

New Mexico Virtual Academy Governing Council statement, April 9, 2014

The NMVA Governing Council respectfully disagrees with the Attorney General's opinion that the NMVA's contract with k12 violates the Charter Schools Act which prohibits a charter schools from contracting with a for-profit company for the "management" of the school. A close reading of the contract reveals that k12 provides educational products and services, but does not "manage" or by any stretch "operate" the school. According to the contract, the school's governing body controls oversight and management by employing the school's head administrator who in turn hires the instructional team, special education director, the school's New Mexico licensed school business manager, and all of the school's New Mexico licensed teachers.

NMVA agrees that the term "management" is undefined in the Charter Schools Act. However, the Attorney General, by limiting its analysis of the term "management" to a common dictionary ignores the numerous references to the term and concept of management used throughout the rest of the Public School Code of which the Charter Schools Act is a part of. It is clear from other references to "management" in the Public School Code that management refers to a complete takeover of operations and an absolute relinquishment of the authority of the underlying board. A simple reading of the NMVA-k12 contract reveals the parties' relationship is far from the concept of management as used within the context of public education statutes in New Mexico. Importantly, the Charter Schools Act does not prohibit contracting with third parties (whether for-profit or not) for educational services the school needs to perform in order to carry out its contract with its authorizer. The Attorney General does not address how the NMVA contract is distinguishable from an ordinary service/products agreement as contemplated within the permissible parameters of the law.

K12 provides services that are described in NMVA's charter, it does not provide for management of the school. Importantly, the Attorney General's office has not observed, inquired or investigated how the contract is being implemented, which would provide substantial factual support demonstrating that this is a service contract and not a management contract.

Moreover, there are numerous provisions of the contract that weigh substantially against the concept that this agreement is a "management" agreement, for example:

- The k12 must abide by all School policies and the Council has ultimate authority to develop, maintain, and adopt policies by which the school operates.
- The Council controls the budget and makes final decisions on the annual budget submitted to the New Mexico Public Education Department, which has been approved every year of the School's existence. The Council hires its own New Mexico business manager that advises the Council regarding all financial matters.
- The Council hires the head administrator of the School, who hires the School's employees. Moreover, the head administrator's has typical responsibilities of a chief operating officer consistent with the definition of a "head administrator" by Public Education Department rule, which is indicative of her substantial control over operations and management of the school.



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- The School may object to K12 employees who are not performing services according to the contractual obligations, an indicator of how the School controls the operations and not visa versa. The contract also clearly provides that k12 shall have no members on the governing body, the body that ultimately can sever the contract for services with k12.
- There are numerous other provisions indicating the Council controls the School's management as well as the performance of k12 under the terms of the contract.

The School was very careful to ensure that its contract complied with state law and had extensive legal assistance in drafting the agreement. NMVA respectfully disagrees with the opinion and stands on advice of counsel that the contract is not a "management" contract as the term is used in the Charter Schools Act and is, therefore, legal and enforceable.

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MEMORANDUM

Date: October 31, 2013
To: Mr. Paul J. Aguilar, Deputy Secretary of the New Mexico Public Education Department
Mr. Tony Gerlicz, Director – Options for Parents
From: Patricia Matthews
Re: k¹² Virtual Schools LLC Contract with NMVA

The New Mexico Attorney General has been asked by Senator Linda Lopez to determine whether the contract between k¹² Virtual Schools LLC (“k¹²”) and the New Mexico Virtual School (“Contract”) violates Section 22-8B-4(R) of the Charter Schools Act (“Act”). You have asked me to review the Contract in the context of this question and to provide an opinion about any potential violations and/or areas in the agreement that may need to be revisited to ensure compliance with the law.

I. What does “the management” of a charter school mean?

Because “management” is not defined, either in the Charter Schools Act or elsewhere in the Public School Code; rules of statutory interpretation require that the word be given its ordinary meaning. *Trinosky v. Johnstone*, 2011-NMAC-045, 149 N.M. 605, 252 P.3d 829. “Management” is defined as “1. the act, manner, or practice of managing, supervision, or control. 2. The person or persons who control or direct a business or other enterprise.” “management.” *The American Heritage Dictionary of the English Language, Fifth Edition* ©2011 retrieved April 13, 2013 from <http://ahdictionary.com>. “Manage” is defined as, “to direct or control the use of. 2. to exert control over.” *Id.* The ordinary meaning of the word contemplates control and supervision of the business at hand.

