

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
BEFORE THE NEW MEXICO SECRETARY OF EDUCATION**

IN THE MATTER OF

THE GREAT ACADEMY AND ITS GOVERNING BODY,

Appellants,

vs.

NEW MEXICO PUBLIC EDUCATION COMMISSION,

Respondent.

DECISION AND ORDER

The above matter came on for hearing before Albert V. Gonzales, the hearing officer designated by Dr. Ryan Stewart, Secretary of Education of the New Mexico Public Education Department (“PED”) on February 18, 2021. The GREAT Academy (“TGA”) was represented by Attorney Susan Fox and the New Mexico Public Education Commission (“PEC”) was represented by Attorneys Ami Jaeger and Elizabeth Jeffreys. Together, they constitute “the Parties”.

A. DECISIONAL AUTHORITY

This Decision and Order of the Secretary of Education (“Secretary”) is issued pursuant to NMSA 1978, Sections 22-8B-7 (2007), 9-24-8 (2004) and 9-24-10 (2004); PED Rule 6.80.4.14 NMAC (2020); and Article XII, Section 6 of the Constitution of New Mexico.

B. STATEMENT OF THE CASE

TGA seeks to appeal an adverse decision of the PEC relative to a December 9, 2020 meeting in which by a vote of 10 to 0 of the PEC membership, they voted to deny TGA’s application to renew its charter to operate as a charter school in New Mexico. On December 21,

2020, the PEC issued its written statement of reasons for denying TGA’s renewal application. The PEC’s grounds for denial, issued under NMSA 1978, Sections 22-8B-12(K)(2) and (3), were, in material part:

1. TGA has failed to meet or make substantial progress toward achievement of the Department’s standards of excellence or student performance standards identified in the charter contract, and as demonstrated by their reports to the Charter Schools Division (CSD) and the packet provided to the PEC.
2. TGA has failed to meet generally accepted standards of fiscal management, as supported by their closed financial audits for fiscal years 2017, 2018 and 2019.

TGA filed its Notice of Appeal of Charter Renewal Denial and Arguments in Support of Appeal (“Notice of Appeal”) on January 19, 2018 with Exhibits 1 through 17 attached to its Notice of Appeal.¹ Receipt of the Notice of Appeal was acknowledged by the January 27, 2021 letter of the Secretary setting the date and time for the hearing which was conducted via Zoom. The Appointment of Hearing Officer was entered on January 19, 2021.

The PEC filed its Objections and Response to TGA’s Notice of Appeal on February 2, 2021. On February 17, 2021, the PEC filed a Motion to Dismiss-Failure to Procure Record. TGA filed its Response to the Motion to Dismiss on that same day.

The hearing on this appeal was held on February 18, 2021 and the transcript of that hearing was filed with the record of this appeal. At the hearing, PEC’s Motion to Dismiss was denied. (Appeal Hearing Transcript, p. 4, lines 22-25, p. 5, line 1.)²

The above documentation constitutes the record considered in this appeal.

C. FINDINGS OF FACT

¹ All filings in this appeal were done via email due to the closing of the PED office because of the COVID-19 pandemic.

² The transcript of the February 18, 2021 hearing will be referred to as the Appeal Hearing Transcript.

I make the following findings of fact:

1. The PEC and TGA entered into the Charter School Contract (“Contract”), pursuant to NMSA 1978, § 22-8B-9, on May 13, 2016. (Notice of Appeal, Ex. 3.)

2. The Contract provides that TGA’s performance shall be based on three Performance Frameworks: an Academic, an Organizational and a Financial Framework. (Notice of Appeal, Ex. 3, Contract, § 5.01, p. 28.) The Contract further provides that “[t]he Performance Frameworks are the basis of the annual school review process, and the data and evidence resulting from the annual review ultimately will inform the Authorizer’s renewal decision.” (*Id.*, pp. 29-30.)

3. The Academic Performance Framework consisted of four academic performance indicators, a required performance indicator of meeting acceptable standards on New Mexico’s A-F grading system and 3 Mission-Specific Indicators. (Notice of Appeal, Ex. 4, pp. 2-5).

4. The TGA’s Renewal Application (Exhibit 5) indicated that it received a final grade of C in the 2016-2017 school year, a final grade of D in the 2017-2018 school year and an overall performance score of 40 out of 100 in the 2018-2019 school year under the new System of School Support and Accountability.³ (Notice of Appeal, Ex. 5, p. 21.)

5. With regard to the Mission-Specific Indicators, the Renewal Application stated that with respect to Indicator 2.a, which measures academic growth or proficiency in reading, TGA rated a “Meets Standard” in the 2016-2017 school year, a “Does Not Meet Standard” in the 2017-2018 school year, a “Meets Standard” in the 2018-2019 school year and pending in the 2019-2020 school year due to health emergency school closures, although TGA claimed that based on incomplete data, it had a “Meets Standard” for that year. (Notice of Appeal, Ex. 5, pp. 26-29.)

