



Attorneys and Counselors at Law

Patricia Matthews
pmatthews@matthewsfox.com

office: (505) 473-3020
fax: (505) 474-3727

Susan Barger Fox
sfox@matthewsfox.com

February 1, 2022

Via Email Bev.Friedman@state.nm.us

Ms. Beverly Friedman
300 Don Gaspar Avenue
Santa Fe, NM 87505

Re: *Proposed Rule Making by Public Education Commission*
“Public Education Commission State-Chartered School Policy Making Procedure”

Dear Ms. Friedman:

The Firm provides no specific comments to the proposed rule language because it is our opinion based on the law and cases cited below that the Commission does not have legislatively delegated authority to promulgate rules.

It is settled law that the legislature can properly delegate rulemaking power to administrative agencies through *enabling legislation*. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶14, 140 N.M. 42, 243 P.3d 7456 (*per curiam*)(emphasis added). An administrative agency has no authority to create a rule or regulation that is not in harmony with its statutory authority. 1984-NMSC-076, ¶3, 101 N.M. 592, 593, 686 P.2d 934, 935. Administrative bodies exist by statute and must act within the scope of their delegated authority. *Maxwell Land Grant Co., et al v. Jones*, 28 N.M. 427, 213 P. 1034 (1923). In short, unless the Legislature expressly delegated rulemaking authority to the Commission, it is our opinion that it must comply with the State Rules Act, NMSA 1978, §§14-4-1, *et seq.*, through the Secretary of Education (“Secretary”) and the Public Education Department (“Department”).

The statute the Commission relies upon for its delegation of authority to promulgate rules, i.e., NMSA 1978, 22-8B-5.3, does not even mention the Commission by name, rather the entire section refers to the statutory obligations of a “chartering authority,” which by definition includes a local public school district. *See NMSA 1978, §22-8B-2(B)*(“Chartering authority” means either a local school board or the commission.”) Certainly, the Legislature did not intend that local school districts to be empowered with administrative rule making based on the language in 22-8B-5.3 relied on by the Commission. No other statutory basis for the Commission to assert rulemaking authority is cited in its Notice of Rulemaking and none exists.

Furthermore, compare the language delegating rulemaking to the Secretary found in NMSA 1978, §9-24-8, wherein the Legislature pronounces the “duties and general powers” of the Secretary to include:

The secretary may make and adopt such reasonable and procedural rules as may be necessary to carry out the duties of the department and its divisions. No rule promulgated by the director of any division in carrying out the functions and duties of the division shall be effective until approved by the secretary. Unless otherwise provided by statute, no rule affecting any person or agency outside the department shall be adopted, amended or repealed without a public hearing on the proposed action before the secretary or a hearing officer

designated by the secretary. The final public hearing on adoption, amendment or repeal of a rule shall be held in Santa Fe unless otherwise permitted by statute. Notice of the subject matter of the rule, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed rule or proposed amendment or repeal of an existing rule may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules shall be filed in accordance with the State Rules Act.

See also, NMSA 1978, §9-1-5(E) The Legislature’s intent and limits to that authority is clearly expressed in law. Conversely, in the contiguous subsection at §9-24-9 entitled “Public Education Commission,” the Legislature makes no such express or even implied statement of authority to issue regulations. The Public School Code reiterates in direct and plain language that the Secretary and Department have the authority to issue rules at NMSA 1978, §22-2-1(B)(1); yet, there is no such express language within the same Article 2, entitled “Public Education Department and Commission,” wherein the Legislature delegates statutory authority to the Commission. *See NMSA 1978, §22-2-2.2 “Commission; duties.”* The Legislature knew how to articulate its intent to delegate rulemaking authority and did so, but only with regard to the Secretary and the Department.

It is unreasonable to infer from the language in 22-8B-5.3 that the Commission has statutory authority to issue regulations. The starting point for deciding what authority was delegated is the language of the delegation itself. *Gonzales v. Oregon*, 546 U.S. 243, 258, 126 S. Ct. 904, 916, 163 L. Ed. 2d 748 (2006). The Commission’s authority to issue rules must be found in and be limited by statute. *Winston v. NM State Police Bd.*, 1969-NMSC-066 ¶3, 80 N.M. 310, 454 P.2d 967. Where words used in the statute are free from ambiguity and doubt, and express plainly, clearly, and distinctly the intent of the legislature, there is no need to construe the statute. *McCurry v. City of Farmington*, 97 N.M. 728, 643 P.2d 292 (Ct.App.1982). Absent clear intent to the contrary, statutory words are given their ordinary and usual meaning. *Id.* Section 9-24-9 sets forth the limited scope of the Commission’s authority in law. Nowhere in the brief statute, or elsewhere in Chapter 9, Article 24 (Executive Department; Public Education Department and Commission), does the Legislature expressly or even impliedly suggest that the Commission was delegated authority to issue rules. This is true as well for the Public School Code and the Charter Schools Act.

For the above stated reasons, we do not agree that the Commission has the requisite authority to issue rules and, thus, offer no substantive comments on the language of the proposed rule.

MATTHEWS FOX, P.C.

By: _____

Patricia Matthews

Cc: Dr. Kurt Steinhaus, Secretary of Education – NMPED *via email*
Aaron Rodriguez, Deputy General Counsel – NMPED *via email*
Susan B. Fox, Esq. *via email*
Julia H. Barnes, Esq. *via email*
Matt Pahl, Director – Public Charter Schools of New Mexico *via email*

