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August 19, 2013

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force

RE: STAFF BRIEF: ADMINISTRATIVE RULEMAKING

Proposed Rule:

- **6.80.4 NMAC, Charter School Application and Appeal Requirements**

In the August 15, 2013 issue of the *New Mexico Register*, the Public Education Department (PED) published a Notice of Proposed Rulemaking, proposing amendments to the charter school application and appeal process. The Notice solicited comments on the rules and announced a public hearing on the proposal, to be held on September 17, 2013, in Mabry Hall of the Jerry Apodaca Education Building, in Santa Fe. (See Attachment 1, *NPRM 6.80.4, Charter School Application and Appeal Requirements, 8/15/13*, and Attachment 2, *PED Proposed Rule 6.80.4 NMAC, 8/15/13*.)¹

The proposed amendments affect two sections of the rule:

- **6.80.4.14, Appeals to the Secretary;** and
- **6.80.4.15, Review on the Secretary's Own Motion.**

¹ Based on discussion at the July 2013 meeting of the Public Education Commission (PEC), this proposed rulemaking offers amendments that apparently were agreed to as part of the settlement between the PEC and PED, as a result of the recent lawsuit between the parties over the Secretary's reversal and remand of several PEC decisions regarding charter applications.

In both instances, the proposed amendments affect the actions taken by the Secretary or a chartering authority in those cases where the Secretary reverses the chartering authority's decisions regarding the approval, denial, or revocation of a charter.

In subsection 6.80.4.14, Appeals to the Secretary, the proposed amendments:

- strike the entirety of subsection 6.80.4.14(E)(7), which currently reads:

“If the secretary reverses the chartering authority’s decision, the secretary shall remand the decision to the chartering authority with written instructions for approval of the charter. The instructions shall include specific recommendations concerning approval of the charter and any changes the secretary directs to remedy any concerns identified under Paragraphs (5) or (6) of Subsection E of 6.80.4.14 NMAC above[;]”
- replace the subsection with the following, so that the entirety of subsection 6.80.4.14(E)(7) now reads: “The department shall promptly serve a formal notice of the secretary’s decision upon the parties to the appeal[;]” and
- strike the entire subsection 6.80.4.14(F), which currently reads:

“Implementation of secretary’s decision
(1) The department shall promptly serve a formal notice of the secretary’s decision upon the parties to the appeal.
(2) If the chartering authority’s decision is reversed and remanded, the chartering authority, at a public hearing, shall approve the charter with any required changes within thirty (30) days following the receipt of the notice of the decision. If the chartering authority does not comply with the secretary’s order, the secretary may take appropriate administrative or judicial action.”

In subsection 6.80.4.15, Review on the Secretary’s Own Motion, the proposed amendments strike the entirety of subsection 6.80.4.15(H), which currently reads:

“If the chartering authority’s decision is reversed and remanded, the chartering authority, at a public hearing, shall deny or revoke the charter within thirty (30) days following the receipt of the secretary’s decision. If the chartering authority does not comply with the secretary’s order, the secretary may take appropriate administrative or judicial action.”

These amendments would have the effect of removing any requirement, and obviating any need, for quasi-judicial remand to the chartering authority to change its decision in accordance with the Secretary, and essentially make the Secretary’s decision on appeal the final action in the process, excepting further potential appeals to the district court.

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
NOTICE OF PROPOSED RULEMAKING

The Public Education Department (“Department”) hereby gives notice that the Department will conduct a public hearing at Mabry Hall, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786, on Tuesday, September 17, 2013, from 10:00 a.m. to noon. The purpose of the public hearing will be to obtain input on the proposed amendments to 6.80.4 NMAC (**CHARTER SCHOOL APPLICATION AND APPEAL REQUIREMENTS**).

Interested individuals may provide comments at the public hearing and/or submit written comments to Ms. Mary H. Deets, Administrative Assistant, Office of General Counsel, via email at Rule.FeedBack@state.nm.us, fax (505) 827-6681, or directed to Ms. Deets at Office of General Counsel, Public Education Department, Jerry Apodaca Education Building, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786. Written comments must be received no later than 5:00 p.m. on the date of the hearing. However, the submission of written comments as soon as possible is encouraged.

Copies of the proposed rules may be accessed on the Department’s website (<http://ped.state.nm.us/>) under the “Public Notices” link, or obtained from Ms. Deets by calling (505) 827-6641.

Individuals with disabilities who require this information in an alternative format or need any form of auxiliary aid to attend or participate in the public hearing are asked to contact Ms Deets as soon as possible. The NMPED requires at least ten (10) days advance notice to provide requested special accommodations.

TITLE 6 PRIMARY AND SECONDARY EDUCATION
CHAPTER 80 ALTERNATIVE EDUCATION - CHARTER SCHOOLS
PART 4 CHARTER SCHOOL APPLICATION AND APPEAL REQUIREMENTS

6.80.4.1 ISSUING AGENCY: Public Education Department
 [6.80.4.1 NMAC - Rp, 6.80.4.1 NMAC, 6/29/07]

6.80.4.2 SCOPE: This rule shall apply to applicants and operators of start-up charter schools and previously authorized conversion schools.
 [6.80.4.2 NMAC - Rp, 6.80.4.2 NMAC, 6/29/07]

6.80.4.3 STATUTORY AUTHORITY: Sections 22-2-1, 22-8-1 through 22-8-47 and 22-8B-1 through 22-8B-17, NMSA, 1978
 [6.80.4.3 NMAC - Rp, 6.80.4.3 NMAC, 6/29/07]

6.80.4.4 DURATION: Permanent
 [6.80.4.4 NMAC - Rp, 6.80.4.4 NMAC, 6/29/07]

6.80.4.5 EFFECTIVE DATE: June 29, 2007, unless a later date is cited at the end of a section.
 [6.80.4.5 NMAC - Rp, 6.80.4.5 NMAC, 6/29/07]

6.80.4.6 OBJECTIVE: To establish the initial application and renewal process for charter schools, whether locally or state chartered, the appeal process of charter schools to the secretary of education and the secretary of education’s review process.
 [6.80.4.6 NMAC - Rp, 6.80.4.6 NMAC, 6/29/07]

6.80.4.7 DEFINITIONS:

- A. “Applicant” means one or more teachers, parents or community members or a public post-secondary educational institution or nonprofit organization who submits an initial or renewal application to a chartering authority.
- B. “Authorizer” means either a local school board or the commission that permits the operation of a charter school.
- C. “Charter school” means a conversion school or start-up school authorized by a chartering authority to operate as a public school.
- D. “Chartering authority” means either a local school board or the commission that permits the operation of a charter school.
- E. “Chief executive officer” means the person with duties similar to that of a superintendent as set forth in 22-5-14 NMSA 1978.
- F. “Commission” means the public education commission.
- G. “Conversion school” means an existing public school within a school district that was authorized by a local school board or the commission to become a charter school.
- H. “Department” means the public education department.
- I. “Division” means the charter schools division of the department which maintains offices in both Santa Fe and Albuquerque.
- J. “Governing body” means the governing body of a charter school as set forth in the school’s charter.
- K. “Head administrator” means the duly licensed school administrator who is the chief executive officer of the charter school.
- L. “Locally chartered charter school” means a charter school authorized by a local school board.
- M. “MEM” means membership, which is the total enrollment of qualified students on the current roll of a class or school on a specified day.
- N. “New Mexico coalition for charter schools” means the non-profit membership organization representing charter schools in New Mexico.
- O. “New Mexico school boards association” means the organization consisting of the local public school boards and the governing bodies of charter schools in New Mexico.

P. "Organizer" means one or more persons or entities who seek to arrange, form or otherwise put together a charter school.

Q. "Prospective applicant" means one or more teachers, parents or community members or a public post-secondary educational institution or nonprofit organization who submits a notice of intent to a chartering authority.

R. "Secretary" means the New Mexico secretary of public education.

S. "Start-up charter school" means a public school developed by one or more parents, teachers or community members who applied to and were authorized by a chartering authority to become a charter school.

T. "Application for start-up charter school" means an application requesting the establishment of either a locally-chartered or state-chartered school.

U. "Special education plan" means a comprehensive written design, scheme or method that includes specific details on how the charter school shall:

(1) utilize state and federal funds to provide children with disabilities a free and appropriate public education, in accordance with applicable law;

(2) provide educational services, related services and supplementary aids and services to children with disabilities in accordance with each child's individualized education program; and

(3) address a continuum of alternative educational placements to meet the needs of students with disabilities, in accordance with applicable law.