³ The ABCDF School Ratings Act was repealed and replaced by the New Mexico System of School Support and Accountability Act, §§ 22-2F-1 through 3, NMSA 1978, effective June 14, 2019.

6. With regard to Indicator 2.b, which measures academic growth or proficiency in math, the Renewal Application stated that TGA rated a “Meets Standard” in the 2016-2017 school year, a “Does Not Meet Standard” in the 2017-2018 school year, an “Exceeds Standard” in the 2018-2019 school year and pending in the 2019-2020 school year due to health emergency school closures. (Notice of Appeal, Ex. 5, pp. 31-34.) Indicator 3 sets a goal of TGA graduates having no less than 12 credits earned from taking dual credit courses completed with a grade of “C” or better and measures two cohorts, cohort 1 (students who started at TGA in the 9th or 10th grade) and cohort 2 (students who started at TGA in the 11th grade).

7. The Renewal Application stated that TGA rated a “Falls Far Below Standard” in the 2016-2017 school year, a “Meets/Exceeds Standard” in the 2017-2018 school year, a “Falls Far Below Standard” in the 2018-2019 school year and a “Falls Far Below Standard” in the 2019-2020 school year. (Notice of Appeal, Ex. 5, pp. 35-37.)

8. The PEC Authorized Charter School Annual Monitoring Reports for school years 2016-2017, 2017-2018 and 2018-2019 reported on the progress in meeting the student performance standards identified in the Contract as well as compliance with the other terms of the Contract. (Notice of Appeal, Ex. 6.)

9. The 2016-2017 Monitoring Report stated that the TGA met the standard on the A-F grading system but rated a “Falls Far Below Standard” on the required academic performance indicators because it had that rating on one of the 3 mission-specific indicators. (Notice of Appeal, Ex. 6, 2016-2017 Report, p. 1.) The 2017-2018 Monitoring Report stated that TGA rated a “Does Not Meet Standard” on the A-F grading system and a “Does Not Meet Standard” on the required academic performance indicators because it had that rating on 2 out of the 3 mission-specific indicators. (Notice of Appeal, Ex. 6, 2017-2018 Report, p. 1.) The 2018-2019 Monitoring Report

stated that TGA rated a “Does Not Meet Standard” on the A-F grading system and a “Falls Far Below Standard” on the required academic performance indicators because it had that rating on 1 of the 3 mission-specific indicators. (Notice of Appeal, Ex. 6, 2018-2019 Report, p. 1.)

10. § 6.01 of the Contract provides that “[f]ailure to meet the standard(s) set forth in an Academic Performance Indicator ... may be deemed a failure ‘to meet or make substantial progress toward achievement of the department’s minimum educational standards or student performance standards’ (NMSA 1978, §22-8B-12(K)(2)) and may be assessed accordingly for purposes of nonrenewal or revocation.” (Notice of Appeal, Ex. 3, Contract, § 6.01, p. 32.)

11. TGA’s results in its Academic Performance during the contract term has been deficient, including the overall “Falls Far Below Standard” rating on the mission specific goals during the first year of its contract 2016-2017, the overall “Does Not Meet Standard” rating on the mission specific goals in 2017-2018, and the “Falls Far Below Standard” rating on its mission specific goals during the 2018-2019 academic year. (Notice of Appeal, Ex. 5, pp. 26-29.)

12. With regard to the financial audits for fiscal years 2017, 2018 and 2019, the Renewal Application reported that in FY 2017, TGA had 1 finding for Procurement Code noncompliance and the TGA Foundation had 1 finding of control deficiency relating to segregation of duties and Internal Controls.⁴ (Notice of Appeal, Ex. 5, pp. 43-45.)

13. The Renewal Application reported that in FY 2018, TGA had 1 finding of significant deficiency for financial close and reporting and the TGA Foundation had 1 finding of other matters for school support. (Notice of Appeal, Ex. 5, pp. 46-47.) In FY 2019, TGA had 3 findings of other noncompliance for private vehicles used for school-sponsored activities, a

⁴ The TGA Foundation is a 501c3 nonprofit corporation which exists to support TGA and its mission. Among other things, the Foundation leases the building to TGA. The auditors consider it a component unit of TGA. (Notice of appeal, Ex. 10, p. 3.)

significant deficiency for financial close and reporting and a material noncompliance for advance payments of lease payments. (Notice of Appeal, Ex. 5, pp. 47-53.)

14. The TGA Foundation had 4 findings of material noncompliance for expenditures in excess of available resources, a material noncompliance for debt compliance, other matters for financial close and reporting and other matters for internal control over cash disbursements. (Notice of Appeal, Ex. 5, pp. 47-53.) TGA disputed the audit finding of material noncompliance with respect to the advance payments of lease payments and argued that there was no violation with respect to the pre-paid rents and that the PED School Budget Bureau had raised no concerns with respect to pre-paid rents. (Notice of Appeal, Ex. 5, pp. 48-51.)

