STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

THE GREAT ACADEMY
and its GOVERNING BODY,
a New Mexico public charter school,

Appellants,

v.

No.: D-101-CV-2021-00754
Judge: Matthew Wilson

RYAN STEWART, in his official capacity
as SECRETARY OF EDUCATION OF
NEW MEXICO PUBLIC EDUCATION
DEPARTMENT,

Appellee.

ORDER REVERSING MARCH 19, 2021 DECISION AND ORDER OF THE SECRETARY OF THE NEW MEXICO PUBLIC EDUCATION DEPARTMENT

THIS MATTER came before the Court on Appellants The GREAT Academy and its Governing Body's Notice of Appeal seeking relief from a March 19, 2021 Decision and Order of the Secretary of the New Mexico Public Education Department. Having reviewed the pleadings, conducted a full record review and considered oral argument, THE COURT FINDS, CONCLUDES, AND ORDERS:

SUMMARY OF FACTS

a. Procedural Background.

This appeal has been made pursuant to Rule 1-074 NMRA and NMSA 1978, Section 39-3-1.1 (1999). *See also* NMSA 1978, § 22-8B-7(F) (2007) (authorizing appeals from a final decision of the secretary).

On April 6, 2021, Appellants The GREAT Academy and its Governing Body ("Appellants" or "The GREAT Academy"), filed a Notice of Appeal in the above-captioned cause.

Thereafter, Appellants filed an Expedited Motion for Stay Pending Appeal on April 28, 2021. On May 13, 2021, the Secretary of the New Mexico Public Education Department ("Appellee" or the "Secretary") filed a Response to Expedited Motion for Stay Pending Appeal. Appellants filed their Reply on Expedited Motion for Stay Pending Appeal on May 21, 2021. Following oral argument on June 10, 2021 on the motion for stay, the Court entered an Order Granting Stay Pending Rule 1-074 Appeal on June 17, 2021.

On June 4, 2021, Appellants filed their Appellants' Statement of Appellate Issues ("Statement"). In response, Appellee filed its Appellee's Response to Statement of Appellate Issues ("Response") on July 6, 2021. Appellants then replied through Appellants' Reply on Appellee's Response to Statement of Appellate Issues ("Reply") on July 21, 2021.

The Court considered oral argument on the merits of the appeal on August 25, 2021. Counsel Ms. Susan Fox argued for Appellants, and Counsel Mr. Aaron Rodriguez argued for Appellee.

The record on appeal comprises a 795-page record, comprehensively bates-stamped TGA 00001 to TGA 00795 (referred to herein as "[RP]"). The record includes two transcripts from hearings conducted in connection with the administrative matter at issue. [RP 048-101; RP 727-750]

b. Factual Background.

This appeal concerns the Secretary's decision to affirm the Public Education Commission's denial of renewal of the charter contract of The GREAT Academy. The Public Education Commission (the "PEC") is a constitutionally created commission authorized to, *inter alia*, approve and deny applications for renewals of charters for schools chartered by the State of New Mexico. *See* N.M. Const. art. XII, § 6; NMSA 1978, § 22-8B-16 (2007). The GREAT Academy

is a State-chartered charter school initially chartered in 2011, [RP 111], and with a most recent charter contract term between July 1, 2016 and June 30, 2021, [RP 103].

On September 29, 2020, Appellants submitted their renewal application for charter renewal. [RP 003] Thereafter, on November 13, 2020, the Charter Schools Division ("CSD") of the New Mexico Public Education Department (the "Department") issued a Preliminary Analysis of Renewal Application and Site Visit. [RP 015; RP 418-24]; *see also* NMSA 1978, § 22-8B-17 (2007) (creating the charter schools division and defining duties thereof). The preliminary analysis indicated that CSD would make several recommendations relating to various performance frameworks "[p]ending the charter contract renewal decision...." *See, e.g.*, [RP 419]. Following the preliminary analysis, the Department issued on December 1, 2020, [RP 016; RP 760], a "2021 Charter School Renewal Recommendation – The GREAT Academy," which stated, in part:

> 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.

[RP 396]; *see also* [RP 760-61].

On December 9, 2020, the PEC convened to consider Appellants' charter renewal application. *See generally* [RP 048-101] (transcript of proceedings); [RP 617-20] (notice of PEC public meeting). Following presentations by CSD staff and by Appellants' administrators, and extensive questioning by PEC commissioners, the PEC entered into a closed meeting to deliberate the charter renewal decision. [RP 099; 12-9-20 Tr. 205:15 to 207:22] Afterwards, the PEC moved out of closed meeting and voted on renewal of The GREAT Academy's charter. The PEC voted 10 for, and 0 against, to:

> 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.

[RP 101; 12-9-20 Tr. 210:4-13]

Thereafter, the PEC issued on December 21, 2020 a letter decision confirming its nonrenewal decision, and citing NMSA 1978, Sections 22-8B-12(K)(2), (3) (2019) as the statutory basis therefor. [RP 045-46]

On January 19, 2021, Appellants appealed the PEC's decision to the Secretary pursuant to NMSA 1978, Section 22-8B-7 (2007). [RP 001; RP 702] In response to Appellants' appeal to the Secretary, the Secretary appointed Hearing Officer Mr. Albert V. Gonzales to preside over the appeal hearing. [RP 702] The appeal hearing took place on February 18, 2021. [RP 727] Counsel Ms. Susan Fox argued on behalf of Appellants, and Counsel Ms. Elizabeth Jeffreys argued on behalf of the PEC.