V. "State-chartered charter school" means a charter school authorized by the commission.
[6.80.4.7 NMAC - Rp, 6.80.4.7 NMAC, 6/29/07; A, 6/30/08; A, 6/30/09]

6.80.4.8 NOTICE OF INTENT TO ESTABLISH A CHARTER SCHOOL:

A. The organizers of a proposed charter school shall provide a signed written notification to the commission and the school district in which the charter school is to be located of the organizers' intent to establish a charter school. The date for submitting a notice shall be no later than the second Tuesday of January of the year in which the prospective applicant plans to submit an application.

B. Written notification to the commission shall be made to the division at its Albuquerque office; written notification to a local school board shall be made to the superintendent of that district who shall provide copies of the notification to the local school board during a duly noticed board meeting.

C. If the second Tuesday of January falls on a legal holiday, the notification shall be timely if personally delivered on the first day following the legal holiday that the division or office of the pertinent superintendent is open for business. Notice will also be considered timely if it is postmarked four (4) calendar days prior to the second Tuesday of January, regardless of the date on which it is received. Failure to provide timely notification may result in an application being rejected unless the organizers can demonstrate good cause why timely notification was not given.

[6.80.4.8 NMAC - N, 6/29/07; A, 6/30/08; A, 6/30/09]

6.80.4.9 CONTENTS OF APPLICATION FOR START-UP CHARTER SCHOOL: A charter school application shall be a proposed agreement between the chartering authority and the charter school and shall include the following assurances, descriptions, outlines and plans.

A. The mission statement of the charter school. The mission statement must answer the following questions: "Who do you serve?", "What do you seek to accomplish?", "What methods will you use?", and "How will we know if you are achieving your mission?"

B. The goals, objectives and student performance standards to be achieved by the charter school which address how the charter school will comply with the department's required content standards, benchmarks, and performance standards, state accreditation, standardized testing and school report card in accordance with Sections 22-2C-1 et seq. NMSA, 1978. The goals and objectives must be measurable and student-centered.

C. A description of the charter school's educational program and curriculum that meets or exceeds the department's educational standards and must be designed to enable each student to achieve those standards and addresses the following:

- (1) documentation, research or rationale that supports a particular curricular approach;
- (2) a description of the curriculum including scope and sequence and student performance standards;
- (3) a timeline for alignment of the curriculum with the department's content standards, benchmarks and performance standards, if alignment has not been completed at the time the application is submitted;
- (4) strategies and methods to be used in delivering the curriculum and how the curriculum will address students' needs and assist each student in reaching those standards;

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(5) length of school day and school year;
(6) total number of grades the charter school proposes to provide, either immediately or in phases, class size and total projected student enrollment and, if the charter school will be located in a school district that has a total enrollment of not more than one thousand three hundred (1,300) students, a statement that the proposed charter school's proposed enrollment for all grades, in combination with any other charter school's enrollment for all grades, will neither equal nor exceed ten (10) percent of the total MEM of that school district;

(7) proposed requirements for graduation, if applicable.

D. A description of the way a charter school's educational program will meet the individual needs of students, including those students determined to be at risk, and which will address the following:

(1) suggested modifications to the proposed educational program to meet individual student needs, such as bilingual, limited English proficient, and special education;

(2) an outline of a special education plan, the final plan of which must be completed and submitted to the charter authorizer by the end of the planning year;

(3) how the charter school will provide access to other services including but not limited to counseling and health.

E. A description or outline of a plan the charter school considers adopting for evaluating student performance, the types of assessments that will be used to measure student progress toward achievement of the state's standards and the school's student performance standards, the timeline for achievement of the standards, and the procedures for taking corrective action in the event that student performance falls below the standards, and which description or outline addresses the following:

(1) remediation for students not achieving standards, including a timeline for implementation of the remediation plan;

(2) assessments that might be considered in addition to the statewide mandated testing;

(3) documentation and reporting of student data.

F. Assurances that the charter school will be economically sound, including the submission of a proposed budget for the term of the charter and a description of the manner in which the annual audit of the financial and administrative operations of the charter school is to be conducted, and addresses the following:

(1) a proposed budget for year one and the following four (4) years based on the current unit value;

(2) a description of the administrative operations of the charter school.

G. An assurance that the fiscal management of the charter school will comply with all applicable federal and state laws, regulations and rules relative to fiscal procedures. In addition to this basic assurance, the applicant shall clearly state in its assurance that the following information will be provided to the chartering authority by the end of the planning year or within ten (10) days of receipt of any federal or state stimulus funds:

(1) a detailed plan indicating how the charter school will manage its fiscal responsibilities;

(2) a description of its internal control procedures that the charter school will utilize to safeguard assets, segregate its payroll and other check disbursement duties, provide reliable financial information, promote operational efficiency, and ensure compliance with all applicable federal statutes and regulations and state statutes and rules relative to fiscal procedures.

H. The names of the members of the governing body and a description of the operation of the charter school, including:

(1) the method of selecting the governing body;

(2) the qualifications and terms of members, the filling of vacancies, and the procedures for changing governing body membership;

(3) an assurance that the governing body will meet and conduct its meetings in accordance with the Open Meetings Act, Sections 10-15-1 et seq., NMSA 1978;

(4) the nature and extent of parental, professional educator and community involvement in the governance and the operation of the school;

(5) an assurance that the charter school will adopt policies and procedures of the governing body, that address governance, relationship to staff, professional development, the role of the governing body in policy-making, personnel decisions, budgeting, and operation of the charter school, including how decisions will be made;

(6) for locally chartered charter schools, an assurance that it will amend its charter within one (1) year of approval to include procedures agreed upon with its chartering authority for the resolution of disputes between them;

(7) a description of how the charter school proposes to account to the chartering authority with respect to the charter school's compliance with applicable statutes, regulations, rules and charter provisions;

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(8) an assurance by each governing body member that they have read the application and agree to its submission to the chartering authority.

I. An explanation of the relationship that will exist between the proposed charter school and its employees, including evidence that the terms and conditions of employment will be addressed with affected employees and their recognized representatives, if any, and which address the following:

(1) personnel policies and procedures that comply with all applicable federal statutes and regulations, the School Personnel Act, Sections 22-10-1 et seq., NMSA 1978, and the Charter Schools Act, Sections 22-8B-1 et seq. NMSA 1978 or, if personnel policies and procedures have not been developed at the time of the application, a statement that the policies and procedures developed will comply with applicable federal and state labor laws, regulations and rules implementing them;

(2) a description of the evaluation process for staff which shall include evaluation of teachers by a licensed school administrator;

(3) the discipline process for staff, that provides for due process and demonstrates an understanding of applicable state and federal laws, regulations and rules;

(4) an assurance that the governing body or head administrator will recognize and work with employee labor representatives, if any;

(5) a proposed salary schedule;

(6) proposed job descriptions of staff;

(7) a proposed pupil-teacher ratio.

J. The student discipline policy of the proposed charter school that complies with the department's rule on students' rights and responsibilities.

K. For charter schools, a proposed agreement between the charter school and the authorizer regarding their respective legal liability and applicable insurance coverage.

L. A description of how the charter school plans to meet the transportation and food service needs of its students. The description shall address whether the applicant intends to contract with a school district or other party for the provision of transportation and food services; the identity of the school district or that other party, if known, with whom the applicant proposes to contract; a description of the proposed terms of any contract; and for these services a description of the status of any preliminary negotiations with any school districts or other parties regarding the provision of transportation or food service.

M. A description of the waivers that the charter school is requesting from either the local school board or the department or both and the charter school's plan for addressing these waiver requests that:

(1) lists the specific policy by number and title for which waivers are requested from local school board policy;

(2) lists the specific waivers that are requested from the department's requirements, rules, and provisions of the Public School Code, Sections 22-1-1 et seq., NMSA 1978, pertaining to individual class load, teaching load, length of the school day, staffing patterns, subject areas, purchase of instructional material, evaluation standards for school personnel, school principal duties, driver education and graduation requirements.

N. A description of the facilities the charter school plans to use, taking phase-in and availability into account. The charter school shall provide a detailed description of its proposed capital outlay needs, including projected requests for capital outlay assistance for the charter school. Additionally, the charter school shall provide an assurance that:

(1) the facility it seeks to use is safe and suitable for use as a school;

(2) it will develop and maintain a plan for addressing code, accessibility requirements and any other health and safety requirements, if necessary;

(3) it will develop and maintain a plan for operation, maintenance and repair of a facility;

(4) it will produce a certificate of occupancy for use of the facility; and

(5) prior to opening that the facility to be used meets all applicable federal and state health, safety and code requirements.

