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July 18, 2012

MEMORANDUM

TO: Legislative Education Study Committee

FR: David Harrell and Kevin Force, JD

RE: STAFF REPORT: VIRTUAL CHARTER SCHOOLS

Introduction

According to *Keeping Pace with K-12 Online Learning: An Annual Review of Policy and Practice* (Keeping Pace), in school year 2010-2011 there were virtual charter schools in 30 states serving approximately 250,000 students altogether. In addition, citing data provided by the Center for Education Reform, the International Association for K-12 Online Learning (iNACOL) shows that the number of full-time online charter schools has grown from fewer than 50 in 2000 to more than 200 in 2011; and that the number of full-time online charter school enrollments has grown from just over 20,000 to more than 140,000 during the same period. Clearly, virtual education is growing as a feature of charter schools nationwide.

Now with one locally chartered virtual charter school scheduled to open in Farmington this fall – the New Mexico Virtual Academy – and another having applied to the Public Education Commission (PEC) to open a school in Santa Fe in school year 2013-2014, it seems time to review some of the circumstances of virtual charter schools and to identify some of the questions, issues, and concerns that virtual charter schools have raised – both in New Mexico and in other states.

Accordingly, this staff report will discuss:

- the concept and components of virtual charter schools;
- issues raised by virtual charter schools; and
- legal questions about virtual charter schools.

It should be noted that any one of the topics discussed in this report would benefit from an expanded discussion in a report of its own. The purpose here, however, is merely to identify some of the aspects of virtual charter schools that merit attention.¹

Concept and Components of Virtual Charter Schools

Definitions

Perhaps the first question to be addressed is, “What is a virtual charter school?” On the premise that definition should drive program design, the National Association of Charter School Authorizers (NACSA) defines the term this way:

An educational organization that offers K-12 courses through Internet-based methods, with time and/or distance separating the teacher and learner. Students enroll to earn credit towards grade-level advancement and/or graduation.

NACSA goes on to say that virtual schools provide learning “that is not bound by time, space, and pace, liberating education systems from the confines of rigid blocks of time and uninspired configurations of space to better meet the needs of students.”

Another definition comes from state law in Pennsylvania: “an independent public school established and operated under a charter from the Department of Education and in which the school uses technology in order to provide a significant portion of its curriculum and to deliver a significant portion of instruction to its students through the Internet or other electronic means.”

Just as there is some variety in the definition of the term, so is there variety in the term itself. While some states use the term “virtual school” – Arizona, for example – NACSA finds other terms in other states: Alaska and Pennsylvania use the term “cyber school”; Minnesota and Colorado use “online schools”; and the term used in Ohio is “e-schools.”

Finally, from a historical perspective, the Education Commission of the States (ECS) cites a study of distance learning that sees virtual schools as the fourth phase of an evolutionary process that began with correspondence courses in the 19th Century, moved to televised courses in the 1950s, and then evolved into online postsecondary courses in the late 1980s.

¹ The information contained in this report was derived from studies, articles, notices of intent, charter applications, court records, and other documents available either in print or on websites; and from staff correspondence and interviews with school and state agency officials and providers of educational programs for virtual charter schools.

What Happens in a Virtual Charter School

Although there is wide variety among the virtual educational programs currently available and the responses and activities of students and teachers, virtual education programs seem to have some basic elements in common. According to NACSA, families begin with the enrollment process, perhaps completing online forms and submitting proof of residency. K12 Virtual Schools LLC (K12) – the provider of the educational program being used by the virtual charter school in Farmington – hosts enrollment conferences so that students and their parents can make informed choices. Once they are enrolled, students may receive a computer on loan from the school or reimbursement for Internet access; and to attend classes, complete assignments, and perform other schoolwork, students generally log in from home although they may also log in at any location that has Internet access.

In a typical day, according to NACSA, students may also spend time working offline – perhaps reading print materials, working math problems on paper, performing science experiments or drawing. “A parent or other responsible adult is asked to supervise – and sometimes to assist with instruction, motivation, or guidance.”

According to iNACOL, a student in a virtual charter school may begin the day with schoolwork by logging in at home, engage in other activities in mid-day, and then return to the schoolwork at night. In the case of a K12 school, the learning management system is available 24/7. Generally, the younger the student, the less time spent in front of the computer.

Community learning centers that students visit at their option are becoming more common, iNACOL says, as are classroom-like settings in which all students and their teacher log in at the same time. K12 likens the virtual classroom to a webinar, an online experience that most educators, analysts, and policymakers have had. Opportunities for social interaction, such as field trips, are also more frequent than in the early years of virtual schooling, according to iNACOL; and it is common for teachers in virtual schools to maintain regular office hours and to ask selected students to log on at assigned times, depending upon their individual needs.

According to K12, a typical week may begin with the student’s taking an online assessment on Monday and the teacher’s adjusting the lesson plans for the rest of the week accordingly. That is, a student who demonstrates mastery of the material may have more flexibility in the work the rest of the week, whereas a student who needs more help will receive more targeted assignments.

Students Served by Virtual Charter Schools

One point of agreement among virtually all parties is that virtual charter schools are not for every student. According to NACSA, a student in a virtual charter school must have a “high capacity for and commitment to independent, self-regulated learning without the daily face-to-face guidance and support of teachers or the social engagement that traditional schools offer.” According to iNACOL, virtual charter schools are especially well-suited for students who need an accelerated educational program, who are medically fragile, who are working to support themselves or their families, and who participate in athletics or performance arts.

