

AN ACT

RELATING TO EDUCATION; ESTABLISHING THE PUBLIC EDUCATION COMMISSION AS AN INDEPENDENT ENTITY AND REMOVING ITS ADMINISTRATIVE ATTACHMENT TO THE PUBLIC EDUCATION DEPARTMENT; PROVIDING FOR PUBLIC EDUCATION COMMISSION RULEMAKING AUTHORITY AND STAFF; REMOVING FROM THE PUBLIC EDUCATION DEPARTMENT AND GRANTING TO THE PUBLIC EDUCATION COMMISSION THE AUTHORITY TO REVIEW DECISIONS TO GRANT, RENEW, DENY OR REVOKE A CHARTER; PROVIDING FOR A TRANSFER OF FUNDS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 9-24-9 NMSA 1978 (being Laws 2004, Chapter 27, Section 9) is amended to read:

"9-24-9. PUBLIC EDUCATION COMMISSION--CREATION--POWERS AND DUTIES--LEGISLATIVE OVERSIGHT.--

A. The "public education commission" is created pursuant to Article 12, Section 6 of the constitution of New Mexico. The commission shall advise the department on policy matters and shall perform other functions pursuant to the Charter Schools Act and as otherwise provided by law.

B. The commission shall consist of ten members elected from public education districts as provided in the decennial educational redistricting act. Members shall be entitled to receive per diem and mileage as provided in the Per Diem and Mileage Act but shall receive no other

perquisite, compensation or allowance.

C. The commission shall annually elect a chair, vice chair and secretary from among its membership. A majority of the members constitutes a quorum for the conduct of business. The commission shall keep a record of all proceedings of the commission.

D. The commission shall meet at the call of the chair at least quarterly or at the request of a majority of the members. Meetings of the commission shall be held in Santa Fe and at other sites within the state at the direction of the commission. Commission members shall not vote by proxy.

E. No member of the commission shall be appointed secretary or be employed by the department on either a full- or part-time basis.

F. Subject to appropriation by the legislature, the commission shall employ staff as needed to assist the commission in the performance of its duties. Staff shall be subject to the provisions of the Personnel Act.

G. The commission shall prepare an annual budget.

H. The commission may adopt policies and promulgate rules as necessary to implement the provisions of this act.

I. Each year, the commission shall report to the legislature and governor:

(1) the commission's policies and rules; and
(2) any actions the commission takes to
grant, renew or deny an application for a charter or to review
on appeal a granted or denied application pursuant to the
Charter Schools Act."

SECTION 2. Section 22-8B-6 NMSA 1978 (being Laws 1999,
Chapter 281, Section 6, as amended) is amended to read:

"22-8B-6. CHARTER SCHOOL REQUIREMENTS--APPLICATION
PROCESS--AUTHORIZATION--STATE BOARD OF FINANCE DESIGNATION
REQUIRED--PUBLIC HEARINGS--SUBCOMMITTEES--APPEALS.--

A. A local school board has the authority to
approve or deny an application for the establishment of or the
renewal of a charter for a charter school within the school
district in which it is located. The commission has the
authority to approve or deny an application for the
establishment of or the renewal of a charter for a state-
chartered charter school.

B. No later than the second Tuesday of January of
the year in which an application will be filed, the organizers
of a proposed charter school shall provide written
notification to the commission and the school district in
which the charter school is proposed to be located of their
intent to establish a charter school. Failure to notify may
result in an application not being accepted.

C. No fees shall be assessed by the chartering

authority for consideration of the application.

D. An application shall include the total number of grades the charter school proposes to provide, either immediately or phased. A charter school may decrease the number of grades it eventually offers, but it shall not increase the number of grades or the total number of students proposed to be served in each grade.

E. An application shall include a detailed description of the charter school's projected facility needs, including projected requests for capital outlay assistance that have been approved by the director of the public school facilities authority or the director's designee. The director shall respond to a written request for review from a charter applicant within forty-five days of the request.

F. An application may be made by one or more teachers, parents or community members or by a public post-secondary educational institution or nonprofit organization. Municipalities, counties, private post-secondary educational institutions and for-profit business entities are not eligible to apply for or receive a charter.

