curriculum and to participate in extracurricular and other nonacademic activities with nondisabled children;

(f) the requirement of 34 CFR Sec. 300.346(d)(2) that the regular education teacher of a child with a disability, as a member of the IEP team, must assist in determining the supplementary aids and services, program modifications or supports for school personnel that will be provided for the child in compliance with Sec. 300.347(a)(3);

(g) the requirement of 34 CFR Sec. 300.347(a)(4) that the IEP include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and the activities described in Sec. 300.347(a)(3);

(h) the requirements of 34 CFR Sec. 300.503 that a public agency give the parents written notice a reasonable time before the agency proposes or refuses to initiate or change the educational placement of the child or the provision of FAPE to the child and that the notice include a description of any other options considered and the reasons why those options were rejected; and

(i) the requirement of 34 CFR Sec. 300.556 that the SDE carry out activities to ensure that Sec. 300.550 is implemented by each agency and that, if there is evidence that a public agency makes placements that are inconsistent with Sec. 300.550, the department must review the public agency's justification for its actions and assist in planning and implementing any necessary corrective action.

D. Performance goals and indicators. The content standards and benchmarks from the PED's Standards for Excellence (6.30.2 NMAC) for all children attending public schools and state-

supported educational programs in New Mexico shall provide the basic performance goals and indicators for children with disabilities in the general curriculum. The IEP goals and objectives must be directly tied to the New Mexico content standards and benchmarks, including the expanded performance standards for students with significant cognitive disabilities. Unless waivers or modifications covering individual public agencies' programs have been allowed by the PED or the secretary of education, the general curriculum and the content standards and benchmarks shall only be adapted to the extent necessary to meet the needs of individual children with disabilities as determined by IEP teams in individual cases.

E. Participation in statewide and district-wide assessments. Each local educational agency and other public agencies when applicable shall include children with disabilities in all statewide and district-wide assessment programs. Each public agency shall collect and report performance results in compliance with the requirements of 34 CFR Sec. 300.139 and any additional requirements established by the PED. Students with disabilities may participate:

(1) in the appropriate general assessment in the same manner as their nondisabled peers; this may include the use of adaptations that are deemed appropriate for all students by the PED; or

(2) in the appropriate general assessment with appropriate accommodations in administration if necessary; public agencies shall use the current guidance from the PED about accommodations as specified in the student's IEP; or

(3) in alternate assessments for the small number of students with significant cognitive disabilities for whom alternate assessments are appropriate under the PED's established participation criteria; the IEP team must agree and document that the student is eligible for participation in an alternate assessment according to the following criteria:

(a) the student's past and present levels of performance in multiple settings (i.e. home, school, community) indicate that a significant cognitive disability is present;

(b) the student needs intensive, pervasive, or extensive levels of support in school, home, and community settings; and

(c) the student's current cognitive and adaptive skills and performance levels require direct instruction to accomplish the acquisition, maintenance, and generalization of skills in multiple settings (home, school, community).

F. Behavioral management and discipline

(1) Behavioral planning in the IEP. Pursuant to 34 CFR Sec. 346(a)(2)(i), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others shall consider, if appropriate, strategies to address that behavior, including the development of behavioral goals and objectives and the use of positive behavioral interventions, strategies and supports to be used in pursuit of those goals and objectives. Public agencies are strongly encouraged to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal regulations.

(2) Suspensions, expulsions and disciplinary changes of placement. Suspensions, expulsions and other disciplinary changes of placement for children with disabilities shall be carried out in compliance with all applicable requirements of 34 CFR Secs. 300.519-300.529 and these or other SBE rules and standards, including particularly 6.11.2.11 NMAC [formerly 6 NMAC 1.4.11] governing interim disciplinary placements and long-term suspensions or expulsions of students with disabilities.

(3) FAPE for children removed from current placement for more than 10 school days in a school year. FAPE shall be provided in compliance with all applicable requirements of 34 CFR Sec. 300.121(d) and these or other SBE rules and standards for all children with disabilities who have been removed from their current educational placements for disciplinary reasons for more than 10 school days during a school year, as defined in 34 CFR Sec. 300.519.

G. Graduation planning and post-secondary transitions

(1) A graduation plan for each child with a disability shall be developed, implemented and monitored in compliance with all applicable requirements of the SBE Standards for Excellence, 6.30.2 NMAC, and these or other SBE rules and standards. The graduation plan shall be integrated into the transition planning and services provided in compliance with 34 CFR Secs. 300.347(b) and 300.348.

(2) Appropriate post-secondary transition planning for children with disabilities is essential. Public agencies shall integrate transition planning into the IEP process pursuant to 34 CFR Secs. 300.347(b) and 300.348 and shall establish and implement appropriate policies, procedures, programs and services to promote successful post-secondary transitions for children with disabilities.

H. Transfers and other transitions

(1) Transfers and transitions from one school, school level or public agency to another are inherently disruptive for all students, and more so for children with disabilities who need additional services. Accordingly, both sending and receiving schools and public agencies must share the responsibility for minimizing the disruptive effects of transfers and transitions on the educational programs for all children.

(2) Sending schools and agencies shall ensure that all needed records, including IEPs, progress reports and supporting information and evaluations, are forwarded promptly within the agency or to another agency upon a proper request by the parents or a receiving school. When feasible, appropriate personnel from both the sending and receiving agencies should have input into the IEP for a child with a disability at the receiving school. In any event, within a reasonable time after a child with a disability enrolls from another school within or outside the public agency, the receiving school or agency shall ensure that it:

(a) obtains all information needed to determine or verify the child's educational needs pursuant to 34 CFR Sec. 300.533;

(b) reviews and revises or adopts the sending school's or agency's IEP or develops a new IEP, as the receiving school's IEP team deems appropriate and in compliance with all applicable procedural requirements; and

(c) implements the resulting IEP.

(3) A receiving school must honor an existing IEP for an incoming child with disabilities unless a new IEP is promptly developed or the existing IEP is promptly reviewed and revised.

I. Children in charter schools

(1) Pursuant to 34 CFR Sec. 300.312, children with disabilities who attend public charter schools and their parents retain all rights under the IDEA and these rules. Children with disabilities who otherwise qualify for admission to a charter school may not be denied admission, services or benefits because of their disabilities or their needs for special education and related services.

(2) Each charter school shall be responsible for ensuring that children with disabilities are served in the charter school in the same manner as in other public schools. Pursuant to 34 CFR Sec. 300.241, the local educational agency in which a charter school is located shall:

(a) provide IDEA Part B funds to the charter school in the same manner as it provides those funds to its other schools;

(b) ensure that charter school children with disabilities are properly served; and

(c) file sufficient information with the Department to demonstrate that the requirements of the IDEA and these rules regarding charter schools are being met.

J. Children in state-supported educational programs

(1) Children placed or referred by other public agencies

(a) **Applicability.** The rules in this Paragraph (1) of Subsection J apply to children with disabilities who are or have been placed in or referred to a state-supported educational program or facility by another public agency as a means of providing special education and related services.

(b) **Responsibility.** Each public agency shall ensure that a child with a disability who is placed in or referred to a state-supported educational program by another public agency has all the rights of a child with a disability who is served by any other public agency, including being provided special education and related services (i) in conformance with an IEP, (ii) at no cost to the child's parents, and (iii) at a school or facility that is accredited by the New Mexico state board of education and/or licensed by the New Mexico department of health.

(c) **Service delivery.** When an IEP team for a public agency determines that the agency is unable to meet the needs of a child with a disability as identified in the child's IEP, and with proper prior notice to the parents pursuant to 34 CFR Sec. 300.503 and Paragraph (2) of Subsection D of 6.31.2.13 NMAC, the public agency may ask a state-supported educational program to consider the child for possible enrollment. With informed parent consent pursuant to 34 CFR Sec. 300.505 and Subsection F of 6.31.2.13 NMAC, and pursuant to the procedures in 34 CFR Sec. 300.533 and Paragraph (3) of Subsection D of 6.31.2.10 NMAC, the state-supported program may conduct such additional evaluations and gather such additional information as it considers necessary to inform its decision regarding enrollment. If the state-supported program accepts the child for enrollment, the referring public agency and the receiving state-supported program shall be jointly responsible for developing IEPs and ensuring that the child receives a free appropriate public education. If the state-supported program declines to accept the

child, it shall so inform the referring public agency and the parents, in an IEP meeting or another appropriate setting, and shall provide proper notice of its decision to the parents pursuant to 34 CFR Sec. 300.503 and Paragraph (2) of Subsection D of 6.31.2.13 NMAC.