O. A description of the enrollment procedures to be used by the charter school that complies with Section 22-8B-4.1, NMSA, 1978 and Subsection D of 6.80.4.12 NMAC.

P. An explanation of how approval of the charter school would be in the best interest of students, school district and community where it intends to locate, and serves a purpose in that community.

[6.80.4.9 NMAC - Rp, 6.80.4.8 NMAC, 6/29/07; A, 6/30/08]

6.80.4.10 TERM OF A CHARTER:

A. A charter may be approved for an initial term of six (6) years, provided that the first year shall be used exclusively for planning and not for completing the application. The planning year shall be the fiscal year in which the charter is authorized, beginning on the July 1 date on which applications were due and ending on June 30, regardless of the number of months that may be available to a charter school for planning activities.

B. A charter may be renewed for successive periods of five (5) years each unless a lesser period is agreed to in writing by the charter school and its authorizer. The five (5) years of the charter will commence on July 1 of the fiscal year after the charter was approved by its authorizer and shall align with the dates of the fiscal year. [6.80.4.10 NMAC - N, 6/29/07]

6.80.4.11 REQUIREMENTS DURING THE PLANNING YEAR:

A. For charter schools approved prior to July 1, 2010, prior to the end of its planning year, a newly authorized charter school shall demonstrate to the authorizer that its facilities meet the educational occupancy standards required by applicable New Mexico construction codes. For charters approved on or after July 1, 2015, prior to the end of its planning year, the charter school shall demonstrate to its authorizer that its facilities meet the relevant requirements for schools as set forth in Section 22-8B-4.2C, NMSA 1978.

B. A charter school shall simultaneously notify the public school capital outlay council and its authorizer in writing of its readiness to demonstrate that its facilities meet the referenced educational occupancy standards.

C. The public school capital outlay council shall determine whether a charter school's facilities meet established educational occupancy standards, and if not, whether specific requirements are inappropriate or unreasonable for a charter school. If the public school capital outlay council determines that specific requirements of the referenced educational occupancy standards are inappropriate or unreasonable for a charter school, it may grant a variance. The public school capital outlay council shall provide written notification of its decision and the reasons thereto simultaneously to the charter school and its authorizer.

D. Prior to the end of its planning year, a state chartered charter school shall demonstrate that it has qualified as a board of finance and that it has satisfied any conditions imposed by the commission before commencing full operation for the remainder of its charter term.

E. Prior to the end of its planning year, the state-chartered charter schools shall apply to the commission for authorization to commence full operations. If the commission refuses to issue the authorization to commence full operation, it shall provide its reasons in writing which shall be limited to the reasons set forth in Subsection D of 6.80.4.11 NMAC.

[6.80.4.11 NMAC - N, 6/29/07; A, 6/30/08; A, 6/30/09]

6.80.4.12 INITIAL REQUIREMENTS AND REVIEW PROCESS FOR START-UP SCHOOLS:

A. Local school boards may approve the establishment of charter schools to be located in their respective districts. The commission may approve the establishment of a charter school to be located anywhere in the state.

B. An applicant shall apply to only one chartering authority at a time. An applicant whose application has been denied by a chartering authority or approved with amendments unacceptable to the applicant may file the same application the following fiscal year with a different chartering authority.

C. Applications for start-up schools shall be submitted between June 1 and July 1 to be eligible for consideration for the following fiscal year. If July 1 falls on a Saturday or a Sunday, the deadline for filing applications shall be extended to the close of business of the very next Monday, even in the case of a school district closed for summer break. Applications will also be considered timely if they are postmarked four (4) calendar days prior to July 1, regardless of the date on which they are received. Failure to submit a timely application shall result in an application being rejected by the authorizer, unless the parties agree to waive the filing deadline in accordance with Section 22-8B-6 NMSA 1978. Any such waiver shall be in writing and signed by persons authorized to take such action by the applicant and the chartering authority.

D. Enrollment in a start-up charter school shall be guided by the following.

(1) A charter applicant must enroll students on a first-come, first-served basis or through a lottery selection process if the total number of applicants exceeds the number of spaces available.

(2) A charter applicant shall advertise its enrollment process using newspapers, bulletin boards and other methods designed to disseminate its availability to seek student enrollment and to ensure that there is equal opportunity for all parents and students to learn about the school and apply.

(3) A charter school shall not charge tuition or have admission requirements, except as otherwise provided in the Public School Code, Sections 22-1-1 et seq., NMSA 1978.

(4) In subsequent years of its operation, a charter school will give enrollment preference to previously properly admitted students who remain in attendance and siblings of students already admitted to or attending the school.

E. Any revision or amendment to the terms of the charter contract may be made only with the written approval of the authorizer.

F. A charter school shall be a nonsectarian, nonreligious, and non-home-based public school that operates within the geographic boundaries of a public school district.

G. A charter school shall comply with the Age Discrimination Act of 1975, Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and Part B of the Individuals with Disabilities Education Act.

H. A charter school shall comply with the same federal and state audit requirements as do other public schools in the state.

I. A charter school shall meet all applicable federal, state, and local health and safety requirements.

J. A charter school shall operate in accordance with and under authority of state law.

K. A charter school shall provide equitable access to, and participation in, its federally assisted program for students, teachers, and other program beneficiaries with special needs.

L. A charter school shall have an admissions process that does not discriminate against anyone on the basis of race, gender, national origin, color, disability, or age.

M. A charter school's head administrator or governing body shall not employ or approve the employment in any capacity of a person who is the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of a member of the governing body or the head administrator. The governing body may waive the nepotism rule for family members of a head administrator.

N. Applications to the commission for establishment of a state chartered charter school shall be made to the division at its Albuquerque office. Applications to a local school board for establishment of a locally chartered charter school shall be made to the superintendent of that district.

O. An application for a start-up school may be made by one or more teachers, parents, community members, by a public post-secondary educational institution or a nonprofit organization.

P. The chartering authority shall be responsible for reviewing all applications for charter schools. Prior to the submission of the applications, the division shall provide at least three (3) technical assistance workshops for prospective applicants on preparing a start-up application. The chartering authority shall not charge application fees.

Q. A review coordinator shall be used by the chartering authority to assist prospective applicants in the preparation of proposed charters. The assistant secretary for the division shall designate a review coordinator in the division for the commission. The superintendent shall appoint a review coordinator for the local school board, unless the superintendent of a school district performs this duty. Prior to the deadline for submission of applications established by the chartering authority, the review coordinator or superintendent and any prospective applicants shall confer in an attempt to identify:

(1) any concerns regarding noncompliance with requirements of the Charter Schools Act (Sections 22-8B-1 et seq., NMSA 1978), this rule or other applicable state or federal laws or regulations which would arise from the establishment or operation of the proposed charter school;

(2) any licensure, curriculum, or other educational concerns which would arise from the establishment or operation of the proposed charter school;

(3) any interests of the students, the school district or the community which would be adversely affected by the establishment or operation of the proposed charter school and describe the apparent adverse effects.

R. Prospective applicants are to direct any request for technical assistance and information through the authorizer's designated review coordinator. The review coordinator or superintendent shall ensure that the appropriate staff members respond to requests from prospective applicants for information on school operations, policies or practices which prospective applicants regard as necessary to enable them to present an approvable application. Prospective applicants may request information using the Inspection of Public Records Act (Chapter 14, Article 2 NMSA 1978). A review coordinator may require that requests for information not made pursuant to the Inspection of Public Records Act be in a format or directed to a specific person or office in the school district or department. Prospective applicants should not contact school district or department employees directly to obtain information.

S. Prior to the public meeting at which the decision is made, the chartering authority shall hold at least one (1) public hearing to obtain information and community input to assist it in its decision whether to grant a charter school application. At any such hearing, which shall be duly noticed and held pursuant to the Open Meetings Act (Chapter 10, Article 15 NMSA 1978) and the requirements contained in the Laws 2009 Chapter 12, members of the chartering authority may ask questions of the charter applicant and that applicant shall have an opportunity, subject to reasonable time limitations, to respond to any questions or concerns raised by any members of the chartering authority, and present to the chartering authority information that clarifies and verifies the information in the application that the applicant believes will assist the chartering authority in making its decision. Community input may include written or oral comments in favor of or in opposition to the application by the applicant, members of the local community and other interested individuals. Community input shall be provided within a time limit established by the chartering authority.

T. A charter applicant shall respond to requests for information that the chartering authority regards as necessary to verify and clarify issues identified in the charter application; each shall communicate in good faith in an attempt to verify and clarify issues identified in the charter application.

