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August 24, 2011

MEMORANDUM

TO: Legislative Education Study Committee

FR: Kevin Force, J.D.

RE: OPTIONS FOR PARENTS: VIRTUAL SCHOOLING

During the July interim meeting of the Legislative Education Study Committee (LESC) the Secretary-designate for Public Education, Ms. Hannah Skandera provided the committee with a handout outlining the reorganization plan for the Public Education Department (PED). The plan included a Parent Option Division, within the purview of which is included both charter schools and virtual schooling.

According to PED staff, Innovative Digital Education and Learning-New Mexico (IDEAL-NM) will operate under the virtual schooling arm of the new division, and five full-time employees will comprise the staff, including:

- the Executive Director;
- the Academic Services Director;
- the Student Services Coordinator;
- an Administrative Support Specialist; and
- an IT Tech Specialist.

This staff report will outline:

- the focus, according to PED staff, for “virtual schooling;”
- a summary of IDEAL-NM, including its:

- appropriation history;
 - FY 12 appropriation; and
 - course development, training, and program costs;
- PED distance learning rules; and
 - virtual charter school issues.

FOCUS OF PARENT OPTIONS: VIRTUAL SCHOOLING

According to PED staff, among the initiatives to be addressed by the Virtual Schooling Bureau are:

- the lack of programming for students in the K-6 grade levels (currently, IDEAL has programs only for students in grades 7-12); and
- individual districts' distance learning academies, including assessments of:
 - what programs exist; and
 - “whether it is feasible to consolidate, corroborate, and co-use these programs using IDEAL-NM as the ‘hub’ of all options.”

PED staff also indicated that, with the Higher Education Department (HED), PED will be looking at new Learning Management Systems (LMS) that could facilitate further cooperation between the two departments.

IDEAL-NM

In 2007, LESC-endorsed legislation was enacted to establish the New Mexico Cyber Academy (NMCA) to provide distance learning courses for students in grades 6 through 12. That same year, the Legislature appropriated funds to implement IDEAL-NM. Both of these initiatives represent steps toward providing New Mexicans with access to online learning resources. Cooperatively administered by PED and HED, the initiatives aim to:

- provide eLearning services to public schools, higher education institutions, and state agencies;
- reduce geographic and other barriers to educational opportunity statewide; and
- increase the computer literacy skills online learners need to participate in a global economy.

Appropriation History

Since 2007, the Legislature has appropriated a total of approximately \$11.1 million for IDEAL-NM to fund the implementation and operation of the program, including:

- \$7.4 million to HED, including:
 - \$6.4 million to implement the IDEAL-NM infrastructure, including licensing fees for LMS; and

- 1.0 million in the department's budget. However, appropriation reductions in FY 09, FY 10, and FY 11 have reduced HED's portion of IDEAL-NM's budget to almost \$690,000; and
- approximately \$4.2 million to PED, including approximately \$685,000 for the department's FY 11 operational costs.

FY 12 Appropriation

The Legislature appropriated \$500,000 in General Fund dollars to PED for the New Mexico Cyber Academy. PED has provided the LESC with a proposed FY 12 Budget (see Attachment 1, *IDEAL-NM Budget for FY 12*), and the department reports that it is proposing to expend the funds to pay for:

- the salaries and benefits of between five and seven full-time staff, including:
 - the Executive Director;
 - up to two IT Technology Support Specialists;
 - an Academic and Student Services Director;
 - a Student Services Coordinator; and
 - a Business Operations Specialist;
- the costs of fiscal agent services (through an inter-governmental agreement with Regional Education Cooperative #10) for course development, eTeacher training, and other contracts related to virtual school operations; and
- supplies.

PED reports that until this proposed budget is approved internally, the staff positions for the NMCA will be funded with \$50,000 in Government Services Funds pursuant to the federal *American Recovery and Reinvestment Act of 2009* (ARRA).