15. 2b of the Organizational Performance Framework, which measure whether the school is following generally accepted accounting principles, requires an audit that is devoid of significant findings and conditions, material weaknesses, or significant internal control weaknesses in order to meet that standard. (Notice of Appeal, Ex. 4, p. 16.)

16. The 2017-2018 Monitoring Report stated that TGA was working to meet the standard because it had implemented a corrective action plan (“CAP”) with respect to the FY 2017 audit. (Notice of Appeal, Ex. 6, 2017-2018 Report, p. 14.) The 2018-2019 Monitoring Report stated that TGA was working to meet the standard because it had implemented a CAP with respect to the FY 2018 audit. (Notice of Appeal, Ex. 6, 2018-2019 Report, p. 13.)

17. The 2019-2020 Monitoring Report stated that TGA rated a “Falls Far Below Standard” because TGA had earned repeated significant deficiency and material weakness findings in its FY 2019 audit. (Notice of Appeal, Ex. 6, 2019-2020 Report, p. 11.) TGA submitted a CAP with respect to the FY 2019 audit (Notice of Appeal, Ex. 9, FY 2019 CAP) but there is no

indication in the 2019-2020 Monitoring Report that CSD considered the CAP to be a successfully completed CAP. (Notice of Appeal, Ex. 6, 2019-2020 Report, p. 11.)

18. §11.02 of the Contractor provides that “[i]f, based on a performance review conducted by the Authorizer, the School's organization, academic or financial performance appears unsatisfactory or the Authorizer believes there to be a breach of this Contract not warranting immediate revocation, the Authorizer may initiate the process to implement a corrective action plan. The Authorizer shall notify the School of the unsatisfactory review and provide a reasonable opportunity for the School to remedy the Authorizer's concerns.” (Notice of Appeal, Ex. 3, Contract, § 11.02(e), p. 57.)

19. § 11.02(e) of the Contract provides that “[s]uccessful completion of the CAP shall be acknowledged by the Authorizer in writing and the corrected infractions addressed by the CAP shall not be a basis for future for nonrenewal or revocation actions. Successful completion of the CAP shall be acknowledged by the Authorizer in writing and the corrected infractions addressed by the CAP shall not be a basis for future for nonrenewal or revocation actions. However, if the School does not successfully correct the Authorizer's concerns, the Authorizer may take additional steps to insure compliance, which include, but are not limited to seeking assistance from the CSD or another technical assistance provider to implement a plan for correcting the Authorizer's concerns. Failure to comply with the requirements of the CAP may also be considered by the Authorizer when making decisions about renewal, suspension or revocation.” (Notice of Appeal, Ex. 3, Contract, § 11.02(e), p. 58.)

20. It was not demonstrated that the infractions referenced in the renewal application are the kind contemplated within § 11.02 of the Contract. The items referenced are findings that were made against the school in an audit, which included significant findings, and certain ones

which went uncorrected. The findings referenced were completed by a New Mexico Public Education Department annual audit. It was not demonstrated in the course of the proceeding that these were findings made by the Authorizer with a corrective action plan imposed by the Authorizer, nor that satisfactory results were achieved according to the Authorizer with respect to a CAP imposed by it. It was also not demonstrated that TGA complied with requirements of a corrective action plan imposed by the Authorizer during the term of the Contract. (Notice of Appeal, Ex. 5, Application, p. 43-53.)

21. Moreover, the findings included repeat findings, significant findings, or otherwise noteworthy findings to be considered in making a determination regarding renewal of a charter school. This is particularly the case, when it involves a school that has existed since 2010. (Notice of Appeal, Ex. 5, Application, p. 43-53.)

22. For FY 2017, findings included, but were not limited to, findings involving segregation of duties for approval of payment of travel expenditures by an individual acting as both a Foundation Board Treasurer and the business manager for the Great Academy, and the Head Administrator's processing transfers without authorization or the involvement of another appropriate individual. (Notice of Appeal, Ex. 5, Application, p. 43-45.)

23. For FY 2018, findings included, but were not limited to, findings involving beginning balances presented on the roll forward being misstated by \$44,527 in the 2017 fiscal year financial statements, and one person employed by the Great Academy as Director of Academics/Principal also contracting with the Foundation as an independent contractor in the amount of \$45,000. (Notice of Appeal, Ex. 5, Application, p. 45-49.)

24. For FY 2019, there were eleven findings made, which included, but were not limited to, a repeat finding of Financial Close and Reporting (Significant Deficiency), and also

other findings such as prepayment of a lease in the amount of \$894,732.00. (Notice of Appeal, Ex. 5, Application, p. 47-53.)

25. NMSA 1978, Section 22-8B-12(K) provides that:

A charter may be suspended, revoked or not renewed by the chartering authority if the chartering authority determines that the charter school did any of the following: (1) committed a material violation of any of the conditions, standards or procedures set forth in the charter contract; (2) failed to meet or make substantial progress toward achievement of the department's standards of excellence or student performance standards identified in the charter contract; (3) failed to meet generally accepted standards of fiscal management; (4) for a charter school located on tribal land, failed to comply with ongoing consultations pursuant to the Indian Education Act; or (5) violated any provision of law from which the charter school was not specifically exempted.

