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**AGENCY BILL ANALYSIS  
2019 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original        Amendment      
 Correction        Substitute   

Date 3/6/19  
 Bill No: CS/SB429

Sponsor: Sen. Mimi Stewart  
 Short    VIRTUAL CHARTER  
 Title:    SCHOOLS

Agency Name  
 and Code  
 Number:    924 PED  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY19	FY20		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY19</b>	<b>FY20</b>	<b>FY21</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: **HJR 7, SB 1, HB 5, SRJ 9, SB 331, HB 434, HB 171, SB554, SJR 18**  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: SB429SJCsub proposes several changes to the Public School Codes and create the Virtual Charter Schools Act which creates new conditions, in addition to those in the Charter School Act, 22-8B NMSA 1978, which it would be required to follow.

**Section 2** includes is the definitions section for the new Virtual Charter School Act. In this section, SB429SJCsub defines the following terms: management; necessarily small school district; statewide; and virtual charter school. The definition of management is lengthy and includes providing at least 40% of the educational programming at a virtual charter school (p. 2, line 25 – p. 3, line 1). Later in the section of definitions, virtual charter schools are defined as providing the delivery of more than 60% of the instruction to students through online distance learning technologies (p. 3, lines 13-17). The definition of management to include providing educational programming at the school has implications for the school’s initial application (p. 7) and contracting (p.9).

Additionally, there is one notable change from SB429 regarding the 7 subparts for the definition of management. After the 6<sup>th</sup> subpart before listing the 7<sup>th</sup>, includes the word “or”, which is a change from the word “and”. Once regarding this change is that management could be interpreted to no longer mean doing all 7 subcomponents listed, but rather can be interpreted to mean follow 1-6 OR 7, or any of the 7 individually and independent of the others.

**Section 3** describes contract terms for virtual charter schools shall be three school years, except for initial terms would include an additional year exclusively for planning (p. 3) and allows for approvals shorter than 3 years via mutual consent (p. 4, lines 1-3). This section also stipulates that all new and renewal virtual charter schools serving students from more than one district shall only be authorized at the state level by the Public Education Commission (PEC). This section also allows local authorizers may only authorize charter schools for students who reside within the district, outlines PEC’s responsibility for monitoring and oversight, unless delegated to the PED’s CSD. This section of the bill also prohibits virtual charter schools from accessing public funding for transportation, capital outlay, capital improvement or buildings, pursuant to the Public School Codes. This section also required the PED to promulgate rule for this statute.

**Section 4** of the SB429SJCsub stipulates that new virtual charter schools can only serve grades 5 through 12, while those existing virtual charter schools can keep other grades but not enroll new students in K through 4<sup>th</sup> grades. This section also institutes new enrollment caps based on performance for virtual charters schools where no more than 200 students per year until the

school has met or exceeded its performance targets and no more than 1,000 students unless exceeding performance targets and students are passing and on time for graduation. This section also institutes new criteria prohibiting a virtual charter school from accepting students from necessarily small districts if the combined student enrollment for all charters in that district equals or exceeds 10% (p.6, lines 14-21). This section also creates new stipulations restricting the enrollment of specific students: new virtual charter schools may not serve students who need class C or D special education services, unless recommended and agreed to as an appropriate placement by the parents and medical and psychosocial specialists.

**Section 5** of SB429SJCsub outlines the application requirements for virtual charters schools, requiring additional sections in new and renewal applications, such as a detailed description of management and educational programs and a description of how student performance data will be maintained within FERPA rules.

**Section 6.** This section requires additional language for virtual charter school contracts in addition to what the Charter Schools Act requires, that must include the chartering authority's duties to the virtual charter school that includes detailed description of the criteria, processes and procedures the chartering authority will use for oversight and evaluation of governance, operational, financial and academic performance of virtual schools (p.8, lines 5-12).

**Section 7.** This section allows virtual charter schools some flexibility for selecting appropriate test sites and prohibits the waiving of statutory minimum instructional hours requirements. In addition, this section includes lengthy contractual requirements—especially related to management or provision of education services (Subpart C, p. 9)—for virtual charter schools that prohibits them from entering into sole sources contracts. This section allows chartering authorities the power to review any procurement or request for proposals (RFPs).

**Section 8.** This section requires chartering authorities to conduct at least two site visits annually for virtual charter schools and notification to the PED when virtual charter schools fail to meet annual performance targets (since there are impacts for funding and enrollment). This section includes stipulations for non-renewal when a virtual charter school has had its program cost withheld for two or more consecutive years because not meeting annual performance targets.

This section includes subpart D (p.11, lines 8-12) which states that a chartering authority decision is final and not appealable to the PED Secretary of Education, but allowing for appeals to be taken directly to the district court, which could pose a legal concern. See *Substantive Issues* Section.

