

[EXT] Matthews Fox, P.C. Comments to NMAC 6.80.4

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 2 attachments

MATTHEWS FOX COMMENTS TO PROPOSED RULE 6.80.4 NMAC.pdf; MATTHEWS FOX COMMENTS TO PROPOSED RULE 6.80.4 NMAC.docx;

Mr. Sena:

Please find attached comments to the NMPED's proposed rule change to 6.80.4 NMAC.

Thank you for your consideration.

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August 24, 2020

Rule.feedback@state.nm.us
Mr. John Sena
New Mexico Public Education Department, Policy Division
300 Don Gaspar Avenue, Room 121
Santa Fe, NM 87501

Re: *Comments to 6.80.4*

Dear Mr. Sena:

This firm represents a number of charter schools and provides the following comments to the New Mexico Public Education Department's proposed changes to 6.80.4 NMAC.

Comment #1. 6.80.4.7 (K) (as renumbered) NMAC. The new definition of "Head administrator" does not clarify the definition by eliminating the reference to "chief executive officer" and replacing it with the word "director." "Chief Executive Officer" is the term used to define a superintendent in NMSA 1978, §22-5-14, but the term "director" is not defined in statute, rule or elsewhere as it applies to a charter school leader and creates confusion. We recommend the definition proposed be revised as follows:

K. "Head administrator" means the duly licensed school administrator ~~who is the director of the charter school, which is the person~~ with duties similar to that of a superintendent as set forth in Section 22-5-14 NMSA 1978.

This definition incorporates the concept of the head administrator acting as the chief executive officer of the school and otherwise having the responsibilities set forth in the statute identified.

Comment #2. In general, we support the revisions of the 6.80.4.9 NMAC, because many of the requirements are outdated and conflict with existing law, unnecessarily repeat requirements of law, or otherwise exceed the statutory requirements and scope of NMSA 1978, §22-8B-6 and §22-8B-8.

Comment #3.
6.80.4.9 (H) (as renumbered) NMAC. Although the statute, NMSA 1978, §22-8B-8(H) calls for the application to have a plan for addressing displacement of students, teachers, etc. of a conversion charter school, NMSA 1978, §22-8B-2(B) defines a conversion charter school as, "an existing

public school within a school district that was authorized by a local school board to become a charter school *prior to July 1, 2007.*” (emphasis added). Thus, the option for a regular district school to convert to a charter school ceased as of July 1, 2015, when this definition was adopted by the Legislature. The original language in NMSA 1978, §22-8B-8(H), predates the definition and the proposed language in rule is unnecessary for new charter applications.

Comment #4.

6.80.4.9 (L) (as renumbered) NMAC. The word “proposed” should remain, if this entire provision is required at all, because the charter school does not exist as a legal entity until the application is approved and, thus, it cannot have “an agreement with its authorizer” yet. Any provisions around liability and insurance should be part of the contract negotiations and be consistent with existing statutory requirements addressing liability (NMSA 1978, §22-8B-4(P) and §22-8B-9(B)(16)).

Comment #5.

General comment as to 6.80.11(G) and (L). Charter schools must comply with all federal and state laws applicable to public entities. Subparagraph (G) is misleading in that someone who was not familiar with legal obligations of a charter school may assume that no other federal laws apply. If such a rule is in fact deemed necessary, it seems a general statement that a charter school must comply with all applicable federal and state laws and rules, is more appropriate. Subparagraph (L) needs to be updated to include all applicable protected classifications.