Following the appeal hearing, Hearing Officer Gonzales issued a Proposed Decision and Order. [RP 774-792] The Proposed Decision and Order provided numerous findings of fact and conclusions of law for adoption by the Secretary. The Hearing Officer ultimately recommended that the Secretary reverse the decision of the PEC, [RP 791], on three grounds. First, the Hearing Officer concluded that PEC's decision was contrary to law in that the nonrenewal decision incorporated academic performance ratings based on the School Support and Accountability Act[1] in substitution for the A-B-C-D-F Schools Rating Act,[2] which was repealed and replaced effective June 14, 2019. [RP 786-87] The Hearing Officer concluded that the charter contract's academic performance framework, which was based in part on the A-B-C-D-F Schools Rating Act, required

[1] NMSA 1978, Sections 22-2F-1 to -3.
[2] NMSA 1978, Sections 22-2E-1 to -4 (repealed 2019).

modification given the change in law during the term of the charter contract. [RP 787] Thus, the PEC's nonrenewal decision was contrary to law by departing from one component of the agreed upon academic performance framework of the charter contract. [RP 786-87]

Second, the Hearing Officer determined that the PEC's conclusion that Appellants failed to meet generally accepted standards of fiscal management was contrary to law and unsupported by substantial evidence. [RP 787-88] The Hearing Officer reasoned that Section 11.02(e) of the charter contract provides that when corrective action plans are successfully completed, then the related noncompliance may not be used in a future nonrenewal action. Here, "CAPs (corrective action plans) addressing the findings in the FY17 and FY18 audits were successfully completed." [RP 788] Thus, the PEC's decision incorporating findings from those years was contrary to law and the charter contract. [*Id.*] Further, although there were audit findings from fiscal year ("FY") '19, and no evidence that a corrective action plan had been completed, standing alone audit findings from FY19 did not constitute substantial evidence that Appellants failed to meet generally accepted standards of fiscal management. [RP 788]

Third, the Hearing Officer concluded that the PEC's nonrenewal decision was contrary to law, in that it deprived Appellants of due process, because the PEC did not afford Appellants with reasonable notice as to the contemplated nonrenewal of the charter contract. The Hearing Officer reasoned that Section 4.03(c) of the charter contract requires the PEC to give 30 days' notice of the prospect of nonrenewal. Here, the Hearing Officer noted that CSD recommended nonrenewal with only eight days of notice before the PEC's renewal hearing. [RP 788-89]

Following the Hearing Officer's Proposed Decision and Order, the Secretary issued a Decision and Order on March 19, 2021. [RP 751-73] The Secretary deviated from the resolution proposed by the Hearing Officer, instead affirming the PEC's decision to not renew Appellants'

charter contract. As to the reasons cited by the Hearing Officer to support his recommendation that the Secretary reverse the PEC's decision, the Secretary reasoned as follows.

First, the Secretary concluded that the charter contract's academic performance framework was modified by operation of law following the repeal of the A-B-C-D-F Schools Rating Act and replacement with the School Support and Accountability Act. [RP 766] The Secretary further reasoned that if Appellant's argument is accepted (*i.e.*, that the charter contract required modification due to the repeal and replacement of the A-B-C-D-F Schools Rating Act), then "the charter school did not have accountability for student performance during that time, which is clearly contrary to the Charter School [*sic*] Act ... and the Public School Code, and it cannot be accepted." [RP 766]

Second, the Secretary concluded that FY17 and FY18 financial audits were properly considered by the PEC as "there is no evidence that the CAP was accepted as completed by CSD." [RP 768] Further, the Secretary concluded that fiscal concerns for FY19 alone justified nonrenewal of the charter contract, and found the existence of substantial evidence to support the PEC's determination. *See* [RP 768-70] (summarizing seven financial audit findings).

Third, the Secretary concluded that the PEC did not violate procedural due process by failing to follow the requirements of the charter contract in the renewal process. The Secretary reasoned that the "preliminary analysis of the Renewal Application detailed the concerns with the school, and the school had an 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." [RP 771]

Ultimately, the Secretary's March 19, 2021 Decision and Order affirmed the PEC's decision denying the charter contract renewal of The GREAT Academy. The appeal of concern in the above-captioned matter followed.

STANDARD OF REVIEW AND BURDEN OF PROOF

This appeal was brought pursuant to Rule 1-074 NMRA, which authorizes appeals from administrative decisions. Under the Rule, the District Court functions as an appellate court, not as a fact finder. *Mata v. Montoya*, 1977-NMSC-078, ¶ 3, 91 N.M. 20; *Zamora v. Vill. of Ruidoso Downs*, 1995-NMSC-072, ¶¶ 20-21, 120 N.M. 778. In exercising its appellate authority, the Court is to limit its scope of review to the whole record to determine:

> (1) whether the agency acted fraudulently, arbitrarily, or capriciously;
> (2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;
> (3) whether the action of the agency was outside the scope of authority of the agency; or
> (4) whether the action of the agency was otherwise not in accordance with law.

