

**Explanatory paragraph:** This is an amendment to Sections 7, 9, 11 and 13 of 6.31.2 NMAC (CHILDREN WITH DISABILITIES/GIFTED CHILDREN), effective February 29, 2012. Subsection E of Section 7 (DEFINITIONS) is amended to delete the definition of “summary due process hearing” and to renumber the succeeding paragraph accordingly. Section 9 (PUBLIC AGENCY RESPONSIBILITIES) is amended to add language to Subsection I regarding the creation of new school districts and charter schools. Section 11 (EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES) is amended as follows. Subsection A is amended at paragraph (2) to provide that the child qualifying for special education would transition to the Part B program on his or her third paragraph, with related amendments to paragraph (3) of Subsection A. Subparagraphs (f), (g), and (h) of paragraph (5) of Subsection A are amended. The current subparagraph (g) is deleted and replaced. Subsection E relating to reporting requirements is also amended. Section 13 (ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES) is amended to change the requirements for complaints in subparagraph (a) of paragraph (2) of Subsection H to more closely align to federal regulation. A technical correction is made to subparagraph (d) of paragraph (2). Subsection I is amended to delete references to summary due process hearings, to delete subparagraph (d) of paragraph (3), to change the requirements for due process requests in paragraph (5) to more closely align to federal regulation, to delete paragraph (15) regarding summary due process hearings with the following paragraphs renumbered accordingly. Internal cross-references in subsection I are amended to reflect the numbering changes. Subsection M is amended to more closely align with the timelines required by federal regulation.

**6.31.2.7 DEFINITIONS:**

E. The definitions in Subsection E apply only to Section 13, Subsection I (*additional rights of parents, students, and public agencies - due process hearings*).

(1) "**Expedited hearing**" means a hearing that is available on request by a parent or a public agency under 34 CFR Secs. 300.532(c) and is subject to the requirements of 34 CFR Sec. 300.532(c).

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

~~[(3)]~~—"~~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.]

~~[(4)]~~(3) "**Transmit**" means to mail, send 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: [6.31.2.7 NMAC - Rp, 6.31.2.7 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]

**6.31.2.9 PUBLIC AGENCY RESPONSIBILITIES:**

I. Reallocation of funds. If a new LEA is created, the base payment portion of the IDEA subgrant of the LEA that would have served children with disabilities now being served by the new LEA will be adjusted pursuant to 34 CFR Sec. 300.705(b)(2). IDEA funds to new charter schools that are LEAs will be allocated pursuant to 34 CFR Secs. 76.785-76.799 and 34 CFR Sec. 300.705(b). Pursuant to 34 CFR Sec. 300.705(c) if the department determines that a public agency is adequately providing FAPE to all children with disabilities residing in the area served by that public agency with state and local funds, the department may reallocate any portion of the funds under this part that are not needed by that public agency to provide FAPE to other LEAs in the state that are not adequately providing special education and related services to all children with disabilities residing in the areas served by those other LEAs or the department may also retain those funds for use at the state level as provided by 34 CFR Sec. 300.705(c).

[6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]

**6.31.2.11 EDUCATIONAL SERVICES FOR CHILDREN WITH DISABILITIES:**

A. Preschool programs for children aged [2] 3 through 5.

~~[(2)]~~—~~A child who will turn three at any time during the school year who is determined eligible may 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) Eligibility to enroll in Part B preschool program.

(a) If a child turns three at any time during the school year and is determined to be eligible

under Part B, the child may enroll in a Part B preschool program when the child turns three if the parent so chooses, whether or not the child has previously been receiving Part C services.

(b) Notwithstanding subparagraph (a) of this paragraph, if a child turns three at any time prior to July 1, 2012 and is enrolled in a Part C program, the parent has the option of having the child complete the remainder of the school year in early intervention services or, if the child is determined to be eligible under Part B, enrolling the child in a Part B preschool program.

(3) To ensure effective transitioning from IDEA Part C programs to IDEA Part B programs, each public agency must conduct a full and individual initial comprehensive evaluation, at no cost to the parent, and in compliance with requirements of 34 CFR Secs. 300.300, 300.301, 300.302, 300.304 and 300.305 and other department rules and standards before the initial provision of Part B special education and related services to a child with a disability.

(a) The initial comprehensive evaluation process shall be conducted in all areas of suspected disability.

(b) The Part B eligibility determination team shall review current assessments and shall determine the additional data and assessments needed for the comprehensive evaluation. Current assessments are defined as assessments, other than medical assessments, conducted no more than six months prior to the date of the meeting of the Part B eligibility determination team.

(c) The Part B eligibility determination team must consider educationally relevant medical assessments as part of the review of existing evaluation data. The determination of eligibility may not be made solely on the basis of medical assessments. If the team considers medical assessments conducted more than six months prior to the date of the meeting, the team must document the appropriateness of considering such medical assessments.

(5) In particular:

(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. 300.305, 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 in a manner that is consistent with Paragraph (3) of Subsection A of this section. The notice of procedural safeguards shall be given to the parents as provided in Paragraph (3) of Subsection D of 6.31.2.13 NMAC.

[(g) Each LEA shall initiate a meeting to develop an eligible child's IFSP, IEP or IFSP-IEP, in accordance with 34 CFR Sec. 300.323, 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. 300.321 that includes parents and appropriate early intervention providers who are knowledgeable about the child.]

(g) Development of IFSP, IEP or IFSP-IEP.

