

**TITLE 6            PRIMARY AND SECONDARY EDUCATION**  
**CHAPTER 21       PUBLIC SCHOOL FINANCE - AUDIT**  
**PART 2            AUDIT RESOLUTION PROCESS, APPLICATION HEARING PROCESS,**  
**ENFORCEMENT PROCESS**

**6.21.2.1            ISSUING AGENCY:** Public Education Department  
[01-15-99, 07-30-99; 6.21.2.1 NMAC - Rn, 6 NMAC 2.3.1.1, 05-31-01; A, 11-13-09]

**6.21.2.2            SCOPE:** This rule applies to all public school districts, post-secondary institutions, state supported schools, state agencies, private nonprofit organizations, and other entities receiving state appropriated funds or federal funds through the department, and for direct grant programs for which the department has monitoring and enforcement responsibility and authority. This rule does not apply to federal or state funds received through the division of vocational rehabilitation.  
[01-15-99; 6.21.2.2 NMAC - Rn, 6 NMAC 2.3.1.2, 05-31-01; A, 11-13-09]

**6.21.2.3            STATUTORY AUTHORITY:**

A.            New Mexico State Constitution, Article XII, Section 6, and the Public School Code, Section 22-1-1, et seq., set forth the responsibilities, powers, and duties of the public education department pertaining to the control, management and direction, including financial direction, distribution of school funds, and financial accounting of all public schools, pursuant to authority and powers provided by law.

B.            Office of Management and Budget (OMB) Circular A-133, Audits of States, Local Governments, and Non-Profit Organizations, issued under the authority of 31 United States Code (U.S.C.) Sections 503, 1111, and 7501 et. seq. and Executive Orders 8248 and 11541. OMB Circular A-133 was issued pursuant to the Single Audit Act of 1984, P.L. 98-502, and the Single Audit Act Amendments of 1996, P.L. 104-156. It sets forth standards for obtaining consistency and uniformity among federal agencies for the audits of states, local governments, and non-profit organizations expending federal awards.

C.            20 U.S.C. Section 1231 b-2 (a) provides for any applicant or recipient aggrieved by the final action of the department may, within 30 days of such action by the department, request a hearing alleging a violation of state or federal law, rules, regulations, or guidelines governing the applicable program in:

- (1)        disapproving or failing to approve its application or program in whole or in part;
- (2)        failing to provide funds in amounts in accord with the requirements of law and regulation;
- (3)        ordering, in accordance with a final state audit resolution determination, the repayment of misspent or misapplied federal funds; or
- (4)        terminating further assistance for an approved program.

[01-15-99; 6.21.2.3 NMAC - Rn, 6 NMAC 2.3.1.3, 05-31-01; A, 11-13-09]

**6.21.2.4            DURATION:** Permanent  
[01-15-99; 6.21.2.4 NMAC - Rn, 6 NMAC 2.3.1.4, 05-31-01]

**6.21.2.5            EFFECTIVE DATE:** January 15, 1999  
[01-15-99; 6.21.2.5 NMAC - Rn, 6 NMAC 2.3.1.5, 05-31-01]

**6.21.2.6            OBJECTIVE:** The objective of this rule is to establish standard operating procedures covering the audit resolution process (ARP) as it relates to federal and state funds and to set forth the application hearing process as provided for by federal statutes and regulations. These standard operating procedures further set forth the process by which the department may enforce federal and state requirements under any applicable program.  
[01-15-99; 6.21.2.6 NMAC - Rn, 6 NMAC 2.3.1.6, 05-31-01; A, 11-13-09]

**6.21.2.7            DEFINITIONS:**

- A.            "Applicant" means a party requesting a subgrant under a program of the department.
- B.            "Audit(s)" means an audit(s) of a subgrantee which is either conducted by an independent auditor (certified public accountant) in accordance with the Single Audit Act of 1984, as amended or the Audit Act, Sections, 12-6-1 through 12-6-14 NMSA 1978, or those audits/monitoring reviews/program evaluations conducted by department personnel.
- C.            "Audit finding" means a written explanation of errors, noncompliance with legal requirements, use of funds for improper purposes, weakness; deficiencies, adverse conditions, or the need for improvement or changes.

D. "Audit recommendation" means a written suggestion/recommendation for specific action to correct a deficient condition, prevent a recurrence of the condition, and to alleviate the adverse effect of the condition or request repayment of funds used improperly.

E. "Audit resolution process" means a method by which audit finding(s) and recommendation(s) are resolved in a uniform and timely manner and within a predetermined time frame.

F. "Crosscutting issues" means audit finding(s) applicable to the overall operation (i.e., internal control, procurement, inventory, etc.).

G. "Days" means calendar days unless specified as workdays.

H. "Department" means the public education department.

I. "Direct grants" means those federal funds which flow directly from the federal government to a grantee.

J. "Enforcement process" means a mechanism by which the department may enforce the federal or state requirements under any applicable program.