On this last point, NACSA also notes that, because of their flexibility, virtual schools are especially attractive to students who participate in “time-intensive extracurricular activities such as acting or athletics.” Depending upon the eligibility rules in a given state or district, however, athletic participation may be limited to community-sponsored rather than school-sponsored sports. K12 expects that few, if any, of its students would be eligible for traditional interscholastic competition; however, iNACOL has found that some states do allow students in virtual charter schools to participate.²

Whatever the status or needs of a virtual charter school student may be, however, a critical component is a supportive adult at home. In fact, K12 provides separate accounts for the students and their parents to help ensure parental involvement.

Delivery of the Educational Program

As the NACSA definition indicates, separation in time and/or distance is central to the delivery of the educational program of a virtual charter school: “a student in California may be learning from a teacher in Illinois who is employed by a program in Massachusetts.” The instruction may be delivered synchronously – that is, in real-time mode via webinars or some other form of interaction – or asynchronously – that is, through prepared lessons that students access in their own time at their own convenience. NACSA further explains that the virtual school is an especially good fit for charter schools – and, for that matter, home schools as well – because of the “innovative forms of education and the freedoms generally afforded” by those two approaches to schooling.

Despite the significant differences between virtual charter schools and traditional charter schools, virtual schools do comprise some elements of traditional schools. As NACSA explains:

- Like traditional schools, “most virtual schools have an office, administrators, teachers, professional development, curriculum, support services, attendance, grades, report cards, parent conferences, special-education services, field trips, school events, after-school activities, state testing, school board meetings, and even disgruntled parents.”
- On the other hand, virtual schools involve “more individualized and self-paced instruction, greater dependence on technology, complicated logistical issues due to the dispersion of students, different kinds of socialization (some face-to-face, some virtual), no snow days, and more.”

Issues Raised by Virtual Charter Schools

Costs and Funding

Perhaps one of the least-understood aspects of virtual charter schools is their cost. According to NACSA:

² In New Mexico, the provision for a charter school student activities program unit may apply in this case although there may be questions regarding a student’s attendance zone.

The startup and maintenance costs of virtual education are not well known. Virtual schools must budget for sizable expenditures on computers and servers, sophisticated instructional design, content and course management systems, learning management systems, and teacher training. . . . Part of the problem is that the equation involves too many variables. . . . [Cost estimates have ranged from] \$300 per course per semester for online courses to \$7,485 per pupil for comprehensive virtual schools, with many estimates in between.

Some sources suggest that the per-student cost in a virtual charter school is generally lower than the cost in a traditional charter school. *iNACOL*, for example, cites a study of the Florida Virtual School (FLVS) that found, “Largely because it has no expenses related to transportation or construction and maintenance of physical facilities, FLVS is able to offer computer-delivered instruction at a lower per-student cost than traditional schools.” Certainly a virtual charter school would not likely incur a number of costs associated with a traditional charter school – transportation and food service, for example – and it would likely incur lesser expenses for such budget line items as security, maintenance, and janitorial services. However, costs for other services may be higher – hardware, software, and certain logistical costs, for example. On this point, *K12* notes that, by supplying each student with a microscope and other equipment, the school supplies multiple science labs, not just one lab in the school. And *Keeping Pace* says that creating an online school “requires high investment. . . .”

How the costs are funded presents another challenge. *NACSA* says that funding based on the traditional count day “makes little sense for virtual schools, where students complete coursework from home or elsewhere at any hour of the day, any day of the week.” According to *iNACOL*, some states – Florida and New Hampshire, for example – have adopted a competency-based approach to funding virtual schools in which payment is dependent upon students’ course completion.

For New Mexico in particular, several aspects of funding come to mind:

- One dimension to the funding question is the effect that a virtual charter school may have on the enrollment – and therefore the funding – in schools in other districts. *NACSA* describes the situation pretty bluntly: “Virtual schools that generate inter-district competition for students . . . tend to aggravate superintendents and school board members strapped for cash due to declining enrollment or other factors, especially as budgets are slashed across the board.” As discussed under “Legal Questions about Virtual Charter Schools,” below, this issue came to a head recently in a case in North Carolina.
- Because virtual charter schools tend to draw a significant portion of their enrollment from students who were previously home-schooled, another funding effect is the increase in the overall number of public school students. This effect is common throughout the states with virtual charter schools. For example, a recent study by Columbia University and the University of California of virtual schools in California and Pennsylvania notes, “The large influx of students new to the public school roles has resulted in an unexpected need for additional funding to meet the demands of the large enrollment growth.” Depending upon its size, in New Mexico this influx of new public school students may have a negative effect on the unit value.

- Another funding component in New Mexico that may need to be examined is the lease assistance provision in the *Public School Capital Outlay Act*. This provision allocates to school districts and charter schools a grant for lease payments of \$700 per student using the facility or the amount of the actual annual lease payments, whichever is lower. Assuming that the virtual charter school does have a facility, it is unlikely to be as complex or costly as the facilities used by traditional brick-and-mortar schools. In addition, the students' infrequent use of this facility, which is characteristic of virtual charter schools, may suggest the need to reconsider the per-pupil allocation.