26. TGA committed a material violation of the conditions, standards or procedure in the charter contract, and also separately failed to meet generally accepted standards of fiscal management. The fiscal considerations may be made as part of the determination regarding fiscal management separate from other applicable provisions.

27. On November 13, 2020, CSD staff did a preliminary analysis of TGA's Renewal Application which included review of the data, a renewal site visit and stakeholder interviews via the Zoom Meeting platform. (Notice of Appeal, Ex. 10.) CSD noted that TGA's academic performance had been evaluated under two different accountability systems throughout the term of its contract with the A-F Grading Report used in school years 2016-17 and 2017-2018 and the New Mexico System of School Support and Accountability used in school years 2018-2019 and 2019-2020. (Notice of Appeal, Ex. 10, p. 2.)

28. After reporting the data reflected in the above findings, CSD stated that "[p]ending the charter contract renewal decision, the Charter School Division will recommend that the school be required to implement a rigorous academic improvement plan, approved by the Public

Education Commission.” *Id.* CSD also reported on financial issues involving the audits from 2016-2017 through 2018-2019 which had 11 audit findings, which included five from TGA and six from the TGA Foundation. (Notice of Appeal, Ex. 10, p. 3.) With respect to financial concerns, CSD stated that “[p]ending the charter review decision and results of pending reviews, the Charter School Division will recommend that the school be required to provide updates and address the financial concerns, if so directed by the Public Education Commission.” *Id.* While both referenced actions pending the charter decision, the CSD was not recommending renewal.

29. With regard to the Organization Framework, CSD noted that TGA received two “Falls Far Below Standard” ratings in Business Management and Oversight: meeting reporting compliance requirements and Business Management and Oversight: following generally accepted accounting principles indicators, principally due to the audit findings. (Notice of Appeal, Ex. 10, p. 5.) On the Academic Performance Indicator, CSD gave a final rating of “Failing to Demonstrate Substantial Progress.” *Id.* On the 2.a Audit Indicator under Financial Compliance, CSD gave a final rating of “Failing to Demonstrate Substantial Progress.” (Notice of Appeal, Ex. 10, p. 6.)

30. TGA proceeded with submitting a response to CSD’s preliminary analysis and stated that the growth index for students in certain quartiles in reading and math were above state benchmarks. TGA also noted that TGA graduates had completed, with a grade of C or better, 1,182 college credits through TGA’s dual credit program. (Notice of Appeal, Ex. 10, p. 2.) On the audit findings, TGA stated that only 5 of the 11 findings were attributed to TGA and that in FY17 and FY18, TGA only had one finding per year. (Notice of Appeal, Ex. 10, p. 3.)

31. On December 1, 2020, CSD submitted its final Renewal Recommendation with regard to TGA’s Renewal Application, eight days prior to the hearing on the Renewal Application. That recommendation was as follows: “The PED recommends non-renewal of the contract because

the school has failed to meet and has not demonstrated substantial progress toward the department's minimum educational standards and has not met the standards outlined in the performance framework of the charter contract. In addition, the school has failed to meet generally accepted standards of fiscal management." (Notice of Appeal, Ex. 11, p. 1.)

32. In its Evaluation Summary, CSD noted that the rating for TGA on the Department's Standards of Excellence and the Specific Charter Goals was "Failing to Demonstrate Progress" but on 2.a Audit, the rating was "Demonstrates Substantial Progress." (Notice of Appeal, Ex. 11, p. 3.)

33. On December 2, 2020, TGA submitted a Response to the CSD Recommendation and asserted that on academic indicators, 50% were meet or exceeds, 39% were working to meet and 9% were falls far below. (Notice of Appeal, Ex. 12, p. 1.) With respect to the audits, TGA stated that for FY17 and FY18, it only had one finding each of those years and 3 findings in FY19. (Notice of Appeal, Ex. 12, p. 3.) The various concerns with the school are summarized in the CSD Recommendation, which are incorporated as findings, and are further detailed in the conclusions of law. (Notice of Appeal; Ex. 11, 1-3)

34. § 4.03(c) of the Contract provides in material part that "[i]n the event that the Authorizer ever determines that ... nonrenewal of the School is appropriate, the Authorizer shall (1) provide the School with timely notification of the prospect of ... nonrenewal of the Charter and the reasons for such action; (2) allow the School a reasonable time to prepare and submit a response to the Authorizer's action no less than 30 days, absent exigent circumstances (Notice of Appeal, Ex. 3, p. 18.)