HED staff note that the agency's expenditure of funds related to IDEAL-NM centers on paying the \$1.4 million contract with Blackboard Inc. for a LMS, which is able to catalog, register, deliver, and track learners and learning, accessible via a web-portal. HED reports that the contract will be paid for in three portions:

- \$500,000 in federal ARRA Government Services Funds;
- \$450,000 from HED's agency budget; and
- higher education institutions that used Blackboard through the state contract. HED notes that it will establish a fee schedule for the use of Blackboard by these institutions.

In addition, HED notes that the state agencies that used Blackboard through the state contract will continue to be able to do so in FY 12, albeit without receiving technical assistance.

As well as the General Fund dollars noted above, for FY 12 a portion of the costs of IDEAL-NM and the NMCA will be paid using federal ARRA funds. In a June 13, 2011 report, the staff of the Legislative Finance Committee reported that the Governor allocated the following from the federal discretionary ARRA Government Service Fund provided to New Mexico by the US Department of Education:

- \$50,000 to PED to provide funding to support the “Cyber Academy/Virtual School Program;” and
- \$500,000 to HED for data hosting and software maintenance for New Mexico K-12 and higher education online learning system.

Course Development, Training, and Program Costs

The IDEAL-NM website lists 67 courses developed for the cyber academy. According to the department, the average cost to develop a cyber academy course is \$7,200. IDEAL-NM cites two major advantages to the statewide cyber academy developing, maintaining, and housing its own courses:

- The cyber academy can use the same course in multiple semesters and school years without having to pay the fees charged by online course vendors. (According to PED, once a course is developed, it would require only periodic revision to ensure that the course content is updated and other online features remain accurate and functional, at a cost of about \$1,200 every three years.)
- The academy can maintain greater control over course content, allowing the academy to ensure that the online course are aligned with the states academic performance standards as required by state law.

To enable access to courses through the eLearning portal, school districts and charter schools enter into a memorandum of understanding (MOU) with PED. Among its provisions the MOU permits school districts to use and modify course material for their own use, but prohibits the sale of any course from the IDEAL-NM catalogue.

The main cost to school districts or charter schools participating in the cyber academy is the eTeacher’s salary, should the district or charter not use its own teachers. School districts and charters do not pay eTeachers for courses they teach via the cyber academy. Rather, IDEAL-NM contracts with the eTeachers, who are paid a per-student fee for each semester-long course that they teach. School districts must pay \$200 per “semester seat” (equivalent to one student enrolled in one semester-long course) to cover eTeacher and other support costs.

The *Statewide Cyber Academy Act* requires that all online courses be taught by highly qualified teachers, in accordance with the *No Child Left Behind Act of 2011* (NCLB). According to IDEAL-NM, as of September 2010, 175 teachers had been trained and 79 of those have taught in the cyber academy. To teach in the cyber academy, a prospective eTeacher must:

- be highly qualified to teach in New Mexico with a teaching endorsement that corresponds to the content area being taught; and
- have experience as an online learner.

According to PED, eTeachers must complete IDEAL-NM/Regional Educational Technology Assistance (RETA) eTeacher Training, or equivalent training aligned with the online teaching standards developed by the North American Council for Online Learning (NACOL) to prepare eTeachers in both the pedagogical aspects of quality online teaching as well as the technical aspects particular to teaching within the Blackboard LMS.

Following their initial training, eTeachers must:

- engage in a minimum of 16 hours each year of professional development activities specific to online teaching; and
- submit an annual professional development report summarizing their professional development activities and identifying how knowledge and experience gained in those activities has been applied to their own teaching.

PED DISTANCE LEARNING RULES

In 2008, in accordance with the recently passed *Statewide Cyber Academy Act*, PED promulgated distance learning rules¹, prompting a request for an Attorney General's opinion regarding whether the New Mexico open enrollment statute applied to distance education or virtual schools, and if so, whether the new rules contravened that statute. The Attorney General (AG) responded with an advisory letter dated February 19, 2008, opining that the plain language of the statute suggested that the Legislature was contemplating the physical presence of children in school buildings and not the issue of distance learning. The AG further noted that the Legislature had had the opportunity to amend the open enrollment statute when they passed the *Statewide Cyber Academy Act*, but did not. Finally, the AG stated that the regulations specifically require a student to have a "primary enrolling district," of particular concern regarding the state equalization guarantee. Accordingly, the new regulations did not contravene the open enrollment statute (see Attachment 2, *Attorney General Advisory Letter 2-19-08*).