Student Recruitment and Enrollment

Because virtual charter schools could theoretically enroll students from anywhere, recruitment efforts are generally broad-based. The New Mexico Virtual Academy (NMVA) in Farmington, for example, recruited students statewide, using advertisements on television and contacting students and families who had expressed interest in earlier applicants for virtual charter schools (see "Definition of the Term 'School,'" below). The most recent enrollment figures for the NMVA show that only 28 of the 354 students currently enrolled (8.0 percent) come from San Juan County. The rest – 92 percent of the total – come from 27 other counties altogether, with 113 of them, or 32 percent, from Bernalillo County alone.

According to K12, this enrollment ratio is by design for two reasons: (1) the company hopes to achieve a student population reflective of the student demographics statewide; and (2) the company tries not to drain the membership of the host district but rather to recruit students from other districts, with the hope that the impact on those districts' membership will be minimal. K12 adds that approximately 25 percent of all the students enrolled in the NMVA are currently being home-schooled.

A point related to enrollment is student mobility or turnover – called the "churn rate" – which tends to be higher for virtual charter schools than for traditional charter schools, especially with regard to students who enroll in a virtual charter school for what NACSA calls "a temporary transitional solution," such as extended illness or injury, credit recovery, or supplemental coursework.

Student Achievement and Student Services

In a summary of research on the effectiveness of K-12 online learning, *iNACOL* notes a meta-analysis by the US Department of Education (USDE) of some 51 online learning studies conducted in 2009. "The overall results . . . found that, on average, students in online learning conditions performed better than those receiving face-to-face instruction." *iNACOL* also notes, however, that these studies compared both virtual and blended learning approaches (in which schools use a combination of online and traditional instruction) to the face-to-face learning environment. The *iNACOL* summary also lists a number of state-specific studies, including one in Florida that found that students in the Florida Virtual School "consistently outperformed their counterparts in Florida's traditional middle and high schools" on such measures as grades, Advanced Placement scores, and the state's standards-based assessment.

On the other hand, a recent review by the National Conference of State Legislatures (NCSL) reports: "When only test scores are considered, traditional public schools consistently

outperform charter schools nationwide not only in reading and math proficiency of fourth and eighth graders, but also in mean SAT and ACT scores.” The NCSL report adds that virtual charter schools have historically shown lower levels of achievement than traditional charter schools.

Another perspective comes from NACSA: “The formal research is limited, but generally demonstrates that online learning shows no significant difference from traditional physical classrooms Only a selective reading of the audits and studies can lead to a broad conclusion that online charter schools show predominantly good, or bad, outcomes.” NACSA then attempts to redefine the question of the effectiveness of virtual charter schools on student achievement: “Students, parents, educators, and authorizer should ask which types of virtual schools work, under what *conditions*, with which *students*, with which *teachers*, and with what *training*” (emphasis in the original).

Of particular interest in this regard are students receiving special education. Like traditional charter schools, virtual charter schools are subject to the *Individuals with Disabilities Education Act* (IDEA). NACSA says that good virtual schools offer excellent special education services, often through contracts with specialized providers. A case in point is a recent story in *Education Week* about an elementary school student with autism who had been floundering in a traditional classroom because of all the distractions, but whose self-esteem and demeanor improved so much through online classes offered by the South Carolina Connections Academy that friends have begun to ask whether the child still has autism.

On the other hand, this same *Education Week* story notes that not all online classes are suitable for students with disabilities and that often online classes may not even be accessible to such students. NACSA concurs on this point, noting that, “If not handled carefully, the complexity of providing special education in a virtual environment may discourage enrollment of students with disabilities.” To address this need, the USDE issued a request for proposals in July 2011 for providers to develop the Center on Online Learning and Students with Disabilities.

Student Assessment and Accountability

While many assessments are administered online, the state standards-based assessment must be administered and monitored at a physical location. In fact, one of the conditions that the Farmington school board placed on the NMVA was a plan for student assessment, with particular attention to those students from outside the Farmington area. One approach used by many K12 schools is to administer standardized assessments in various locations throughout the state. That is, if enough students from a given area are enrolled, the school sends a teacher to that location to administer the standards-based assessment to those students.

To the issue of authenticating that the work submitted and the tests taken are truly the student’s own, K12 says that its teachers are taught how to monitor attendance and to confirm students’ work through log-in patterns and the amount of time taken to complete assignments or tests. By using the program’s “Total View” system, teachers, K12 says, become better acquainted with their students than do most teachers in brick-and-mortar schools. In addition, all essays are scanned through software designed to detect plagiarism.

One final point on this topic is the effect that virtual charter school students' standards-based assessment scores may have on state-level reporting and accountability. According to NACSA, the results of state standards-based assessments can be distorted by the generally high churn rate of students in virtual charter schools, as many of them may not attend a particular school long enough to take the assessment; or they may take it only for one year, thus not providing data on these students' growth over time. This point is especially significant to New Mexico in terms of the A-F school grading system and the proposed teacher evaluation system.

Teacher Professional Development

Just as learning is different in a virtual school, so is teaching, indicating the need for teacher professional development targeted to this particular educational environment. As ECS explains:

Teaching styles in the classroom are quite different from those via television or the Internet. Distance teachers need to be prepared to spend more time checking and responding to e-mails and answering phone calls than their classroom-based colleagues. In addition, an instructor who provides lively classroom lectures may not be as compelling in his/her online course, or may be reluctant to respond to student messages.