(d) Joint IEPs and interagency agreements. Responsibility for services for children placed in or referred to state-supported educational programs shall be defined by a jointly approved IEP or other written agreement between the referring public agency and the state-supported program.

(e) Annual review. At least annually, the referring public agency, the state-supported educational program and the parent shall jointly review the child's IEP and revise it as the joint IEP team deems appropriate.

(2) Children enrolled in state-supported educational programs by parents or other public authorities. A state-supported educational program that accepts a child with a disability at the request of a parent or upon the request or order of a noneducational public authority and without a referral or appropriate participation by the public agency that has primary responsibility for serving the child assumes all responsibility for ensuring the provision of FAPE. The child's LEA or another public agency with educational jurisdiction may agree to share the responsibility pursuant to a joint IEP or other written agreement between the state-supported program, the other agency and, if appropriate, the parent.

K. Children in detention and correctional facilities

(1) A child with a disability in a juvenile or adult detention or correctional facility is entitled to have FAPE made available within a reasonable time after the facility learns that the child had been eligible for special education and related services in the last educational placement prior to incarceration or otherwise determines that the child is eligible.

(2) Juvenile or adult detention or correctional facilities shall exert reasonable efforts to obtain needed educational records promptly from a child's last known school or educational facility. Records requests and transfers are subject to the regulations under the Family Educational Rights and Privacy Act (FERPA) at 34 CFR Part 99 and the provisions of paragraph L(3) of 6.31.2.13 NMAC. A detention or correctional facility that is unable to obtain adequate records from other agencies, the child or the parents within a reasonable time after the child arrives at the facility shall evaluate children who are known or suspected to be children with disabilities pursuant to Sec. 10 of these rules and develop IEPs for eligible children without undue delay.

(3) FAPE for eligible students in juvenile or adult detention or correctional facilities shall be made available in programs that are suited to the security requirements of each facility and eligible student. The provisions of 34 CFR Sec. 300.311(b)-(c) apply to IEPs for students with disabilities who are convicted as adults under state law and incarcerated in adult prisons.

(4) A state-supported educational program that serves a juvenile or adult detention or correctional facility shall be responsible for ensuring that FAPE is provided to eligible children in that facility. The local school district in which a detention or correctional facility that is not served by a state-supported educational program is located shall be responsible for ensuring that FAPE is made available to eligible children in that facility. A child's LEA of residence or another public agency with educational jurisdiction may agree to share the responsibility pursuant to a written agreement between or among the agencies involved.

(5) Children with disabilities who are detained or incarcerated in detention or correctional facilities are wards of the state and may have surrogate parents appointed pursuant to 34 CFR Sec. 300.515 and Subsection J of 6.31.2.13 NMAC to protect their IDEA rights while in state custody. The public agency that administers the educational program in a juvenile or adult detention or correctional facility shall ensure that surrogate parents are appointed in cases where no parent as defined in 34 CFR Sec. 300.20 and Paragraph (12) of Subsection B of 6.31.2.7 NMAC is reasonably available or willing to make the educational decisions required for children with disabilities who are housed in that facility.

(6) The educational program of a juvenile or adult detention or correctional facility is an educational agency for purposes of the Family Educational Rights and Privacy Act (FERPA) and is entitled to request and receive educational records on children with disabilities on the same basis as a local school district. Public agencies shall promptly honor requests for records to assist such programs in providing appropriate services to children within their educational jurisdiction.

L. Children in private schools or facilities

(1) Children placed in or referred to private schools or facilities by public agencies. Each public agency shall ensure that a child with a disability who is placed in or referred to a private school or facility by the agency as a means of providing special education and related services is provided services in

compliance with the requirements of 34 CFR Sec. 300.401 and has all of the rights of a child with a disability who is served by a public agency.

(2) Children placed in private schools or facilities by other public authorities. Educational decisions involving children with disabilities shall not be made unilaterally and shall not exclude public agencies having educational jurisdiction from the decision-making process. Educational decisions made by other public authorities are not the responsibility of the public agency if the agency has not been appropriately included in the decision-making process. A public authority that places a child with a disability in a private school or facility without appropriate participation by the responsible public agency or agencies becomes financially responsible for providing the child with FAPE unless a public agency with educational jurisdiction agrees to assume all or part of that responsibility.

(3) Children placed in private schools or facilities by parents when FAPE is at issue. The responsibility of a local educational agency to pay for the cost of education for a child with a disability who is placed in a private school or facility by parents who allege that the LEA failed to offer FAPE is governed by the requirements of 34 CFR Sec. 300.403. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of Subsection I of 6.31.2.13 NMAC.

(4) Children enrolled by parents in private schools or facilities

(a) Pursuant to 34 CFR Sec. 300.450, "private school children with disabilities" means children with disabilities who are enrolled by their parents in private schools or facilities other than children with disabilities who are covered under Secs. 300.400-300.402.

(b) Pursuant to 34 CFR Sec. 300.451, each LEA shall locate, identify, and evaluate all private school children with disabilities, including religious-school children residing in the jurisdiction of the LEA, in accordance with 34 CFR Secs. 300.125 and 300.220. The activities undertaken to carry out this responsibility for private school children with disabilities must be comparable to activities undertaken for children with disabilities in public schools.

(c) Pursuant to 34 CFR Sec. 300.452, each LEA shall provide for the participation of private school children with disabilities in the program assisted under Part B of the IDEA by providing them with services to the extent required by, and in compliance with the requirements of, Secs. 300.450-300.462.

(d) Pursuant to 34 CFR Secs. 300.453, each LEA is obligated to spend a portion of its federal IDEA Part B funds to assist private school children with disabilities. The Constitution and laws of New Mexico prohibit public agencies from spending state funds to assist private schools or facilities or their students.

(e) Pursuant to 34 CFR Sec. 300.454, no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

(5) Children schooled at home. Each LEA shall locate, evaluate and determine the eligibility of children with disabilities who are schooled at home pursuant to Secs. 22-2-2V NMSA 1978 the same as private school children with disabilities and shall include IDEA-eligible children who are schooled at home in the LEA's child count. Each LEA shall assist children with disabilities who are schooled at home in compliance with all requirements of Sec. 22-1-2.1 NMSA 1978 on the same basis as private school children with disabilities.

(6) Applicability of procedural safeguards

(a) Pursuant to 34 CFR Sec. 300.457, the notice and consent requirements of Secs. 300.504-300.505, the due process and mediation procedures of Subsection I of 6.31.2.13 NMAC and the surrogate parent requirements of 34 CFR Sec. 300.515 and Subsection J of 6.31.2.13 NMAC do not apply to complaints that an LEA has failed to meet the requirements of Secs. 300.452-300.462, including the provision of services indicated on a child's services plan. The procedures regarding notice and consent, due process/mediation and surrogate parents do apply to complaints that an LEA has failed to comply with Sec. 300.451 by locating, evaluating and determining the eligibility of private school children with disabilities or home-schooled children in compliance with Secs. 300.125, 300.220 and 300.530-300.543. State-level complaints which allege that the department or an LEA has failed to meet the requirements of Secs. 300.451-300.462 may be filed under the department's state complaint procedures in Subsection H of 6.31.2.13 NMAC.

(b) The same procedural safeguards shall apply to children who are schooled at home. [6.31.2.11 NMAC -Rp 6 NMAC 5.2.9.4, 5.2.11.1.1, 5.2.11.2, 5.2.12, 5.2.13, 8/14/2000; A, 7/29/2005]

6.31.2.12 EDUCATIONAL SERVICES FOR GIFTED CHILDREN:

A. Gifted child defined. As used in this section 6.31.2.12 NMAC, “Gifted child” means a school-age person as defined in Sec. 22-1-2(O) NMSA 1978 whose intellectual ability paired with subject matter aptitude/achievement, creativity/divergent thinking, or problem-solving/critical thinking meets the eligibility criteria in this Section 6.31.2.12 NMAC and for whom a properly constituted IEP team determines that special education services are required to meet the child’s educational needs.

B. Qualifying areas defined

(1) “Intellectual ability” means a score two standard deviations above the mean as defined by the test author on a properly administered intelligence measure. The test administrator must also consider the standard error of measure (SEM) in the determination of whether or not criteria have been met in this area.

(2) “Subject matter aptitude/achievement” means superior academic performance on a total subject area score on a standardized measure, or as documented by information from other sources as specified in Subparagraph (b) of Paragraph (2) of Subsection B of 6.31.2.12 NMAC.