Rule 1-074(R) NMRA; *Gallup Westside Development, LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30.

As the appealing party, Appellants bear the burden of showing "'that agency action falls within one of the oft-mentioned grounds for reversal....'" *Fitzhugh v. N.M. Dep't of Labor, Emp't Sec. Div.*, 1996-NMSC-044, ¶ 25, 122 N.M. 173 (internal citation omitted).

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97. "The burden is on the part[y] challenging the decision to make this showing." *Attorney General v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174. "Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though another

conclusion might have been reached." *Perkins v. Dep't of Human Services,* 1987-NMCA-148, ¶ 20, 106 N.M. 651. Also, deference is given to any agency's interpretation of its regulations so long as the interpretation is reasonable. *Phelps Dodge Tyrone, Inc. v. N.M. Water Quality Control Comm'n*, 2006-NMCA-115, ¶ 25, 140 N.M. 464.

"Findings of fact supported by substantial evidence will not be overturned on appeal.... 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and if there is such evidence in the record to support a finding, it will not be disturbed.... Moreover, in examining such evidence an appellate court will view the evidence in a light most favorable to the prevailing party below and will not disturb findings, weigh evidence, resolve conflicts, or substitute its judgment as to the credibility of witnesses where evidence substantially supports the findings of the trial court." *Den-Gar Enterprises v. Romero*, 1980-NMCA-021, ¶ 11, 94 N.M. 425 (internal citations and quotations omitted).

"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.... The court will confer a 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 function.' ... However, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.... The court should reverse if the agency's interpretation of a law is unreasonable or unlawful." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579 (internal citations and quotations omitted).

"Administrative decisions are not in accordance with the law 'if the agency unreasonably or unlawfully misinterprets or misapplies the law.'" *Princeton Place v. N.M. Human Serv. Dep't, Med. Assistance Div.*, 2018-NMCA-036, ¶ 27, 419 P.3d 194 (citation omitted).

DISCUSSION

The Court conducted the whole record review as mandated by the rule and case law, and examined each section of the standard of review. Appellants raise the following arguments on appeal:

(a) The Secretary erred by delegating the appeal hearing to the Hearing Officer, and the Secretary's unexplained departure from the Hearing Officer's recommendation demonstrates that the Secretary's decision is unsupported by substantial evidence, arbitrary and capricious, and contrary to law;

(b) The Secretary's conclusion that the PEC did not violate the Open Meetings Act is contrary to law;

(c) The Secretary erred by concluding that the PEC could ignore the 2016 performance frameworks and base its decision on goals and measures other than those delineated in the charter contract;

(d) The Secretary erred by equating the Department's standards of excellence with undefined educational standards; and,

(e) The Secretary erred by basing his decision on matters outside the record on appeal.

The Court addresses each argument below.

a. Appellants Failed to Preserve their Objection to the Secretary's Delegation of the Appeal Hearing; However, the Secretary's Decision Was In Part Unsupported by

Substantial Evidence, Arbitrary and Capricious, and Not in Accordance with Law.

NMSA 1978, Section 22-8B-7(B) (2007) authorizes a charter applicant to "appeal a decision of the chartering authority concerning the denial, nonrenewal, suspension or revocation of a charter school" to the Secretary of the New Mexico Public Education Department. In the instance of such appeal, Section 22-8B-7(B) provides, in part, "the secretary, at a public hearing ... shall review the decision of the chartering authority and make findings." The related regulations of the New Mexico Administrative Code further authorize, and expound upon the procedural requirements of, appeals to the Secretary concerning charter nonrenewal decisions. *See generally* 6.80.4.14 NMAC (9/29/2020). Notably, neither Section 22-8B-7 nor 6.80.4.14 NMAC contemplate delegation of the Secretary's duty to conduct a public hearing to a hearing officer.

Appellants argue that the Secretary erred by appointing a hearing officer to preside over the hearing to consider Appellants' appeal from the PEC's nonrenewal decision. The Secretary, however, explains that Appellants failed to preserve this argument as Appellants did not timely object before or during the February 18, 2021 hearing. Appellee's Resp. 14-16. The Court agrees that Appellants failed to preserve their objection to the Secretary's appointment of the hearing officer to conduct the February 18, 2021 hearing.

Rule 1-074(K)(2) NMRA requires appellants to show "how the issues were preserved in the proceedings before the agency." Further, the New Mexico Court of Appeals confirmed that appellants must preserve their objections in administrative proceedings. *See Selmeczki v. N.M. Dep't of Corrs.*, 2006-NMCA-024, ¶ 23, 139 N.M. 122 ("While the formal rules of procedure need not all be followed in administrative proceedings, we do require preservation of issues raised on appeal from an administrative decision." (citing *Garza v. State Taxation & Revenue Dep't*, 2004-