Speaking of virtual charter schools in particular, NACSA explains, "Virtual charters present challenges to teachers, who must learn new technologies and teaching approaches to be successful."

Continuing the point, *iNACOL* says that one of the biggest obstacles facing teachers in virtual schools is the lack of professional development specific to virtual education currently available through colleges of education (COEs). According to NACSA, most states require no specialized training, but some states – Tennessee and Wisconsin, for example – do require teachers in virtual schools to have certification or professional development specific to teaching in a virtual environment; and the Georgia Department of Education has developed its own program. Yet some COEs are developing effective training programs in online teaching. In fact, *iNACOL* cites the program at New Mexico State University as a good example.

In some cases, providers of virtual educational programs themselves are insisting on professional development. K12, for example, requires its teachers to take a standard 40-hour training session and to attend 40 more hours of professional development during the school day each month – all paid for by the school.

Beyond the specific benefits for teachers in virtual charter schools, professional development in online teaching may benefit teachers in general. *iNACOL* cites a study at Columbia University that found that teachers' instructional practices are "transformed by learning how to teach online." In fact, this study also found that online teaching improves teachers' practice in both virtual and face-to-face settings.

The Role of the Chartering Authority

Authorizing a virtual charter school is an especially critical process, NACSA suggests: "Because of the potential scale involved, authorizing a single high-quality virtual school can

provide valuable opportunities to thousands of students – while a single low-quality virtual school can harm thousands.” To emphasize this point, NACSA adds that the potential for cost-savings that virtual charter schools may afford provides “both incentive and opportunity for low-quality operators to *disserve* thousands of students. It is the responsibility of authorizers to carry out due diligence and careful scrutiny to discern the difference” (emphasis in the original).

Overall, NACSA says, good authorizing is good authorizing, no matter what kind of charter school; and, while some significant policy changes may be necessary, a chartering authority can apply a number of sound practices without state policy changes. Furthermore, NACSA identifies a number of particular points that chartering authorities should consider in reviewing applications for virtual charter schools, among them:

- expertise in educational technology: if the chartering authority lacks such expertise, experts in online schooling should be included among those who review the applications;
- contracts with school management organizations: if the governing board plans to contract with a company for the virtual educational program, the school’s governing board must have sufficient technological expertise to oversee the operations of the service provider;
- performance record of school replicators: if the application comes from a company with experience elsewhere, authorizers should examine the applicant’s track record;
- data management systems and academic reporting: to ensure that the chartering authority can monitor the virtual charter school effectively, there should be a “data bridge” between the authorizer and the school to provide timely information about academics, operations, and finances;
- larger scale: given the capacity of virtual charter schools to expand their services, authorizers should require evidence that, if the school proposes to expand, it can do so without sacrificing student learning; and
- special education services: because virtual charter schools have the same responsibility under IDEA as other schools, authorizers must ensure that all individualized education programs are modified to accommodate the virtual learning environment and that, in the absence of a traditional school building, other facilities are available for any pull-out services that may be needed.

The Business of Virtual Charter Schools

Perhaps more so than traditional public schools and traditional charter schools, virtual charter schools rely heavily upon a business relationship with the provider of the virtual education program.³ In fact, another of the conditions that the Farmington Municipal Schools placed on its approval of the NMVA was a detailed memorandum of understanding (MOU) between K12 and the NMVA regarding the services the vendor will provide, the vendor’s involvement in the

³ The virtual charter school business seems to be growing and changing. Keeping Pace notes several recent business mergers: Kaplan acquired Insight Schools, and K12 bought Kaplan’s Virtual Education division. In addition, as noted in the June 2012 staff update, Pearson Education recently acquired Connections Education, which has applied to the PEC for a virtual charter school opening in school year 2013-2014.

school's decision-making process, the resolution of any disputes between the vendor and the school, and the financial relationship between the vendor and the school.

The MOU in this case is of particular interest because it provides numerous details about the relationship between a virtual charter school and the provider of the virtual educational program. Among its provisions, as recently revised, the MOU between the NMVA and K12:

- anticipates a “long-term relationship,” with an initial term of 10 years and renewal terms of seven years each⁴;
- requires that K12 have the responsibility to “recommend various policies for the operation of the Program”;
- requires that K12 be granted a 30-day right of first refusal before the school's governing board makes any third-party procurements for goods or services not covered by the MOU;
- assesses an annual administrative services fee to the school of up to 15 percent of the school's “program revenues,” which include state and local per-pupil basic education funds and federal funds, to cover services enumerated below;
- assesses an annual technology services fee of up to 7.0 percent of the school's program revenues for the value of technology services provided⁵;
- provides that K12 will hire administrative personnel – perhaps including a “school operations director” – to deliver the educational services; and that, for the positions of head administrator, business manager, and special education coordinator, K12:

will advertise the position, identify and interview candidates, perform any background checks required by law or requested by the School, and shall present its recommendations and related candidate resume [sic] to the School. . . . In the event that the School intends to hire a candidate not among those recommended by K12, K12 shall first be afforded an opportunity to interview and screen the candidate and to provide its advice and recommendation concerning the candidate to the School;

- provides that the school will hire the teachers and be responsible for all associated costs;
- requires the school to “use its best efforts” to gain approval for extending the grades served and increasing the student enrollment;
- specifies that K12's general services include recruiting students and implementing the program's admissions policy and student enrollment process; and
- enumerates K12's administrative services, among them:
 - preparing forms, manuals, handbooks, guides, policies, and procedures;
 - working with the school's counsel on legal matters affecting the program;
 - preparing a proposed annual program budget, “including projected revenues, expenses and capital expenditures”;

⁴ When asked about this provision – given that the term of an initial charter is only six years (including a planning year) and the term of a charter renewal is only five years – K12 responded that the longer term of agreement in the MOU earns better contract terms.