G. An initial application for a charter school shall not be made after June 30, 2007 if the proposed charter school's proposed enrollment for all grades or the proposed charter school's proposed enrollment for all grades in combination with any other charter school's enrollment for all

grades would equal or exceed ten percent of the total MEM of the school district in which the charter school will be geographically located and that school district has a total enrollment of not more than one thousand three hundred students.

H. A state-chartered charter school shall not be approved for operation unless the governing body of the charter school has qualified to be a board of finance.

I. The chartering authority shall hold at least one public hearing in the school district in which the charter school is proposed to be located to obtain information and community input to assist it in its decision whether to grant a charter school application. The chartering authority may designate a subcommittee of no fewer than three members to hold the public hearing, and, if so, the hearing shall be transcribed for later review by other members of the chartering authority. Any member of the chartering authority who was not present at the public hearing shall receive the transcript of the public hearing together with documents submitted for the public hearing before a decision to accept or deny an application is made. Community input may include written or oral comments in favor of or in opposition to the application from the applicant, the local community and, for state-chartered charter schools, the local school board and school district in whose geographical boundaries the charter

school is proposed to be located.

J. Provided that the application was submitted to the chartering authority by July 1, the chartering authority shall rule on the application for a charter school in a public hearing by the following September 1. The absence of a ruling pursuant to the provisions of this subsection shall constitute a final decision denying the charter application from which an applicant may appeal pursuant to the provisions of Subsection M of this section. The charter school applicant and the chartering authority may jointly waive the deadlines set forth in this section.

K. A chartering authority may approve, approve with conditions or deny an application. A chartering authority may deny an application if:

- (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;
- (3) the proposed head administrator or other administrative or fiscal staff was involved with another charter school whose charter was denied or revoked for fiscal mismanagement or the proposed head administrator or other administrative or fiscal staff was discharged from a public school for fiscal mismanagement;

(4) for a proposed state-chartered charter school, it does not request to have the governing body of the charter school designated as a board of finance or the governing body does not qualify as a board of finance; or

(5) 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 charter school applies to operate.

L. If the chartering authority denies a charter school application or approves the application with conditions, it shall state its reasons for the denial or conditions in writing within fourteen days of the hearing. If the chartering authority grants a charter, the approved charter shall be provided to the applicant together with any imposed conditions.

M. A denial of the charter application by a local school board may be appealed by the charter school applicant or governing body to the commission pursuant to the provisions of Section 22-8B-16 NMSA 1978. A denial of the charter application that is a final decision of the commission may be appealed by the charter school applicant or governing body to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

SECTION 3. Section 22-8B-7 NMSA 1978 (being Laws 1999, Chapter 281, Section 7, as amended) is amended to read:

"22-8B-7. COMMISSION REVIEW OF GRANTED OR RENEWED
CHARTERS--PROCEDURES--APPEAL.--

A. The commission, on its own motion, may review a local school board's decision to grant or renew a charter and determine whether the decision was arbitrary or capricious or whether the establishment or operation of the proposed charter school would:

- (1) violate any federal or state laws concerning civil rights;
- (2) violate any court order; or
- (3) threaten the health and safety of students within the school district.

B. If the commission determines that the charter would violate the provisions set forth in Subsection A of this section, the commission shall revoke the charter. The commission may extend the time lines established in this section for good cause. The decision of the commission shall be final.

C. A charter school applicant or governing body may appeal a final decision of the commission in accordance with this section to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

SECTION 4. Section 22-8B-16 NMSA 1978 (being Laws 2006, Chapter 94, Section 29) is amended to read:

"22-8B-16. PUBLIC EDUCATION COMMISSION--APPEAL OF LOCAL HB 392
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SCHOOL BOARD RULINGS AGAINST THE CHARTER SCHOOL APPLICANT OR GOVERNING BOARD.--

A. The commission, upon receipt of a notice of appeal from a charter school applicant or governing body, shall review a denial, nonrenewal, suspension or revocation of a charter by a local school board in accordance with the provisions of this section.