NMCA-061, ¶¶ 7, 8, 135 N.M. 673)). Here, Appellants concede that they did not object to the Hearing Officer's presiding over the public hearing. Appellants' Reply 5. However, Appellants ask the Court to overlook their failure to object, arguing that: (i) Appellants could not have known at the time of appointment that the Secretary would not attend the hearing; (ii) Appellants did not anticipate that the Secretary would deviate from the findings and conclusions of the Hearing Officer; (iii) an objection at the public hearing would have been futile; and, (iv) the issue of appointing a hearing officer is jurisdictional, which does not necessitate preservation of an objection. *Id.*

The Court concludes that Appellants failed to preserve their objection to the Hearing Officer's presiding over the public hearing. *Cf.* [RP 727-50] (transcript of February 18, 2021 hearing). Appellants' three initial arguments do not adequately explain why Appellants did not lodge a timely objection to the Hearing Officer's appointment to, and presiding over, the hearing. *See Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 ("We will not review unclear arguments, or guess at what [a party's] arguments might be." (citation omitted)). Further, the Court rejects Appellants' contention that the appointment of the Hearing Officer was jurisdictional in nature. In support, Appellants cite to authority explaining that "subject matter jurisdiction" is the "power or authority to decide the particular matter presented." *See* Appellants' Reply 5 (citing *Sundance Mech. & Util. Corp. v. Atlas*, 1990-NMSC-031, ¶ 12, 109 N.M. 683). However, the record establishes that the Hearing Officer did not decide the matter before him; rather, he merely "issue[d] a recommended decision to the Secretary," [RP 738; 2-18-21 Tr.

42:11], which the Secretary rejected. Therefore, the Court does not further consider Appellants' arguments concerning the appointment of the Hearing Officer.

Nonetheless, Appellants contend that the Secretary erred either by failing to adopt the Hearing Officer's Proposed Decision and Order, or by failing to adequately explain the grounds for the Secretary's departure from the Hearing Officer's Proposed Decision and Order. Appellants' Statement 15. Pursuant to NMSA 1978, Section 22-8B-7 (2007), the Secretary is solely authorized to decide appeals from charter decisions, and the Secretary need not explain his departure from the Hearing Officer's recommendation. However, the Secretary's Decision and Order must satisfy the standards of review set forth in Rule 1-074(R) NMRA. The Court concludes that, in one material respect, the Secretary's decision is unsupported by substantial evidence, arbitrary and capricious, and not in accordance with law.

The Charter Schools Act provides, in pertinent part, "[t]he chartering authority shall develop processes for suspension, revocation or nonrenewal of a charter that: (1) provide the charter with timely notification of the prospect of suspension, revocation or nonrenewal of the charter and the reasons for such action; [and] (2) allow the charter school a reasonable amount of time to prepare and submit a response to the *chartering authority's action*;...." NMSA 1978, § 22-8B-12(L) (2019) (emphasis added).

Here, the record reflects that on December 1, 2020 either the Department or CSD recommended to the PEC nonrenewal of Appellants' charter contract. *Compare* [RP 396-98] (noting recommendation of the Department), *with* [RP 760] (noting recommendation of CSD). This action was in line with the CSD's responsibility to "make recommendations to the commission regarding the approval, denial, suspension or revocation of the charter of a state-chartered charter school." NMSA 1978, § 22-8B-17(D) (2007). Nonetheless, the record is devoid

of any evidence that the PEC—as the chartering authority—"(1) provide[d] the charter with timely notification of the prospect of ... nonrenewal of the charter and the reasons for such action; [and] (2) allow[ed] the charter school a reasonable amount of time to prepare and submit a response to the chartering authority's action...." NMSA 1978, § 22-8B-12(L) (2019); *see also* NMSA 1978, § 22-8B-2(B) (2015) ("'chartering authority' means either a local school board or the commission"). While the Department or CSD may have recommended nonrenewal to the PEC, the responsibility for the nonrenewal decision is that of the PEC, and the PEC is statutorily required to "develop processes for ... nonrenewal of a charter that: (1) provide[s] the charter school with timely notification of the prospect of ... action; [and] (2) allow[s] the charter school a reasonable amount of time to prepare and submit a response to the *chartering authority's action....*" § 22-8B-12(L) (emphasis added).

The charter contract additionally requires that the "Authorizer shall i. provide the School with timely notification of the prospect of ... nonrenewal of the Charter and the reasons for such action; [and] ii. allow the School a reasonable amount of time to prepare and submit a response to the Authorizer's action no less than 30 days, absent exigent circumstances...." [RP 120]; *see also* [RP 109] (defining "Authorizer" as the New Mexico Public Education Commission).

The Secretary's conclusion that the PEC provided timely notice of the prospect of nonrenewal, [RP 770-71], is unsupported by substantial evidence in the whole record, is arbitrary and capricious, and contrary to law. *See* Rule 1-074(R) NMRA. The Secretary conflates activity by the CSD as evidence that Appellants should have anticipated that the PEC contemplated nonrenewal of the charter contract. [RP 771]; *compare* § 22-8B-12(L) (PEC's statutory obligation to provide notice of the prospect of nonrenewal), *with* § 22-8B-17(D) (CSD's statutory obligation to make recommendations regarding nonrenewal).