(3) “Creativity/divergent thinking” means outstanding performance on a test of creativity/divergent thinking, or in creativity/divergent thinking as documented by information from other sources as specified in Subparagraph (b) of Paragraph (2) of Subsection B of 6.31.2.12 NMAC.

(4) “Problem-solving/critical thinking” means outstanding performance on a test of problem-solving/critical thinking, or in problem-solving/critical thinking as documented by information from other sources as specified in Subparagraph (b) of Paragraph (2) of Subsection B of 6.31.2.12 NMAC.

(5) For students with “factors” as specified in Paragraph (2) of Subsection E of 6.31.2.12 NMAC, the impact of these factors shall be documented and alternative methods will be used to determine the student’s eligibility.

C. Evaluation procedures for gifted children

(1) Each district must establish a child find procedure that includes a screening and referral process for students in public school who may be gifted.

(2) Analysis of data. The identification of a student as gifted shall include documentation and analysis of data from multiple sources for subject matter aptitude/achievement, creativity/divergent thinking, and problem solving/critical thinking including:

(a) standardized measures, as specified in Subsection B of 6.31.2.12 NMAC, and

(b) information regarding the child’s abilities from other sources, such as collections of work, audio/visual tapes, judgment of work by qualified individuals knowledgeable about the child’s performance (e.g., artists, musicians, poets and historians, etc.), interviews, or observations.

(3) The child’s ability shall be assessed in all four areas specified in Subsection B of 6.31.2.12 NMAC.

D. Standard method for identification. Under the standard method for identification students will be evaluated in the areas of intellectual ability, subject matter aptitude/achievement, creativity/divergent thinking, and problem solving/critical thinking. A student who meets the criteria established in Subsection B of 6.31.2.12 for intellectual ability and also meets the criteria in one or more of the other areas will qualify for consideration of service. A properly constituted IEP team, including someone who has knowledge of gifted education, will determine if special education services are required to meet the child’s educational needs.

E. Alternative method for identification

(1) A district may apply to the public education department (PED) to utilize an alternative protocol for all students. Eligibility of a student will then be determined by a properly administered and collected, PED-approved alternative protocol designed to evaluate a student’s intellectual ability, subject matter aptitude/achievement, creativity/divergent thinking, and problem solving /critical thinking.

(2) If an accurate assessment of a child’s ability may be affected by factors including cultural background, linguistic background, socioeconomic status or disability condition(s), an alternative protocol as described in Paragraph (1) of Subsection E of 6.31.2.12 NMAC will be used in all districts to determine the student’s eligibility. The impact of these factors shall be documented by the person(s) administering the alternative protocol.

(3) The student assistance team (SAT) process requirements will not apply to students who meet the criteria established by the alternative protocols. When a student’s overall demonstrated abilities are very superior (as defined by the alternative protocol author), a properly constituted IEP team, including

someone who has knowledge of gifted education, will determine if special education services are required to meet the child's educational needs.

F. Applicability of rules to gifted children

(1) All definitions, policies, procedures, assurances, procedural safeguards and services identified in 6.31.2 NMAC for school-aged children with disabilities apply to school-aged gifted children within the educational jurisdiction of each local school district, including children in charter schools within the district, except:

(a) the requirements of 6.31.2.8 NMAC through 6.31.2.10 NMAC and Subsections J, K and L of 6.31.2.11 NMAC regarding child find, evaluations and services for private school children with disabilities, children with disabilities in state-supported educational programs, children with disabilities in detention and correctional facilities and children with disabilities who are schooled at home; and

(b) the requirements of 34 CFR Secs. 300.519-300.528, Subsection I of 6.31.2.13 NMAC and 6.11.2.10 and 6.11.2.11 NMAC regarding disciplinary changes of placement for children with disabilities.

(2) Assuming appropriate evaluations, a child may properly be determined to be both gifted and a child with a disability and be entitled to a free appropriate public education for both reasons. The rules in this Section 6.31.2.12 NMAC apply only to gifted children.

(3) Nothing in these rules shall preclude a school district or a charter school within a district from offering additional gifted programs for children who fail to meet the eligibility criteria. However, the state shall only provide funds under Section 22-8-21 NMSA 1978 for PED-approved gifted programs for those students who meet the established criteria.

G. Advisory committees

(1) Establishment and membership. Pursuant to Subsection C of Section 22-13-6.1 NMSA 1978, each school offering a gifted education program shall create an advisory committee of parents, community members, students and school staff members. The membership of each advisory committee shall reflect the cultural diversity of that school's enrollment. Formal documentation of committee membership, activities and recommendations shall be maintained.

(2) Purposes. The advisory committee shall:

(a) regularly review the goals and priorities of the gifted program, including the operational plans for student identification, evaluation, placement and service delivery;

(b) demonstrate support for the gifted program;

(c) provide information regarding the impact that cultural background, linguistic background, socioeconomic status and disability conditions within the community may have on the child referral, identification, evaluation and service delivery processes; and

(d) advocate for children who have been under-represented in gifted services due to cultural or linguistic background, socioeconomic status, or disability conditions, in order to ensure that these children have equal opportunities to benefit from services for gifted students.

[6.31.2.12 NMAC - Rp 6 NMAC 5.2.14, 8/14/2000; A, 7/29/2005]

6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:

A. General responsibilities of public agencies. Each public agency shall establish, implement and maintain procedural safeguards that meet the requirements of 34 CFR Secs. 300.500-300.576 and all other applicable requirements of these or other PED rules and standards.

B. Examination of records. Each public agency shall afford the parents of a child with a disability an opportunity to inspect and review all education records related to the child in compliance with 34 CFR Secs. 300.501(a), 300.562-300.569, 34 CFR Part 99 and any other applicable requirements of these or other PED rules and standards.

C. Parent and student participation in meetings. Each public agency shall afford the parents of a child with a disability and, as appropriate, the child, an opportunity to participate in meetings with respect to the identification, evaluation and educational placement or the provision of FAPE to the child, in compliance with 34 CFR Secs. 300.345, 300.501(b)-(c) and any other applicable requirements of these or other PED rules and standards.

D. Notice requirements

(1) Notice of meetings. Each public agency shall provide the parents of a child with a disability with advance written notice that complies with 34 CFR Sec. 300.345 for IEP meetings and any other meetings in which the parent has a right to participate pursuant to 34 CFR Sec. 300.501.

(2) Notice of agency actions proposed or refused. A public agency must give written notice that meets the requirements of 34 CFR Sec. 300.503 to the parents of a child with a disability a reasonable time before the agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. If the notice relates to a proposed action that also requires parental consent under 34 CFR Sec. 300.505, the agency may give notice at the same time it requests parent consent.

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, at a minimum, (a) upon initial referral for evaluation; (b) upon each notification of an IEP meeting; (c) upon reevaluation of the child; and (d) upon receipt of a request for due process under 34 CFR Sec. 300.507. The notice must meet all requirements of 34 CFR Sec. 300.504, including the requirement to inform the parents of their obligation under 34 CFR Sec. 300.403 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency.

E. Communications in understandable language. Pursuant to 34 CFR Secs. 300.500(b)(1), 300.501(c)(5), 300.503(c) and 300.504(c), each public agency must communicate with parents in understandable language, including the parent's native language or other mode of communication if necessary for understanding, in IEP meetings, in written notices and in obtaining consent where consent is required.

F. Parental consent

(1) Informed parental consent as defined in 34 CFR Sec. 300.500(b) must be obtained in compliance with 34 CFR Sec. 300.505 before (a) conducting an initial evaluation or reevaluation; and (b) initial provision of special education and related services to a child with a disability. Consent for initial evaluation may not be construed as consent for initial placement.

(2) Pursuant to 34 CFR Sec. 300.505(a)(3), parental consent is not required before (a) reviewing existing data as part of an evaluation or a reevaluation; or (b) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(3) Pursuant to 34 CFR Sec. 300.505(b), If the parents of a child with a disability refuse consent for an initial evaluation or a reevaluation, the public agency may use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC to determine if the child may be evaluated or reevaluated without parental consent. If the hearing officer upholds the public agency, the agency may evaluate or reevaluate the child without the parent's consent subject to the parent's rights of appeal under the due process procedures.

(4) Pursuant to 34 CFR Sec. 300.505(c), informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent by using procedures consistent with those in 34 CFR Sec. 300.345(d) and the child's parent has failed to respond.