**Section 9.** This section explicitly states that virtual schools are subject to the Public School Codes applicable to charter schools, except as provided by the Virtual Charter Schools Act the Public School Finance Act.

**Section 10.** Includes changes to the Public School Finance Act that relating to the program cost calculation of virtual charter schools. Additionally, Subpart B of this section requires the PED to withhold 10% of the program cost for virtual charter schools that do not meet or exceed annual performance targets.

## **FISCAL IMPLICATIONS**

According to Section 3 of SB429SJCsub, virtual charter schools shall not be eligible for funding

pursuant to the Public School Capital Outlay Act, the Public School Capital Improvements Act, the Public School Buildings Act or transportation funding pursuant to 22-16 NMSA 1978 (p.4, line 24 through p.5, line 3).

Section 10 of SB429SJCsub propose program cost calculation changes for virtual charter schools in the Public School Finance Act, 22-8 NMSA 19798. According to the bill on page 12 (lines 1-10), for fiscal year 2020 and subsequent fiscal years, the total program units for the purpose of computing the program cost of virtual charter schools shall be calculated by multiplying the staff cost multiplier by the following program costs units:

- (1) basic education
- (2) special education, if generated; and
- (3) national board for professional teaching standards certification only if the certified teacher is a resident of New Mexico and licensed by the department.

Additionally, on the notification by the chartering authority that a virtual charter school does not meet annual performance targets established in its performance framework, the PED shall withhold 10% of the school's program cost (p. 12, lines 13-16). It is the view that such reductions are not only disruptive the school's finance and operations, but would create challenging conditions for instructional programming, potentially harming children in the process. Such reductions, if uniformity and sufficiency of education are points at issue, are not warranted.

Furthermore, in order to provide timely guidance and information to the virtual charter school, the Department would need to increase and streamline communication across divisions, particularly with the Charter Schools Division, the School Budget and Financial Analysis Bureau, Accounting and Auditing Bureau, and the Fiscal Grants Management Bureau. The CSD would need to provide the School budget team with current program performance information in order for it to correctly generate accurate program cost information. Additionally, oversight and monitoring extends to auditing functions relating to the verification of teaching and experience (or teaching cost index) of certified school personnel.

## **SIGNIFICANT ISSUES**

**Definitions of management in relation to virtual charter schools and contracting.** As mentioned in the previous section, the definition of management is lengthy and includes providing at least 40% of the educational programming at a virtual charter school (p. 2, line 25 – p. 3, line 1). Later in the section of definitions, virtual charter schools are defined as providing the delivery of more than 60% of the instruction to students through online distance learning technologies (p. 3, lines 13-17). The definition of management to include providing educational programming at the school has implications for the school's initial application (p. 7) and contracting (p. 9) and can be confusing. It is not clear whether the intent of the statute is to:

- **Ensure virtual charter school applicants meet definitions:** Clarify that schools that do not intend to provide more than 60% of programming online or less than 40% off-site need not apply for virtual charter school status; or
- **Gain clarity around the virtual charter school's management and educational programming vendors and partners:** Require that potential virtual school operators clearly articulate—through the initial or renewal application process—its proposed

management and educational program providers.

**Potential concern over separation of powers.** According to Section 8 of SB429SJCSUB, when a chartering authority revokes or refuses to renew a virtual charter school's charter, that decision is deemed final, leaving as the sole legal recourse for the school is to appeal directly to district court. The language in the bill indicates that a chartering authority's final decision cannot be appealed to the PED Secretary of Education (p. 11, lines 8-12). This is concerning for the state-authorized virtual charter schools falling under the PEC as the chartering authority. Given that the PEC is administratively attached to the PED, such proposed language in SB429SJCSUB may raise separation of powers concerns under the New Mexico Constitution. The sponsor(s) and/or next reviewing committee may wish to review this provision to ensure it not in conflict with the state constitution.

**Fundamental right of parents.** While SB426SJCSUB may attempt to ensure that virtual charter schools are not unnecessarily generating substantial additional SEG funding, the provision in the bill could potentially be viewed as restrictive for eligible students requiring Class C and D special education and related ancillary services. This provision restricts parent choice and student access to virtual charter schools by creating what might be considered burdensome process requiring affirmative assent from various parties before such students can be enrolled (p. 6, line 22 through p. 7 line 5). While the intent of the provision may be to ensure additional care towards the needs of such children, it may constrain parent rights about what the best learning environment for their child, and raises legal concerns about free and appropriate education (FAPE) and least restrictive environments (LRE). The U.S. Supreme Court has recognized fundamental rights of parents (*Meyer v. Nebraska* and *Farrington v. Tokushige*).