U. No earlier than three (3) days after the public hearing to obtain information and community input, the chartering authority shall rule on the application in a public meeting. The public meeting at which the decision is made shall be held by September 1. The charter applicant and the chartering authority may, however, jointly waive the September 1 deadline provided they do so in a signed written statement. If not ruled upon by September 1, or the stipulated deadline, the charter application will be automatically reviewed by the secretary pursuant to the applicable provisions of Section 22-8B-7 NMSA 1978 and 6.80.4.14 NMAC.

V. A chartering authority may approve, approve with conditions or deny an application. A chartering authority may deny an application where:

- (1) the application is incomplete or inadequate;
- (2) the application does not propose to offer an educational program consistent with the requirements and purposes of the Charter Schools Act (Chapter 22, Article 8B NMSA 1978);
- (3) the proposed head administrator or other administrative or fiscal persons were involved with another charter school whose charter was denied or revoked for fiscal mismanagement or the proposed head administrator or other administrative or fiscal member was discharged from a public school for fiscal mismanagement;
- (4) the public school capital outlay council has determined that the facilities do not meet the standards required in Section 22-8B-4.2 NMSA 1978;
- (5) for a proposed state-chartered charter school, it does not request the governing body to be designated as a board of finance, or the governing body does not qualify as a board of finance; or
- (6) the application is otherwise contrary to the best interests of the charter school's projected students, the local community or the school district in whose geographic boundaries the applicant seeks to operate.

W. If the chartering authority denies a charter school application or approves the application with conditions, it shall state its reasons for the denial or imposition of conditions in writing within fourteen (14) days of the meeting. The written decision must be based upon the vote that was taken at the public meeting and reflect the stated reasons for the vote of the chartering authority to deny a charter school application or approve the application with conditions. If the chartering authority grants a charter, it shall deliver the approved charter to the applicant. The time within which to file notice of appeal shall commence upon receipt of the written denial. The chartering authority shall maintain a copy of the charter for its files.

X. If the approved charter contains a waiver request for release from department rules or the Public School Code the applicant must follow the procedures on requesting waivers from the department. The department shall notify the authorizer and the charter school whether the request is granted or denied and, if denied, the reasons thereto.

Y. If the authorizer denies a charter school application or imposes conditions for approval that are unacceptable to the charter applicant, the applicant may appeal the decision to the secretary pursuant to Section 22-8B-7 NMSA 1978 and section 6.80.4.14 NMAC.

[6.80.4.12 NMAC - Rp, 6.80.4.9 NMAC, 6/29/07; A, 6/30/08; A, 6/30/09]

6.80.4.13 CHARTER SCHOOL RENEWAL PROCESS AND RENEWAL APPLICATIONS:

A. The governing body of a charter school seeking to renew its charter shall file its renewal application with a chartering authority no earlier than two hundred seventy (270) days prior to the date the charter expires. Commencing with any charters that are due to expire at any time after January 1, 2008, all applications for renewal shall be submitted no later than October 1 of the fiscal year prior to the expiration of the school's charter.

The chartering authority shall rule in a public meeting on the renewal application no later than January 1 of the fiscal year in which the charter expires.

B. The governing body may submit its charter renewal application to either the commission or to the local school board of the district in which the charter school is located, but may not submit the renewal application to both authorizers simultaneously.

C. The application shall contain:

(1) a report on the progress of the charter school in achieving the goals, objectives, student performance standards, state minimum educational standards and other terms of the initial approved charter application, including the accountability requirements set forth in the Assessment and Accountability Act (Section 22-2C-1 et seq. NMSA, 1978);

(2) a financial statement that discloses the costs of administration, instruction and other spending categories for the charter school that is understandable to the general public, that will allow comparison of costs to other schools or comparable organizations and that is in a format required by the department;

(3) any changes to the original charter the governing board is requesting and any amendment to the initial charter, which were previously approved;

(4) a certified petition in support of the charter school renewing its charter status signed by not less than sixty-five (65) percent of the employees in the charter school;

(5) a certified petition in support of the charter school renewing its charter status signed by at least seventy-five (75) percent of the households whose children are enrolled in the charter school as identified in the school's 120-day report of the fiscal year prior to the expiration of the charter;

(6) a description of the charter school facilities and assurances that the facilities are in compliance with the requirements of Section 22-8B-4.2 NMSA 1978; and

(7) a statement of the term of the renewal requested, if less than five (5) years; if a charter school renewal application does not include a statement of the term of the renewal, it will be assumed that renewal is sought for a term of five (5) years.

D. A chartering authority may refuse to renew a charter if it determines that:

(1) the charter school committed a material violation of any of the conditions, standards or procedures set forth in the charter;

(2) the charter school failed to meet or make substantial progress toward achievement of the department's minimum educational standards or student performance standards identified in the charter application;

(3) the charter school failed to meet generally accepted standards of fiscal management;

(4) the charter school violated any provision of law from which the charter school was not specifically exempted;

(5) the public school capital outlay council has determined that the facilities do not meet the standards required in Section 22-8B-4.2 NMSA 1978.

E. If the chartering authority refuses to approve a charter school renewal application or approves the renewal application with conditions, it shall state its reasons for the non-renewal or imposition of conditions in writing within fourteen (14) days of the meeting; provided that if the chartering authority grants renewal of a charter, it shall deliver the approved charter to the applicant and a copy to the chartering authority. The chartering authority shall keep a copy of the charter for its files.

F. If the approved charter contains a waiver request for release from department rules or the Public School Code, the department shall notify the authorizer and the charter school whether the request is granted or denied and, if denied, the reasons thereto.

G. If the authorizer refuses to approve a charter school renewal application or imposes conditions for renewal that are unacceptable to the charter applicant, the applicant may appeal the decision to the secretary pursuant to Sections 22-8B-7 NMSA 1978 and 6.80.4.14 NMAC.

H. The provisions of this section shall apply to conversion schools.
[6.80.4.13 NMAC - Rp, 6.80.4.8 NMAC, 6/29/07; A, 6/30/08 A, 6/30/09]

6.80.4.14 APPEALS TO THE SECRETARY:

A. Right of appeal. A charter applicant may appeal to the secretary from any chartering authority decision denying a charter school application, revoking or refusing to renew a previously approved charter, or imposing conditions for approval or renewal that are unacceptable to the applicant. Appeals from suspension of governing bodies and head administrators by the secretary shall be governed by the procedures set forth in 6.30.6 NMAC ("Suspension of Authority of a Local School Board, Superintendent or Principal").

B. Notice of appeal

PED Proposed Rule 6.80.4 NMAC, 08/15/13

(1) Filing and service of notice. A charter applicant or governing body of a charter school that wishes to appeal a decision of a chartering authority concerning the denial, nonrenewal or revocation of a charter, or the imposition of conditions for approval or renewal that are unacceptable to the charter school or charter school applicant shall file and serve a written notice of appeal within thirty (30) days after service of the chartering authority's decision. One (1) original plus four (4) copies of the notice of appeal together with any supporting documents shall be filed with the secretary at the department's main office in Santa Fe. No notice of appeal, including exhibits and other related documents, shall be filed using compact disks, floppy disks or email; instead, paper documents must be filed with the department.

(2) Grounds of appeal. The notice shall include a brief statement of the reasons why the appellant contends the chartering authority's decision was in error with reference to the standards set forth in Section 22-8B-7B that the authorizer acted arbitrarily or capriciously, rendered a decision not supported by substantial evidence, or did not act in accordance with law. The appellant shall limit the grounds of its appeal to the authorizer's written reasons for denial, nonrenewal, revocation or imposition of conditions.

(3) Required attachments. The appellant shall attach to each copy of the notice of appeal:

(a) a copy of the chartering authority's written decision, together with a copy of the authorizer's minutes or draft minutes of the meeting if available; and

(b) a copy of the charter or proposed charter in question.

C. Filing and service of other documents. An original document shall be filed with the secretary at the department's main office in Santa Fe. Each party shall simultaneously serve a copy of all documents filed with the secretary including any attachments upon the other party at that party's address of record on appeal. A party may file documents other than a notice of appeal and required documents referenced at Paragraph (5) of Subsection D of 6.80.4.14 NMAC below, by email to the secretary provided that the email includes any attachments, as well as the sender's name and mailing address. Filings with the secretary shall reflect by certification of the sender that a copy of all documents being submitted is simultaneously being served on the other party, the method of service, and the address where filed. Filing or service by mail is not complete until the documents are received.

