



924 Park Ave SW, Ste C  
Albuquerque, NM 87102  
505.255.2840  
nmpovertylaw.org

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New Mexico Public Education Department  
Attn: Jamie Gonzales  
Policy Division, Rm. 101  
300 Don Gaspar Avenue  
Santa Fe, NM 87501

Sent via email: [rule.feedback@state.nm.us](mailto:rule.feedback@state.nm.us)

Dear Secretary-Designate Ruskowski:

The New Mexico Center on Law & Poverty opposes PED's Proposed Rule 6.19.9 "Early Literacy Remediation, Interventions, and Parental Engagement." The proposed regulation exceeds PED's rulemaking authority and conflicts with current statutes regarding remediation and promotion. The state's current retention policy, which is clearly set forth in statute, is good policy. NMSA § 22-2C-6. It allows districts, teachers, and parents to determine what remediation a child needs to become proficient. NMSA § 22-2C-6 also allows districts to determine what is best for a child based on her individual needs as a student, not based on what she scores on a standardized test. PED's proposed rule violates this statute.

Not only is the proposed regulation illegal, it is bad policy. The proposed rule does not implement or support any programs that actually help students learn, like PreK, extended learning time (K-3 Plus, summer and afterschool programs, and tutoring), and professional development for teachers to teach reading. Instead, PED mandates a state reading assessment that K-3 graders must pass to be promoted.

It appears that PED is seeking to legislate through rule-making what it could not convince the Legislature to do after many years of unsuccessfully trying to pass third grade retention legislation. PED's proposed rule attempts to usurp the Legislature by implementing that policy by regulation.

### **I. PED's proposed regulation exceeds its statutory authority.**

The State Rules Act states that "[n]o rule is valid or enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the statute." NMSA § 14-4-5.7(A). The New Mexico Legislature has already determined the remediation process for students in grades 1-

12. See NMSA § 22-2C-6. PED’s proposed regulation “Early Literacy Remediation, Interventions and Family Engagement” directly conflicts with current law.

**a. In conflict with current law, PED’s proposed rule would require school districts to use a PED-designated benchmark assessment and a PED-determined cut score to define reading proficiency.**

Contrary to state law, PED’s proposed rule grants itself the authority to designate which benchmark assessment (short-cycle assessment) school districts would be required to use to determine students’ reading proficiency in grades K-3. 6.19.9.8(D). Further, PED would determine the cut scores for reading proficiency for all districts. 6.19.9.8(A) The results of the PED-designated assessment would determine whether a student would need early literacy intervention and would direct the use of daily intervention, remediation, or alternative programming. 6.19.9.8(C).

This is in direct conflict with the current statute, which states that all remediation, academic improvement programs, and promotion policies shall align with school-district-determined assessment results. NMSA § 22-2C-6(A). The statute defines “school district-determined assessment results” as the results obtained from student assessments developed or adopted by a local school board and conducted at an elementary or middle school level. *Id.* at § 22-2C-6(J)(2). Additionally, current statute gives school districts the authority to measure academic proficiency by grades, performance on school district assessments, and other measures identified by the school district. NMSA § 22-2C-6(F)(3)(b).

**b. Several provisions in PED’s proposed rule are outside of the scope of NMSA § 22-2C-6 and are therefore invalid.**

PED’s proposed rule applies to K-3 students. However, the remediation statute only applies to students in grades 1-12, and does not include Kindergarten. NMSA § 22-2C-6(B). Thus, PED cannot regulate remediation programs, intervention, or retention of Kindergarten students.

The proposed rule also allows for exemptions from retention for “good cause.” However, NMSA § 22-2C-6 does not identify any exemptions from its retention policy outside of special education students. *Id.* at § 22-2C-6(I). Similarly, PED’s proposed rule outlines acceleration options for students in grades K-3. The proposed regulation would require school districts to offer certain options to students who excel. However, NMSA § 22-2C-6 does not give PED authority to regulate promotion policies. Thus, these sections of the proposed rule are invalid.

**c. PED’s definitions are in conflict with current statute.**

Finally, PED’s proposed regulation offers definitions that conflict with what is already defined in statute, including “academic improvement plan” and “student assistance team”. See § 22-2C-6(J). The statutory definitions of these terms should be identical in the proposed regulation.

**2. Rather than pursuing a failed policy that does not improve literacy proficiency, PED should implement evidence-based programs and services that have proven to improve literacy rates for New Mexico's students.**

While it is by now a well-known fact that most New Mexican students cannot read at grade level, mandatory retention based on a standardized test will not solve this crisis. Instead, the state should be providing all students with educational services and programs that work. Children who attend high-quality PreK programs are less likely to be retained, need special education services, and are more likely to graduate from high school. The LFC has found that New Mexico PreK has positive long-term impacts on reading test scores through the 8<sup>th</sup> grade. Currently, however, only about 4,000 four-year-olds (of 27,000) have access to full-day PreK in New Mexico.

Similarly, K-3 Plus and extended learning time, such as summer and afterschool programs, have a positive impact on student learning in the early grades. K-3 Plus is proven to increase academic achievement for students. In fact, the LFC has found that the achievement gap between low-income and non-low-income students is closed when children participate in both PreK and K-3 Plus. Still, the LFC estimates that 52,000 students do not have access to K-3 Plus.

In addition to programs that work, teachers need continuing and embedded professional development to learn how to teach reading to children. But school districts do not receive enough SEG funding to provide the professional training that teachers need. Rather than mandating high-stakes testing for our youngest children in school, the PED should invest in instructional coaches and other professional development opportunities.

PED's answer to the vast majority of New Mexico's students being non-proficient in reading is to implement a test to 5-8 year-olds to determine whether a student should be promoted. The solution to teaching young children to read does not lie in high-stakes testing. Research shows that retention policies based on high-stakes testing does not help students academically. Students who are retained are less likely to pursue postsecondary education and are more likely to drop out and have poorer employment outcomes in terms of earnings.

We know what investments we need to make in New Mexico to improve literacy and the lives of our children. It does not include an investment in testing. Instead, invest in early childhood education and extended learning; provide technical assistance and professional development to districts to ensure these programs are high-quality and effective. Even the pieces of PED's proposed regulation that do not violate law are not answers to helping children learn how to read. For these reasons, the New Mexico Center on Law & Poverty opposes the proposed rule in its entirety and urges PED to withdraw it from consideration.

Sincerely,

Lauren A. Winkler  
Staff Attorney  
New Mexico Center on Law & Poverty  
[lauren@nmpoertylaw.org](mailto:lauren@nmpoertylaw.org)

Gail Evans  
Legal Director  
New Mexico Center on Law & Poverty  
[gail@nmpoertylaw.org](mailto:gail@nmpoertylaw.org)

On behalf of the following:

Dual Language Education of New Mexico  
Hatch Valley Public Schools  
Julia Rosa Lopez-Emslie, Member of the HEAC  
Lake Arthur Municipal Schools  
Learning Alliance New Mexico  
Loretta C. Salazar, Coalition for the Majority  
Mary Jean H. Lopez, former educator  
Michelle Valverde  
New Mexico Center on Law & Poverty  
Santa Fe Public Schools