The Court notes that Section 2.01 of the charter contract designates CSD as staff support to the PEC and requires CSD to provide recommendations regarding nonrenewal. [RP 112]; *see also* Section 22-8B-17 ("The [CSD] shall: A. provide staff support to the commission; . . . and D. make recommendations to the commission regarding ... denial...."). Further, Section 2.01 states, in part, "[t]he [PEC] or any person designated by the [PEC] to address an issue or [*sic*] shall be referred to generally as 'Authorizer' from this point forward." [*Id.*] However, the Court did not find, and Appellee's Decision and Order did not cite, any provision of the charter contract that designates the CSD as an entity authorized to provide notice on behalf of the PEC regarding the prospect of nonrenewal by the PEC. Therefore, the Court concludes that the Secretary's conclusion that the PEC provided Appellants with timely notice of the prospect of nonrenewal is unsupported by substantial evidence.

Further, by engaging in a cursory analysis on the issue of notice, the Secretary's decision was arbitrary and capricious. *See Atlixco Coal. v. Maggiore*, 1998–NMCA–134, ¶ 24, 125 N.M. 786 ("[A]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand."). Assuming *arguendo* that the CSD was designated to provide notice on behalf of the PEC regarding the prospect of nonrenewal, the Secretary failed to address the 30 days' notice requirement set forth in the charter contract. [RP 771-72]

The Secretary's decision in this regard was additionally not in accordance with law, as the decision failed to recognize that the PEC did not implement any processes for notification of the prospect of nonrenewal required by Section 22-8B-12(L). *See also* [RP 120] (charter contract provision requiring authorizer, *i.e.*, the PEC, to provide timely notice of potential nonrenewal and an opportunity to respond).

Therefore, the Court reverses the March 19, 2021 Decision and Order of the Secretary on the basis of: (a) the PEC's failure to implement processes for nonrenewal set forth in Section 22-8B-12(L); and, (b) the Secretary's failure to reverse the PEC's decision for its noncompliance with Section 22-8B-12(L).

b. The Secretary's Conclusion that the PEC Did Not Violate the Open Meetings Act is in Accordance with Law.

The New Mexico Open Meetings Act[3] provides that a State commission must conduct open meetings. NMSA 1978, § 10-15-1(B) (2013). However, the Open Meetings Act's open meeting requirement does not apply to "meetings pertaining to issuance, suspension, renewal or revocation of a license, except that a hearing at which evidence is offered or rebutted shall be open." § 10-15-1(H)(1).

Statutory construction is an issue of law for *de novo* review by an appellate court. *Moongate Water Co., Inc. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405. The Court's "charge is to determine and give effect to the Legislature's intent." *Id.* (quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24). "We give words their ordinary meaning, and if the statute is clear and unambiguous, we 'refrain from further statutory interpretation.'" *Id.* "Unless 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." NMSA 1978, § 12-2A-2 (1997).

Appellants contend that the PEC erred, and thus the Secretary's Decision and Order was contrary to law, when the PEC entered a closed meeting to deliberate whether to renew Appellants' charter contract. Appellants' Statement 18-21. The Court disagrees. Here, whether the PEC's

[3] NMSA 1978, Sections 10-15-1 to -4.

deliberation in a closed meeting was lawful hinges on the definition of license. The Open Meetings Act fails to define license. The common usage of license is permission to act. *N.M. Sheriffs & Police Ass'n v. Bureau of Revenue*, 1973-NMCA-130, ¶ 8, 85 N.M. 565 ("The ordinary meaning of license being 'permission to act,' the contract in question was a license from taxpayer to Shaffer to publish the magazine."); *see also* Black's Law Dictionary (11th ed. 2019), license ("1. A privilege granted by a state or city upon the payment of a fee, the recipient of the privilege then being authorized to do some act or series of acts that would otherwise be impermissible."). Similarly, "[a]s used in the Charter Schools Act: A. 'charter school' means a conversion school or start-up school *authorized by the chartering authority to operate* as a public school;...." NMSA 1978, § 22-8B-2 (2015) (emphasis added). A chartering authority is "either a local school board or the commission that *permits the operation* of a charter school." 6.80.4.7(E) NMAC (9/29/2020) (emphasis added). Thus, the Court concludes that the term license, within the context of Section 10-15-1(H)(1), also includes a charter.

Appellants further argue that Section 10-15-1(H)(1) does not apply as the December 9, 2020 PEC hearing contemplated the admission and rebuttal of evidence, thereby implicating an exception to the closed meeting provision. *See* § 10-15-1(H)(1) ("except that a hearing at which evidence is offered or rebutted shall be open."). However, Appellants fail to cite any portion of the record that indicates "evidence [wa]s offered or rebutted" during the closed meeting. *Cf.* [RP 099; 12-9-20 Tr. 205:15-20] ("If there are no further questions, I am going to move that the Public Education Commission enter into a Closed Session, pursuant to NMSA Section 10-15-1(H)(1). The subject to be discussed pertains to issuance of The GREAT Academy charter license renewal."); *see also Kleinberg v. Board of Educ. of Albuquerque Pub. Schs.*, 1988-NMCA-014, ¶¶ 19-20, 107 N.M. 38 (distinguishing deliberation concerning a personnel matter, which may be

conducted in closed session, from the final action of board in open session). Thus, because the closed meeting concerned deliberation alone, the exception clause within Section 10-15-1(H)(1) is inapplicable. *See also* [RP 100; 12-9-20 Tr. 207:23 to 209:23] (PEC ends closed meeting). Therefore, the Secretary did not act contrary to law when concluding that the PEC did not violate the Open Meetings Act.

c. The Secretary Did Not Err When Affirming the PEC's Decision with Respect to the Departure from the Charter Contract's Academic Performance Framework.