35. On December 9, 2020, the PEC conducted a public hearing on TGA's Renewal Application. (Notice of Appeal, Ex. 2.) Karen Woerner, Deputy Director of CSD, addressed the

PEC on CSD's recommendation on renewal of TGA's charter. (Notice of Appeal, Ex. 2, pp. 21-37.) Jasper Matthews and Keisha Matthews, TGA's Executive Director and Director of Academics respectively, addressed the PEC on the Renewal Application and the concerns of the CSD in its renewal recommendation and read statements from their business manager and CPA into the record. (Notice of Appeal, Ex. 2, pp. 47-59.)

36. Susan Fox, TGA's attorney, objected to deliberations on the Application being done in closed session and Ami Jaeger, PEC's attorney, responded to the objection. (Notice of Appeal, Ex. 2, pp. 62-64.) Parents, students and teachers also addressed the PEC in support of the charter's renewal. (Notice of Appeal, Ex. 2, pp. 66-76.) Members of the PEC then questioned Mr. and Mrs. Matthews regarding questions and concerns they had with regard to the Renewal Application and the concerns raised by CSD in its renewal recommendation. (Notice of Appeal, Ex. 2, pp. 96-205.)

37. Following the PEC's questions and the closed session, the following motion was made:

I move that the PEC not renew the charter for The GREAT Academy as it has failed to meet or make substantial progress toward achievement of the Department's Standards of Excellent (sic), or student performance standards as identified in the charter contract, and as demonstrated by their reports to the CSD and presented in their packet to us. And it has failed to meet Generally Accepted Standards of Fiscal Management as supported by their close financial audits for '17, '18, and '19.

(Notice of Appeal, Ex. 2, p. 210, ll. 4-13.)

38. There being no discussion on the motion, the PEC voted ten to zero in favor of the motion. (Notice of Appeal, Ex. 2, pp. 210-212.) The Final Decision to Non-renew the Charter of The GREAT Academy, dated December 21, 2020, restated the motion made at the public meeting and added the statutory basis for the decision. (Notice of Appeal, Ex. 1; p. 2.)

39. § 5.04 of the Contract states in material part that “[a]ny modification of the Performance Frameworks requires an amendment that must be agreed to and executed by both Parties. Each Party must vote on this amendment in an open public meeting prior to execution of the amendment. (Notice of Appeal, Ex. 3, p. 31; *see also* § 13.02, Ex. 3, p. 59.) The only Performance Framework agreed to and executed by TGA and the PEC is the Performance Framework agreed to in 2016. (*See* Ex. 4.)

40. § 13.01 of the Contract states in material part that “[t]his Contract shall not take precedence over any applicable provisions of law, rule or regulation.” (Notice of Appeal, Ex. 3, p. 59.) § 13.07 provides in material part that “[i]n the event of a change in law, regulation, rule, procedure or form affecting the School during the term of this Contract, the Parties shall comply with the change in law, rule, regulation or procedure or utilize the new form, provided, however, that the change does not impair the existing Contract and the Parties respective rights hereunder.

D. CONCLUSIONS OF LAW

1. NMSA 1978, Section 22-8B-7(B) states as follows: “If the secretary finds that the chartering authority acted arbitrarily or capriciously, rendered a decision not supported by substantial evidence or did not act in accordance with law, the secretary may reverse the decision of the chartering authority and order the approval of the charter with or without conditions.” Because these grounds for reversal are written in the disjunctive, TGA need only prove one of these grounds.

2. “Arbitrary and capricious action by an administrative agency consists of a ruling or conduct which, when viewed in light of the whole record, is unreasonable or does not have a rational basis, and ‘is the result of an unconsidered, willful and irrational choice of conduct and not the result of the ‘winnowing and sifting’ process.’” *Perkins v. Dep’t of Human Servs.*, 1987-

NMCA-148, ¶ 19, 106 N.M. 651, 655, 748 P.2d 24, 28, citing *Garcia v. New Mexico Human Servs. Dep't*, 94 N.M. 178, 179, 608 P.2d 154, 155 (Ct.App.1979) (quoting *Olson v. Rothwell*, 28 Wis.2d 233, 239, 137 N.W.2d 86, 89 (1965)).

3. “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Bernalillo Co. Health Care Corp. v. N.M. Regulation Comm’n*, 2014-NMSC-008, ¶ 9, 319 P.3d 1284, 1287 citing *In re Comm'n's Investigation of the Rates for Gas Serv. Of PNM's Gas Servs.*, 2000–NMSC–008, ¶ 6, 128 N.M. 747, 998 P.2d 1198. In determining whether substantial evidence supports an administrative decision, the Secretary “views the evidence in the light most favorable to the agency decision but may not view favorable evidence with total disregard to contravening evidence.” *National Council on Compensation Ins. v. N.M. State Corp. Comm’n*, 188-NMSC-036, ¶ 7, 107 N.M. 278, 756 P.2d 558 (citations omitted).

4. Section 22-8B-12(K)(2) states that a charter may not be renewed if the charter “failed to meet or make substantial progress toward achievement of the department’s standards of excellence or student performance standards identified in the charter contract.” This is the first reason given by the PEC for not renewing the charter. TGA argues that there are no standards of excellence because it is not defined in statute, the PED has never promulgated a rule identifying the PED’s standards of excellence and as a result, it cannot be deemed to having failed to meet a nonexistent standard.