VIRTUAL CHARTER SCHOOL ISSUES

In 2009, three organizations applied to the Public Education Commission (PEC) to become state-chartered charter schools.² All three schools were denied charters in accordance with the Assistant Secretary of Education recommendations. The Assistant Secretary found that:

- for Sandia Academy and Senator Dennis Chavez Academy:
 - the mission statements, educational plan and government/management plan were inadequate; and
 - the relationship between the schools and their vendor, K-12 Curriculum, was of concern because the rationale for the school and the services offered by the vendor were so inextricably interwoven that it was uncertain whether the school could continue to exist were another vendor selected during the procurement process; and
- for the Kaplan Academy of New Mexico:
 - the mission statement, educational plan, government/management plan, and financial plan were inadequate; and
 - the relationship between the school and their vendor, Kaplan Virtual Education, was of concern because the rationale for the school and the services offered by the vendor were so inextricably interwoven that it was uncertain whether the school could continue to exist were another vendor selected during the procurement process.

¹ See 6.30.8 NMAC, *Distance Learning*.

² Sandia Academy, Senator Dennis Chavez Academy, and the Kaplan Academy of New Mexico.

The Sandia and Chavez academies both appealed the denial to the Secretary of Public Education, who upheld the decision of the PEC. Both academies took their appeal to district court. The judge for the Sandia Academy case affirmed the Secretary's decision. The Chavez Academy case is still pending.

Although he emphasized that the reasons for the recommendation to deny the applicants charters were the inadequacies found in their applications, the Assistant Secretary was also concerned with the legality of virtual charter schools in general, and sought a legal opinion on the matter from the Charter School Division's counsel (see Attachment 3, *PED Charter Schools Division Counsel Opinion in re: Virtual Charter Schools, 9/4/09*). Specifically, the Assistant Secretary asked:

- whether the PEC could authorize virtual charter schools; and
- whether the secretary of public education could waive the requirements of the public school code to allow for the creation of virtual charter schools.

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

In examining the powers of the secretary of public education, counsel noted that the power to waive requirements was limited by statute. He further noted that there was language in PED rule that the charter school applicants seemed to rely upon for the secretary's authority to create virtual schools.³ However, any reading of rule to allow full-time virtual schools would conflict with statutory requirements that schools be physical buildings designed to educate students in a particular place. When there is conflict between statutes and regulations, the requirements of statutory law prevail. As any waivers granted by the secretary must be based upon law, and no provision of law appeared to afford the secretary that authority, counsel opined that the secretary did not have the power to waive requirements to allow the operation of a virtual charter school in contravention to the plain meaning of statute.

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

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

The issue of virtual charter schools arose again in August 2011 when the Farmington Municipal School Board heard a petition by the New Mexico Virtual Academy⁴ to allow the academy to offer their virtual school as a different alternative to students, especially those with special needs or circumstances. While the primary demographic of the academy was to be local students who do not fit well into a traditional public school model, the academy was to be open to students statewide. Although the academy and its supporters maintained that the virtual school would allow these students to learn at an appropriate pace and in a fitting setting, others voiced concerns over issues such as enrollment demographics, financial burdens, and instructional methods (see Attachment 4, *Virtual School Is a Cloudy Vision*). It should be noted that the vendor for New Mexico Virtual Academy, K-12 Curriculum, is the same vendor utilized by the failed charter applicants, Sandia Academy, and Senator Dennis Chavez Academy, mentioned above.

⁴ See New Mexico Virtual Academy, at: <http://www.k12.com/nmva/lp/myths-about-online-learning>.

