

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: SB 157

51st Legislature, 1st Session, 2013

Tracking Number: .190718.4

Short Title: Public Education Dept. Rules Procedures

Sponsor(s): Senator Jacob Candalaria

Analyst: Kevin Force

Date: February 7, 2013

Bill Summary:

SB 157 amends the *Public Education Department Act* regarding notice and hearing requirements for administrative rulemaking by the Public Education Department (PED).

Among its provisions, SB 157:

- adds new definitions, including:
 - “proceeding,” which means a formal or informal department process or procedure that is commenced or conducted by PED; and
 - “provide to the public,” which means department distribution of rulemaking information in ways designed to notify members of the public of the rulemaking action, particularly those who may be affected by the subject of the rulemaking, and:
 - shall include the distribution of rulemaking information in English and Spanish by:
 - ✓ posting to the PED website and the Sunshine Portal;
 - ✓ posting it in a conspicuous location in every public school, in English and Spanish, requesting student input;
 - ✓ making it available in PED’s district, field, and regional offices, as well as government offices of Indian nations, tribes, or pueblos;
 - ✓ sending it, via either mail or email, to all who have requested, in writing, to be notified by PED of rulemakings on the pertinent subject matter; and
 - ✓ providing it to the legislative council for distribution to the appropriate interim and standing committees; and
 - may include, where appropriate, feasible or required by law, distribution of rulemaking information:
 - ✓ in languages other than English and Spanish;
 - ✓ to local government agencies;
 - ✓ to community, interest group, and trade publications;

- ✓ to public facilities, such as libraries and community centers, in counties, lacking a PED office, where the rulemaking will have significant impact;
 - ✓ to radio and television outlets, particularly in those areas where there are no print media and where languages used by a significant percentage of the population are unwritten; and
 - ✓ publication in newspapers of general circulation in counties where the rulemaking will have significant impact.
- strikes language regarding public notice and hearing that, under the provisions of the bill, would be redundant;
 - adds a new section of the *Public Education Department Act* regarding notices of proposed rulemaking, which includes:
 - provisions regarding public notices and hearings, which require:
 - PED to provide to the public notice of the proposed rulemaking; and
 - three public hearings in “geographically dispersed areas” of the state;
 - required elements that all notices of proposed rulemakings shall contain, including:
 - a summary of the proposed rule;
 - citation to the specific legal authority for the rule;
 - information on how a person may comment on the rule;
 - information on the location and time of the public hearing, and how the public may participate;
 - internet links to the notice and the full text of the proposed rule; and
 - a citation to technical information, if any, that served as the basis for the rule, and how the full text of that information may be obtained;
 - a requirement that PED provide notice to the public of any changes to the date of the public hearing or comment period;
 - adds a new section regarding provisions for public participation and comment in department rulemakings, including requirements that:
 - the notice of proposed rulemaking specify a public comment period of at least 30 days after the publication of the notice;
 - PED consider all information and comments on the proposed rule that are submitted within the comment period;
 - members of the community attending a public hearing, to be presided over by a department representative or hearing officer, be afforded a reasonable opportunity to submit data and arguments orally or in writing; and
 - all department rule hearings be open to the public and recorded; and
 - a new section, barring PED from taking any action on the rule that differs from the action proposed in the notice, unless it is a logical outgrowth of the rulemaking action as originally proposed.

Fiscal Impact:

SB 157 does not contain an appropriation.

The Fiscal Impact Report from the Legislative Finance Committee indicates a recurring cost to the PED operating budget of \$1,000 to \$5,000 for FY 14 to FY 15.

Fiscal Issues:

PED states that meeting the required elements of notice contained in SB 157 “would be incredibly expensive.”

Substantive Issues:

According to the PED analysis of HB 157, the notice requirements contained in the bill would be “practically impossible not to violate,” noting that, “[i]f one public school was not noticed correctly, or an interim legislative committee was not properly noticed,” [sic] rulemaking would be unachievable.

According to the Attorney General’s Office, Page 6, Lines 14-19,¹ appears to conflict with the *New Mexico Administrative Code*. That section of the bill states:

“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. No rule promulgated by the director of any division in carrying out the functions and duties of the division shall be effective until approved by the secretary.”

The apparently conflicting section of the NMAC, 1.24.10.16(E), states:

“No rule shall be valid and enforceable until it is filed with the records center and published in the New Mexico register as provided by the State Rules Act.”