(5) Pursuant to 34 CFR Sec. 300.505(e), A public agency may not use a parent's refusal to consent to one service or activity for which consent is required to deny the parent or child any other service, benefit or activity of the public agency, except as required by 34 CFR Part 300.

G. Conflict management and resolution

(1) Each public agency shall seek to establish and maintain productive working relationships with the parents of each child the agency serves and to deal constructively with the disagreements that will inevitably arise. Toward that end, each public agency is strongly encouraged to provide appropriate training for staff and parents in skills and techniques of conflict prevention and management and dispute resolution, and to utilize an informal dispute resolution method as set forth under Subparagraph (a) of Paragraph (2) of Subsection G of 6.31.2.13 NMAC to resolve disagreements at the local level whenever practicable.

(2) Spectrum of dispute resolution options. To facilitate dispute prevention as well as swift, early conflict resolution whenever possible, the PED and the public agency shall ensure that the following range of dispute resolution options is available to parents and public agency personnel.

(a) Informal dispute resolution option. If a disagreement arises between parents and a public agency over a student's IEP or educational program, either the parents or the public agency may convene a new IEP meeting at any time to attempt to resolve their differences at the local level, without state-level intervention.

(b) Third-party assisted intervention. The special education bureau (SEB) of the PED will ensure that mediation is available to parents and public agencies who request such third-party assisted

intervention before filing a state-level complaint or a request for a due process hearing. The SEB will honor a request for mediation that: (i) is in writing; (ii) is submitted to the SEB; (iii) is a mutual request signed by both parties or their designated representatives; and (iv) includes a statement of the matter(s) in dispute and a description of any previous attempts to resolve these matters at the local level. Any request that does not contain all of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(c) Formal dispute resolution

(i) A state-level complaint may be filed with the SEB of the PED by the parents of a student, or by another individual or organization on behalf of a student, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the responding public agency must offer in writing to convene a CAIEP meeting with the parent(s) and other relevant members of the IEP team to address any IEP-related issues raised in the complaint. The parent may accept or decline this offer, or the parties may agree to convene a FIEP meeting or mediation instead, as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by a public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a FIEP meeting or mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

H. State complaint procedures

(1) Scope. This Subsection H of 6.31.2.13 NMAC prescribes procedures to be used in filing and processing complaints alleging the failure of the PED or a public agency to comply with state or federal laws or regulations governing programs for children with disabilities under the IDEA or with state statutes or regulations governing educational services for gifted children.

(2) Requirements for complaints

(a) The SEB of the PED shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint must: (i) be in writing; (ii) be submitted to the SEB (or to the secretary of education, in the case of a complaint against the PED); (iii) be signed by the complainant or a designated representative; (iv) include a statement that the PED or a public agency has violated a requirement of an applicable state or federal law or regulation; and (v) contain a statement of the facts on which the allegation of violation is based, and a description of any efforts the complainant has made to resolve the complaint issue(s) with the agency (for a complaint against a public agency). Any complaint that does not contain each of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(b) Pursuant to 34 CFR Sec. 300.662(c), the complaint must allege a violation that occurred not more than one year before the date the complaint is received by the SEB unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three years before the date the complaint is received by the SEB.

(3) Preliminary meeting

(a) CAIEP meeting. Upon receipt of a complaint that meets the requirements of Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the SEB of the PED shall acknowledge receipt of the complaint in writing and notify the public agency against which the violation has been alleged. Once a state-level complaint has been filed, the public agency shall offer in writing to convene a CAIEP meeting to address IEP-related issues raised in the complaint. The parent(s) may accept or decline this offer, or the parties may agree in writing instead to convene a FIEP meeting or mediation, as described in Subparagraph (b) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC. The public agency must (and the parent(s) may) notify the SEB within 1 business day of agreeing to convene (or not to convene) one of these alternative dispute resolution (ADR) options. If the parties agree to convene a CAIEP meeting, as described at Paragraph D(1) of 6.31.2.7 NMAC, the following requirements apply.

(i) It must take place within 14 days of the date of the SEB's written acknowledgement of the complaint.

(ii) It must include the relevant members of the IEP team who have specific knowledge of the facts identified in the complaint.

(iii) It may not include an attorney of the public agency unless the parent is accompanied by an attorney.

(b) FIEP meeting; mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation instead of a CAIEP meeting. To do so, the public agency must (and the parent may) notify the SEB of the PED in writing within 1 business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed not later than 14 days from the date of the SEB's written acknowledgement of the complaint, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.

(c) Mediation requirements. If the parties choose to use mediation, the following requirements apply.

(i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.

(ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.

(iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly or develop an IEP addendum, as appropriate.

(iv) The mediator shall transmit a copy of the written mediation agreement to each party within 7 days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.

(v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(4) Complaints and due process hearings on the same issues. Pursuant to 34 CFR Sec. 300.661(c).

(a) The SEB of the PED shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.

(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.

(c) A complaint alleging a public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

(5) Complaints against public agencies

(a) Impartial review. Upon receipt of a complaint that meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC above, the SEB of the PED shall: (i) undertake an impartial investigation which shall include complete review of all documentation presented and may include an independent on-site investigation, if determined necessary by the SEB; (ii) give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; and (iii) review all relevant information and make an independent determination as to whether the public agency is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision which includes findings of fact, conclusions, and the reasons for the decision and which addresses each allegation in the complaint shall be issued by the SEB and mailed to the parties within sixty (60) days of receipt of the written complaint, regardless of whether or not the parties agree to convene a CAIEP meeting, a FIEP meeting, or mediation. Such decision shall further include procedures for effective implementation of the final decision, if needed, including technical assistance, negotiations, and if corrective action is required, such action shall be designated and shall include the timeline for correction and the possible consequences for continued noncompliance.

(c) Failure or refusal to comply. If the public agency fails or refuses to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance may be effected by the PED by any means authorized by state or federal laws or regulations. The PED shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required.

(6) Complaints against the PED. If the complaint concerns a violation by the PED and (i) is submitted in writing to the secretary of education; (ii) is signed by the complainant or a designated representative; (iii) includes a statement that the PED has violated a requirement of an applicable state or federal law or regulation; and (iv) contains a statement of facts on which the allegation of violation is based, the secretary of education or designee shall appoint an impartial person or impartial persons to conduct an investigation.

(a) Investigation. The person or persons appointed shall: (i) acknowledge receipt of the complaint in writing; (ii) undertake an impartial investigation which shall include a complete review of all documentation presented and may include an independent onsite investigation, if necessary; (iii) give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; and (iv) review all relevant information and make an independent determination as to whether the PED is violating a requirement of an applicable state or federal statute or regulation.

(b) Decision. A written decision, including findings of fact, conclusions, and the reasons for the decision and addressing each allegation in the complaint, shall be issued by the person or persons appointed pursuant to this paragraph and mailed to the parties within sixty (60) days of receipt of the written complaint.

(7) Extension of time limit. An extension of the time limit under Subparagraph (b) of Paragraph (5) or Subparagraph (b) of Paragraph (6) of this Subsection H of 6.31.2.13 NMAC shall be permitted by the SEB of the PED only if exceptional circumstances exist with respect to a particular complaint.

(8) Conflicts with federal laws or regulations. If any federal law or regulation governing any federal program subject to this regulation affords procedural rights to a complainant which exceed those set forth in Subsection H of 6.31.2.13 NMAC for complaints within the scope of these rules, such statutory or regulatory right(s) shall be afforded to the complainant. In acknowledging receipt of such a complaint, the SEB shall set forth the procedures applicable to that complaint.

I. Due process hearings

(1) Scope. This Subsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for the following types of cases:

(a) requests for due process in IDEA cases governed by 34 CFR Secs. 300.506-300.514 and 300.520-300.528; and

(b) claims for gifted services.

(2) Definitions. In addition to terms defined in 34 CFR Part 300 and 6.31.2.7 NMAC, the following definitions apply to this Subsection I of 6.31.2.13 NMAC.

(a) "Expedited hearing" means a hearing that is available on request by a public agency under 34 CFR Secs. 300.521 or 300.526 or by a parent under 34 CFR Sec. 300.525 and is subject to the requirements of 34 CFR Sec. 300.528.

(b) "Gifted services" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

(c) "Summary due process hearing" means a hearing designed to proceed more quickly and incur less expense than a standard due process hearing, as explained under Paragraph (15) of Subsection I of 6.31.2.13 NMAC.