K. "Final letter of determination/notice of intended action" means a letter issued by the department setting forth:

(1) notice of intent to disapprove or failure to approve an application or program in whole or in part;  
(2) notice ordering, in accordance with the department audit resolution determination, the repayment of misspent or misapplied federal funds;

(3) notice terminating further assistance for an approved program;

(4) notice of intent to suspend partially or entirely the distribution of federal funds; and

(5) notice ordering in accordance with a final state audit resolution determination, compliance with the audit resolution request.

L. "Grant" means an award of financial assistance in the form of money to an eligible grantee.

M. "Grantee" means a government or other legal entity to which a grant is awarded.

N. "Management decision" means the evaluation by the department of the audit findings and corrective action plan and the issuance of a written decision as to what corrective action is necessary.

O. "Secretary" means the secretary of the federal awarding agency.

P. "Secretary of public education" means the New Mexico secretary of public education appointed by the governor and confirmed by the senate.

Q. "Subgrant" means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by the department to an eligible subgrantee.

R. "Subgrantee" means the government or other legal entity to which a subgrant is awarded and which is accountable to the department for the use of the funds provided.

S. "Written ruling" means a letter issued by the department outlining the department's position based on the results of the hearing as presented by the hearing officer.

[01-15-99; 6.21.2.7 NMAC - Rn, 6 NMAC 2.3.1.7, 05-31-01; A, 11-13-09]

#### **6.21.2.8 PROCESSING AUDIT REPORTS CONDUCTED IN ACCORDANCE WITH THE SINGLE AUDIT ACT OF 1984, AS AMENDED, OMB CIRCULAR A-133, AND/OR THE STATE AUDIT ACT**

A. Purpose of audits: Audits conducted in accordance with the Single Audit Act of 1984, as amended, OMB Circular A-133 and/or the Audit Act Sections 12-6-1 through 12-6-14 NMSA 1978 serve to provide the department with information on activities performed under subgrants. These audits provide an opinion as to whether legal requirements regarding expenditure of funds are being met with regard to:

(1) contract, grant, subgrant or cooperative agreement obligations are met;

(2) all applicable federal and state laws, rules, and regulations are being adhered to;

(3) claimed costs are eligible; and

(4) adequate internal control systems are in place.

B. The receipt date of the audit report marks the commencement of the timeframe in which the department will ultimately issue its management decision on any audit finding noted.

(1) Desk review: A desk review is conducted on all audit reports received. The objectives of the review are as follows:

(a) determine if the audit report contains the required components pursuant to OMB Circular A-133;

(b) identify audit finding(s), and/or recommendation(s);

(c) identify any crosscutting issues;

- (d) coordinate and solicit input from the appropriate agencies/individuals in determining the department's resolution request on audit findings) and/or recommendation(s);
  - (e) determine if appropriate department personnel should provide technical assistance to the subgrantee, when applicable;
  - (f) develop and forward to the subgrantee a letter outlining the results of the desk review, to include the identification of any outstanding audit findings) or recommendation(s), the subrecipient's response to the state auditor, if applicable, the department's resolution and corrective action request, and the due date for a response from the subgrantee.
  - (g) forward a closeout letter for those audit reports, which do not contain audit findings.
  - (h) if any subgrantee audit report includes audit finding(s) and/or recommendations) concerning direct grants, the resolution of these findings will be the responsibility of the awarding agency; if, however, these audit findings are considered by the department to involve crosscutting issues, the resolution of the audit finding(s) will also be addressed in the desk review letter.
- (2) After the desk review is conducted, the department will issue a desk review letter to the subgrantee outlining the results of the desk review relative to the subgrantee's audit report. The department will attempt to resolve any audit findings through written correspondence, submission of documentation or any other method deemed appropriate such as telephone conversation, or on-site visits. A public school district's response to the department with regard to the resolution of any audit findings shall be approved by the local school board at a legally scheduled meeting.
- (3) A final letter of determination will be issued to a subgrantee and will include those desk audit finding(s) or recommendation(s) which were not resolved as a result of a subgrantee's failure to comply with the department's resolution and corrective action request as identified in the desk review letter. The following components must be included in this letter:
- (a) audit findings) or recommendation(s);
  - (b) the subgrantee's response to the state auditor, if applicable;
  - (c) the department's resolution and corrective action request;
  - (d) activities subsequent to the issuance of the desk review letter;
  - (e) due date for response from the subgrantee; and
  - (f) the subgrantee's right to appeal.