B. A charter school applicant or governing body may appeal a decision of the local school board to deny, not renew, suspend or revoke a charter by providing the commission with a notice of appeal within thirty days after the local school board's decision. The charter school applicant or governing body bringing the appeal shall limit the grounds of the appeal to the grounds upon which the local school board based its decision. The notice shall include a brief statement of the reasons that the charter school applicant or governing body contends that the denial, nonrenewal, suspension or revocation of the charter by the local school board was erroneous. Within sixty days after receipt of the notice of appeal, the commission shall review the decision of the local school board. If the commission finds that the local school board acted arbitrarily or capriciously, rendered a decision not supported by substantial evidence or did not act in accordance with law, the commission may grant to the charter school or charter school applicant a charter as a

state-chartered charter school. The decision of the commission shall be final.

C. A charter school applicant or governing body may appeal a final decision of the commission in accordance with this section to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978."

SECTION 5. FUNDS TRANSFER.--Three hundred seventy-five thousand dollars (\$375,000) of the program cost that is allowed to be withheld by the public education department for administrative support of charter schools pursuant to the Charter Schools Act is transferred from the department to the public education commission for fiscal year 2014. _____

LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS

Bill Number: HB 392a

51st Legislature, 1st Session, 2013

Tracking Number: .190766.3

Short Title: Public Education Commission as Independent

Sponsor(s): Representatives Mary Helen Garcia and Sheryl M. Williams Stapleton and Mimi Stewart, and Others

Analyst: Kevin Force

Date: March 8, 2013

AS AMENDED

The House Education Committee amendments:

- explicitly provide rulemaking authority to the Public Education Commission (PEC) in order to implement the provisions of HB 392; and
- transfers \$375,000 from the program cost allowance, withheld by the Public Education Department (PED) for administration of charter schools, from PED to PEC.

Amended Fiscal Impact:

HB 392a transfers, from PED to PEC, \$375,000 from the two percent set-aside allowed to be withheld by PED for administrative support of charter schools.

Original Bill Summary:

HB 392 proposes to amend sections of the *Public Education Department Act*, and the *Charter Schools Act* to establish the Public Education Commission (PEC) as a separate, independent entity from the Public Education Department (PED).

A section-by-section synopsis of HB 392 follows:

Section 1 amends that section of the *Public Education Department Act* to:

- remove the PEC's administrative attachment to PED;
- stipulate that the PEC shall meet at least quarterly, *or* at the request of a majority of the members; and
- adds new subsections to:
 - permit the PEC to employ staff, subject to the *Personnel Act*, as needed to assist the commission in the execution of its duties, subject to appropriation by the Legislature;
 - direct the PEC to prepare an annual budget; and
 - require the PEC to report annually to the Legislature and the governor:

- the commission's policies and rules;
- any actions that the PEC took to grant, renew, or deny an application for a charter school; and
- any actions the PEC took to review, on appeal, a granted or denied application for a charter school.

Sections 2 through 4 all amend the *Charter Schools Act*.

Section 2:

- grants authority to the PEC to approve or deny applications for the establishment or renewal of state-chartered charter schools;
- stipulates that no fees may be charged for the consideration of an application, either by the PEC or any other chartering authority;
- requires any member of a chartering authority to be furnished with the transcript, and other documents submitted for consideration, of a public hearing regarding charter school applications, before a decision is made on the disposition of the application;
- requires the chartering authority to rule, in a public hearing, on an application by September 1 so long as it was submitted by the preceding July 1;
- stipulates that the absence of a ruling on a charter school application shall constitute a final denial of the charter, which an applicant may appeal; and
- stipulates that a denial of an application by:
 - a local school board, acting as chartering authority, may be appealed to the PEC by either the applicant or the charter school governing body; and
 - a final decision of the PEC may be appealed to the district court by either the applicant or the governing body.

Section 3:

- permits the PEC, on its own motion, to review a local school board's decision to grant or renew a charter to determine:
 - if the decision was arbitrary and capricious; or
 - the establishment or operation of the charter would:
 - violate state or federal civil rights laws;
 - violate any court order; or
 - threaten the health and safety of students in the district;
- directs the commission to revoke the charter if it makes any of the above findings;
- notes that a decision by the commission under this section is final; and
- permits an applicant or governing body to appeal a final decision by the commission to the district court.