D. Pre-hearing procedures

(1) Within ten (10) days after receipt of the notice of appeal, the secretary shall inform the parties by letter of the date, time and location for the appeal hearing.

(2) Except for brief inquiries about scheduling, logistics, procedure or similar questions that do not address the merits of the case, neither party shall communicate with or encourage others to communicate with any employee of the department about a pending appeal unless the other party is simultaneously served with a copy of any written communication or has an opportunity to participate in any conversation by meeting or conference call. Nor shall any employee of the department initiate such prohibited communications. The secretary must disqualify himself or herself from hearing an appeal if the secretary determines, after learning of a prohibited communication, that the secretary is unable to render an unbiased decision. Appellants will be provided a point of contact in the letter referenced in Paragraph (1) of Subsection D of 6.80.4.14 NMAC.

(3) The deadlines in 6.80.4.14 NMAC may be extended by the secretary for good cause. Good cause may include, but shall not be limited to, an agreement between the parties or a well-reasoned request from either party based upon hardship, a scheduling conflict or an event beyond the control of the requester.

(4) All submissions to the secretary on appeal shall focus on the factual and legal correctness of the chartering authority's decision in light of the grounds upon which a chartering authority may deny an application set forth in Section 22-8B-6K or the grounds for non-renewal or revocation as set forth in Subsection F of Section 22-8-12, NMSA 1978, and the standards for affirmance or reversal that the chartering authority's decision was arbitrary, capricious, not supported by substantial evidence or otherwise not in accordance with the law.

(5) Within ten (10) days after filing the notice of appeal, the appellant shall file one (1) original and four (4) copies with the secretary and serve upon the chartering authority one (1) copy of:

(a) the appellant's arguments for reversal of the chartering authority's decision, clearly labeled accordingly;

(b) the chartering authority's written decision that the appellant is appealing;

(c) the charter or proposed charter in question, of which only two (2) copies need to be filed;

and

(d) any other materials related to the issues raised by the appellant which the appellant wishes to have considered in support of its appeal.

(6) Within ten (10) days after receiving the appellant's submissions, the chartering authority shall file one (1) original and four (4) copies with the secretary and serve upon the appellant one (1) copy of:

(a) the chartering authority's response to the appellant's arguments; and

(b) any other materials the chartering authority wishes to have considered in support of its decision.

(7) If requested by the secretary, the division and other department staff as appropriate shall review each party's submissions and prepare a report for the secretary which:

(a) analyzes and outlines the parties' contentions on appeal with reference to the standards of Subsection K of Section 22-8B-6 and Subsections B and E of Section 22-8B-7 NMSA 1978;

(b) sets forth the staff's recommendations for the secretary to affirm or reverse the chartering authority's decision, with or without reasonable conditions or changes to the charter, and the reasons for those recommendations.

(8) At least five (5) days before the hearing date, the division shall deliver its report and recommendations to the secretary and shall simultaneously serve a copy upon each party.

(9) While an appeal is pending, the parties are strongly encouraged to continue discussions and negotiations in an effort to resolve the matter by agreement and reestablish productive working relations. An appellant may withdraw an appeal at any time before the secretary reaches a final decision. If an appeal is withdrawn, the secretary shall approve an appropriate order of dismissal. The secretary's decision and order may incorporate the terms of any agreement reached by the parties. An appeal which has been withdrawn may not be refiled.

E. Secretary hearing and decision

(1) Unless an extension for good cause has been granted pursuant to Paragraph (4) of Subsection D of 6.80.4.14 NMAC within sixty (60) days after receipt of the notice of appeal, the secretary, after a public hearing that may be held in Santa Fe or in the school district where the proposed charter school has applied for a charter, shall review the decision of the chartering authority and make written findings.

(2) Participants at the hearing before the secretary shall be the designated representatives of the appellant, the chartering authority and the division and other department staff as appropriate.

(3) The time allotment for a hearing shall be three (3) hours. Both parties shall be allowed up to thirty (30) minutes for their presentations. Department staff shall be allowed twenty (20) minutes for their presentation. The appellant may reserve part of its thirty (30) minutes for rebuttal if desired. The order of presentations will be department staff, appellant, chartering authority and rebuttal by the appellant if time has been reserved. The parties may present remarks from whomever they wish in their thirty (30) minutes but must include any comments they wish to make on the staff recommendations within their allotted time. Presentations, questions or discussions that exceed these limits may be ruled out of order by the secretary. The secretary may ask questions of the staff, the parties or the secretary's counsel at any time and may take up to one (1) hour after the staff's and the parties' presentations for further questions, discussion and its decision. Unless stricken during the hearing for good cause or withdrawn, the parties can assume that the department staff and the secretary have reviewed their written submissions, which shall be deemed evidentiary submissions subject to be given increased or diminished weight based upon the oral presentations.

(4) All presentations and discussion before the secretary shall focus on the factual and legal correctness of the chartering authority's decision in light of the standards and grounds set forth in Subsection K of Section 22-8B-6, Subsections B, C or E of Section 22-8B-7 and Subsection F of Section 22-8B-12.

(5) The secretary may reverse the decision of the chartering authority, with or without the imposition of reasonable conditions, if the secretary finds that the chartering authority:

- (a) acted arbitrarily or capriciously;
- (b) rendered a decision not supported by substantial evidence; or
- (c) did not act in accordance with the law.

(6) The secretary shall reverse a decision of the chartering authority denying an application, refusing to renew an application or revoking a charter if the secretary finds that the decision was based upon a determination by the public school capital outlay council that the facilities of the proposed or exiting charter school did not meet the standards required by Section 22-8B-4.2, NMSA 1978 and that the decision was:

- (a) arbitrary or capricious;
- (b) not supported by substantial evidence; or
- (c) otherwise not in accordance with the law.

(7) ~~[If the secretary reverses the chartering authority's decision, the secretary shall remand the decision to the chartering authority with written instructions for approval of the charter. The instructions shall include specific recommendations concerning approval of the charter and any changes the secretary directs to remedy any concerns identified under Paragraphs (5) or (6) of Subsection E of 6.80.4.14 NMAC above.]~~ The department shall promptly serve a formal notice of the secretary's decision upon the parties to the appeal.

(8) A person aggrieved by a final decision of the secretary may appeal the decision to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

~~[F. Implementation of secretary's decision~~

~~(1) The department shall promptly serve a formal notice of the secretary's decision upon the parties to the appeal.~~

~~(2) If the chartering authority's decision is reversed and remanded, the chartering authority, at a public hearing, shall approve the charter with any required changes within thirty (30) days following the receipt of the notice of the decision. If the chartering authority does not comply with the secretary's order, the secretary may take appropriate administrative or judicial action.]~~

~~[G.]~~ F. The provisions of this section shall apply to conversion schools.

[6.80.4.14 NMAC - Rp, 6.80.4.10 NMAC, 6/29/07; A, 6/30/08; A, x/xx/13]

6.80.4.15 REVIEW ON THE SECRETARY'S OWN MOTION:

A. The secretary, on the secretary's own motion, may review a chartering authority's decision to grant a charter.

B. Within ten (10) days after the secretary moves to review, the secretary shall issue an appropriate order establishing procedures for the chartering authority and the charter applicant to submit information and arguments for review by the secretary and division staff.

C. Within sixty (60) days after the secretary moves to review, the secretary, at a public hearing that may be held in Santa Fe or in the district in which the proposed charter school applied for a charter, shall review the decision of the chartering authority and determine whether the decision was arbitrary and capricious or whether the establishment or operation of the proposed charter school would violate any standard in Subsection C of Section 22-8B-7 NMSA 1978.

D. If the secretary determines that the charter would violate any standard in Subsection C of Section 22-8B-7 NMSA 1978, the secretary shall reverse the chartering authority's decision and remand the decision to the chartering authority with instructions to deny the charter application, suspend or revoke the charter.

E. The timelines in 6.80.4.15 NMAC may be extended by the secretary for good cause. Good cause may include but shall not be limited to an agreement between the parties, a reasonable request from either party or reasonable consideration of the secretary's previously established meeting schedule.

F. A person aggrieved by a final decision of the secretary may appeal the decision to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

G. The secretary shall promptly serve a copy of the decision on the parties to the proceeding.

~~[H. If the chartering authority's decision is reversed and remanded, the chartering authority, at a public hearing, shall deny or revoke the charter within thirty (30) days following the receipt of the secretary's decision. If the chartering authority does not comply with the secretary's order, the secretary may take appropriate administrative or judicial action.]~~

[6.80.4.15 NMAC - Rp, 6.80.4.11 NMAC, 6/29/07; A, 6/30/08; A, x/x/13]

6.80.4.16 QUALIFICATION FOR BOARD OF FINANCE DESIGNATION:

A. Within ninety (90) days of approval of its charter application, the governing body of a state-chartered charter school shall file a separate application with the commission seeking approval as a board of finance. This deadline may be extended by the commission for good cause shown.