## **PERFORMANCE IMPLICATIONS**

**Performance targets.** One major concern is that SB429SJCSUB does not define "performance targets" though meeting or exceeding these performance targets have major implications for the virtual school's funding and its ultimate size (enrollment cap). Virtual schools can serve up to 200 students, but not expand beyond that until it can demonstrate meeting or exceeding its annual performance targets (p.5, lines 23-25). Further, a virtual school not serve more than 1,000 students unless it **exceeds** its annual performance targets and further, that it students pass their courses, are on-track toward timely or early graduation and receive diplomas of excellence (p. 6, lines 1-8).

Yet, according to the Charter School Act, 22-8B NMSA 1978, all charter schools are required to meet the standards of the Charter Performance Framework and contracts, as entered into between the school and its chartering authority. This concern is also pointed out in SB1.

All state-authorized charter schools are subject to the Charter School Act, 22-8B NMSA 1978, its executed charter contract with its chartering authority, the PEC, and any additional policies approved by the PEC. State-authorized virtual charter schools must also meet the standards set by the PEC and its approved charter school performance framework, as outlined in 22-8B-9.1 NMSA 1978. Specifically, Section B states the following:

Annual performance targets shall be set by each chartering authority in consultation with its charter schools and shall be designed to help each charter school meet applicable federal, state and chartering authority expectations as set forth in the charter contracts to which the authority is a party.

SB429SJCSUB amends this concern by referencing the charter performance framework in Section 8, Subpart A (p. 10, lines 20-21).

**Financial sanctions for not meeting performance targets.** SB429SJCSUB requires the PED to withhold 10% of the virtual charter school's program cost for subsequent school years until performance targets are met (p. 12, lines 13-16). This type of measure appears to may negatively impact students being served by the school. There does not appear to be a body of evidence that suggests cutting financial support increases performance outcomes. Taken together, the school's finances would not be able to provide a uniform and sufficient education, to which all students must be afforded.

**Meaningful data availability for informed decision-making.** The disparate requirement limiting the length of initial and renewal term for virtual charter schools put the chartering authority at a disadvantage when it comes to making informed and principled decision-making on such high stakes decisions, which can be costly to all parties. It has been the experience of the PEC that fewer than five years in a term is highly undesirable. In its recent decision-making, when shortened contracts have been recommended, the PEC has granted longer terms on the basis that additional data is needed. Even in cases where terms have gone four years, the PEC has determined the abbreviated timeline to be problematic, given that schools needs time to demonstrated sustained improvement on objective measures. Schools seeking renewal must submit application in the fall prior to the end of the current contract year ending on June 30<sup>th</sup>. Thus, even for five-year terms, there would only be four years of data; meaning that for three-year terms, there would only be two consecutive years of data on which to make decisions. This puts virtual charter schools on shortened window to demonstrate results – which is not necessarily undesirable, however, we should expect the same sense of urgency for dramatic growth and movement from *all* public schools since no children have the luxury of waiting. This difference in length of contract terms creates lack of uniformity across charter schools and undermines effective charter authorizing by limiting judicious decision-making substantiated by robust data.

Additionally, the Charter Schools Act, 22-8B NMSA 1978, as written, does not appear to support the practice of voting on and approving initial or renewal charters to schools at less than the stipulated terms of 5 years, except for initial charters at 6 years. Instead of shortening the contract term, the chartering authority would be better served in exercising its power to all necessary conditions to address legitimate concerns.

## **ADMINISTRATIVE IMPLICATIONS**

As written, the Virtual Charter School Act proposed in SB429SJCSUB requires chartering authorities to have significantly more oversight over virtual charter schools. In this bill alone, the chartering authority would be required to:

- double minimum annual onsite monitoring and technical assistance visits (p. 10, line 17)
- more tightly monitor the school to ensure its students receive statutorily required instructional hour minimums (p.10, lines 6-9)
- increase oversight functions to include additional on-site monitoring of charter board governance, including operations and procurement functions, including potential review of the virtual charter school's contracts
- increase the level of detail in academic monitoring of performance targets by grade level

(FERPA concerns included)

- overhaul its internal accountability processes to coordinate intensive interventions across divisions when the school is struggling with academic, organizational, and financial performance

As noted above in bullet two, the requirement for ensuring students served as virtual charter schools meet the required number of instructional hours during a school year would require additional and more discrete methods for tracking time, both in-person and online distance learning given the stipulations in this bill for percentage requirements related to instructional programming and delivery.

**Assessment and accountability.** Issues around course/content assessment, course pacing, and course completion is a concern for all schools, especially those designed to incorporate online distance learning technology. It is incumbent on the school to ensure all students make adequate process to be sufficiently prepared to sit for corresponding assessments in accordance to federal and state laws for public school students. Virtual charter schools are not substitutes for homeschooling—therefore, parents must understand their responsibility for ensuring students are assessed on all required state exams. Additionally, all schools must adhere to required test security compliance requirements. Given that the performance of virtual charter schools will be evaluated by grade level, it is incumbent for schools to ensure high test participation rates.