ATTACHMENT 1

IDEAL-NM BUDGET		
2012 Budget		
Total Budget		\$500,000
200 Category - Salaries & Benefits		
Executive Director		\$83,649
IT Technology Support Specialist II		\$42,000
IT Technology Support Specialist II		\$42,000
Academic & Student Services Director		\$69,388
Student Services Coordinator (Bus. Ops A)		\$41,000
Bus. Ops Specialist O		\$44,512
Staff Benefits (30%)		\$96,765
Subtotal 200		\$419,314
300 Category - Contractual Srvs		
Fiscal Agent IGA <i>Course Development, eTeacher Training, and other contracts related to virtual school operations</i>		\$68,300
Subtotal 300		\$68,300
400 Category - Other		
Supplies		\$12,386
Subtotal 400		\$12,386
TOTAL FY11		\$500,000
<i>Difference from Appropriation</i>		\$0

Proposed



Attorney General of New Mexico

GARY K. KING
Attorney General

ALBERT J. LAMA
Chief Deputy Attorney General

February 19, 2008

The Honorable Al Park
New Mexico State Representative
1840 Dakota NE
Albuquerque, NM 87110

Re: Opinion Request - Open Enrollment and Distance Education

Dear Representative Park:

You have requested our opinion whether the open enrollment statute, NMSA 1978, Section 22-1-4 (2003), applies to distance education/virtual schools. If the open enrollment statute does apply to all groups of students across the state, you ask whether the Public Education Department's regulations at NMAC 6.30.8.1 to 6.30.8.11 are inconsistent with Section 22-1-4. Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us at this time, we conclude that Section 22-1-4 does not address distance education/virtual schools and, accordingly, do not find any regulatory inconsistency with that statute.

Section 22-1-4, by its language, does not address distance education/virtual schools. The statute makes available a free public school education for school-age persons and provides for withdrawal, transfer and re-enrollment mechanisms. As evidenced by its language, Section 22-1-4 contemplates the physical presence of students in schools. Section 22-1-4 provides, in part:

- E. A local school board shall adopt and promulgate rules governing enrollment and re-enrollment at public schools other than charter schools within the school district. These rules shall include:
 - (1) definition of the school district boundary and the boundaries of attendance areas for each public school;
 - (2) for each public school, definition of the boundaries of areas outside the school district boundary or within the school district but outside the public school's attendance area and within a distance of the public school that would not be

served by a school bus route as determined pursuant to Section 22-16-4 NMSA 1978 if enrolled, which areas shall be designated as “walk zones”;

(3) priorities for enrollment of students as follows:

- (a) first, students residing within the school district and within the attendance area of a public school;
- (b) second, students enrolled in a school ranked as a school that needs improvement or a school subject to corrective action;
- (c) third, students who previously attended the public school; and
- (d) fourth, all other applicants;

(4) establishment of maximum allowable class size if smaller than that permitted by law;

(Emphasis added.) The plain language of Section 22-1-4 focuses upon “residence,” “attendance area,” “allowable class size,” and other descriptive terms that suggest that, when passing this legislation, the legislature had in mind the physical presence of children in school buildings. The statute does not address distance education/virtual schools. Accordingly, no issue is raised whether the Public Education Department’s regulations at NMAC 6.30.8.1 through 6.30.8.11, which establish requirements for distance education, contravene Section 22-1-4.

The Department has defined distance learning as the process of providing educational instruction when the teacher and student are not in the same location. 6.30.8.7(D) NMAC (1/16/97). “Distance learning provides an opportunity for public schools within the state to expand their course offerings ... [but] shall not be used as a substitute for all direct, face-to-face student and teacher interactions....” 6.30.8.8(A) NMAC (1/16/07). Those regulations, which are entitled to deference,¹ support the view that Section 22-1-4 has no application to the special policy considerations attendant distance education/virtual schools. State equalization guarantee funding is an example of such special policy consideration. Addressing this consideration, 6.30.8.9(B) NMAC (1/16/07) provides:

Students must have a primary enrolling district. Should a student enroll in a distance learning course offered by a district or charter school other than the student’s enrolling district, the student can only be counted once as a qualified student for state equalization guarantee funding purposes as defined in Section

¹ See Morningstar Water User’s Assn v. N.M. Public Utility Comm’n, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995) (court confers on administrative agency heightened degree of deference to legal questions that “implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory determination”) (quoting Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co., 746 P.2d 896, 903 (Alaska 1987)).