Although the Public School Code does not define “management,” the concept of control of the business (school), essential to the plain meaning of the word, is consistent with the use of “the management” in other sections of the Public School Code. In NMSA 1978, §22-2C-7, which addresses steps for schools failing to meet AYP under NCLB, one of the final steps in the process provides for turning over “the management” of the school from the local district to the Public Education Department. NMSA 1978, §22-2C-7(K). The statute clearly requires the district to relinquish control of the school to the Department. Subsection M, of this same statute prohibits the Department or district from entering into a contract with a private entity for “the management” of a public school; again in the context of replacing the district’s authority. NMSA 1978, §22-2C-7(M).

NMSA 1978, §12-2A-2 (“Unless a word or phrase is defined in the statute ..., its meaning is determined by its context, the rules of grammar and common usage.”). If Subsection (R) is read to mean not only *the* management, but also any contract for services that are for managerial or administrative functions, this would contradict the first sentence of that subsection and the clear language of Subsection (D). Such a reading is inconsistent with New Mexico’s established rules of statutory construction.

In addition, when these two subsections are read together, they indicate an intent to give broad authority to the charter schools when contracting with third parties to accomplish the Charter Contract terms; an intent consistent with the stated purpose of the Act. Had the legislature intended to prohibit charters from contracting with third parties for particular aspects of the school’s operations it could have so limited, but it did not.² Instead, the *only* restriction on a school’s contracting authority is plainly stated in the second sentence of Subsection (R); no for-profit management of charter schools. In summary, “*the* management” cannot include contracts that are only for discrete management and administrative services rather than absolute management of the schools; to conclude so would render language in (D) and (R) at the very least superfluous. The legislature is presumed to have used no surplus words in statute and statutes must be construed so that no word and no part of a statute are rendered superfluous. NMSA 1978, §12-21A-18; *Vaughn v. State Taxation and Revenue Dept.* 98 N.M. 362, 648 P.2d 820 (1982)

Finally, when construing the legislation, the court presumes that the legislature was aware of existing statutory and common law and did not intend to enact a law inconsistent with the existing law. *Citation Bingo, Ltd. V. Otten*, 121 N.M. 205, 910 P.2d 281 (1995). Subsection (R) was added in 2006 after a major revision of the Act (SB600) providing for the PEC as an authorizer of state-authorized charter schools. The Fiscal Impact Report of SB600 reveals recognition that state authorized schools had greater autonomy and in that context the prohibition against contracting for “the management” of the school was added to the law. Thus, according to rules of construction, the new language in (R) must be presumed to mean something different than what is described in Subsection (D); an original provision of the 1999 Act.

II. Does the contract between k12 and NMVA constitute a contract for “the management” of the school as interpreted above?

The Contract describes an agreement for k¹² to provide various administrative and managerial *functions* – consistent with the plain meaning of 22-8B-4(D) and (R). It does not describe a contract for “the management” of the school, which is obvious by the numerous provisions of the Contract ensuring that the Council (or the Head Administrator) retains control over key aspects of the School’s business. From my interpretation of the Contract, the following provisions of the agreement reserve authority by the Council to control the School’s business which is inconsistent with a position that the Contract is for “the management” of the School:

² The fact the law does not include such prohibitions was made clear by this years proposed legislation. HB460.

Section §22-2-2 NMSA sets forth the Department's statutory authority. Such authority includes the power to, "supervise all schools ..., *including taking over the control and management* of a public school or district that has failed to meet the requirements of law." (emphasis added). It is clear that the intent of this law is for the Department to assume control over the school/district, removing entirely the district's decision making authority.¹ The language in the second sentence of Subsection 22-8B-4(R) reflects the same legislative intent as evident in these other provisions of the Public School Code; that "the management" means supervision and control of the school by a for profit entity, which is specifically prohibited.

To read prohibition broadly to include all contracts that may provide for management of specific administrative functions and for other administrative or education-related services, is inconsistent with the plain language of 22-8B-4(D) and the first sentence of (R). New Mexico rules of construction provide that the text of a statute is the primary, essential source of its meaning. NMSA 1978, §12-2A-19(1997). The guiding principal in statutory construction is for the court to give effect to statutory language that is clear and unambiguous. *United Rentals Northwest, Inc. v. Yearout Mechanical, Inc.*, 2010-NMSC-030, 148 N.M. 426, 37 P.3d 728. The primary indicator of the legislative intent is the plain language of the law. *Id.*

Looking at the plain language of §22-8B-4(R), it provides that a charter may contract:

With a school district or *other party* for the provision of *financial management*, food services, transportation, facilities, *education-related services or other services*.

(emphasis added) The first sentence of this subsection is unambiguous and provides no prohibition as to the nature of the "other party" with which a school can contract for *financial management* and *education-related services*. The only prohibition to a charter's contracting authority is stated in the second sentence of (R), which provides that:

[t]he governing body shall not contract with a *for-profit* entity for the management of the charter school." (emphasis added) NMSA 1978, §22-8B-4(R).