(i) The IFSP, IEP, or IFSP-IEP will be developed by a team constituted in compliance with 34 CFR Sec. 300.321 that includes parents. For children transitioning from Part C programs to Part B programs, the team must also include one or more early intervention providers who are knowledgeable about the child. "Early intervention providers" are defined as Part C service coordinators or other representatives of the Part C system.

(ii) For each child transitioning from a Part C program to a Part B preschool program, the LEA shall initiate a meeting to develop the eligible child's IFSP, IEP or IFSP-IEP, in accordance with 34 CFR Sec. 300.124. The IFSP, IEP or IFSP must be developed and implemented no later than the child's third birthday, consistent with 34 CFR Sec. 300.101(b).

(h) In compliance with 34 CFR Sec. 300.101(b)(2), if a child's birthday occurs during the summer, the child's IEP team shall determine the date when services under the IEP or IFSP will begin. Each public agency must engage in appropriate planning with the Part C lead agency so that the eligible child will be prepared to receive Part B special education and related services when the IEP team determines that the services under the IEP or IFSP will begin.

**E.** Participation in statewide and district-wide assessments. Each local educational agency and other public agencies when applicable shall include all 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 [See.] Secs. 300.157 and 300.160(f) and Sec. 1111(h) of the Elementary and Secondary Education Act, and any additional requirements established by the department. Students with disabilities may participate:

**6.31.2.13 ADDITIONAL RIGHTS OF PARENTS, STUDENTS AND PUBLIC AGENCIES:**

**H.** State complaint procedures.

**(2)** Requirements for complaints.

**(a)** The SEB of the department 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 department); (iii) be signed by the complainant or a designated representative and have the complainant's contact information; (iv) if alleging violations with respect to a specific child, include the name and address of the child and the school the child is attending; ~~(iv)~~**(v)** include a statement that the department or a public agency has violated a requirement of an applicable state or federal law or regulation; ~~and (v)~~ **(vi)** 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)~~; and **(vii)** include a description of a proposed resolution of the problem to the extent known. 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.

**(d)** Pursuant to 34 CFR Sec. 300.153(c), the complaint must allege a violation that occurred not more than one year before the date the complaint is received by the SEB in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 ~~[NMSAC]~~ NMAC.

**I.** Due process hearings.

**(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.

~~**(e)**—"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)**~~**(c)** "Transmit" means to mail, send 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:

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

**(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 department 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. 300.227 because the responsible public agency is unable to establish and maintain appropriate programs of FAPE, or that the department 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 department 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].~~

**(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 department. 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 department. The written request shall state with specificity the nature of the dispute and shall include:

**(e)** the name~~;~~ and 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];~~

~~**(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)**~~**(g)** a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;

~~[(4)]~~**(h)** a request for an expedited hearing must also include a statement of facts sufficient to show that a requesting parent or public agency is entitled to an expedited hearing under 34 CFR Secs. 300.532(c) or 20 USC Sec. 1415(k)(3);

~~[(4)]~~**(i)** 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;

~~[(4)]~~**(j)** a request for hearing filed by or on behalf of a party who is represented by an attorney 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; and

~~[(4)]~~**(k)** a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this paragraph.

**(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:

**(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 timeframe provided in Subparagraph (a) of Paragraph ~~[(20)]~~ **(19)** of Subsection I of 6.31.2.13 NMAC;

**(f)** the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph ~~[(25)]~~ **(24)** of Subsection I of 6.31.2.13 NMAC below.

**(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:

**(d)** review the hearing rights of both parties, as set forth in Paragraphs ~~[(16) and (17)]~~ **(15) and (16)** 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;

**(i)** as appropriate, determine the current educational placement of the child pursuant to Paragraph ~~[(27)]~~ **(26)** of Subsection I of 6.31.2.13 NMAC below;

~~[(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)~~(15) Any party to a hearing has the right to:

~~(17)~~(16) Parents involved in hearings also have the right to:

~~(18)~~(17) The record of the hearing and the findings of fact and decisions described above must be provided at no cost to the parents.

~~(19)~~(18) Limitations on the hearing.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph ~~(19)~~ (18) 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:

~~(20)~~(19) Rules for expedited hearings. The rules in Paragraphs (4) through ~~(19)~~ (18) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(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)~~ (19) 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)~~ (19) of Subsection I of 6.31.2.13 NMAC above. The timeline for resolution sessions provided in 34 CFR Sec. 300.532(c)(3) shall be observed.

(f) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph ~~(25)~~ (24) of Subsection I of 6.31.2.13 NMAC below.

~~(21)~~(20) Decision of the hearing officer.

(a) In general. Subject to Subparagraph (b) of Paragraph ~~(21)~~ (20) 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).

~~(22)~~(21) 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 department, as described under Subsection H of 6.31.2.13 NMAC.

~~(23)~~(22) 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)~~ (24) 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)~~(23) 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)~~ (25) of Subsection I of 6.31.2.13 NMAC below.

~~(25)~~(24) Civil action.

~~(26)~~(25) Attorney fees.

~~(27)~~(26) Child's status during 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)~~ (26) of Subsection I of 6.31.2.13 NMAC.

M. Computation of time.

(3) Notwithstanding Paragraph (1) of this subsection, if the due date of a decision referenced in Subsection I of 6.31.2.13 NMAC falls on a Saturday, a Sunday or a legal holiday, the decision must be mailed no later than the actual due date. A decision is considered "mailed" when addressed, stamped and placed in a United

States postal service mailbox. If a parent exercises the option of receiving the decision electronically, the decision is “mailed” when transmitted electronically.

[6.31.2.13 NMAC - Rp, 6.31.2.13 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11; A, 02/29/12]