

**August 14, 2012 Advisory Letter--Opinion Request – Public Education Department
& National School Lunch Program**

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Albuquerque, NM 87123

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Re: Opinion Request – Public Education Department & National School Lunch Program

Dear Senator Keller:

You have requested our advice regarding whether the New Mexico Public Education Department (“Department”) can implement a policy that will require a local school district to automatically enroll a student who has applied for free or reduced-price lunches if the district has not processed the application within ten working days. It is our understanding that the federal government has set up a free or reduced-price lunch program through the National School Lunch Program (“Program”). See 7 CFR 210.1. In connection with the Program, the federal government has promulgated several rules including those covering the enrollment process, although it has not promulgated a specific rule mandating that enrollment must occur within ten working days (so-called “ten day rule”). The federal rules authorize states to impose additional requirements so long as such requirements are not inconsistent with federal rules. See 7 C.F.R. § 210.19(e). Based on our examination of the relevant constitutional, statutory and case law authorities, and the information available to us at this time, we conclude that the Department has the authority to promulgate a rule that will require a local school district to automatically enroll a student who has applied for free or reduced-price lunches if the district has not processed the application within ten working days.

The National School Lunch Program involves the federal government, states and local school districts. The federal government has promulgated several rules governing the Program that cover definitions, administration, enrollment, payment process, reporting and record keeping. See 7 C.F.R. § 210, 7 C.F.R. § 245. We understand that the federal government is the major funder of the Program and reimburses states and school districts approximately seventy percent of the costs of the Program. See 7 C.F.R. § 210.17(a). The federal rules place certain responsibilities on state education departments. “[T]he responsibility for the administration of the Program in schools...shall be in the state educational agency.” 7 C.F.R. § 210.3. In this capacity, the Department, acting as New Mexico’s state educational agency, has provided technical assistance and oversight to school districts to help set up and run the program. The federal rules provide that the Department shall “review and evaluate the performance of local educational agencies and of schools...and shall advise local educational agencies of any deficiencies found and any corrective action required to be taken.” 7 C.F.R. § 245.11. The rules also provide a role for local school districts. Each school district has the option to enter the Program and to run it in conjunction with its

standard lunch cafeteria. If a school district enters the Program, it agrees to provide subsidized lunches to those students who meet certain low-income eligibility requirements.

The federal rules do not mandate that a school district enroll a student in the Program within ten days. The rules only provide that a school district “must determine eligibility [and enrollment]... when a household submits an application....” 7 C.F.R. § 245.6(c). It should also be noted that the rules authorize households who receive Food Stamp Program or TANF benefits to be automatically enrolled and “no application...is required.” 7 C.F.R. § 245.6(c)(6)(ii). The “ten day rule” comes from the United States Department of Agriculture’s “2008 Federal Policy for Determining and Verifying Eligibility Manual for School Meals” manual. According to the manual: “[a]n eligibility determination must be made and implemented within 10 working days of receipt of the application. Whenever possible, applications should be processed immediately....” USDA Eligibility Manual, January 2008, at 16. However, the USDA’s Southwest Regional Office has informed the Department that the manual is only a guidance document.

According to the Department, school districts may fear that the “ten day rule” will create additional budgetary costs on the districts. School districts may argue that state law gives them authority over controlling their own budgets and the “ten day rule” encroaches on this authority. See NMSA 1978, § 22-8-18(B) (2007).

Assuming arguendo that the “ten day rule” would result in more costs to school districts, there are two rules of statutory construction that may assist in this matter. First, “[w]henver possible, [courts] must read different legislative enactments as harmonious, instead of contradicting one another.” State v. Herbstman, 1999-NMCA-014, ¶ 18, 126 N.M. 683, 688. This canon can be applicable to interpreting the federal rules and state statutes together. As stated above, the federal rules provide that the Department has the responsibility for the administration of the program. This is consistent with New Mexico law where the Department “shall prescribe standards and regulations for the establishment and operation of school lunch programs in the state.” NMSA 1978, § 22-13-13(A) (1967). The federal rules permit the Department to tackle fiscal issues, including but not limited, verification of funds and imposing costs on school boards if corrective action is needed. See 7 C.F.R. § 210.17(a), § 210.19(a)(2), § 210.19(c). The federal rules also place requirements on school boards that implicate fiscal issues. See 7 C.F.R. § 210.10 (requiring schools to use contractors who serve meals that meet certain nutritional content), 7 C.F.R. § 210.11(b) (school district may impose restrictions on the sale of certain other foods sold at the school). Decisions by the federal government or other agencies can result in higher costs for a school district in providing food for students. For example, “[s]chool lunch prices...will increase by 10 cents next year, as part of a federal push for districts to provide healthier food...[school districts have] to choose between either increasing lunch prices or supplementing the district’s food services budget with [more] operational money.” Hailey Henz, “School Lunch To Get Pricier”, Albuquerque Journal, C-1 (Apr. 19, 2012).

The federal rules also expressly provide that: “Nothing contained in this part shall prevent a State agency from imposing additional requirements for participation in the Program which are not inconsistent with the provisions of this part.” 7 C.F.R. § 210.19(e). The federal rules do not prohibit the “ten day rule.” Instead, a federal manual recommends this approach.

Therefore, the federal rules and state statutes, when read together, give the Department broad responsibility in administering the Program in New Mexico. Fiscal matters and cost issues are deeply interwoven within the federal rules and the Department’s administration of the Program. The Department is authorized to have a role in the fiscal matters of the Program and may carry out these responsibilities, including mandating the “ten day rule,” even if it may result in budgetary implications on school districts.

The second applicable canon of statutory construction is that a statute cannot be read to create an unjust, absurd or contradictory result. See State v. Shije, 1998-NMCA-102, ¶10, 125 N.M. 581, 583. We conclude that Section 22-8-18(B) should not be read so rigidly as to block the Department’s role in this federal program. It would be contradictory to the effective administration of the Program if the Department were blocked from taking certain actions when those actions might have budgetary implications on school districts. That being said, a school district that believes that the Department’s role involving fiscal matters is an improper encroachment on its authority is always free to voluntarily withdraw from the Program.

Your letter also asks whether the Department can mandate the “ten day rule” by policy or by promulgating a rule. In 1993, our office was asked the question: “are state agencies ... required to file all policy directives and policy manuals as rules?” N.M. Att’y Gen. Op. No. 93-01 (1993). Under New Mexico law, a “rule” includes “any ... statement of policy...issued ... by any agency and purporting to affect one or more agencies besides the agency issuing such rule....” NMSA 1978, § 14-4-2(C) (1969). Therefore, our office concluded that “unless it is meant to apply only to the issuing agency or its employees, policy statements contained in a manual or other document must be filed [as a rule] to be valid and enforceable.” N.M. Att’y Gen. Op. No. 93-01 (1993).

A school district is its own political subdivision and thus should be considered a different agency than the Department. See State ex rel. Stratton v. Roswell Schools, 111 N.M. 495, 502, 806 P.2d 1085 (Ct. App. 1991). Therefore, if the Department wishes to issue and enforce a policy statement that affects school districts, it must be promulgated as a rule. The Department has this authority because it may “adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary.” NMSA 1978, § 22-2-1(B)(1); see also Ellenberg v. N.M. Military Inst., 478 F.3d 1262, 1270 (10th Cir. 2007).

In conclusion, the Department does have sufficient legal authority to promulgate a rule that will require a local school district to automatically enroll a student who has applied for free or reduced-price lunches if the district has not processed the application within ten working days.

Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

ZACHARY
Assistant Attorney General

SHANDLER

Cc: Honorable Hanna Skandera, Cabinet Secretary