[01-15-99; 6.21.2.8 NMAC - Rn, 6 NMAC 2.3.1.8, 05-31-01]

**6.21.2.9 APPLICANTS OR SUBGRANTEES AGGRIEVED BY FINAL LETTER OF DETERMINATION OR NOTICE OF INTENDED ACTION - OPPORTUNITY FOR A HEARING**

A. Scope: The procedures set forth in this section shall be implemented to comply with the statutory and regulatory requirements of 20 U.S.C. Section 1231 b-2(a) and 34 CFR 76.401 so as to afford the opportunity for a hearing to any applicant or subgrantee aggrieved by a final action of the department and alleging a violation of state or federal law, rules, regulations, or guidelines governing the applicable program with regard to the department's (i) disapproving or failing to approve its application or program in whole or in part; (ii) failing to provide funds in amounts in accord with the requirements of laws and regulations; (iii) ordering, in accordance with the department's audit resolution determination, the repayment of misspent or misapplied federal funds; or (iv) terminating further assistance for an approved program.

- (1) The department will, if required by federal statute or regulation, provide an opportunity for a hearing prior to disapproval of the application.
- (2) If the department is not required to provide the opportunity for a hearing prior to the disapproval of the application, the department will provide the opportunity for the hearing either before or after disapproval of the application.

B. Procedures

- (1) Request for hearing: The applicant or subgrantee shall request in writing the hearing within thirty (30) days of the date of the final letter of determination or notice of intended action.
- (2) Availability of records: The department shall make available, at reasonable times and places, to each applicant or subgrantee all records of the department pertaining to the review or appeal the applicant is conducting, including records of other applicants.
- (3) Hearing: Within thirty (30) days after the department receives a request for a hearing pursuant to this section, the department shall hold a hearing on the record and shall review its action or proposed action. The following procedures shall apply:
  - (a) a written notice of hearing to all parties;

- (b) an opportunity for all parties to participate in the hearing;
- (c) prohibition of ex parte contacts between one party and the impartial hearing officer;
- (d) an impartial hearing officer, who has not taken part in the investigation and who is not under the supervision of a department employee who did, shall be appointed by the secretary of public education;
- (e) the right of the parties to appear with counsel;
- (f) the right to present oral and written evidence and to conduct cross examinations;
- (g) the right to submit proposed findings of fact and conclusions of law; and
- (h) the compiling and availability of a record upon which the impartial hearing officer's recommended findings of fact, conclusions of law, and decision are based.

(4) Ruling

(a) No later than ten (10) days after the hearing, the department shall issue its written ruling, including findings of fact and reasons for the ruling.

(b) If the department determines that its action or proposed action in whole or in part was contrary to federal or state statutes, regulations, and guidelines governing the applicable program, the department shall rescind its action or proposed action in whole or in part.

(5) Appeal to the secretary: If the department does not rescind its final action or proposed action after a review under this section, the applicant may appeal to the secretary. The applicant shall file a notice of the appeal with the secretary within twenty (20) days after the applicant has been notified by the department of the department's ruling.

C. Repayment: Repayment of misspent or misapplied federal funds, as determined through the audit resolution determination, shall be made from nonfederal sources or from federal funds, no accountability for which is required to the federal government.

[01-15-99; 6.21.2.9 NMAC - Rn, 6 NMAC 2.3.1.9, 05-31-01; A, 11-13-09]

**6.21.2.10 FEDERAL FUNDS ENFORCEMENT PROCESS**

A. Scope

(1) This section shall apply only to those actions encompassed by 20 U.S.C. 1232 c(b) and shall not apply to those actions encompassed by 20 U.S.C. Section 1231 b-2(a) that are subject to the procedures set forth in section 9.

(2) Notwithstanding any other remedies available to the department, and specifically reserving such remedies, the department, in order to enforce the federal requirements under any applicable program, may:

(a) withhold approval, in whole or in part, of an application for funds under an applicable program until the department is satisfied that the federal requirements will be met; except the department shall not finally disapprove an application unless the department provides an opportunity for a hearing before an impartial hearing officer and such officer determines that there has been a substantial failure to comply with any of such requirements;

(b) suspend payments, in whole or in part, under an applicable program if the department has reason to believe that there has been substantial failure to comply with any of such requirements;

(i) the department shall not suspend such payments until fifteen (15) days after the department provides an opportunity to show cause why such action should not be taken;

(ii) no suspension shall continue in effect longer than sixty (60) days unless the department within such period provides the notice for a hearing required under Subsection A., Paragraph (2), Subparagraph (c) of 6.21.2.10 NMAC;

(c) withhold payments, in whole or in part, under any such program if the department finds, after reasonable notice and opportunity to be heard before an impartial hearing officer, that the subgrantee has failed substantially to comply with any such requirements; any withholding of payments shall continue until the department is satisfied that there is no longer a failure to comply substantially with any of such requirements.

B. Procedures

(1) When a hearing is required under these rules or other applicable federal requirements, the secretary of public education shall appoint an impartial hearing officer to conduct the proceeding. The impartial hearing officer shall be an impartial decision-maker who has not taken part in the investigation and who is not under the supervision of a department employee who did and who shall not have personal, economic, or professional interest in the outcome of the hearing other than the proper application of federal laws, regulations, and policies.