⁵ While these fees are part of this particular MOU, the *Charter Schools Act* allows the chartering authority to withhold 2.0 percent of a charter school's program cost for its administrative support of the charter school.

- recommending discipline policies and procedures;
- developing teacher training; and
- seeking competitive pricing and centralized purchasing of computers, monitors, and other peripherals.

Striking a Balance

One final point about the issues associated with virtual charter schools should be made: because virtual schools are a growing part of the public school landscape, educators and policymakers cannot ignore them but instead should anticipate them. As NACSA observes, “Finding the right balance between ensuring quality, but yet not stifling innovation, may be the most difficult challenge that authorizers and policymakers face as they contemplate twenty-first century teaching and learning.” The university study cited above describes this balance as a reconciliation of “the objectives of an expanding school choice movement with the demands of public accountability.”

Legal Questions about Virtual Charter Schools

In addition to the components, benefits, questions, and issues already discussed, virtual charter schools raise some legal questions as well; and they have encountered some legal issues. Whether for pedagogical or business reasons, virtual charter schools have not gone unchallenged; and a review of the topic should acknowledge some of these legal ramifications. For New Mexico in particular, perhaps the most fundamental question is whether virtual charter schools are even permissible under current state law.

Definition of the Term “School”

In 2009, three organizations applied to the Public Education Commission (PEC) to become state-chartered virtual charter schools.⁶ All three schools were denied charters in accordance with the recommendations of the Assistant Secretary of Education at that time. Two of the applicants – Sandia Academy and Senator Dennis Chavez Academy, which had proposed using the program provided by K12 – appealed the denial to the Secretary of Public Education, who upheld the decision of the PEC. Both academies took their appeal to district court. The judge for the Sandia Academy case affirmed the Secretary’s decision; the Chavez Academy case is still pending.

Although he emphasized that the reasons for the recommendation to deny the charters were the inadequacies found in their applications, the Assistant Secretary was also concerned with the legality of virtual charter schools in general, and he sought a legal opinion on the matter from the Charter School Division’s counsel (see the Attachment, *PED Charter Schools Division Counsel Opinion in re: Virtual Charter Schools, 9/4/09*). Specifically, the Assistant Secretary asked:

⁶ The three schools proposed were Sandia Academy, Senator Dennis Chavez Academy, and the Kaplan Academy of New Mexico.

- whether the PEC could authorize virtual charter schools; and
- whether the Secretary of Public Education could waive the requirements of the *Public School Code* to allow for the creation of virtual charter schools.

Counsel opined that New Mexico law contemplated schools as “brick and mortar” buildings with a physical presence in a particular place, tied to “attendance areas,” with “walk zones,” and “allowable class sizes,” all of which suggested that the Legislature had in mind the physical presence of children in school buildings. Additionally, he noted that the Legislature could have permitted virtual schools when it passed the *Statewide Cyber Academy Act*, but did not.⁷ Counsel concluded, therefore, that, in his opinion, the PEC could not legally authorize virtual charter schools.

In examining the powers of the Secretary of Public Education, counsel noted that the power to waive requirements was limited by statute. He further noted that there was language in PED rule that the charter school applicants seemed to rely upon for the Secretary’s authority to create virtual schools.⁸ However, any reading of rule to allow full-time virtual schools would conflict with statutory requirements that schools be physical buildings designed to educate students in a particular place. When there is conflict between statutes and regulations, the requirements of statutory law prevail. As any waivers granted by the Secretary must be based upon law, and no provision of law appeared to afford the Secretary that authority, counsel opined that the Secretary did not have the power to waive requirements to allow the operation of a virtual charter school in contravention to the plain meaning of statute.⁹

Even if this opinion were to be upheld, it might be argued that, in the case of the NMVA, the requirement of a physical building may be satisfied by the learning center that the NMVA has secured. Although not a traditional school building, it will house offices and provide work areas for students. Similarly, the New Mexico Connections Academy has proposed “a teaching/learning center in Santa Fe” for the virtual charter school it hopes to open.

Contractual Prohibition

The *Charter Schools Act* contains this prohibition: “the governing body [of a charter school] shall not contract with a for-profit entity for the management of the charter school.” While this prohibition seems clear in theory, it may be difficult to apply in practice as the term

⁷ In an advisory letter issued on February 19, 2008, the Attorney General reached the same conclusions. In addition, the university study of virtual charter schools in California and Pennsylvania notes that only 10 of the 15 states in which cyber charter schools were operating at the time had explicitly permitted the cyber charter school model.