NMSA 1978, Section 22-8B-9.1(A) (2015) provides, in part, "[t]he performance provisions in the charter contract shall be based on a framework that clearly sets forth the academic and operations performance indicators and performance targets that will guide the chartering authority's evaluation of each charter school. The performance framework shall be a material term of the charter school contract...." *See also* NMSA 1978, § 22-8B-2(L), (M) (2015) (defining "performance indicator" and "performance target").

In 2019, the New Mexico Legislature enacted the School Support and Accountability Act, NMSA 1978, Sections 22-2F-1 to -3 (2019), and further repealed the A-B-C-D-F Schools Rating Act, NMSA 1978, Sections 22-2E-1 to -4 (repealed 2019). The A-B-C-D-F Schools Rating Act required the Department to "assign a letter grade of A, B, C, D or F to each public school...." NMSA 1978, § 22-2E-4(B) (2015, repealed 2019). The School Support and Accountability Act no longer requires assignment of a letter grade to public schools; however, the act requires implementation of an accountability system based upon similar performance metrics as the A-B-

C-D-F Schools Rating Act. *Compare* NMSA 1978, § 22-2F-3(B) (2019), *with* NMSA 1978, § 22-2E-4(B) (2015, repealed 2019).

Appellants contend that the Secretary erred when affirming the decision of the PEC, which partially based its assessment of The GREAT Academy's performance on the accountability system of the School Support and Accountability Act. Appellants' Statement 21-22; *see, e.g.*, [RP 054; 12-9-20 Tr. 22:14-18]; [RP 381-83]; *see also* [RP 765-67]. Appellants further argue that if the PEC sought to review The GREAT Academy's academic performance under a different accountability system than that set forth in the charter contract (*i.e.*, the A-B-C-D-F Schools Rating Act), then it was incumbent upon the PEC to accordingly amend the charter contract. *Compare* [RP 130] ("The School's performance shall be based on three Performance Frameworks: an Academic, an Organizational and Financial Framework...."), *with* [RP 133] ("Any modification of the Performance Frameworks requires an amendment that must be agreed to and executed by both parties.").

Section 13.01 of the charter contract provides, "[t]his Contract shall not take precedence over any applicable provisions of law, rule or regulation." [RP 161] Further, Section 13.07 of the charter contract states, in part:

> In 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. If an amendment to this Contract is required to comply with a change in the law or rule, then the Parties shall execute such an amendment, to the extent that the change does not impair the Parties' respective rights hereunder.

[RP 163]

Thus, the charter contract obligated both parties to comply with the change in law. The PEC's evaluation of the school under the School Support and Accountability Act reflected the

PEC's adherence to the new law, as the PEC could no longer gauge The GREAT Academy's academic performance under the repealed act. *See* NMSA 1978, Section 22-8B-12(D) (2019) ("A chartering authority shall monitor the fiscal, overall governance and student performance and legal compliance of the charter schools that it oversees, including reviewing the data provided by the charter school to support ongoing evaluation according to the charter contract."); *see also* [RP 214] (Appellants' renewal application noting performance under School Support and Accountability Act system).

Further, while Section 5.04 of the charter contract states, "[a]ny modification of the Performance Frameworks requires an amendment that must be agreed to and executed by both parties," [RP 133], the charter contract obligated both the PEC and The GREAT Academy to amend the academic performance framework to comply with the change in the law. [RP 163] Here, neither party sought modification of the academic performance framework following the repeal of the A-B-C-D-F Schools Rating Act, and enactment of the School Support and Accountability Act. Resultantly, Appellants and the PEC were in mutual breach of the charter contract, and neither party is in a position to assert error when the contract contemplated bilateral action. *See* 15 Williston on Contracts § 43:31 (4th ed. 2019) ("As a general principle, the mutual inability or unwillingness of the parties to a contract to perform will discharge the duty of each to the other."); *cf. Scott v. Bd. of Comm'rs of Cnty. of Los Alamos*, 1989-NMSC-066, ¶ 9, 109 N.M. 310 ("Breach of contract by state actors does not amount to a deprivation of property without procedural due process if adequate state law remedies exist to redress the breach."); NMSA 1978, Section 22-8B-9(C) (2015) ("The process for revision or amendment to the terms of the charter contract shall be made only with the approval of the chartering authority and the governing body

of the charter school. If they cannot agree, either party may appeal to the secretary as provided in Subsection A of this section.").

Additionally, the Court does not construe the repeal of the A-B-C-D-F Schools Rating Act, and enactment of the School Support and Accountability Act, as an impairment of the charter contract or any right conferred to The GREAT Academy under the charter contract. Rather, the change in law merely resulted in a substitution of one general academic performance assessment for another, each based upon similar academic performance metrics. *Compare* NMSA 1978, § 22-2F-3(B) (2019), *with* NMSA 1978, § 22-2E-4(B) (2015, repealed 2019); *see also* [RP 766-67] ("Both academic performance frameworks would have reviewed the same accountability data for this school."); *N.M. Attorney Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 12, 309 P.3d 89 ("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." (citations and internal quotations omitted)).