Comment #6

6.80.4.12 (W) NMAC. The added language is very helpful; however, it adds a term, “factors,” that may create confusion when the statutory language is examined. NMSA 1978, §22-8B-6(M) sets for the legal grounds for denying a charter application. If the Legislature had intended for the legal grounds as set forth in subparagraph (M) to be the “reasons,” then it would have referred to the statutory grounds enumerated in items 22-8B-6(M)(1) through (6) as “reasons.” It did not. Subsection (N) requires that if a chartering authority denies a charter application (for the statutory grounds set forth in 6(M)) the authorizer must provide the “reasons” for the denial. Further, the authorizer is acting in a quasi-judiciary capacity when it rules on a charter application and an applicant may appeal a denial or condition to the Secretary pursuant to NMSA 1978, §22-8B-7. The appeal is decided on the record, not in a hearing *de novo*. For the Secretary to understand the reasons why the authorizer decided the application was deficient for one of the legal grounds stated in 22-8B-6(M), the authorizer must articulate its reasons from the record (application, hearing transcripts, other submissions, etc.). Reiterating the legal basis for denial, does not assist the Secretary in understanding the authorizer’s analysis of whether the application met the statutory requirements. The authorizer must adequately show its rationale for its determination so there can be a meaningful review by the Secretary or the district court. *Atlixco Coalition v Maggiore, 1998-NMCA-134¶17, 125 N.M. 786, 793, 965 P.2d 376*. Without requiring the authorizer to state its reasoning for concluding a charter application is statutorily deficient and, thus, should be denied, the applicant is denied a meaningful appeal.

We propose the following revisions in italics and strike through to avoid injecting a term that is not used in the statute, but which will provide an interpretation of existing statutory language that clarifies the requirement that an authorizer must provide its rational supporting its legal conclusion to deny the application or to impose conditions:

W. If the chartering authority denies a charter school application or approves the application with conditions, it shall state its *legal grounds and supporting* reasons for the denial or imposition of conditions in writing within 14 days of the meeting. The written decision must be based upon the vote that was taken at the public meeting and reflect the stated reasons *legal ground(s) as set forth in Subsection V of 6.80.4.12 NMAC* for the vote of the chartering authority to deny a charter school application or approve the application with conditions. The written decision shall ~~also include specific references to those factors enumerated in Subsection V of 6.80.4.12 NMAC as well as a~~ *the charter authorizer's reasons detailed explanation of the factor(s) that formed a basis for supporting its legal grounds to deny denial of the application, or approval with conditions, on a form developed by the department.* If the chartering authority grants a charter, it shall deliver the approved charter to the applicant. The time within which to file notice of appeal shall commence upon receipt of the written denial. The chartering authority shall maintain a copy of the charter for its files.

Comment #7

6.80.4.13(D)(2)(formerly sub-subparagraph (a)) NMAC. We agree that sub-subparagraph (b) should be stricken. However, in addition to (b) sub-subparagraph (a) should also be stricken in that it refers to an evaluation criterion the Public Education Commission has developed (originally tied to the A-F grading system). Moreover, the Public Education Commission's criteria does not apply to locally authorized, district charter schools. Leaving (a) in the rule is confusing and appears to give the Commission the authority to set the NMPED's standards of excellence for all charter schools. The grounds for non-renewal are clearly set forth in NMSA 1978, §22-8B-12(K) and do not permit the Commission to impose by rule one of its policies for assessing all charter renewal applications in the state.

Comment #8

6.80.4.13(D)(2)(E) NMAC. Like Comment #6, distinguishing between the legal basis for denying the charter renewal and the reasons that justify the legal grounds for denial is very helpful as there have been multiple charter appeals complicated by charter school authorizers' failure to articulate the reasons supporting a legal basis to not renew a charter school's contract. We recommend the minor changes to track statutory language in italics and strike through:

E. If the chartering authority refuses to approve a charter school renewal application or approves the renewal application with conditions, it shall state its reasons for the non-renewal or imposition of conditions in writing within 14 days of the public meeting at which the vote was taken. The written decision [~~must~~] shall restate the motion that was voted on in the public meeting and must restate the *legal grounds and* reasons that were voted on in the public meeting during which the vote was taken. The written decision shall include specific reference to ~~those factors~~ *one or more legal grounds* enumerated in Subsection D of 6.80.4.13 NMAC as well as *the charter authorizer's reasons-a detailed explanation of the factors that formed a the basis for the legal ground(s) to denial of the application, or approval with conditions, on a form developed by the department.*

See NMSA 1978, §22-8B-12(K) and (M).

Thank you for considering our comments.

Sincerely yours,
MATTHEWS FOX, P.C.

A handwritten signature in black ink, appearing to read 'Patricia Matthews', with a long horizontal flourish extending to the right.

By:

Patricia Matthews