B. The application shall include:

(1) an affidavit or affidavits, signed by the personnel who will be given the responsibility of keeping the financial records of the charter school, describing the training completed, professional licensure held and degrees earned by them;

(2) a statement signed by every member of the governing body that the governing body agrees to consult with the department on any matter not covered by the manual of accounting and budgeting before taking any action relating to funds held as a board of finance;

(3) a copy of a certificate of insurance that indicates that the person who will be entrusted with handling the funds of the charter school is adequately bonded;

(4) a signed affidavit from each governing body member declaring that the member is not a governing body member of any other charter school and that the member was not a governing body member of another charter school that was suspended or failed to receive or maintain their board of finance designation.

C. Within thirty (30) days of filing of the application to qualify as a board of finance, the commission shall issue a decision approving or denying the application. A copy of the decision will be provided to the governing body and the commission.

[6.80.4.16 NMAC - N, 6/29/07; A, 6/30/08]

6.80.4.17 NEW MEXICO SCHOOL FOR THE ARTS:

A. Upon approval by the commission, a state chartered charter school may operate as the New Mexico school for the arts (“the school”), which shall be a statewide residential charter school for grades 9 through 12 offering intensive preprofessional instruction in the performing and visual arts combined with a strong academic program that leads to a New Mexico diploma of excellence.

B. An application to the commission for approval of a charter shall contain assurances of compliance together with a plan for how the school will accomplish the following requirements contained in the New Mexico School for the Arts Act, being Laws 2008, Chapter 15, Sections 1 to 9:

(1) paying for all expenses associated with outreach activities and for room and board costs for students unable to pay all or part of the cost of room and board from a foundation or other private funding sources;

(2) working with a foundation or soliciting other private funding sources to obtain gifts, grants and donations to ensure that the school has adequate revenue to make the payments described in Paragraph (1) of Subsection B of 6.80.4.17 NMAC;

(3) not using money received from the state other than charter school stimulus funds to make the payments described in Paragraph (1) of Subsection B of 6.80.4.17 NMAC;

(4) admitting an equal number of students from each of the state’s congressional districts, to the greatest extent possible and without jeopardizing admissions standards;

(5) conducting its admissions process in a way that provides equal opportunity regardless of a student’s prior exposure to artistic training and to the student’s ability to pay for room and board; and

(6) conducting admissions criteria-free outreach activities throughout the state each year that acquaint potential students with the programs at the school, to include programs specifically for middle school students and workshops for teachers.

C. By July 1 after the first year the school has provided preprofessional instruction in the performing and visual arts and by July 1 every year thereafter, the school shall submit a report simultaneously to the division and the commission containing:

(1) non-personally identifiable demographic information about both applicants and students admitted to the school delineated by counties, congressional districts, socioeconomic status, gender and ethnicity; and

(2) the number of students who requested financial assistance for room and board, the total amount of financial assistance provided, and the amounts distributed delineated by the source of gifts, grants and donations received by the school.

D. During the planning year the school shall develop a sliding-fee scale subject to the following considerations:

(1) the purpose of the sliding-fee scale is to defray all or part of the costs of room and board for students whose parents or guardians are financially unable to pay these fees;

(2) in determining ability to pay, the school may use a variety of methods including but not limited to:

(a) self disclosures in a financial aid application developed by the school;

(b) poverty thresholds as maintained by the United States census bureau;

(c) poverty guidelines as maintained by the United States department of health and human services;

(d) whether the public school that the student applicant most recently came from was a recipient of funds under Title I, Part A of the Elementary and Secondary Education Act of 1965, as amended;

(e) whether the student applicant for enrollment was eligible to receive free or reduced price school meals at the public school previously attended; and

(f) the amount or percentage of assistance an enrolled student received for room and board the prior school year from the school;

(3) the school shall submit its sliding-fee scale to the commission for initial approval during the planning year and may request changes at subsequent commission meetings for good cause shown.

E. It shall be the responsibility of the school to obtain adequate funding from private sources to pay annual outreach costs and to defray all or part of room and board fees for students financially unable to pay. No state funds except for charter school stimulus funds received and used during the planning year may be used for

these purposes. Private funding sources available to the school shall include the use of a foundation or the soliciting and receipt of gifts, grants and donations. Failure to secure adequate funding for these purposes shall constitute grounds for denial or revocation of a charter.

F. Except for provisions of this rule related to admission of students by lottery, admission on a first-come first-serve basis, the ability to charge for residential fees, admissions criteria and location of the school anywhere in the state, all other provisions of this rule related to state-chartered charter schools shall apply to the school.

[6.80.4.17 NMAC - N, 6/29/07; 6.80.4.17 NMAC - N, 6/30/08]

6.80.4.18 DISTANCE LEARNING:

A. A charter school offering or seeking to offer distance learning courses to students shall comply with 6.30.8 NMAC.

B. Any charter school offering or seeking to offer distance learning courses in New Mexico pursuant to the Charter Schools Act [Chapter 22, Article 8B NMSA 1978] must be physically located in the state of New Mexico.

[6.80.4.18 NMAC - N, 6/30/08]

6.80.4.19 LOTTERY WHEN CHARTER SCHOOL CAP IS EXCEEDED:

A. For purposes of compliance with Section 22-8B-11, NMSA 1978, the first five year period shall be deemed to have ended in 2003 and the successive five-year periods begin in 2003.

B. If by October 1st the chartering authorities have authorized more charter schools than permitted by Section 22-8B-11, NMSA 1978, the department shall notify all chartering authorities with newly authorized charter schools that those charter schools may not be established for operations until a lottery is held.

C. Within 45 days after determining that the cap for charter schools has been exceeded, the department shall conduct a lottery at a publicly noticed meeting to determine the available slots for charter schools. The department shall randomly draw the names of charter schools from the available pool of all charter schools that were authorized by October 1st. The schools whose names were drawn shall be given the available charter school slots until the maximum numbers of slots have been selected. The charter schools that are selected shall be approved for operation in the first fiscal year after the lottery. The charter schools whose names were not drawn shall be approved for operation in the second fiscal year after the lottery.

D. A charter school that was approved for operation in the second fiscal year after participation in a lottery shall not be subject to a second lottery in the event that in the second fiscal year more charter schools are authorized than permitted by Section 22-8B-11, NMSA 1978.

E. Any charter school authorized after October 1st in a year in which the department conducts a lottery pursuant to this rule, shall be approved for operation no earlier than the second fiscal year after the school was authorized.

[6.80.4.19 NMAC - Rn, 6.80.4.17 NMAC, 6/30/08; 6.80.4.19 NMAC - N, 6/30/09]

6.80.4.20 GOVERNING BODY TRAINING:

A. All governing body members of charter schools shall attend five hours of training at least annually on topics that include department rules, policies and procedures, statutory powers and duties of governing boards, legal concepts pertaining to public schools, finance and budget and other relevant matters.

B. Governing body members who have been in office for one or more years shall attend five hours of annual training approved by the department that is sponsored by the New Mexico school boards association (NMSBA) or the New Mexico coalition for charter schools (NMCCS).

C. Newly selected governing body members who have been in office for less than a year, shall receive three of the required five hours from attending a training course developed by the department and sponsored by the NMSBA or the NMCCS. The additional two hours of annual training for new governing body members shall consist of sessions approved by the department that are sponsored by the NMSBA or by the NMCCS.

D. In order to be credited with attendance at training courses, each attendee shall complete written attendance forms provided by the department and kept on file with the charter schools. Prior to September 1 of each year, the NMSBA or the NMCCS shall provide each head administrator of a charter school with a list of training hours earned annually by each governing body member. The accountability report of the school district or charter school shall include the names of those governing body members who failed to attend annual mandatory training.

E. The governing body of a charter school shall develop a planned program of training consistent with this section that ensures that each member of the governing body participates and complies.

PED Proposed Rule 6.80.4 NMAC, 08/15/13

[6.80.4.20 NMAC - N, 6/30/09]

6.80.4.21 SEVERABILITY: Any part of this rule found by adjudication before a competent tribunal to be contrary to law shall be stricken without affect to the remainder.