5. However, NMSA 1978, Section 22-8B-9.1 (2105), which governs performance frameworks, states that a performance framework shall include performance indicators and performance targets for, among other things, student academic performance and student academic growth. Those performance standards are set out in 6.29.1 NMAC. 6.29.1.8 NMAC states that: “This regulation shall assist in the implementation of standards for excellence through the use of

the *education plan for student success (EPSS)*, content standards with benchmarks and performance standards, and additional program and procedural requirements specified in this regulation.”

6. The New Mexico Uniform Statute and Rule Construction Act provides that “[u]nless a word or phrase is defined in the statute or rule being construed, its meaning is determined by its context, the rules of grammar and common usage. A word or phrase that has acquired a technical or particular meaning in a particular context has that meaning if it is used in that context.” NMSA 1978, Section 12-2A-2 (1997). Therefore, while “standards of excellence” do not have a specific definition in Section 22-8B-12, when read together with the context of Section 22-8B-9.1 and 6.29.1 NMAC, its meaning becomes clear as the educational standards expected of all New Mexico students.

7. The term “Department’s Standards of Excellence” is used in CSD’s Evaluation Summary of its recommendation on renewal to define one of the academic performance indicators and so it is clear that the agency charged with administering the Charter Schools Act defines it the same way. (Notice of Appeal, Ex. 11, p. 3) “When an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency’s interpretation.” *Morningstar Water Users Ass’n v. New Mexico Pub. Util. Comm’n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 583, 904 P.2d 28, 32; see also *Stokes v. Morgan*, 1984-NMSC-032, ¶ 24, 101 N.M. 195, 202, 680 P.2d 335, 342 (“The special knowledge and experience of state agencies should be accorded deference.”). The interpretation applied to the term “standards of excellence” in Section 22-8B-12(K)(2) is not unreasonable given the above analysis.

8. TGA argues that under the Charter Schools Act and the Charter Contract, the New Mexico System of School Support and Accountability analysis cannot be substituted for the

“School Grade” student performance indicator, absent an amendment to the existing Performance Framework agreed to by both parties. The ABCDF School Ratings Act was repealed and replaced by the New Mexico System of School Support and Accountability Act, NMSA 1978, §§ 22-2F-1 through 3, effective June 14, 2019.

9. TGA’s contention would essentially mean that the charter school did not have accountability for student performance during that time, which is clearly contrary to the Charter School Act, NMSA 1978, § 22-8B-1 et seq., and the Public School Code, and it cannot be accepted. (See *Dorman v. Sargent*, 1915-NMSC-049, 20 N.M. 413, 150 P. 1021 (1915), providing that it is a cardinal rule that all legislation is to be construed in connection with the general body of the law....; See also NMSA 1978, § 12-2A-18(A)(3), providing that a statute or rule is construed, if possible, to: (1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result.”) Further, the Academic Performance Framework was modified by operation of law due to the repeal and replacement of the A-F grading system, and per § 13.01 of the Contract, the Contract shall not take precedence over applicable law.

10. It would also be inaccurate to conclude that any change in the provisions of the academic performance framework resulted in an impairment of rights. Both academic performance frameworks would have reviewed the same accountability data for this school. For purposes of the terms of the agreement, the difference is largely whether A-F grading system would be applied to determine whether the school is exceeding standards, meeting standards, or not meeting standards. Rather than an A-F grading system applying, under the New Mexico System of School Support and Accountability, schools would be determined to have exceeded standards if in the top 25% of all public schools, meeting standards if in the middle 50% of all public schools,

or not meeting standards if in the lowest 25% of all public schools in the State. There is no indication as to how moving from this grading system versus the prior one was prejudicial or resulted in any kind of impairment of rights.

11. Concerns with TGA's academic performance includes having poor performance over the entire contract term, most recently scoring in the lowest 25% of all public schools, having concerns with providing services to special education students, including not providing appropriate direct services or meeting maintenance of effort, and other similar concerns. TGA's retention and recurrent enrollment shows that in 2017-2018, 41% withdrew during the year, and 69% returned from the prior year; in 2018-2019, 36% withdrew during the year, and 66% returned from the prior year; and in 2019-2020, 40% withdrew during the year, and 71% returned from the prior year. (Notice of Appeal, Ex. 13, pp. 1-2.)