**Promulgating new rules.** A provision of SB429SJCSUB requires the Department to promulgate rules to carry out the changes in the bill, if enacted (p. 5 lines 4-5). The bill, if enacted, would go into effect on July 1, 2019, which may leave be administratively burdensome. Given the overwhelming feedback received over the last year that the Department should slow down its rulemaking process to ensure adequate stakeholder engagement is conducted, there should be additional time for allowed for the development of the significant changes proposed as well as their effectual implementation.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

This bill proposes a Virtual Charter Schools Act, as a companion to the Charter Schools Act, 22-8B NMSA 1978. With respect to performance targets, the bill also relates to the SB 1. Additionally, the bill should reconcile this bill with other proposed bills such as SJR 9 which, if also enacted, would change the scope and responsibility of the PEC, affecting the chartering authority for all state-authorized schools. SB 554 and HB 171 have implications for this bill since it proposes changes to the statutory minimums in instructional hours required.

**Potential concern over parental rights.** Additionally, HJR 7 proposes to amend Article 2 of the State Constitution to “create a parental right to direct the upbringing, education and care of their children” further articulating that directing education includes “the right to choose as an alternative to public education, private, religious or home schools and the right to make reasonable choices within public schools for the parent's child.” If HJR 7 enacted, this resolution would be submitted to the people for their approval at an election. Given, the earlier concern about students requiring Class C and D special education services, this part of the SB429SJCSUB may be in conflict if the bill is enacted and the constitution is also amended.

**Potential concern over separation of powers.** According to Section 8 of SB429SJCSUB, when a chartering authority revokes or refuses to renew a virtual charter school’s charter, that decision is deemed final, leaving as the sole legal recourse for the school is to appeal directly to district

court. The language in the bill indicates that a chartering authority's final decision cannot be appealed to the PED Secretary of Education (p. 11, lines 8-12). This is concerning for the state-authorized virtual charters schools falling under the PEC as the chartering authority. Given that the PEC is administratively attached to the PED, such proposed language in SB429SJCsub may raise separation of powers concerns under the New Mexico Constitution. The sponsor(s) and/or next reviewing committee may wish to review this provision to ensure it not in conflict with the state constitution.

## **TECHNICAL ISSUES**

SB429SJCsub addresses several issues from previous version of the bill that addresses Charter Schools Act with respect to differences in treatment of charter schools and virtual charter schools by creating a Virtual Charter Schools Act.

However, SB429SJCsub still includes potential technical issues. As raised in the *Significant Issues* section, the bill does not clearly articulate why the definition of management includes the educational programming beyond creating requirements that impact the application and contracting processes.

It is not clear if the Sponsor's intent is to ensure that virtual charter schools:

- Provide all students with at least 40% of the instruction *at* the school, where more than 60% of the instruction is done offsite through an online delivery system (distance learning); or
- Applicants clearly and transparently described it management model and education service provides for evaluation

Further, the term "at" used on page 3, line 1 needs to be clarified since it could be open to interpretation that the Sponsor does not intend. For example, the Sponsor may need to clarify that the term "at" means "physically on-site" and under supervision of a licensed teacher or whether instead "at" simply mean that an enrolled student must receive the instruction via access to the school's designated learning platform. Given the requirement that students meet statutory minimums for instructional hours, this difference in semantics has administrative and potentially fiscal implications for tracking the instructional hours correctly.

## **OTHER SUBSTANTIVE ISSUES**

### **ALTERNATIVES**

See the *Amendments* section.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Several sections of this bill help ensure that virtual charter schools are serving the best interest of students and are monitored appropriately. Not enacting the bill leaves too many issues open to interpretation and litigious behavior that further depletes public dollars that are not used toward advancing academic outcomes for children.

### **AMENDMENTS**

As discussed in the *Substantive Issues* and *Conflicts* section, the Sponsor may wish to consider deleting Subpart D of Section 8 in SB429SJCsub (p. 11, lines 8-12), and instead default to the appeal section of the Charter Schools Act that would apply to virtual charter schools.

As discussed in the *Significant Issues* section, creating uniform charter school contract terms would better support effective charter authorizing where decision-making is driven by substantial data. Additionally, the Charter Schools Act, 22-8B NMSA 1978, as written, does not appear to support the practice of voting on and approving initial or renewal charters to schools at less than the stipulated terms of 5 years, except for initial charters at 6 years. Instead of shortening the contract term, the chartering authority has full reign to impose several conditions to address concerns.