(emphasis added) The plain language of this sentence clearly limits the type of entity and the subject matter of the contract. Subsection (R) must also be read together with Subsection (D) of 22-8B-4. Subsection (D) authorizes charter schools to contract with *any other* third party to perform "*any service or activity* that the charter school is required to perform in order to carry out the educational program described in its charter contract..." NMSA 1978, §22-8B-4(D)(emphasis added). Thus, for the entirety of 22-8B-4 to be internally consistent, the last sentence of Subsection (R) (prohibiting for-profit management) when read together with the first sentence of (R) and Subsection (D) must mean something different than just contracting for services that may include management-related or administrative related services. NMSA 1978, §12-2A-18 ("A statute or rule is construed, if possible to: (2) give effect to its entire text.")

¹ See also, 3.30.6.8(D) NMAC which describes the process for suspending public school districts and specifically precludes contracting with a for profit company to manage the district in event of a takeover by the Department.

Recitals – Describes educational products, administrative services and technology services as the intended object of the Contract. These services are consistent with the requirements and representations in the Charter Contract as approved by Farmington. There is no recital evidencing that the control of the School is vested in k¹².

2.5.1: k¹² is subject to the terms and conditions of the Charter and policies of Council.

3.1: The School is responsible for monitoring k¹²'s performance and compliance with the Contract. School/Council must oversee all aspects of the School to ensure compliance with the Authorizer's performance measures and Charter Contract; it is significant that this authority is reserved and not delegated.

3.2: School retains ultimate authority for adoption of policies and for overseeing that k¹² implements them where applicable to services/products provided. k¹² offers advice and works with School to develop appropriate policies, but School ultimately adopts its own policies.

4.3.1: Council cannot be precluded from exercising the right to contract with other entities for Educational Products and Services, if necessary in the exercise of its fiduciary duties. The Council maintains authority to contract for other services that are not included in the Educational Products and Services as it deems necessary.

4.3.2: k¹² assists in developing the school's budget; k¹² proposes a budget with specific assumptions and the school agrees to consider k¹²'s proposal in *good faith* to agree. This provision indicates influence in a key function of management,³ but there is no requirement that the School must concede to the budget proposed. The School approves the budget, and the approval of a stipulated budget only affects issuance of credits and not whether k¹² will continue to offer the contractual obligations.

4.3.5: School enters into lease that complies with public facility requirements.

4.6: k¹² is accountable to the Council by means of regular reporting on all services provided.

7.1: k¹² has its own staff allocated to the services provided and clearly delineated from the staff employed by the school and under the control of the corporation.

7.2: Process by which School/Council can raise issues regarding k¹² staff performance is included.

7.3: School hires key employees. I think it is significant that the Contract clearly designates, as "employees of the school" the Head Administrator/Operations Coordinator, Business Manager, and Special Education Coordinator. These are key position over which the Council and School have the authority to hire, fire, pay, etc. Separation of employment obligations of each party is articulated.

7.3.1: Head Administrator/Operations Coordinator, hired by the Council; typical responsibilities of a CEO as described by charter school regulation. This is a key provision demonstrating that the Council and School Administration maintain "the management" of the School.

7.3.2: Business Manager is hired by the School, which provides for a clear separation of duties when it comes to financial oversight. Again, this is an important indication that the Council and Administration maintain control over the business of the School.

7.3.3: Special Education coordinator hired by School; oversees k¹² implementation of this aspect of the program.

³ Section 22-8B-4(R) specifically permits contracting with third parties for "financial management" services.

7.9: Teachers are hired by the School; employment decisions remain with the School.

9.1: Clarifies the separation of entities. Basic agency concepts seem applicable when evaluating the Contract for establishing who is managing and in control of the School. The statement that, “[n]either Party will be the agent of another except to the extent otherwise specifically provided in the Agreement [of which I could not identify any specific instance]...” is not consistent with the concept that the corporation (the purported agent) has management authority granted by the principal (the School). If this were a management contract, I would have inserted as a key provision a clear statement delegating authority to the contractor (agent) to act on behalf of the School (principal).

9.3: Very clear statement that k¹² shall have no members on the Council or any right to vote in matters under the authority of the Council and thereby cannot control how the Council exercises its rights under the Contract, including termination of the agreement.

Exhibits: The exhibits set forth those services contracted for that should coincide with the provisions of the Charter Contract. The services describe a substantial role for the corporation in providing education related services and services that would be considered administrative and management functions of the School. However, contracting for services is different than contracting for “the management” of the school and permitted by the Act.