[6.80.4.21 NMAC - Rn, 6.80.4.19 NMAC, 6/30/09]

HISTORY OF 6.80.4 NMAC:

Material in this part was derived from that previously filed with the Commission of Public Records - State Records Center and Archives:

6.80.4 NMAC, Charter School Application and Appeal Requirements, 12/3/01

History of Repealed Material:

6.80.4 NMAC, Charter School Application and Appeal Requirements - Repealed, 6/29/07

STATE OF NEW MEXICO
LEGISLATIVE EDUCATION STUDY COMMITTEE

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August 19, 2013

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force and Ian Kleats

RE: STAFF BRIEF: SUMMARY OF LEGAL CHALLENGE TO EDUCATIONAL RETIREMENT BOARD (ERB) REFORM LEGISLATION

INTRODUCTION

During the 2012 interim, the Legislative Education Study Committee (LESC) considered a pension reform proposal endorsed by the Educational Retirement Board (ERB) and approved by ERB stakeholders. The LESL unanimously endorsed the proposal on January 14, 2013, and a version of it was introduced in each chamber as House Bill (HB) 64 and Senate Bill (SB) 115.

SB 115 was amended during the committee process to include changes to the pension's cost-of-living adjustment (COLA) for current and future retirees, a feature not present in the proposal endorsed by the LESL. The amended bill passed both chambers and was signed into law as Laws 2013, Chapter 61.

On June 24, 2013, in the matter of *Bartlett, et al v. Cameron, et al*, Petitioners¹ filed an original proceeding in mandamus in the Supreme Court of New Mexico², seeking an order compelling Respondents to pay Petitioners the COLA benefits that were in law prior to the 2013 legislative session and the enactment of Laws 2013, Chapter 61, which effected a reduction in COLA for all

¹ Petitioners are four retired New Mexico employees with vested rights in their pension plan, all of whom are seniors and three of whom suffer from ill health.

² The New Mexico Supreme Court has original jurisdiction of all proceedings in mandamus against state officers, boards, and commissions.

existing members and current retirees beginning July 1, 2013. Respondents³ replied on July 17, 2013, declaring that they had no clear legal duty not to comply with the decrease in COLA benefits and, further, that mandamus was an inappropriate remedy for the Petitioners' alleged harm.

SUMMARY OF FACTS

- The arguments in this case depend mainly upon interpretation of Article XX, Section 22 of the New Mexico Constitution:

“Sec. 22. [Public employees and educational retirement systems trust funds; expenditures and encumbrances prohibited; administration; vesting of property rights.]

D. Upon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions.

E. Nothing in this section shall be construed to prohibit modifications to retirement plans that enhance or preserve the actuarial soundness of an affected trust fund or individual retirement plan. (As added November 3, 1998.)”

- Under the current statute, Petitioners' COLA benefits are determined as follows:

“The annuity shall be adjusted by applying an adjustment factor that results in an adjustment equal to one-half of the percentage increase of the consumer price index between the next preceding calendar year and the preceding calendar year, except that adjustment shall not exceed four percent, in absolute value. In the event that the percentage increase of the consumer price index is less than two percent, in absolute value, the adjustment factor shall be the same as the percentage increase of the consumer price index...”⁴

- Senate Bill 155 modified this formula so that:
 - COLA is immediately reduced for all retirees until the plan is 100 percent funded;
 - COLA reduction is based on the median retirement benefit (about \$18,000 for FY 12) of all retirees, including those with disabilities;
 - retirees with benefits at or below the median *and* 25 or more years of service will have a 10 percent COLA reduction, resulting in an average COLA of 1.8 percent; and
 - all other retirees will have a 20 percent COLA reduction, resulting in an average COLA of 1.6 percent.

³ Respondents are the Board of Trustees and the Executive Director of the New Mexico Educational Retirement Board.

⁴ § 22-11-31(B) NMSA 1978

- On August 17, 2012, stakeholders to the ERB presented a proposed plan change to the board that would not affect current retirees' COLA, which the board adopted the following month, which was likewise endorsed by the interim Investments and Pensions Oversight Committee and the Legislative Education Study Committee.
- After SB 115 passed the Senate Education Committee and its companion bill, HB 64, passed the House, the Senate Finance Committee amended the bill to make the COLA formula dependent upon the funded ratio of the ERB fund, after which the bill passed both houses and was signed by the Governor.

LEGAL ARGUMENTS

According to Petitioners:

- This mandamus proceeding presents urgent questions regarding the interpretation of the New Mexico Constitution, Article XX, Section 22, which states, in part, that a member of a state retirement plan acquires a “vested property right with due process protections.” (NM Const. Art. XX § 22(D)).
- According to the court, details of vested property rights are to be determined by statutes in effect at the time of maturity.⁵
- Petitioners are retired New Mexico employees with vested property rights in the educational retirement plan, and the statutes that were in effect at the time of maturation of petitioners' benefits included an annual COLA adjustment.
- Senate Bill 115 would reduce the COLA for all members *and* existing retirees as of the beginning of Fiscal Year 2014, leading to a reduction in the COLA benefit to all current retirees over the age of 65, including Petitioners, in violation of Article XX, Section 22 of the Constitution of New Mexico.
- Intervention in the instant case represents an appropriate exercise of the court's original jurisdiction because:
 - the issue present a fundamental question of great public concern;
 - the facts are undisputed;
 - the legal issues would eventually have come before the Supreme Court; and
 - Petitioners require an early resolution to the dispute.
- Emergency action is needed to prevent Respondents from violating Petitioners' rights as of the new fiscal year.
- While COLA reductions take effect immediately, the full impact of compounding loss will come in 15-25 years, when retirees are older, more fragile, and possibly infirm.
- Constitutional protections require due process and the payment of just compensation for the taking of Petitioners' vested property rights.

⁵ *Pierce v. State of New Mexico*, 121 N.M. 212, 910 P.2d 288 (1995)

- COLA rights are constitutionally protected, vested property rights, as has been held in a number of analogous cases⁶, and thus must be afforded due process and just compensation.
- Respondents argue that Article XX, Section 22(E) allows modification to retirement plans so long as the modifications enhance or preserve the actuarial soundness of an affected individual retirement plan (see Respondents’ arguments, *infra*), however, the legislative history of paragraph (E) shows that these potential modifications were to be applied only to unvested benefits.
- Due process protections would require that the Legislature provide employees and retirees with “notice and opportunity to respond.”⁷
- While stakeholders presented ERB with proposed changes to the retirement plan, which they adopted, in advance of the legislative session, the Legislature, and the legislative process, failed to adequately apprise Petitioners of their intention to reduce COLA benefits by approving SB 115, as amended, thus violating due process.
- Mandamus is an appropriate exercise of the Court’s authority to prohibit an unlawful or unconstitutional official action.⁸

According to Respondents:

- Petitioners fail to consider adequately paragraph (E) of Article XX, Section 22 of the New Mexico Constitution, which allows alteration to retirement plans that enhance or preserve their actuarial soundness.
- The Petition fails because:
 - mandamus is not appropriate where, as here, Respondents have no non-discretionary duty to act. Rather, the Petition is a request for a declaratory judgment that the COLA change violates Article XX, Section 22;
 - Petitioners ask the Court to substitute its judgment for the Legislature’s in the formulation of public policy; and
 - the COLA change was made for the purpose of enhancing and protecting the actuarial soundness of the ERB Fund; balancing Petitioners’ property rights against the Fund’s actuarial soundness weighs in favor of the change’s constitutionality.
- Mandamus is inappropriate because:
 - Mandamus is only applied to enforce a clear legal right against someone having a clear legal duty to act, and Article XX, Section 22(D) does not mandate any duty for ERB.
 - The New Mexico Supreme Court previously has held that not even statements of legislators are considered competent evidence in the determination of legislative

⁶ See, e.g.: *Calabro v. City of Omaha*, 247 Neb.955, 531 N.W. 541 (1995) (holding Omaha’s elimination of a cost-of-living supplemental plan was unconstitutional). See also: *Williams v. Rohm and Haas Pension Plan*, 497 F.3d 710 (7th Cir. 2007), *cert. denied* March 17, 2008 (US Supreme Court letting stand the 7th Circuit’s decision holding that COLAs for retirees whose pensions were governed by the *Employee Retirement Income Act of 1974* were an accrued benefit.

⁷ *Pierce*

⁸ *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995).