22-8-2 of the New Mexico Statutes Annotated for determining membership in the student's enrolling district. Any reimbursement for cross-district enrollment for distance learning courses shall be arranged between the districts or charter school through signed written documents.

Additionally, the legislature could have amended Section 22-1-4 to cover distance education/virtual schools when it enacted the Statewide Cyber Academy Act.² The statewide cyber academy provides distance learning courses for grades six through twelve and professional development for teachers, instructional support providers and school administrators. The Act reflects the special treatment the legislature provides for distance education, particularly when addressing funding issues. For example, Section 6 (A) of that Act provides:

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

Your request to us was for a formal Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,



ANDREA R. BUZZARD
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

² 2007 N.M. Laws, Ch. 292 and Ch. 293, codified at NMSA 1978, §§ 22-15E-1 to -8 (2007). The Act creates in the public education department the "statewide cyber academy" program. The statewide cyber academy is a collaborative program among the public education department, the higher education department, telecommunications networks and representatives of other state agencies engaged in providing distance education.

M E M O R A N D U M

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

FROM: Rudolph P. Arnold, Counsel

RE: Virtual Schools

DATE: September 4, 2009

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

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

ANALYSIS:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The department may:

(1) adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary;

(2) enter into contracts to carry out its duties;

(3) apply to the district court for an injunction, writ of mandamus or other appropriate relief to enforce the provisions of the Public School Code [22-1-1 NMSA 1978] or rules promulgated pursuant to the Public School Code; and

(4) **waive provisions of the Public School Code as authorized by law**. (Emphasis added).

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

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

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

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

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

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

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

³ Sandia Academy and Senator Dennis Chavez Academy



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Virtual school is a cloudy vision

By Jenny Kane The Daily Times
Posted: 08/11/2011 09:46:33 PM MDT

FARMINGTON — The Farmington Municipal school board of education saw too many "grey areas" surrounding a proposed virtual charter school during the school's public hearing Thursday afternoon.

"It's not for every kid," said Mary Gifford, senior vice president of K12 Inc., the company which would oversee curricula for the academy.

Though aimed primarily toward local students who do not fit into the traditional public school system, it would cater statewide to students with special needs; students who have fallen behind in school; students who want to move at a faster pace; or students looking to finish their high school education without having to physically return., said academy board member Larry Palmer.

Students in grades kindergarten through 12th grade could enroll. Local students would be the primary demographic, though students could enroll statewide.

000200000637000004C1 631. Parents lined up on both sides of the room to offer support and opposition. "Please give us the option so they don't slip through the cracks," said Susan Glendy, a parent who already uses the K12 Inc. programs to teach her children at home.

excellent alternative but she currently has to pay for the program because she is using it independently from a school. If offered through a charter school the education would be publicly funded, as is the case with any charter school.

Various other parents spoke of their children's learning disabilities, some disabilities recognized in the school system and others not. They said a virtual school would allow their children to learn at an appropriate pace and in a fitting setting.

Aside from one-half of the audience's enthusiasm, other parents and members of the district board felt there were too many questions left unanswered.

Questions of financial burden, enrollment demographic, and instructional method were tossed around but not quite answered by academy board members leaving the local

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district administrators uneasy.

The academy board members focused on the richness of the curricula and the diversity of students for which it would appeal.

They focused on the supplies sent to every student enrolled, the tangibility of virtual assistance, and also the presence of a local facility where area students could visit for face-to-face help.

Jenny Kane: jkane@daily-times.com 00040000000A00000002 0A AF4 0 00050000000A00000002 0A AF4 0 00060000002D00000001 0; C 3 0AÇÇ; FFFFÄÄ 0Ç C0000 0~ 4 0~; Ç 000700000006500000001 0AA~ 13333 0~ 1 0~Ä 24 40, No Style 10 0Ä 00080000009700000001 40, Geneva 40, 4 0 3 0~

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August 24, 2011