⁸ The PED rule provides as follows: “Distance learning courses provide an opportunity for schools within the state to expand their course offerings and expand access to learning resources. While distance learning technologies may occasionally be used as full-time educational programming for students in unusual circumstances, asynchronous distance learning shall not be used as a substitute for all direct, face-to-face student and teacher interactions unless approved by the local board of education.”

⁹ In the 2010 legislative session, LESC-sponsored legislation was introduced that addressed the potential issue of virtual charter schools. Such schools were defined as “an educational program that uses a proprietary curriculum and that is designed to deliver more than one-half of the program to the student electronically in the student’s home or other site that is not a public school.” The bill specifically excepted the cyber academy and IDEAL-NM from that definition, and prohibited virtual charter schools in New Mexico. Ultimately, action on the bill was postponed indefinitely when the House Rules Committee did not find it to be germane.

“management” is not defined. As noted above, the MOU between K12 and the NMVA enumerates a large number of administrative tasks that the private company will perform. The only service that K12 is not performing, the company says, is managing instruction. According to K12, however, these tasks do not constitute management of the school because the company does not have the authority to determine policy for the school, only to recommend policy.

Court Decision in North Carolina

In a situation similar to the NMVA in New Mexico, a local school board in North Carolina approved a virtual charter school to be operated by a nonprofit group affiliated with K12.

North Carolina Learns, Inc. (NC Learns) sought and received approval from the Cabarrus County Board of Education for the North Carolina Virtual Academy, despite an announcement by the State Board of Education that it would not accept any applications for online charter schools for school year 2012-2013. Denied final approval by the State Board, NC Learns sued the state in administrative court, where the judge granted approval of the academy’s application, saying that the school could proceed with operations because the State Board had failed to respond to the application by the state’s deadline.

The State Board, joined by 89 of North Carolina’s school districts under the umbrella of the North Carolina School Boards Association, appealed the administrative law judge’s decision in Wake County Superior Court. In a story about this appeal, the *Raleigh News & Observer* stated:

The academy would receive several thousand dollars in public money for each student enrolled. Those funds would come at the expense of local school districts, which must give to charters educating children who would otherwise have been enrolled in a public school there. It may also mean that the local districts will have to start paying for home schooled children who sign up for the virtual charter school.

The Superior Court judge overturned the administrative judge’s ruling, saying that the State Board was not required to respond to the application. The judge noted that, although a written response to the application would have been better, the State Board was not legally bound to provide one because it had previously announced that it would not entertain applications for virtual charter schools. Further, the Superior Court judge ruled that the State Board has final authority in these matters and that the administrative judge had overstepped his authority. The decision from the Superior Court did not address the issue of whether a for-profit company could open a virtual charter school in North Carolina, however.

According to one of the attorneys representing NC Learns, the company’s board of directors was considering how to proceed after the decision from the Superior Court.

Alleged Securities Violations, Investigations, and Class Action Lawsuits

Allegations of unfair or illegal business practices by virtual charter schools have arisen in some states. On this point, the study of virtual charter schools in California and Pennsylvania alludes to reports of mismanagement of public funds, questionable accountability practices that result in minimal oversight of teaching and learning, and “the borderless student enrollment zones

spanning entire states, that have resulted in both fiscal and accountability challenges for districts from which students transfer” Of perhaps more significance to New Mexico, several class action suits have been filed recently against K12, alleging violations of securities law and rule.

The lawsuits were apparently precipitated by a story in the *New York Times* on December 12, 2011. That story examined the rise of online schools in general, with a focus on K12, particularly the Agora School of Pennsylvania, as exemplary of many of the potential problems associated with the privatization of public education into the virtual arena. For example, in addition to the specific allegations made against K12 in the several lawsuits, discussed below, the article indicated that:

- much of the funding that K12 receives from government sources is rolled into advertising, lobbying, and recruitment, rather than actual education;
- a state audit of the Colorado Virtual Academy, also run by K12, revealed that the school had continued to count for state reimbursement approximately 120 students whose enrollment could not be verified, who failed to meet residency requirements, or who had never logged on at all. The audit resulted in the reimbursement of more than \$800,000;
- many states, like New Mexico, prohibit for-profit public education management companies like K12 from running schools under contract with public districts or nonprofit charters; yet these companies are almost always in charge of nearly every detail of the day-to-day operations of the schools, including curriculum, hiring teachers and principals, and evaluating student performance;
- K12 appears to maximize its income by establishing virtual schools in poor districts, which receive more government support in some states. For example, the Tennessee Virtual Academy is located in Union County, Tennessee, which has a poverty rate of nearly 25 percent. In contrast, few of the pupils enrolled in the school reside in the district;
- although K12 and other such companies sometimes cite the accomplishments of their students as superior to many of their peers in traditional schools, a Stanford University group, the Center for Research on Education Outcomes, tracked students in eight different Pennsylvania schools, including Agora, and concluded that, “in every subgroup, with significant effects, cyber charter performance is lower”;
- while many educators do agree that full-time virtual learning can be useful, especially for students whose pace is extremely accelerated, or who have behavioral problems or other exceptional circumstances, for most students, particularly in the younger classes, the school experience is essential to socialization, development, and self-definition, and it should not be replaced with online learning.

The article’s apparent revelation of K12’s alleged false statements, poor business practices, and nondisclosure of crucial information to the public, including K12 shareholders, prompted the filing of several class action lawsuits against the corporation and its officers, as well as several investigations of the corporation’s officers and board of directors.