(d) "Transmit" means to mail, transmit by electronic mail or telecopier (facsimile machine) or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means: (i) an electronic mail system's confirmation of a completed transmission to an e-mail address that is shown to be valid for the individual to whom the transmission was sent; (ii) a telecopier machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent; (iii) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery; or (iv) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered. A due process hearing final decision shall be transmitted to any party not represented by counsel by the

U.S. postal service, certified mail, return receipt requested, showing to whom the article was delivered and the date of delivery.

(3) Bases for requesting hearing. A parent or public agency may initiate an impartial due process hearing on the following matters:

- (a)** the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;
- (b)** the public agency refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;
- (c)** the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of, or services to, a child who needs or may need gifted services;
- (d)** an IDEA due process hearing provides a forum for reviewing the appropriateness of decisions regarding the identification, evaluation, placement or provision of a free appropriate public education for a particular child with a disability by the public agency that is or may be responsible under state law for developing and implementing the child's IEP or ensuring that a FAPE is made available to the child; the IDEA does not authorize due process hearing officers to consider claims asserting that the PED should be required to provide direct services to a child with a disability pursuant to 20 USC Sec. 1413(g)(1) and 34 CFR Sec. 300.360 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the PED has failed to adequately perform its duty of general supervision over educational programs for children with disabilities in New Mexico; accordingly, a due process hearing is not the proper forum for consideration of such claims and the PED will decline to refer such claims against it to a hearing officer; such claims may be presented through the state-level complaint procedure under Subsection H of 6.31.2.13 NMAC above.

(4) Bases for requesting expedited hearing

(a) Pursuant to 34 CFR Sec. 300.525 and 20 USC Sec. 1415(k)(3), a parent may request an expedited hearing to review any decision regarding placement or a manifestation determination under 34 CFR Secs. 300.520-300.528.

(b) Pursuant to 34 CFR Sec. 300.526(c) and 20 USC Sec. 1415(k)(3), a public agency may request an expedited hearing if it believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others.

(5) Request for hearing. A parent requesting a due process hearing shall transmit written notice of the request to the public agency whose actions are in question and to the SEB of the PED. A public agency requesting a due process hearing shall transmit written notice of the request to the parent(s) and to the SEB of the PED. The written request shall state with specificity the nature of the dispute and shall include:

- (a)** the name of the child;
- (b)** the address of the residence of the child (or available contact information in the case of a homeless child);
- (c)** the name of the school the child is attending;
- (d)** the name of the public agency, if known;
- (e)** the name, address and telephone number(s) of the party making the request (or available contact information in the case of a homeless party) and, if the party is represented by an attorney or advocate, the name, address and telephone number(s) of the attorney or advocate;
- (f)** a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;
- (g)** a description of efforts the parties have made to resolve their dispute at the local level before filing a request for due process; and
- (h)** a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;
- (i)** a request for an expedited hearing must also include a statement of facts sufficient to show that a requesting parent is entitled to an expedited hearing under 34 CFR Secs. 300.525 or 300.527 or 20 USC Sec. 1415(k)(3) or that a requesting public agency is entitled to an expedited hearing under 34 CFR Sec. 300.521 or 300.526 or 20 USC Sec. 1415(k)(3);
- (j)** a request for a hearing must be in writing and signed and dated by the parent or the authorized public agency representative; an oral request made by a parent who is unable to communicate by writing shall be reduced to writing by the public agency and signed by the parent;

(k) a request for hearing filed by or on behalf of a party who is represented by an attorney or advocate shall include a sufficient statement authorizing the representation; a written statement on a client's behalf that is signed by an attorney who is subject to discipline by the New Mexico supreme court for a misrepresentation shall constitute a sufficient authorization; representation by other advocates must be specifically authorized in a writing signed by the party being represented.

(6) Response to request for hearing

(a) A request for a hearing shall be deemed to be sufficient unless the party receiving the notice of request notifies the hearing officer and the other party in writing that the receiving party believes the request has not met the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC.

(b) Public agency response

(i) In general. If the public agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process hearing request, such public agency shall, within 10 days of its receipt of the request, send to the parent a response that meets the requirements of 20 USC Sec. 1415(c)(2)(B)(i). This requirement presents an additional opportunity for parties to clarify and potentially resolve their dispute(s).

(ii) Sufficiency. A response filed by a public agency pursuant to (i) of Subparagraph (b) of Paragraph (6) shall not be construed to preclude such public agency from asserting that the parent's due process hearing request was insufficient where appropriate.

(c) Other party response. Except as provided in Subparagraph (b) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the non-complaining party shall, within 10 days of its receipt of the request for due process, send to the requesting party a response that specifically addresses the issues raised in the hearing request. This requirement also presents an opportunity to clarify and potentially resolve disputed issues between the parties.

(d) A party against whom a due process hearing request is filed shall have a maximum of 15 days after receiving the request to provide written notification to the hearing officer of insufficiency under Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC. The 15-day timeline for the public agency to convene a resolution session under Paragraph (8) of Subsection I of 6.31.2.13 NMAC below runs at the same time as the 15-day timeline for filing notice of insufficiency.

(e) Determination. Within five days of receipt of a notice of insufficiency under Subparagraph (d) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the hearing officer shall make a determination on the face of the due process request of whether it meets the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC, and shall immediately notify the parties in writing of such determination.

(f) Amended due process request. A party may amend its due process request only if:

(i) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to Paragraph (8) of Subsection I of 6.31.2.13 NMAC; or

(ii) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(g) Applicable timeline. The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(7) Duties of the SEB of the PED. Upon receipt of a written request for due process, the SEB shall:

(a) appoint a qualified and impartial hearing officer who meets the requirements of 34 CFR Sec. 300.508 and 20 USC Sec. 1415(f)(3)(A);

(b) arrange for the appointment of a qualified and impartial mediator or IEP facilitator pursuant to 34 CFR Sec. 300.506 to offer ADR services to the parties;

(c) inform the parent in writing of any free or low-cost legal and other relevant services available in the area; the SEB shall also make this information available whenever requested by a parent; and

(d) inform the parent that in any action or proceeding brought under 20 USC Sec. 1415, a state or federal court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(g)(3)(b) and 34 CFR Sec. 300.513, may award reasonable attorneys' fees as part of the costs to a prevailing party;

(e) the SEB shall also: (i) keep a list of the persons who serve as hearing officers and a statement of their qualifications; (ii) appoint another hearing officer if the initially appointed hearing officer excuses himself or herself from service; (iii) ensure that mediation and FIEP meetings are considered as voluntary and are not used to deny or delay a parent's right to a hearing; and (iv) ensure that within forty-five (45) days of commencement of the timeline for a due process hearing, a final written decision is reached and a copy transmitted to the parties, unless one or more specific extensions of time have been granted by the hearing officer at the request of either party (or at the joint request of the parties, where the reason for the request is to allow the parties to pursue an ADR option);

(f) following the decision, the SEB shall, after deleting any personally identifiable information, transmit the findings and decision to the state IDEA advisory panel and make them available to the public upon request.

(8) Preliminary meeting

(a) Resolution session. Before the opportunity for an impartial due process hearing under Paragraphs (3) or (4) of Subsection I of 6.31.2.13 NMAC above, the public agency shall convene a resolution session with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process request, unless the parents and the public agency agree in writing to waive such a meeting, or agree to use the FIEP or mediation process instead. The resolution session:

(i) shall occur within 15 days of the respondent's receipt of a request for due process;

(ii) shall include a representative of the public agency who has decision-making authority on behalf of that agency;

(iii) may not include an attorney of the public agency unless the parent is accompanied by an attorney; and

(iv) shall provide an opportunity for the parents of the child and the public agency to discuss the disputed issue(s) and the facts that form the basis of the dispute, in order to attempt to resolve the dispute;

(v) if an agreement is reached following a resolution session, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind that agency, and which is enforceable in any state court of competent jurisdiction or in a district court of the United States; if the parties execute an agreement pursuant to a resolution session, a party may void this agreement within three business days of the agreement's execution; further, if the resolution session participants reach agreement on any IEP-related matters, the binding agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly or develop an IEP Addendum, as appropriate.

(b) FIEP meeting; mediation. Parties to a due process hearing may choose to convene a FIEP meeting or mediation instead of a resolution session. To do so, the party filing the request for the hearing must (and the responding party may) notify the hearing officer in writing within one business day of the parties' decision to jointly request one of these options. A FIEP meeting or mediation shall be completed not later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless, upon joint request by the parties, an extension is granted by the hearing officer. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the hearing. The requirements for mediation, as set forth at Subparagraph (c) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC, apply to mediation in this context, as well.