Therefore, with respect to the aforementioned issue, the Court concludes that the Secretary did not err when affirming the decision of the PEC, which based its decision in part on The GREAT Academy's academic performance under the accountability system of the School Support and Accountability Act.

d. The Secretary Did Not Err When Equating the Department's Standards of Excellence with the Department's Standards of Excellence.

NMSA 1978, Section 22-8B-12(K) (2019) provides, in pertinent part, "[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: ... (2) failed to meet or make substantial progress toward achievement of the department's standards of excellence...." The term "standards

of excellence" is undefined within the Charter Schools Act. *Cf.* NMSA 1978, Section 22-8B-2 (2015).

Appellants contend that the Secretary erred when upholding the PEC's nonrenewal decision, which was partially based upon PEC's determination that The GREAT Academy "failed to meet or make substantial progress toward achievement of the department's standards of excellence...." Section 22-8B-12(K)(2). *See* Appellants' Statement 22-24; *see also* [RP 046]. Appellants argue that the Department's "standards of excellence" do not exist. Thus, Appellants contend that because the Secretary equated the Department's "standards of excellence" with the Department's "standards for excellence," the "Secretary's decision was arbitrary and capricious, contrary to law, *ultra vires* and further deprived Appellants of due process." Appellants' Statement 24. The Court disagrees.

NMSA 1978, Section 12-2A-2 (1997) states, in part, "[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 fundamental rule of statutory construction is that all provisions of a statute, together with other statutes *in pari materia*, must be read together to ascertain the legislative intent." *Wilson v. Denver*, 1998-NMSC-016, ¶ 36, 125 N.M. 308 (quoting *Roth v. Thompson*, 1992-NMSC-011, ¶ 15, 113 N.M. 331).

NMSA 1978, Section 22-8B-12(J) (2019) states, in material part, "[a] charter school renewal application submitted to the chartering authority shall contain: (1) a report on the progress of meeting academic performance ... including achieving the ... state standards of excellence and other terms of the charter contract, including the accountability requirements set forth in the Assessment and Accountability Act." *See also* NMSA 1978, § 22-8B-12(K)(2) (2019).

Additionally, NMSA 1978, Section 22-8B-4(M) (2012, amended 2021) provides that charter schools are subject to the Assessment and Accountability Act.[4]

The Assessment and Accountability Act requires the Department to adopt academic content and performance standards, and establish an assessment and accountability system aligned with such standards. NMSA 1978, §§ 22-2C-3, -4 (2015). Citing *inter alia* Section 22-2C-3 and Section 22-2C-4 as statutory authority, the New Mexico Administrative Code sets forth the Department's standards for excellence, constituting a regulation that "provides for the implementation of educational standards and expectations for all students who attend public schools in the state." 6.29.1.6 NMAC (12/15/2020).[5] Hence, although the Department's "standards of excellence" are not defined by the Charter Schools Act, the Department's "standards for excellence" are promulgated in 6.29.1 NMAC under the Assessment and Accountability Act, with which charter schools are bound to comply. *See* 6.29.1.3 NMAC (12/15/2020) (setting forth statutory authority);[6] § 22-8B-4(M) (2012, amended 2021).

Thus, given the context in which the term "standards of excellence" is used, and reading corollary statutes *in pari materia*, the Court determines that the term refers to the Department's "standards for excellence" promulgated in 6.29.1 NMAC. Therefore, the Court concludes that the Secretary did not err when equating the Department's standards of excellence, referenced in Section 22-8B-12(K)(2), with the Department's standards for excellence set forth in 6.29.1 NMAC and promulgated under Sections 22-2C-3 and 22-2C-4 of the Assessment and Accountability Act.

[4] NMSA 1978, Sections 22-2C-1 to -13.
[5] *See also* 6.29.1.6 NMAC (6/30/2009) (previous version of regulation setting forth similar objective).
[6] The Court notes that the previous version of the regulation, 6.29.1.3 NMAC (6/30/2009), also cites to Section 22-2C-3 as statutory authority for the regulation.

e. The Court Does Not Find Reversible Error in the Secretary's Basing His Decision on Matters Beyond Those Cited in the PEC's Decision.

Regarding the Secretary's scope of review vis-à-vis an appeal of a nonrenewal decision of the PEC, NMSA 1978, Section 22-8B-7(B) provides, in part, "[i]f 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." Further, 6.80.4.14(D)(3) NMAC (9/29/2020) states, in part, "[a]ll submissions to the secretary on appeal shall focus on the factual and legal correctness of the chartering authority's decision in light of ... the grounds for non-renewal or revocation as set forth in Subsection K of Section 22-8B-12 NMSA 1978...."

Appellants assert that the Secretary erred by basing his decision on factual matters and legal conclusions beyond those of the PEC's decision. Specifically, Appellants argue error in that the Secretary based his decision on financial audits of The GREAT Academy Foundation, "an associated not-for-profit foundation ... designated as a component unit of the School." [RP 127] Further, Appellants argue that the "Secretary acted outside his authority by considering evidence outside the record from PEC staff,[7] ... and by injecting a new finding that was not part of the PEC's decision below: that the School committed a material violation of the charter contract." Appellants' Statement 25. The Court disagrees.