- intent, thus much of Petitioners’ argument regarding the intended purpose of Article XX, Sections 22(D) and (E) is unpersuasive.
- Mandamus cannot lie where an allegedly clear duty can be determined only after a close examination of two constitutional provisions.
 - While Petitioners desire an early resolution via mandamus, they have had several months, since at least the signing of SB 115, to seek an appropriate remedy, and cannot manufacture urgency by waiting until just before the effective date of the statute to file their petition.
 - Mandamus typically is only appropriate when there is no other clear, speedy, and adequate remedy available in the ordinary course of the law, such as money damages.⁹
- The Legislature is the proper body to make these public policy decisions, not the Court, because policy decisions regarding how best to protect the Fund for its members is best made by the Legislature, and the Court defers to its judgment in such matters.¹⁰
 - The COLA change was an appropriate and constitutional change to the Fund made to enhance and protect its actuarial soundness:
 - Petitioners’ reading of Article XX, Section 22 largely ignores the implications of paragraph (E), arguing that:
 - permitting the taking of property rights without compensation would defeat the entirety of the section; and
 - legislative history of Section 22(E) shows that it was not intended to permit the lowering of benefits.
 - While Petitioners argue that Section 22(D) prohibits modification or COLA benefits, the interplay between both paragraph (D) and (E) actually guarantees vested members due process, which requires a balancing of members’ rights against any action taken to preserve or enhance the Fund.
 - As with any due process claim, the Court must apply the appropriate level of scrutiny to the statute purporting to affect petitioners’ property rights, which in this case is rational basis review, which presumes constitutionality.¹¹
 - In New Mexico, the rational basis test requires:
 - a factual foundation in the record to support the basis of the challenged law; or
 - a firm legal rationale to support the basis of the law.
 - There is both factual support and a firm legal basis for the change to the COLA benefit at issue:

⁹ *El Dorado at Santa Fe, Inc. v. Board of County Commissioners*, 89 N.M.313, 551 P.2d 1360 (1976)

¹⁰ See, e.g.: *State ex rel. Hudgins v. Public Employees Retirement Board*, 58 N.M. 543. 273 P.2d, 743 (1954) (holding that determining the rate of employee contributions to the retirement plan was appropriately within legislative discretion).

¹¹ The three levels of Constitutional scrutiny which may be applied to any alleged due process violation are strict scrutiny, intermediate scrutiny and the rational basis review. The latter is applicable when the challenged action does not affect a fundamental right, create a suspect class, nor impinge upon an important individual interest.

- Reduced COLA means decreased outflows from the Fund, which over time helps achieve the goal of improving the funded ratio.
 - A higher funded ratio protects the fund against economic downturns and may mitigate the need for other, more drastic changes in the future.
 - The Petitioners do not demonstrate any failure to satisfy the rational basis framework arising from the change in COLA benefits.
- The change to the COLA benefit does not violate Petitioners' procedural due process rights:
- Relying on *Pierce*, Petitioners allege that the Legislature was required to provide Fund members with adequate notice and opportunity to respond to the changes enacted by SB 115, as amended.
 - The *Pierce* Court found that publicity in local newspapers and the fact that the legislative committee meetings are open to the public satisfied any due process claims in that case.
 - The particular language from *Pierce* upon which Petitioners rely is dicta; that is, it is neither central to, nor necessary for, the Court's holding, and thus is not precedential.
 - Any other reading would allow for an improper judicial intrusion into legislative powers and process, as the Legislature may be required to halt its normal committee process when considering any provision or amendment that might affect pension benefits, forcing a de facto process more appropriate to administrative rulemaking.
 - Other courts have found that general statutory changes do not require individual notice and opportunity to be heard.¹²
- The COLA change does not constitute a compensable taking of a property right:¹³
- A reasonable reduction of in the rate of increase from a COLA will not be a taking if it:
 - ✓ is reasonably related to a proper purpose; and
 - ✓ does not unreasonably deprive Petitioners of all, or substantially all, of the beneficial use of their property.¹⁴
 - The impact of the change is shared by other retirees, as well as active members through their higher contributions to the Fund and additional conditions imposed upon new members.

¹² See, e.g.: *Atkins v. Parker*, 472 U.S. 115 (1985) (altering eligibility requirements for food stamps did not violate due process or require notice and opportunity to be heard). See also: *McKierny v. Public Employees' Retirement Association*, 976 P.2d, 348 (Colo. Ct. App. 1998), *cert. denied* (failure to provide notice of legislative changes to retirement benefits did not violate due process).

¹³ To determine if a law is a regulatory taking, the Court must consider the economic impact on Petitioners, the extent to which the change interfered with Petitioners' investment-backed expectations and the character of the Legislature's action.

¹⁴ *New Mexicans for Free Enterprise v. City of Santa Fe*, 138 N.M 785, 126 P.2d 1149.

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Cort Honored by Legislature

LAS CRUCES – 2013 New Mexico Teacher of the Year Pamela Cort, who teaches French at Las Cruces High School, was honored by the New Mexico State Legislature July 10, 2013 in Ruidoso.

During a meeting of the Legislative Education Study Committee (LESC) in Ruidoso, Cort was presented with framed proclamations from the New Mexico State House of Representatives and State Senate as recognition of her selection as the state teacher of the year. She also was the LCPS 2013 teacher of the year.

The certificates were presented to Cort by State Senator John M. Sapien, D-Bernalillo and Sandoval, who is chairman of the LESC and the Senate Education Committee; and State Representative Mimi Stewart, D-Bernalillo, a member of the LESC and chair of the House Education Committee.

“I spoke for a short time at the (LESC) meeting, giving a summary of my experiences to date as the New Mexico teacher of the year,” said Cort. “I also asked for increased communication between the educational policy makers and teachers,” said Cort.

“I was so pleased to be able to attend the LESC meeting, thanks to an invitation from LESC Director Frances Ramirez-Maestas. I gained a greater understanding of the educational policy process. When policy makers listen to teachers and teachers involve themselves in educational policy, we create policy that is student-centered and effective. I thank the senators and representatives for allowing my voice to be heard,” said Cort. She was accompanying to the LESC meeting by LCPS Deputy Superintendent Dr. Steven Sanchez.



2013 New Mexico State Teacher of the Year Pamela Cort of Las Cruces High School, center, with New Mexico State Senator John M. Sapien, D-Bernalillo and Sandoval, who is chairman of the LESC and the Senate Education Committee; and State Representative Mimi Stewart, D-Bernalillo, a member of the LESC and chair of the House Education Committee. Photo courtesy of Pam Cort.



Hanna Skandera
Secretary

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NEWS RELEASE

For Immediate Release: July 23, 2013

New Mexico Awarded Additional \$12 Million in Race to the Top Funds

Additional dollars mean NM to receive over \$37 million for early childhood education

SANTA FE – On Tuesday, Governor Susana Martinez announced the U.S. Department of Education will award New Mexico an additional \$12.5 million as part of the federal Race to the Top program. This award will be added to the \$25 million award announced in December for a total of more than \$37 million to go towards educating the state's youngest children. Recognizing New Mexico's efforts to reform education for children, the early learning portion of the Race to the Top award is given to only 14 states nationwide.

"These new dollars are incredibly helpful to our continued efforts to help New Mexico's youngest students," said Governor Susana Martinez. "These funds will be targeted in areas where they can produce the best results for our children by making sure they are better prepared for success in school. We want every child in our state reading on grade level by the 3rd grade, and this award will help us to increase our focus on literacy in the early years."

New Mexico's Race to the Top application was a collaborative effort by the Public Education Department (PED), the Children, Youth and Families Department (CYFD), and the Department of Health.

"These are the results we can expect when we develop plans that put our students first," said PED Secretary Hanna Skandera. "New Mexico's student achievement results clearly show we need a renewed focus on our elementary students and when our efforts are recognized nationally, we know we're headed in the right direction."

Funds from New Mexico's Race to the Top challenge go to help students both before and after Kindergarten. These programs will focus on preparing students for elementary school by ensuring systems are in place to track student progress and provide support prior to elementary school.

The grant is being used for the following projects: focusing on early childhood investment zones; expanding professional development opportunities; developing a cross agency early childhood data system; developing a universal Kindergarten assessment tool and process, along with enhancing and expanding the current Tiered Quality Rating and Improvement System.

“The Race to the Top funding has allowed our agency the opportunity to hit the ground running in working with local communities to develop early childhood systems,” said CYFD Cabinet Secretary Yolanda Deines. “The new funding will go a long way in continuing our efforts to help high risk communities implement early childhood care programs which will benefit many children throughout our state.”

Implementation of the programs outlined in the Race to the Top application has already begun, but opportunities for students are expected to dramatically increase in August. Detailed descriptions of programs can be found in the 2011 Race to the Top application posted online: <http://ped.state.nm.us/rttt/index.html>.