Class action suits against K12 and certain of its officers have been filed in US District Court for the Eastern District of Virginia by plaintiffs alleging various violations of securities laws. The allegations made against K12 are largely the same among the several lawsuits. Generally,

plaintiffs allege that, between September 9, 2009 and December 16, 2011 (the “Class Period,” which ended just a few days after the *New York Times* article was published), K12 and certain of its officers violated provisions of the *Securities Exchange Act of 1934* and related regulations by concealing material information and making false and misleading statements relating to K12’s business and financial condition. Specifically, they allege that:

- K12 and certain of its officers violated federal securities laws by issuing materially false and misleading statements regarding K12’s business and prospects;
- K12 engaged in improper and deceptive recruiting and sales strategies, aimed at enrolling students regardless of how well suited they might be to the company’s curriculum;
- as a result of K12’s aggressive recruiting practices, the company experiences student retention problems and high rates of withdrawal (the “churn rate,” described above);
- K12 failed to disclose administrative pressure from upper management to pass students despite poor or nonexistent academic performance, so as to maintain high enrollment levels and continued government funding;
- a significant number of K12 students failed to meet federal and state standards of academic achievement;
- according to various academic benchmarks, K12 students chronically underperformed when compared with their peers at traditional schools;
- K12 schools often have much higher student-to-teacher ratios than the company advertizes;
- defendants’ statements regarding the company’s performance and practices were false, misleading, and lacked a reasonable basis;
- as a result of defendants’ misleading statements, K12 common stock traded at artificially inflated prices during the Class Period; and
- after the publication of the *New York Times* article, the price of K12 common stock fell approximately 23.5 percent, on December 13, and 34.4 percent by December 16, on unusually high trading volume, thereby causing harm to plaintiffs.

These lawsuits are still pending before US District Court, although LESC staff has been unable to determine their current disposition, class members, lead plaintiffs in all but two cases, and other details because of limited access to the official records.

M E M O R A N D U M

TO: Don Duran,
Assistant Secretary of Education
Charter Schools Division

FROM: Rudolph P. Arnold, Counsel

RE: Virtual Schools

DATE: September 4, 2009

You have requested my opinion whether the Public Education Commission can authorize virtual charter schools that are not brick and mortar, discernible as buildings, designed to educate students in particular places. In the alternative, you have asked whether the secretary of public education can grant waivers, of the requirements contained in the public school code to allow for the creation of virtual schools in New Mexico.

Based on my examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to me at this time, it is my opinion that the Public Education Commission does not have the authority to approve virtual charter schools that are not brick and mortar, discernible as buildings, designed to educate students in particular places. It is my opinion that the secretary cannot grant waivers, of the requirements contained in the public school code to allow for the creation of virtual schools in New Mexico.

ANALYSIS:

Charter school applicants have submitted applications for state-chartered charter schools which rely primarily on distance learning as the method of instruction. As virtual charter schools, the applicants will not have a brick and mortar school building, but rather they are proposing to have learning centers or administrative offices located in the state where students may occasionally meet face-to-face with a teacher.

A basic canon of statutory construction is that terms should be read according to their plain meaning. See *Wilson v Denver*, 125 N.M. 308, 314, 961 P.2d 153 (1998). The New Mexico statutes contain definitions of public school and school. The Public School Code, Section 22-1-2 NMSA 1978 provides:

M. "public school" means that part of a school district that is a single attendance center in which instruction is offered by one or more teachers and is **discernible as a building or group of buildings** generally recognized as either an elementary, middle, junior high or high school or any combination of those and includes a charter school; (Emphasis added.)

N. "school" means a supervised program of instruction designed to educate a student in **a particular place**, manner and subject area; (Emphasis added.)

These definitions reflect the intent of the legislature to define public schools in New Mexico as brick and mortar, discernible as buildings, designed to educate students in particular places.

Another indication of the intent of the legislature to define public schools in New Mexico as brick and mortar, discernible as buildings, designed to educate students in particular places is found in Section 22-1-4 NMSA 1978. This statute makes available a free public school education to students in New Mexico. As evidenced by the language regarding enrollment in schools, Section 22-1-4 contemplates the physical presence of students in schools, it provides, in part:

- E. A local school board shall adopt and promulgate rules governing enrollment and reenrollment at public schools other than charter schools within the school district. These rules shall include:
- (1) definition of the school district boundary and the boundaries of attendance areas for each public school;
 - (2) for each public school, definition of the boundaries of areas outside the school district boundary or within the school district but outside the public school's attendance area and within a distance of the public school that would not be served by a school bus route as determined pursuant to Section 22-16-4 NMSA 1978 if enrolled, which areas shall be designated as "walk zones";
 - (3) priorities for enrollment of students as follows:
 - (a) first, students residing within the school district and within the attendance area of a public school;
 - (b) second, students enrolled in a school ranked as a school that needs improvement or a school subject to corrective action;
 - (c) third, students who previously attended the public school; and
 - (d) fourth, all other applicants;
 - (4) establishment of maximum allowable class size if smaller than that permitted by law; (Emphasis added.)