Section 4:

- requires the commission to review a local school board's decision to deny, not renew, suspend, or revoke a charter when they receive a notice of appeal from an applicant or governing body;

- allows an applicant or governing body to appeal such decisions by local school boards by providing the PEC with a notice of appeal:
 - within 30 days of the local school board's decision;
 - that limits the grounds for appeal to those grounds that were the basis of the school board's decision; and
 - that includes a brief statement of why the board's decision was wrong;
- requires the PEC to review the board's decision within 60 days of receipt of the notice of appeal;
- stipulates that the PEC may grant a charter to the applicant, as a state-chartered charter school, if the commission finds that the board's decision was:
 - arbitrary and capricious;
 - not supported by evidence; or
 - in violation of law; and
- stipulates that an applicant may appeal the decision of the PEC under this section to the district court.

Original Fiscal Impact:

HB 392 does not contain an appropriation.

Original Fiscal Issues:

According to the Fiscal Impact Report (FIR) by the Legislative Finance Committee (LFC):

- The PEC is administratively attached to PED.
- PED receives 2.0 percent of all state-chartered charter schools' state equalization guarantee (SEG) distributions to provide administrative oversight of state-chartered charter schools.
- Because the PEC is administratively attached to PED, the department is responsible for funding PEC meetings and member travel and per diem.
- HB 392 does not change the distribution of SEG set-aside funding, so PED would continue to receive 2.0 percent of all state-chartered charter schools SEG distributions.
- Thus, the PEC would remain unfunded until a pertinent statutory change is effected or the Legislature appropriates funds for the operation of the PEC.

Substantive Issues:

According to the FIR, HB 392:

- HB 392 establishes the PEC as a free standing commission able to seek funding from the Legislature.
- The bill eliminates the authority of the Secretary of Public Education to:
 - review charter applications not ruled on by a chartering authority; and
 - review appeals.

- The bill establishes the PEC as the body authorized to review an appeal from a decision made by a local school board to grant or deny a charter, but the grounds of appeal are limited to the grounds upon which the school board based its decision to deny, non-renew, suspend, or revoke the charter school.
- A charter school applicant or governing body may appeal a final decision of the commission only to district court.
- The PEC would be required to prepare an annual budget and report to the governor annually on the commission's policies and rules and any actions the commission takes to grant, renew, or deny an application for a charter, or any actions taken on appeal.
- A reversal by the Secretary may be problematic as there may be the appearance of a conflict:
 - The PEC does not have its own staff and must rely on the staff of the Charter Schools Division (CSD) of PED.
 - CSD staff advise the PEC whether to accept or reject an application or renewal based on their interpretation of the relevant statutory provisions and examination of pertinent data.
 - If the PEC rules against a charter applicant, under current law, that applicant may appeal to the Secretary, who in some cases overrules the PEC and the recommendations of the Secretary's own staff.
- Concerns have been raised with regard to locally chartered charter schools appealing to the Secretary that, when overruling a local district and forcing a district to charter a charter school, the Secretary commits local capital resources without district consideration.
- Potential remedies to these issues include:
 - disconnecting the PEC from PED, and allowing locally chartered charter schools to appeal to the PEC and state-chartered charter schools to appeal to district court, as HB 392 does;
 - eliminating an appeal process altogether;
 - granting rulemaking authority to the PEC;
 - creating a different state-level chartering authority; and
 - allowing only local school board to authorize charter schools.
- Some of the issues raised with regard to the appeals process may be resolved when charter performance contracts are required for all charter schools, as SB 446, enacted in the 2011 legislative session, does.¹
- Charter contracts prescribe the criteria, processes, and procedures that the chartering authority will use for its ongoing oversight of operations and financial and academic performance of the charter school.
- The contract will also clarify the criteria, procedures, and timelines that the parties have agreed upon to address charter revocation and deficiencies found in the required annual status report.
- Charter school contracts do not, however, address issues relating to the initial denial and subsequent appeals process.