(c) Applicable timelines

(i) If the parties agree to convene a resolution session, the applicable timelines for the due process hearing shall be suspended for up to 30 days from the date the due process request was received by the SEB (except in the case of an expedited hearing), and the meeting shall proceed according to the requirements set forth under Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC above.

(ii) If the parties agree to convene a FIEP meeting or mediation, the public agency shall contact the person or entity identified by the SEB to arrange for mediation or a FIEP meeting, as appropriate. Except for expedited hearings, the parties to the FIEP meeting or mediation process may jointly request that the hearing officer grant a specific extension of time for the prehearing conference and for completion of the hearing beyond the 45-day period for issuance of the hearing decision. The hearing

officer may grant such extensions in a regular case but may not exceed the 45-day deadline in an expedited case.

(iii) If the parties agree to waive all preliminary meeting options and proceed with the due process hearing, the hearing officer shall send written notification to the parties that the applicable timelines for the due process hearing procedure shall commence as of the date of that notice. The hearing officer shall thereafter proceed with the prehearing procedures, as set forth under Paragraph (12) of Subsection I of 6.31.2.13 NMAC.

(d) Resolution. Upon resolution of the dispute, the party who requested the due process hearing shall transmit a written notice informing the hearing officer and the SEB that the matter has been resolved and withdrawing the request for hearing. The hearing officer shall transmit an appropriate order of dismissal to the parties and the SEB.

(e) Hearing. If the parties convene a resolution session and they have not resolved the disputed issue(s) within 30 days of the receipt of the due process request by the SEB in a non-expedited case, the public agency shall (and the parents may) notify the hearing officer in writing within one business day of reaching this outcome. The hearing officer shall then promptly notify the parties in writing that the due process hearing shall proceed and all applicable timelines for a hearing under this part shall commence as of the date of such notice.

(f) The resolution of disputes by mutual agreement is strongly encouraged and nothing in these rules shall be interpreted as prohibiting the parties from engaging in settlement discussions at any time before, during or after an ADR meeting, a due process hearing or a civil action.

(9) Hearing officer responsibility and authority. Hearing officers shall conduct proceedings under these rules with due regard for the costs and other burdens of due process proceedings for public agencies, parents and students. In that regard, hearing officers shall strive to maintain a reasonable balance between affording parties a fair opportunity to vindicate their IDEA rights and the financial and human costs of the proceedings to all concerned. Accordingly, each hearing officer shall exercise such control over the parties, proceedings and the hearing officer's own practices as (s)he deems appropriate to further those ends under the circumstances of each case. In particular, and without limiting the generality of the foregoing, the hearing officer, at the request of a party or upon the hearing officer's own initiative and after the parties have had a reasonable opportunity to express their views on disputed issues:

(a) shall ensure by appropriate orders that parents and their duly authorized representatives have timely access to records and information under the public agency's control which are reasonably necessary for a fair assessment of the IDEA issues raised by the requesting party;

(b) shall limit the issues for hearing to those permitted by the IDEA which the hearing officer deems necessary for the protection of the rights that have been asserted by the requesting party in each case;

(c) may issue orders directing the timely production of relevant witnesses, documents or other information within a party's control, protective orders or administrative orders to appear for hearings, and may address a party's unjustified failure or refusal to comply by appropriate limitations on the claims, defenses or evidence to be considered;

(d) shall exclude evidence that is irrelevant, immaterial, unduly repetitious or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in federal courts or the courts of New Mexico; and

(e) may issue such other orders and make such other rulings, not inconsistent with express provisions of these rules or the IDEA, as the hearing officer deems appropriate to control the course, scope and length of the proceedings while ensuring that the parties have a fair opportunity to present and support all allowable claims and defenses that have been asserted.

(10) Duties of the hearing officer. The hearing officer shall excuse himself or herself from serving in a hearing in which he or she believes a personal or professional bias or interest exists which conflicts with his or her objectivity. The hearing officer shall:

(a) make a determination regarding the sufficiency of a request for due process within 5 days of receipt of any notice of insufficiency, and notify the parties of this determination;

(b) schedule an initial prehearing conference within 14 days of commencement of the timeline for a due process hearing, or as soon as reasonably practicable in an expedited case pursuant to Paragraph (12) of Subsection I of 6.31.2.13 NMAC below;

(c) reach a decision, which shall include written findings of fact, conclusions of law, and reasons for these findings and conclusions and shall be based solely on evidence presented at the hearing;

(d) transmit the decision to the parties and to the SEB within 45 days of the commencement of the timeline for the hearing, unless a specific extension of time has been granted by the hearing officer at the request of a party to the hearing, or at the joint request of the parties where the reason for the request is to permit the parties to pursue an ADR option; for an expedited hearing, no extensions or exceptions beyond the 45-day deadline are permitted;

(e) the hearing officer may reopen the record for further proceedings at any time before reaching a final decision after transmitting appropriate notice to the parties; the hearing is considered closed and final when the written decision is transmitted to the parties and to the SEB;

(f) the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(11) Withdrawal of request for hearing. A party may unilaterally withdraw a request for due process at any time before a decision is issued. A written withdrawal that is transmitted to the hearing officer and the other party at least two business days before a scheduled hearing shall be without prejudice to the party's right to file a later request on the same claims, which shall ordinarily be assigned to the same hearing officer. A withdrawal that is transmitted or communicated within two business days of the scheduled hearing shall ordinarily be with prejudice to the party's right to file a later request on the same claims unless the hearing officer orders otherwise for good cause shown. A withdrawal that is entered during or after the hearing but before a decision is issued shall be with prejudice. In any event, the hearing officer shall enter an appropriate order of dismissal.

(12) Prehearing procedures. Unless extended by the hearing officer at the request of a party, within 14 days of the commencement of the timeline for a due process hearing and as soon as is reasonably practicable in an expedited case, the hearing officer shall conduct an initial prehearing conference with the parent and the public agency to:

(a) identify the issues (disputed claims and defenses) to be decided at the hearing and the relief sought;

(b) establish the hearing officer's jurisdiction over IDEA and gifted issues;

(c) determine the status of the resolution session, FIEP meeting or mediation between the parties, and determine whether an additional prehearing conference will be necessary as a result;

(d) review the hearing rights of both parties, as set forth in Paragraphs (16) and (17) of Subsection I of 6.31.2.13 NMAC below, including reasonable accommodations to address an individual's need for an interpreter at public expense;

(e) review the procedures for conducting the hearing;

(f) set a date, time and place for the hearing that is reasonably convenient to the parents and school personnel involved; the hearing officer shall have discretion to determine the length of the hearing, taking into consideration the issues presented;

(g) determine whether the child who is the subject of the hearing will be present and whether the hearing will be open to the public;

(h) set the date by which any documentary evidence intended to be used at the hearing by the parties must be exchanged; the hearing officer shall further inform the parties that, not less than 5 business days before a regular hearing or, if the hearing officer so directs, not less than two business days before an expedited hearing, each party shall disclose to the other party all evaluations completed by that date and recommendations based on the evaluations that the party intends to use at the hearing; the hearing officer may bar any party that fails to disclose such documentary evidence, evaluation(s) or recommendation(s) by the deadline from introducing the evidence at the hearing without the consent of the other party;

(i) as appropriate, determine the current educational placement of the child pursuant to Paragraph (27) of Subsection I of 6.31.2.13 NMAC below;

(j) exchange lists of witnesses and, as appropriate, entertain a request from a party to issue an administrative order compelling the attendance of a witness or witnesses at the hearing;

(k) address other relevant issues and motions; and

(l) determine the method for having a written, or at the option of the parent, electronic verbatim record of the hearing; the public agency shall be responsible for arranging for the verbatim record of the hearing;

(m) the hearing officer shall transmit to the parties and the SEB of the PED a written summary of the prehearing conference; the summary shall include, but not be limited to, the date, time and place of the hearing, any prehearing decisions, and any orders from the hearing officer.

(13) Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents, child and school personnel involved.

(14) In order to limit testimony at the hearing to only those factual matters which remain in dispute between the parties, on or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(15) Summary due process hearing. These summary due process hearing procedures are designed to afford parents and public agencies an alternative, voluntary dispute resolution process that requires less time and expense than a traditional due process hearing. The use of summary due process hearing procedures shall not alter the requirement that the public agency convene a resolution session within 15 days of its receipt of the request for the hearing, unless the parties agree to waive that option in writing or choose to use a FIEP meeting or mediation instead.