The AGO recommends examining the language in this section of the bill for possible further amendments to bring this section closer to the apparent intent of SB 157.

Technical Issues:

Subsection 4(D) of SB 157 includes a requirement that PED “provide notice to the public” of any change in the proposed action to be taken in the rulemaking. The defined term included in the bill is “provide to the public.” The sponsor may wish to consider changing the word order of the phrasing in subsection 4(D) to reflect the language of the defined term; for example, “[T]he department shall provide to the public notice of the change.”

Background:

In general, rules are written by the various state agencies to implement, clarify, and support the more general laws enacted by the Legislature. Each agency can have its own rulemaking procedures. Apropos, the *Public School Code* additionally requires PED to “solicit input from local school boards and school districts in the formulation and implementation of department rules.”² However, all agencies must adhere to certain provisions of law regarding the rulemaking process prescribed in:

¹ This language is present in current law, at 9-24-8(D) NMSA 1978.

² 22-2-2(S) NMSA 1978

- the *State Rules Act* (Chapter 14, Article 4 NMSA 1978);
- the *New Mexico Administrative Code (Code)* (Title 1, Chapter 24); and
- Chapter 14, Article 11 NMSA 1978, regarding records, rules, notices, and oaths.

STATE RULES ACT

Provisions pertaining to the authority and duties of the State Records Administrator, the Administrative Law Division, and technical rulemaking requirements are contained in the *State Rules Act*.

Authority and duties of the State Records Administrator and Administrative Law Division include:³

- the publication and maintenance of the *Code* and the *Register*;
- the promulgation of rules of procedure prescribing the format, structure, and compilation of the *Code*; and
- the supplementation or revision of the *Code* at least once annually.

Technical rulemaking requirements and procedures state that:

- rulemakings must be submitted to the State Records Center, who shall then publish them in a timely manner in the *Register*, which is published twice monthly, and compile them into the *Code*;
- an agency must adhere to the technical, formatting and clerical submittal requirements for publication by the State Records Administrator;
- the Administrative Law Division will ensure that the rule complies with these technical requirements, and date- and time-stamp the rule for publication;
- no rule is valid or enforceable until filed and published;
- failure to comply with statutory requirements, such as any required publication of notice, may result in invalidation of the rulemaking; and
- emergency rules may be effective immediately upon filing with the Division, but will be effective for only 30 days unless published in the *Register*.

NEW MEXICO ADMINISTRATIVE CODE (TITLE 1, CHAPTER 24)

Title 1, Chapter 24 of the *Code* contains rules promulgated by the New Mexico Commission of Public Records outlining technical requirements and procedures that must be followed in order for a rule to be accepted for publication in the *Register* and the *Code*. These rules include provisions stating that:

- when an agency file rules with the Administrative Law Division, they must include a transmittal form signed by the appropriate agency authority, such as the secretary of an agency;
- if a rulemaking does not conform to the clerical, technical, and formatting requirements necessary to publication, it may be rejected; and
- upon publication, emergency rules are “converted” to regular rules.

³ The Administrative Law Division and State Records Center are not authorized to investigate the validity of rules.

Chapter 14, Article 11 NMSA 1978

According to Chapter 14, Article 11 NMSA 1978, regarding notices, records, rules, and oaths, all legal notices must also be published on the agency's website, although this electronic posting is not a substitute for the other required publication, and failure to post this information to the website is not grounds to challenge a rule's validity. These sections also establish standards for the publication of notice in newspapers and periodicals, if required.

ADMINISTRATIVE PROCEDURES ACT

Although the *Administrative Procedures Act* (APA) provides the most comprehensive procedural requirements for an agency to undertake a rulemaking, it is the least widely applicable body of law pertaining to rulemaking.⁴ The provisions in the APA include requirements for:

- publication of notice and public comment;
- agency review of public input and other materials;
- emergency rules; and
- administrative and judicial review.

Committee Referrals:

SEC/SJC

Related Bills:

HB 108a *Rules Development Requirements*

⁴The *Administrative Procedures Act* applies only to agencies that are specifically deemed to be subject to its requirements. Even then, that applicability might be limited to certain areas. For example, the Attorney General's Office and the Office of Indian Affairs must adhere to the provisions of the APA when jointly promulgating rules for the implementation of the *Indian Arts and Crafts Sales Act*.