¹ Laws 2011, Chapter 14

LFC staff offer the following alternatives to the HB 392:

- leaving the PEC administratively attached to PED, but eliminating the Secretary's ability to overrule decisions of a local chartering authority or the PEC;
- leaving the PEC administratively attached to PED, but allowing charter applicants seeking local authorization and locally chartered charter schools to appeal to the PEC, while allowing state-chartered charter schools to appeal to district court; and
- eliminating the ability of a charter school to appeal a decision entirely in light of the increased oversight that will be provided under charter school performance contracts.

Background:

- In December 2010, the PEC denied the request of three locally chartered charter schools to be authorized as state-chartered charter schools on the recommendation of the CSD.
- CSD staff noted failure to meet educational standards as one of the reasons for denying the application, including:
 - proficiency levels at the school that were "well below the proficiency levels of the district"; and
 - the school's failure to keep pace with progress made in other district schools to close "the gap between the students' performance and the annual measurable objectives articulated for the grade levels served."
- Upon appeal, the Secretary of PED reversed the PEC decision in each case, concluding that the PEC's decision to deny the schools' renewal was "arbitrary or capricious, not supported by substantial evidence, and made contrary to law."
- In such circumstances, reversal by the Secretary remands the cases to the PEC for approval, after which the PEC has 30 days to act on the reversal.
- Most recently, the Secretary reversed a decision by the PEC to deny the application of the New Mexico Connections Charter Academy, to operate as a state-chartered virtual charter school.
- During the November 2012 meeting of the Legislative Education Study Committee (LESC), the committee considered several policy options as potential legislation, including creating the PEC as an independent body, with authority to:
 - carry out all statutory duties and responsibilities;
 - conduct rulemaking in the matter of charter schools;
 - have operational control of dedicated staff sufficient to support the work of the PEC responsibilities; and
 - have a line-item budget sufficient to accommodate the PEC's duties and responsibilities.
- LESG staff were directed to draft legislation for this, among others, proposed policy option. HB 392 is the result of this directive.

Committee Referrals:

HVEC/HEC

Related Bills:

CS/CS/HB 460 *School Management Contracts & Charter Bonds*

SB 333aa *School Leases & Interest Conflicts*

*CS/SB 338 *Define Virtual Charter School & Moratorium*

SB 476a *Public Education Commission as Independent (Identical)*



State of New Mexico

April 5, 2013

HOUSE EXECUTIVE MESSAGE NO. 38

The Honorable W. Ken Martinez and
Members of the House of Representatives
State Capitol Building
Santa Fe, NM 87501

Honorable Speaker Martinez and Members of the House:

Pursuant to the Constitution of the State of New Mexico, Article IV, Section 22, I hereby VETO and return HOUSE BILL 392, as amended, which was enacted by the Fifty-First Legislature, First Session, 2013.

House Bill 392 creates an independent public education commission (PEC) and gives the commission the authority to approve, deny, or renew charter school applications and hear and rule on appeals. This new agency will also oversee charter schools.

I am concerned that by creating an independent PEC and removing the secretary of the Public Education Department from the chartering process, the bill seriously undermines the existing separation of powers and the internal system of checks and balances.

Section 9-24-8 NMSA 1978 provides that "It is the secretary's duty to manage all operations of the department and to administer and enforce the laws with which he or the department is charged." By removing the secretary from these processes, this bill prohibits the secretary from executing the secretary's managerial and administrative duties pursuant to this statute and undermines the appropriate relationship between charter schools and the public education department.

Finally, I am concerned that this bill permits the PEC to abdicate the duty to approve or deny a charter school application by permitting a type of "pocket veto" of applications where the absence of a ruling constitutes a final decision denying the charter application.

For these reasons, I cannot sign House Bill 392 into law.

Respectfully yours,

A handwritten signature in black ink that reads "Susana Martinez". The signature is written in a cursive style with a large, stylized initial "S".

Susana Martinez
Governor

RECEIVED FROM THE OFFICE OF THE GOVERNOR