(a) Any party requesting a due process hearing may request that the dispute be assigned to a summary due process hearing track. A request for a summary due process hearing may be submitted simultaneously with the request for due process hearing, at the prehearing scheduling conference, or at a later time by agreement of all parties.

(b) Any party opposing a request for summary due process shall state its objection within 5 days of the date of receipt of the request for a summary due process hearing. The summary due process hearing option is voluntary. If a party timely states its opposition to this option, the matter will be placed on a traditional due process hearing track.

(c) On or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(d) On or before 5 days before the summary due process hearing, each party shall produce to the opposing party and to the hearing officer a copy of all documents that the party seeks to introduce into evidence at the hearing and identify all witnesses that the party intends to call to testify at the hearing.

(e) Each party shall have one half (1/2) day to present its case. In the event that extensive cross examination, arguments or other factors impede a party's ability to complete its case in one half day, the hearing officer shall have discretion to extend the time for the hearing, as needed.

(f) The hearing officer shall issue a decision to the parties within 7 days of the completion of the summary due process hearing.

(g) Except as modified herein, the procedural rules and procedures applicable to due process hearings as stated in Subsection I of 6.31.2.13 NMAC shall also apply to summary due process hearings.

(16) Any party to a hearing has the right to:

(a) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(b) present evidence and confront, cross-examine and compel the attendance of witnesses;

(c) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before a regular hearing or, if the hearing officer so directs in the prehearing summary, at least two business days before an expedited hearing;

(d) obtain a written, or, at the option of the parents, electronic verbatim record of the hearing; and

(e) obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(17) Parents involved in hearings also have the right to:

(a) have the child who is the subject of the hearing present; and

(b) open the hearing to the public.

(18) The record of the hearing and the findings of fact and decisions described above must be provided at no cost to the parents.

(19) Limitations on the hearing

(a) The party requesting the due process hearing shall not be allowed to raise issues at the hearing that were not raised in the request for a due process hearing (including an amended request, if such amendment was previously permitted) filed under Paragraph (5) of Subsection I of 6.31.2.13 NMAC, unless the other party agrees otherwise.

(b) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the due process request.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC above shall not apply to a parent if the parent was prevented from requesting the hearing due to:

(i) specific misrepresentations by the public agency that it had resolved the problem that forms the basis of the due process request; or

(ii) the public agency's withholding of information from the parent that was required under this part to be provided to the parent.

(20) Rules for expedited hearings. The rules in Paragraphs (4) through (19) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions:

(a) The SEB of the PED and the hearing officer shall ensure that a hearing is held within 20 school days of the date the request for hearing is received by the SEB, and a written decision is reached within 10 school days of the completion of the hearing, without exceptions or extensions, and thereafter mailed to the parties.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC, and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above.

(d) The hearing officer may shorten the five-business-day rule for exchanging evidence before the hearing to not less than two business days and shall state the deadline established and the consequences of the parties' failure to meet the deadline in the written summary of the prehearing conference.

(e) The hearing officer may shorten the 15-day timeline for providing notice of insufficiency of a request for an expedited due process hearing to 10 school days.

(f) The hearing officer may shorten the timeline for the exchange of proposed stipulated facts between the parties as (s)he deems necessary and appropriate given the circumstances of a particular case. The hearing officer may also shorten the timeline for providing agreed-upon stipulated facts to the hearing officer to two school days before the hearing.

(g) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(21) Decision of the hearing officer

(a) In general. Subject to Subparagraph 21(b) of Subsection I of 6.31.2.13 NMAC below, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

(b) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(i) impeded the child's right to a FAPE;

(ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or

(iii) caused a deprivation of educational benefits.

(c) Rule of construction. Nothing in this paragraph shall be construed to preclude a hearing officer from ordering a public agency to comply with procedural requirements under this section.

(22) Rule of construction. Nothing in this Subsection I shall be construed to affect the right of a parent to file a complaint with the SEB of the PED, as described under Subsection H of 6.31.2.13 NMAC.

(23) Modification of final decision. Clerical mistakes in final decisions, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the hearing officer at any time on the hearing officer's own initiative or on the request of any party and after such notice, if any, as the hearing officer orders. Such mistakes may be corrected after a civil action has been brought pursuant to Paragraph (25) of Subsection I of 6.31.2.13 NMAC below only with leave of the state or federal district court presiding over the civil action.

(24) Expenses of the hearing. The public agency shall be responsible for paying administrative costs associated with a hearing, including the hearing officer's fees and expenses and expenses related to the preparation and copying of the verbatim record, its transmission to the SEB, and any further expenses for preparing the complete record of the proceedings for filing with a reviewing federal or state court in a civil action. Each party to a hearing shall be responsible for its own legal fees or other costs, subject to Paragraph (26) of Subsection I of 6.31.2.13 NMAC below.

(25) Civil action

(a) Any party aggrieved by the decision of a hearing officer in an IDEA matter has the right to bring a civil action in a state or federal district court pursuant to 20 USC Sec. 1415(i) and 34 CFR Sec. 300.512. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party.

(b) A party aggrieved by the decision of a hearing officer in a matter relating solely to the identification, evaluation, or educational placement of or services to a child who needs or may need gifted services may bring a civil action in a state court of appropriate jurisdiction within 30 days of receipt of the hearing officer's decision by the appealing party.

(26) Attorneys' fees

(a) In any action or proceeding brought under 20 USC Sec. 1415, the court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(i) and 34 CFR Sec. 300.513, may award reasonable attorneys' fees as part of the costs to:

(i) the parent of a child with a disability who is a prevailing party;

(ii) a prevailing public agency against the attorney of a parent who files a request for due process or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) to a prevailing public agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Any action for attorneys' fees must be filed within one year of the last administrative decision.

(c) Opportunity to resolve due process complaints. A meeting conducted pursuant to Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC shall not be considered:

(i) a meeting convened as a result of an administrative hearing or judicial action; or

(ii) an administrative hearing or judicial action for purposes of this paragraph.

(d) Hearing officers are not authorized to award attorneys' fees.

(e) Attorneys' fees are not recoverable for actions or proceedings involving services to gifted students or other claims based solely on state law.

(27) Child's status during proceedings

(a) Except as provided in 34 CFR Sec. 300.526 and Paragraph (4) of Subsection I of 6.31.2.13 NMAC, and unless the public agency and the parents of the child agree otherwise, during the pendency of any administrative or judicial proceeding regarding an IDEA due process request, the child involved must remain in his or her current educational placement. Disagreements over the identification of the current educational placement which the parties cannot resolve by agreement shall be resolved by the hearing officer as necessary.

(b) If the case involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the public agency and the parents for purposes of Subparagraph (a) of Paragraph (27) of Subsection I of 6.31.2.13 NMAC.

(28) Effective date and transitional provisions

(a) The procedures in this Subsection I of 6.31.2.13 NMAC shall govern due process requests received by the SEB after the July 29, 2005, effective date of this subsection.

(b) The provisions of the IDEA 2004 that took effect on July 1, 2005, shall apply to due process cases filed between July 1 and July 29, 2005, in the event of irreconcilable conflicts with the state rules as they existed during that time.

(c) The parties to due process cases that were pending on July 29, 2005, may enter into a written agreement to waive the administrative review process that would otherwise be available under the former state rules and proceed directly from a final decision by a hearing officer to a civil action in a state or federal district court. The parties to cases in which administrative appeals were pending on July 29, 2005, and in which the administrative appeal officer has not yet ruled on the merits of any substantive issue may likewise agree to waive the administrative review process but shall decide whether to do so within a reasonable time to be established by the administrative appeal officer.

(d) The parties to cases pending on July 29, 2005, may likewise enter into a written agreement to dismiss any claims under Section 504 of the federal Rehabilitation Act that would otherwise be hearable or administratively reviewable under the former state rules, provided that the hearing or appeal officer has not yet ruled on the merits of any substantive issue raised under an affected Section 504 claim.

(e) Upon receipt of a timely and sufficient motion incorporating an agreement under Subparagraphs 28(c) or 28(d) of Subsection I of 6.31.2.13 NMAC above, the authority before whom the case is pending shall enter an appropriate order to implement the agreement.

J. Surrogate parents and foster parents

(1) Each public agency shall ensure that a qualified surrogate parent is appointed in compliance with 34 CFR Sec. 300.515 when needed to protect the rights of a child with a disability who is within the agency's educational jurisdiction. A surrogate parent need not be appointed if a person who qualifies as a parent under 34 CFR Sec. 300.20(b) and Paragraph B(12) of 6.31.2.7 NMAC can be identified.