The Secretary's charge, pursuant to Section 22-8B-7(B), was to consider *inter alia* whether substantial evidence in the whole record supported the PEC's nonrenewal decision. In turn, the Secretary found substantial evidence in the whole record to support that The GREAT Academy

[7] Appellants' argument equates PEC staff with CSD staff. *See generally* NMSA 1978, § 22-8B-17 (2007) ("The [CSD] shall: A. provide staff support to the commission; . . .").

failed to meet generally accepted standards of fiscal management. [RP 768-70] Appellants' contend that the Secretary erred when considering audit findings of The GREAT Academy Foundation when evaluating whether substantial evidence existed to support the PEC's decision. However, Section 4.04(c) of the charter contract provides, "[t]he School has an associated not-for-profit foundation named the GREAT Academy Foundation, and the foundation is designated as a component unit of the school. The foundation shall pay a reasonable, additional amount to include the not-for-profit foundation in the School's audit if required." [RP 127] Given that the charter contract expressly contemplated The GREAT Academy Foundation as a component unit of the school, the Secretary did not err when incorporating audit findings of the foundation in his assessment as to whether the PEC's decision was supported by substantial evidence. *Compare* [RP 184] (performance framework relating to audit findings), *with* [RP 768-70] (audit findings of The GREAT Academy and The GREAT Academy Foundation cited in Secretary's Decision and Order); *see also* [RP 348-49] (summarizing audit findings).

Further, the Secretary concluded that The GREAT Academy violated a material term of the charter contract, *see* [RP 759], thereby deviating from the decision of the PEC. This finding—in and of itself—does not warrant reversal. *See Archuleta v. Santa Fe Police Dept. ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 17, 137 N.M. 161 ("Generally, courts should not attempt to supply a reasoned basis for an agency's decision, but may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." (internal quotations and citations omitted)). Here, the Secretary adequately explained the grounds upon which he determined that the PEC's decision was in accordance with the law and supported by substantial evidence in the record. Although the Secretary's finding that The GREAT Academy committed a material violation of the charter contract deviated from the PEC's reasoning, Appellants fail to inform the Court as to how

that finding, standing alone, renders the remainder of the Secretary's decision void within the Rule 1-074(R) NMRA standards of review. Therefore, the Court does not reverse the Secretary's Decision and Order on the basis of the Secretary's additional finding of a material violation of the charter contract.

With respect to Appellants' argument that the Secretary considered an email communication between the Hearing Officer and CSD staff in rendering his decision, Appellants fail to inform the Court as to how a communication between the Hearing Officer and CSD staff renders the Secretary's Decision and Order invalid. Statement 25. While the Hearing Officer's initiation of the communication may have not complied with 6.80.4.14(D)(2) NMAC (9/29/2020), Appellants fail to proffer an argument to the Court as to how this communication would have rendered the Secretary unable to make an unbiased decision. [RP 793–795] *See* 6.80.4.14(D)(2) NMAC (9/29/2020) ("The secretary shall disqualify himself or herself from hearing an appeal if the secretary determines, after learning of a prohibited communication, that the secretary is unable to render an unbiased decision."); *see also Headley v. Morgan Mgmt. Corp.*, 2005-NMCA-045, ¶ 15, 137 N.M. 339 ("We will not review unclear arguments, or guess at what [a party's] arguments might be." (citation omitted)).

Therefore, the Court concludes that the Secretary's Decision and Order does not warrant reversal vis-à-vis: (a) the Secretary's consideration of The GREAT Academy Foundation's audit findings; (b) the Secretary's finding that The GREAT Academy committed a material violation of the charter contract; or, (c) the Hearing Officer's communication with CSD staff.

CONCLUSION

Based upon the pleadings, oral argument, and all matters of record, this Court finds:

1. This Court has jurisdiction over the parties hereto and the subject matter hereof;

2. This review is governed by Rule 1-074 NMRA;
3. The Secretary's Decision and Order is, in material part, unsupported by substantial evidence, arbitrary and capricious, and not in accordance with law; and,
4. Reversal of the Secretary's Decision and Order is appropriate and permitted pursuant to Rule 1-074(T)(2) NMRA.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED BY THE COURT that the March 19, 2021 Decision and Order of the Secretary of the New Mexico Public Education Department is hereby **REVERSED**. The Secretary of the New Mexico Public Education Department is hereby ordered to reverse the decision of the Public Education Commission and order the approval of Appellants' charter with any condition(s) the Secretary deems appropriate and otherwise permitted by law. Although this Order reverses the Secretary's decision, this Order shall not be construed as prohibiting the Public Education Commission from initiating suspension or revocation proceedings in accordance with NMSA 1978, Section 22-8B-12 (2019).

IT IS HEREBY ORDERED.

2/15/22

MATTHEW WILSON
DISTRICT COURT JUDGE
DIVISION IX
4DPL

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the date of acceptance for e-filing a true and correct copy of the foregoing was e-served on counsel registered for eservice in this matter as listed below.

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