

**November 13, 2018 Advisory Letter — Opinion Request – Validity of Guidelines  
Amending Public Education Department Regulations Governing Teacher  
Licensure Advancement**

Senator John M. Sapien  
New Mexico State Senate  
1600 West Ella Drive  
Corrales, NM 87048

**Re:** Opinion Request – Validity of Guidelines Amending Public Education  
Department Regulations Governing Teacher Licensure Advancement

Dear Senator Sapien:

You requested our advice regarding the validity of guidelines issued by the Public Education Department (“PED”) that modified PED’s existing regulations governing the advancement and renewal of teaching licenses. In particular, you ask whether PED violated NMSA 1978, Section 9-24-8(D), which prohibits PED from adopting or amending a rule affecting persons outside PED without a public hearing. As discussed in more detail below, we conclude that the guidelines were improperly issued because they failed to comply with Section 9-24-8(D), including the requirement for a public hearing.

Background

By memorandum dated December 22, 2014, PED stated that it was “committed to providing guidance to districts and charters regarding the advancement process for Level 1 and Level II teachers who have licenses that will expire in June of 2015.” See memorandum from Leighann C. Lenti, Deputy Secretary for Policy and Program to District Superintendents and Charter Directors (Dec. 22, 2014) (“Memorandum”).<sup>1</sup> PED explained that “[c]urrent New Mexico regulation does not provide for any flexibility for a teacher to advance if he/she does not meet competency (ineffective or minimally effective),” and that the guidelines gave “districts and schools greater discretion and flexibility over teacher advancement decisions.” Although the Memorandum does not specify which “current New Mexico regulation” it refers to, according to your request the regulation is 6.60.6.9 NMAC (2010), titled “Requirements for Advancement and Renewal of Teaching Licenses.” The Memorandum then sets out the requirements for advancement by Level 1 and Level 2 teachers with licenses expiring in June 2015 based on their competency ratings. Although, according to the Memorandum, PED’s current regulations do not permit advancement for teachers rated “minimally effective,” the guidelines permitted those teachers to advance, provided they met the specified conditions.

Applicable Law

Under the Public School Code, the Secretary of Public Education has “control, management and direction of all public schools, except as otherwise provided by law.” NMSA 1978, § 22-2-1(A) (2004). PED may “adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary.” *Id.* § 22-2-1(B).

The Public Education Department Act provides, in pertinent part:

The secretary may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the department and its divisions.... Unless otherwise provided by statute, no rule affecting any person or agency outside the department shall be adopted, amended or repealed without a public hearing on the proposed action before the secretary or a hearing officer designated by the secretary....

NMSA 1978, § 9-24-8(D) (2004). Section 9-24-8(D) goes on to require publication of a notice of the public hearing on the proposed adoption, amendment or repeal of a rule at least thirty days before the hearing date and “[a]ll rules shall be filed in accordance with the State Rules Act.”

The State Rules Act requires state agencies to file their rules with the State Records Center. NMSA 1978, § 14-4-3 (1995). The Records Center maintains the original copy of a rule and has it “published in a timely manner in the New Mexico register and compiled into the New Mexico Administrative Code.” *Id.* A rule is not “valid or enforceable until it is filed with the records center and published in the New Mexico register....” NMSA 1978, § 14-4-5 (1995). Except for emergency regulations or where “a later date is otherwise provided by law, the effective date of a rule shall be the date of publication in the New Mexico register.” *Id.*

#### The Memorandum Amends a Rule Affecting Persons Outside PED

The Memorandum was subject to the notice, hearing and other requirements of Section 9-24-8(D) if it (1) was or amended a “rule,” and (2) the rule “affect[ed] any person or agency outside [PED].” Neither the PED Act nor the Public School Code defines “rule.” Accordingly, we turn to the Uniform Statute and Rule Construction Act, NMSA 1978, §§ 12-2A-1 to -20 (1997) (“USRC Act”) for guidance. That Act governs the construction of a statute “unless the statute ... expressly provides otherwise, the context of its language requires otherwise or the application of [the Act] to the statute would be infeasible.” *Id.* § 12-2A-1(B).

In pertinent part, the USRC Act provides that “[i]n the statutes ... of New Mexico,”

“rule” means a rule, regulation, order, standard or statement of policy, including amendments thereto or repeals thereof, promulgated by an administrative agency, that purports to affect one or more administrative agencies other than the promulgating agency or that purports to affect persons who are not members or employees of the promulgating agency.

*Id.* § 12-2A-3(K). See also NMSA 1978, § 14-4-2(C) (1969) (defining “rule” for purposes of the State Rules Act as “any rule, regulation, order, standard, statement of policy, including amendments thereto or repeals thereof issued or promulgated by any agency and purporting to affect ... persons not members or employees of such issuing agency”).

Under the above definitions, the term “rule” in a New Mexico statute, such as the PED Act, includes a “regulation” promulgated by a state agency. As discussed above, the Memorandum, by its terms, changes the requirements of PED’s current regulation, i.e., 6.60.6.9 NMAC, by allowing Level 1 and Level 2 teachers whose contracts expired in June 2015 to advance with a “minimally competent” rating. In other words, the Memorandum amends a “rule” of PED.

In addition to amending a “rule,” the Memorandum meets the second criterion discussed above for Section 9-24-8(D) to apply. Specifically, the Memorandum and the regulation it amends affect superintendents of and teachers employed by local school districts and charter schools, or “person[s] outside the [PED].” Accordingly, Section 9-24-8(D) prohibited PED from issuing the Memorandum without notice, public hearing and filing in accordance with the State Rules Act. Because they were not properly issued, we conclude that amendments to PED’s regulations described in the Memorandum were invalid and without legal effect. See also NMSA 1978, § 14-4-5 (a rule that is not filed with the State Records Center and published in the New Mexico Register is not “valid or enforceable”).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

Sally Malavé  
Assistant Attorney General

[1] In addition to the Memorandum, your request refers to a subsequent memorandum issued by PED on January 16, 2015 that “purports to offer ‘additional flexibility and guidance regarding the advancement process for teachers who received evaluations for the 2013-2014 school year and whose licenses are expiring at the end of the 2014-15 school year.’” We did not receive a copy of the subsequent memorandum, so our analysis is limited to the Memorandum issued December 22, 2014.