(2) A foster parent who meets all requirements of 34 CFR Sec. 300.20(b) may be treated as the child's parent pursuant to that regulation. A foster parent who does not meet those requirements but meets all requirements of 34 CFR Sec. 300.515 may be appointed as a surrogate parent if the public agency that is responsible for the appointment deems such action appropriate.

(3) Pursuant to 34 CFR Sec. 300.515, a surrogate parent may represent the child in all matters relating to the identification, evaluation and educational placement of the child and the provision of FAPE to the child.

K. Transfer of parental rights to students at age 18

(1) Pursuant to Secs. 12-2A-3 and 28-6-1 NMSA 1978, a person's age of majority begins on the first instant of his or her 18th birthday and a person who has reached the age of majority is an adult for all purposes not otherwise limited by state law. A guardianship proceeding under the Probate Code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his or her own decisions taken away. Public agencies and their IEP teams are not empowered to make such determinations under New Mexico law. Accordingly, pursuant to 34 CFR Sec. 300.517, when a student with a disability reaches age 18 and does not have a court-appointed general guardian, limited guardian or other person who has been authorized by a court to make educational decisions on the student's behalf:

(a) a public agency shall provide any notices required by 34 CFR Part 300 to the student and the parents;

(b) all other rights accorded to parents under Part B of the IDEA, New Mexico law or PED rules and standards transfer to the student; and

(c) the public agency shall notify the individual and the parents of the transfer of rights.

(2) Pursuant to 34 CFR Sec. 300.347(c), each annual IEP review for a child who is 16 or older must include a discussion of the rights that will transfer when the child turns 18 and, as appropriate, a

discussion of the parents' plans for obtaining a guardian before that time. Each child's IEP beginning not later than when the student turns 17 must include a statement that the student and the parent have been informed of the rights that will transfer to the student at age 18.

L. Confidentiality of information

(1) Confidentiality requirements. Each public agency collecting, using or maintaining any personally identifiable information on children under Part B of the IDEA shall comply with all applicable requirements of 34 CFR Secs. 300.560-300.576 and the Family Educational Rights and Privacy Act, 34 CFR Part 99.

(2) Parental rights to inspect, review and request amendment of education records. Each public agency shall permit parents or their authorized representatives to inspect and review any education records relating to their children that are collected, maintained or used by the agency under Part B of the IDEA pursuant to 34 CFR Sec. 300.562. A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child may request the agency that maintains the information to amend the information pursuant to 34 CFR Sec. 300.567 and shall have the opportunity for a hearing on that request pursuant to 34 CFR Secs. 300.568-300.570 and 34 CFR Sec. 99.22.

(3) Transfer of student records

(a) Pursuant to 34 CFR Sec. 99.31(a)(2), an educational agency may transfer student records without parental consent when requested by another educational agency in which a student seeks or intends to enroll as long as the sending agency has included the proper notification that it will do so in its required annual FERPA notice to students and parents. In view of the importance of uninterrupted educational services to children with disabilities, each New Mexico public agency is hereby directed to include such language in its annual FERPA notice and to ensure that it promptly honors each proper request for records from an educational agency that has become responsible for serving a child with a disability.

(b) State-supported educational programs and the educational programs of juvenile or adult detention or correctional facilities are educational agencies for purposes of the Family Educational Rights and Privacy Act (FERPA) and are entitled to request and receive educational records on children with disabilities on the same basis as local school districts. Public agencies shall promptly honor requests for records to assist such programs in providing appropriate services to children within their educational jurisdiction.

(c) Pursuant to 34 CFR Sec. 99.34(b), an educational agency that is authorized to transfer student records to another educational agency without parental consent under Sec. 99.31(a)(2) may properly transfer to the receiving agency all educational records the sending agency maintains on a student, including medical, psychological and other types of diagnostic and service information which the agency obtained from outside sources and used in making or implementing educational programming decisions for the child.

(d) Pursuant to Paragraph (3) of Subsection D of 6.30.2.10 NMAC, 34 CFR Sec. 300.576 and the federal No Child Left Behind Act at 20 USC 7165, any transfer of educational records to a private or public elementary or secondary school in which a child with disabilities seeks, intends, or is instructed to enroll must include the following:

- (i) transcripts and copies of all pertinent records as normally transferred for all students;
- (ii) the child's current individualized education program with all supporting documentation, including the most recent multidisciplinary evaluations and any related medical, psychological or other diagnostic or service information that was consulted in developing the IEP; and
- (iii) disciplinary records with respect to current or previous suspensions or expulsions of the child.

(4) Parental refusals of consent for release of information. If parental consent is required for a particular release of information regarding a child with a disability and the parent refuses consent, the sending or receiving public agency may use the first-level impartial due process hearing procedures specified in Subsection I of 6.31.2.13 NMAC to determine if the information may be released without parental consent. If the hearing officer determines that the proposed release of information is reasonably necessary to enable one or more public agencies to fulfill their educational responsibilities toward the child, the information may be released without the parent's consent. The hearing officer's decision in such a case shall be final and not subject to further administrative review.

(5) Destruction of information

(a) Pursuant to 34 CFR Sec. 300.573, each public agency shall inform parents when personally identifiable information collected, maintained, or used under 34 CFR Part 300 is no longer needed to provide educational services to the child. As at other times, the parents shall have the right to inspect and review all educational records pertaining to their child pursuant to 34 CFR Sec. 300.562. The information must be destroyed at the request of the parents or, at their option, the records must be given to the parents. When informing parents about their rights to destruction of personally identifiable records under these rules, the public agency should advise them that the records may be needed by the child or the parents for social security benefits and other purposes.

(b) If the parents do not request the destruction of personally identifiable information about their children, the public agency may retain that information permanently. In either event, a permanent record of a student's name, address and phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. Additional information that is not related to the student's IDEA services may be maintained if allowed under 34 CFR Part 99.

[6.31.2.13 NMAC - Rp 6 NMAC 5.2.9.1.1-9.1.4, 5.2.9.1.6-9.1.8, 5.2.10, 8/14/2000; A, 8/15/2003; A, 8/31/2004; A, 7/29/2005]

6.31.2.14 RULES OF CONSTRUCTION:

A. U.S. Department of Education Interpretations. The U.S. Department of Education's interpretations of the provisions of 34 CFR Part 300 as set forth in Appendix A to 34 CFR Part 300, its Analysis of Comments and Changes to Part 300 at 64 Federal Register 12537-12656 (March 12, 1999), and other interpretations that are published or announced by the USDE in the Federal Register are recognized as the federal government's official positions regarding the requirements of the IDEA. Such interpretations shall be followed by the State Board and Department to the extent that they do not conflict with express provisions of the IDEA or case law from the federal courts.

B. Uniform Statute and Rule Construction Act. The Uniform Statute and Rule Construction Act, Secs. 12-2A-1 through -20 NMSA 1978, applies to the interpretation of 6.31.2 NMAC except to the extent that these rules incorporate permissible variations under the New Mexico version of the Uniform Act. References in 6.31.2 NMAC to state or federal laws, rules or regulations are intended to incorporate future amendments unless a provision in these rules is irreconcilable with a future amendment under the standards of the Uniform Act.

C. Conflicts with State or Federal Laws or Regulations. If any state law, a state rule or regulation adopted by the SBE or a federal law or regulation grants greater rights to an individual or agency than these rules provide, the other provision shall control to the extent necessary to avoid a conflict.

[6.31.2.14 NMAC - N, 8/14/2000]

HISTORY OF 6.31.2 NMAC:

Pre-NMAC History:

Material in this Part was derived from that previously filed with the commission of public records - state records center and archives:

SBE Regulation 85-4, Educational Standards for New Mexico Schools Basic, Special Education, Vocational Programs, 10/21/85

SBE Regulation 86-7, Educational Standards for New Mexico Schools, 9/2/86

SBE Regulation 87-8, Educational Standards For New Mexico Schools, 2/2/88

SBE Regulation 88-9, Educational Standards For New Mexico Schools, 10/28/88

SBE Regulation 89-8, Educational Standards For New Mexico Schools, 11/22/89

SBE Regulation 90-2, Educational Standards For New Mexico Schools, 9/7/90

History of Repealed Material:

6 NMAC 5.2, Primary and Secondary Education, Special Education, Children with Disabilities/Gifted Children -- Repealed, 8/14/2000