12. With regard to the second reason given for the nonrenewal decision, which was that TGA failed to meet generally accepted standards of fiscal management as supported by the FY17, FY18 and FY19 audits, TGA argues that "generally accepted standards of fiscal management" has never been defined and there was no evidence presented on how the audit findings violated "generally accepted standards of fiscal management" such that nonrenewal was warranted. However, following generally accepted accounting principles was an indicator under the Business Management and Oversight component of the Organizational Performance Framework and meeting that indicator was clearly defined. The phrases "Working to Meet Standard" and "Falls Far Below Standard" were also defined. (Notice of Appeal, Ex. 4, p. 16.) Within the context of the Business Management and Oversight component of the Organizational Performance Framework, "generally accepted standards of fiscal management" includes the meaning provided in 2.b. of the

Organizational Framework. *Id.* Additionally, the term does not require further definition, as accepted standards of fiscal management is otherwise proscribed by NMSA 1978, § 22-8B-12(K).

13. PEC stated in its denial letter that the evidence of failing to meet generally accepted standards of fiscal management was TGA's closed audits for '17, '18 and '19. The findings in the FY17 and FY18 audits could be considered as a basis for the nonrenewal decision, particularly as there is no evidence that the CAP was accepted as completed by CSD. Further, standing alone, the FY19 audit findings are substantial evidence that TGA failed to meet generally accepted standards of fiscal management.

14. There are clear and significant financial concerns demonstrated by the school which must be taken into consideration in any non-renewal decisions, and would otherwise warrant immediate revocation. This includes the fiscal findings outlined in PED Recommendation, as well as the potentially substantial concerns regarding conflict of interest and appearance of impropriety existing based on the foundation board members also including the Head Administrator, the Secretary of the school's governing board, and a staff member who serves as President of the Foundation. (Notice of Appeal; Ex. 13, 1-2.)

15. The fiscal concerns for FY 2019 alone included the following, summarized and paraphrased here:

a) TGA 2019-001 Private Vehicles Used for School-Sponsored Activities (Other Noncompliance, which involved the executive director having received a vehicle allowance stipend of \$7,749.56. However there was no supporting documentation kept that indicated Board approval of the stipend for fiscal year 2019. The vehicle used by the Executive Director did not meet the requirements under NMAC 6.41.4.8(D)(1)(b) to be used in school sponsored activities. Approval of the board could not have been assumed beforehand, considering that the head

administrators, Mr. and Mrs. Matthews, make a combined income from the school of over \$220,000 as salary, plus other benefits. An added fringe benefit, of this amount could not have been assumed.

b) TGA 2019-002 Financial Close and Reporting (Significant Deficiency), which included the school not properly reversing the prior year payroll accrual which resulted in variances to beginning fund balance of \$21,661. Also, the school made thirteen rent payments to the Foundation during the year, however the thirteenth payment was not properly recorded as a prepaid expense. The School also paid \$19,066 for a partial roof replacement which was paid out of Fund 31600 H8-33. The School made Improvements to a building that is not a public building.

c) TGA 2019-003 Advance Payments of Lease Payments (Material Noncompliance), which involved the school remitting \$250,000 to the Foundation characterized as *prepaid rent*. The School's lease payments (including the maintenance component) increased approximately \$2,609 annually even when factoring in the increased amortization. The revised lease agreement included an Increase in the maintenance component of the base lease payments by an additional \$12,000 a year, although there was no evidence in the minutes of either the School or the Foundation that this increase was approved. This \$250,000 *prepaid rent* amount is in addition to previous advance rent payments made prior to fiscal year 2018 of \$450,000 and \$300,000 by the School to the Foundation. These payments amounted to a total \$1,000,000, including the \$250,000 payment in 2019, of which \$894,732 was reflected as prepaid rent as of June 30, 2019. The foundation had \$15,586 in cash as of June 30, 2019 and had expended the remaining prepayments advanced by the school. Therefore, the Foundation lacked the ability to return the funds to the School if required. There also appeared to be no financial benefit to the School related to the prepaid rent paid of \$250,000 or previous payments made.

d) TGAF 2019-001 - Expenditures In Excess of Available Resources (Material Noncompliance), which included the Foundation reporting expenditures in excess of revenues by \$396,161, which had increased the deficit fund balance to \$865,622 as of June 30, 2019. As of June 30, 2019, the Foundation reported a cash balance of \$15,586. In addition, the Foundation reported a liability of \$894,732 as of June 30, 2019 classified as: "unearned revenue". The amount classified as "unearned revenue" represented payments from the School for rent paid in advance, which the Foundation was unable to repay to the School if required.

e) TGAF 2019-002 Debt Compliance (Material Noncompliance), which included the Foundation being subject to a Debt Service Coverage Ratio (DSCR) covenant of 1.20:1. The Foundation did not meet this requirement in fiscal year 2018 and 2019. The Foundation did not obtain a waiver related to either fiscal year 2018 or 2019, thus is in default of the agreement.

f) TGAF 2019-003 Financial Close and Reporting (Other Matters), which included the escrow balance not having been reconciled to the June 30, 2019 statement, therefore the balance being understated by \$10,603. The Foundation received thirteen rent payments from the school in fiscal year 2019. The thirteenth rent payment of \$18,751 was not properly recorded a deferred rent as this payment was not earned by the Foundation as of June 30, 2019.

g) TGAF 2019-004 Internal Control Over Cash Disbursements (Other Matters), which included the treasurer's initials appearing to be digital or copied. According to the TGAF Liaison, the treasurer did not sign (either physically or digitally), but that the TGAF Liaison would get verbal approval over the phone. Therefore, there is was no evidence of authorization and the use of copied signatures posed significant fraud risk.