The plain language of Section 22-1-4 focuses upon "residence," "attendance area," "allowable class size," and other descriptive terms that suggest that, when passing this legislation, the legislature had in mind the physical presence of children in school buildings.¹

¹ Relying upon these same provisions in statute, the Attorney General also concluded the legislature had in mind the physical presence of children in school buildings, N.M. Atty. Gen advisory letter 2/19/08

Additionally, the legislature could have permitted virtual schools when it enacted the Statewide Cyber Academy Act, [22-30-1 to 22-30-8, NMSA 1978]. The Act reflects the special treatment the legislature provides for distance learning. The fact that the language used throughout the Act refers only to courses suggest that, when passing this legislation, the legislature had in mind courses to supplement offerings at schools not the creation of distance learning schools. In addressing the issue of funding for distance learning, Section 22-30-6A of the Act provides:

A student must be enrolled in a public school or a state-supported school and must have the permission of the student's local distance education learning site to enroll in **a distance learning course**. A distance learning student shall only be counted in the student's primary enrolling district for the purpose of determining the membership used to calculate a school district's state equalization guarantee. A student shall have only one primary enrolling district, (Emphasis added).

This language in the Act clearly indicates that the legislature intended that funding for students participating in distance learning would be based upon a school district's state equalization guarantee given to the school that permitted the student to take a distance learning course. Funding for virtual schools would have required adjustments to the state equalization guarantee and was not contemplated by the legislature when the Cyber Academy Act was passed.²

Based on the plain language of the provisions in statutes there is no ambiguity that public schools in New Mexico are brick and mortar, discernible as buildings, designed to educate a students in a particular place. Therefore the Public Education Commission cannot authorize virtual charter schools that do not have brick and mortar, discernible as buildings, designed to educate students in a particular place.

The applicants have requested that the secretary waive the provisions of the statutes that require a school to be brick and mortar, discernible as buildings, designed to educate a students in a particular place. The powers of the secretary of public education are set forth in Section 22-2-1 NMSA 1978 which provides:

A. The secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.

B. The department may:

- (1) adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary;
- (2) enter into contracts to carry out its duties;
- (3) apply to the district court for an injunction, writ of mandamus or other appropriate relief to enforce the provisions of the Public School Code [22-1-1 NMSA 1978] or rules promulgated pursuant to the Public School Code; and
- (4) **wave provisions of the Public School Code as authorized by law**. (Emphasis added).

The secretary's authority to grant waivers is limited by this statute.

² Sharon S. Ball & J. Placido Garcia, Jr., New Mexico, in National Center for Education Statistics, Public School Finance Programs of the United States and Canada: 1998-99 (2001), available at <http://nces.ed.gov/edfin/pdf/StFinance/NewMexi.pdf>. discusses factors in the state equalization formula.

There is language in the department's rule on distance learning that the charter school applicants seem to rely upon for the secretary's authority to create virtual schools. The public education department's rule at 6.30.8.8A NMAC provides:

Distance learning courses provide an opportunity for schools within the state to expand their course offerings and expand access to learning resources. While distance learning technologies may occasionally be used as full-time educational programming for students in unusual circumstances, asynchronous distance learning shall not be used as a substitute for all direct, face-to-face student and teacher interactions, unless approved by the local board of education.

The charter school applicants have interpreted this rule as permitting the full-time educational programming for students in virtual schools as a substitute for all direct, face-to-face student and teacher interactions, if approved by the local board of education or, in this case, the secretary of education. Two charter school applicants³ have submitted plans to teach courses in cyber space and require students to attend sessions at a learning center to satisfy the requirements for some face-to-face teacher interaction and a brick and mortar presence in New Mexico. Any reading of the distance learning rule to permit full-time virtual schools would conflict with the statutory requirements that public schools in New Mexico are brick and mortar, discernible as buildings, designed to educate students in a particular place.

A cabinet secretary, board, or commission must have statutory authority to promulgate rules. The state Supreme Court has stated: "The authority of an administrative agency to 'promulgate ... regulations must be found in and is limited by statute. ", Howell v. Heim, 118 N.M. 504, 882 P.2d 541 (1994) (citations omitted). Regulations are presumptively valid and will be upheld if reasonably consistent with the authorizing statutes, New Mexico Mining Ass'n v. New Mexico Water Quality Control Comm., 2007NMCA-010, ¶ 12, 141 N.M. 41, 46. It is well established that if there is a conflict or inconsistency between statutes and regulations promulgated by an agency, the language of the statutes shall prevail, See, e.g., Jones v. Employment Servs. Div., 95 N.M. 97, 99, 619 P.2d 542, 544 (1980), cf. Gladden Motor Co. v. Eunice Sch. Bd., 142 N.M. 483, 486 (N.M. Ct. App. 2007). Case law authority has also clearly established that an agency has no authority to enact a rule contrary to the plain meaning of the statute, State ex rel. Helman v. Gallegos, 114 N.M. 414, 418-419 (N.M. Ct. App. 1992).

Any waivers granted by the secretary must be based upon some provisions authorized by law. I have found no provision of the Public School Code that authorizes the secretary to waive the requirement that public schools in New Mexico are brick and mortar, discernible as buildings, designed to educate students in a particular place. The secretary does not have the authority to grant a waiver that would allow an applicant to operate a charter school in a manner which is contrary to the plain meaning of the statute.

³ Sandia Academy and Senator Dennis Chavez Academy