(2) The following procedures shall apply:

(a) a written notice of hearing;

(b) an opportunity for the aggrieved party to be heard; and

(c) a prohibition of ex parte contacts between one party and the impartial hearing officer.  
(3) The impartial hearing officer shall issue a written decision that includes findings of fact and conclusions of law.

C. Appeal to the secretary of the United States department of education: Nothing in this chapter shall abrogate any right of appeal to the secretary of the United States department of education or other appropriate federal agency as provided for by federal statute or regulation.

[01-15-99; 6.21.2.10 NMAC - Rn, 6 NMAC 2.3.1.10, 05-31-01; A, 11-13-09]

#### **6.21.2.11 STATE FUNDS ENFORCEMENT PROCESS**

A. Scope: This section shall apply to the accountability of state funds where there is a failure to correct a deficiency cited in an audit. The remedies set forth in this section may be used only after the department has requested in writing that the deficiency or deficiencies in question be corrected and there has been a failure to correct the deficiency or deficiencies after a reasonable opportunity to do so. When applicable, the department may avail itself of any of the remedies hereinafter set forth in this section, notwithstanding the fact that other remedies are available to or may have been used by the department.

B. Procedures: In order to enforce the provisions of the Public School Code of the state of New Mexico, Section 22-1-1 et. seq., NMSA 1978, any other applicable state or federal law, or as a result of an unresolved audit finding, the department may, pursuant to applicable state law:

(1) recommend suspension of a local school board which has been designated as its own board of finance from acting as a board of finance if the secretary of public education reasonably believes there is mismanagement, improper recording or improper reporting of public school funds under the local school board's control, in accordance the provisions of Sections 22-8-39 NMSA 1978;

(2) disapprove instructional units or administrative functions which are determined to be detrimental to the educational process in accordance with the provisions of Section 22-2-14 NMSA 1978;

(3) suspend from authority and responsibility any local school board, which has notice of disapproval and fails to comply with procedures of Subsection B, Paragraph (2) of 6.21.2.11 NMAC in accordance with the provisions of Section 22-2-14 NMSA 1978;

(4) institute legal proceedings for violation or enforcement of the Public School Code in accordance with the provisions of Sections 22-2-2 and 22-8-42 NMSA 1978;

(5) refer audit finding(s) to the proper law or other enforcement agency (ies) as appropriate;

(6) institute legal proceedings of other enforcement provisions as provided by any applicable state law.

C. Withholding of funds: In accordance with Subsection D of Section 22-8-13, the department shall withhold allotments of funds to any school district where the superintendent has failed to comply with the requirements of Section 22-8-13 NMSA 1978 until the superintendent complies with and agrees to continue complying with requirements. The following procedures shall apply:

(1) The secretary of public education or his designee will advise the business manager of the district/charter school of the deficiency(ies) and establish timelines for compliance.

(2) If compliance is not effectuated in accordance with the timeline(s) established in paragraph (1), the director of the school budget planning unit or his designee will advise the district/charter school superintendent that the district/charter school has not made progress toward resolution of the issues. At the discretion of the director of the school budget planning unit, further technical assistance may be provided to the district/charter school.

(3) Upon a determination by the director of the school budget planning unit that the district/charter school has not made adequate progress toward resolution of the issues, the secretary of public education or his designee will inform the appropriate district/charter school personnel in writing that the district/charter school has been given ample opportunity to correct the deficiencies and progress has not been made. A copy of the letter will also be sent to the local school board or the governance council of the applicable charter school. As a result, the department will begin withholding of funds until the district/charter school has corrected the problem(s) or made significant progress toward the resolution of the problem areas.

[01-15-99; 6.21.2.11 NMAC - Rn, 6 NMAC 2.3.1.11, 05-31-01; A, 10-15-03; A, 11-13-09]

**6.21.2.12 CONFLICTS:** If any statute or regulation governing any federal program subject to this rule affords procedural rights exceeding those set forth in this rule, or otherwise establishes additional or inconsistent requirements, such statutory or regulatory right(s) shall be afforded and such requirements shall govern.

[01-15-99; 6.21.2.12 NMAC - Rn, 6 NMAC 2.3.1.12, 05-31-01; A, 11-13-09]

**HISTORY OF 6.21.2 NMAC:**

**PRE-NMAC HISTORY:** The material in this regulation was derived from that previously filed with the State Records Center and Archives under: SBE Regulation No. 88-8, Audit Resolution Process, Application Hearing Process, Enforcement Process, filed August 2, 1988 and SBE Regulation 88-8, Amendment 1, Audit Resolution Process, Application Hearing Process, Enforcement Process, filed August 11, 1988.