16. TGA argue that PEC deprived it of due process of law in failing to adhere to the requirements of the Contract and the Performance Framework in the renewal process. However,

the preliminary analysis of the Renewal Application detailed the concerns with the school, and the school had opportunity to respond. Further, the process leading into the renewal hearing included trainings during the year and other established processes, which would inform the school of the possibility of non-renewal. This is in addition to the findings involving fiscal mismanagement that would inform the school of the possibility as well.

17. TGA contends that the PEC violated the Open Meeting Act (“OMA”) by convening a closed session for a reason, to consider a charter application, that is not consistent with the exceptions enumerated under the OMA because a charter is not a license under NMSA 1978, § 10-15-1(H)(1). The OMA permits a public body like the PEC to enter into a closed session to discuss matters “pertaining to issuance, suspension, renewal or revocation of a license...” *Id.*

18. TGA argues that the Legislature did not use the term “license” but rather “charter” in authorizing the PEC to approve the operation of charter schools. Black’s Law Dictionary (11th ed. 2019) defines a charter as “an instrument ... that grants rights, liberties, or powers to its citizens” which comports with the power granted to the PEC under the Charter Schools Act to grant the right or power to open and operate a charter school and is similar to the definition of “license” under New Mexico law as a “permission by a competent authority, to do some act which without such authorization would be illegal” as defined by the Court of Appeals in *N.M. Sheriffs and Police Ass’n v. Bureau of Revenue*, 1973-NMCA-130, ¶ 7, 85 N.M. 565, 566, 514 P.2d 616, 617.

19. The definition of “Authorizer”, as defined by 6.80.4.7(B) NMAC, “means either a local school board or the commission that permits the operation of a charter school.” Other state courts have held that a charter is in the nature of a license or permit to operate a charter school. *See Honors Academy, Inc. v. Texas Education Agency*, 555 S.W.3d 54, 63 (Tex. 2018); *Foreman*

v. Chester-Upland School District, 941 A.2d 108, 115 (Pa. 2008). TGA further argues that you can only go into closed session if the matter before the body involves constitutional issues of privacy, which was not involved here. (Notice of Appeal, p. 41)

20. However, TGA does not cite to case law supporting that position and the support given for this assertion is the Attorney General’s Compliance Guide on the OMA. *Id.* The Attorney General’s Guide does not definitively address this issue and there is no case law cited to support it. Therefore, the decision of the PEC will not be denied on those grounds.

21. In its Objections and Response, the PEC asserts that the statutory delegation of judicial power under Section 22-8B-7 that authorizing the PED Secretary to conduct a legal review of PEC’s charter authorizing decisions is unconstitutional under the Separation of Powers Clause, Article III, Section 1 of the New Mexico Constitution. TGA also argues that since the underlying statute governing the Secretary’s authority is invalid, the related regulations issued pursuant to it are void and unenforceable. The Secretary’s authority to decide charter school appeals is governed by the decisional authority cited in Paragraph B of this Decision and Order, and those other issues do not need to be addressed herein.

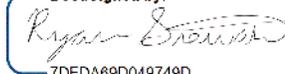
22. The PEC also filed a Motion to Dismiss the appeal due to the Secretary failing to procure the underlying record on this appeal from the PEC. Nothing in 6.80.4.14 NMAC or § 22-8B-7 obligates the Secretary to “procure the record” and the obligation of filing documents is placed on the parties to this appeal and not the Secretary. *See* 6.80.4.14(B) and (C) NMAC. Therefore, there is no basis for dismissing the appeal based on the ground raised in the Motion.

23. The PEC’s decision not to renew the TGA’s charter was supported by substantial evidence and in accordance with law in making its decision.

E. ORDER

For the reasons set forth above, the Public Education Commission’s decision in denying the application of The GREAT Academy is affirmed.

By:

DocuSigned by:

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Ryan Stewart Ed.L.D.
Secretary of Education

Dated:

3/19/2021

RIGHT OF APPEAL

This is a final Decision and Order of the Secretary of Education entered as of the date appearing above, which pursuant to Section 22-8B-7(F) of the New Mexico Statutes Annotated-1978, is not subject to further appeal before the PED. Any aggrieved person may, pursuant to NMSA 1978, Section 39-3-1.1, appeal the final Decision and Order to a district court by filing a notice of appeal within thirty days of the date of filing of this final decision.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Decision and Order was served upon the following individuals by email March 19, 2021, via email, to: Susan Fox sfox@matthewsfox.com; Beverly Friedman Bev.friedman@state.nm.us; Ami Jaeger asj@bio-law.com.

Aimee Wismar
Aimee Wismar
For PED Paralegal