

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF THE SECRETARY OF EDUCATION
300 DON GASPAR AVENUE
SANTA FE, NEW MEXICO 87501

In the Matter of:

THE GREAT ACADEMY
and its Governing Body,

Appellants,

vs.

NMPED Contract Impasse Appeal No. _____

THE NEW MEXICO PUBLIC EDUCATION COMMISSION,

Respondent.

EXPEDITED NOTICE OF CONTRACT IMPASSE APPEAL AND BRIEF IN SUPPORT

Appellant The GREAT Academy, and its governing body, a New Mexico public charter school (“Appellants”, “School” or “TGA”) currently authorized by the New Mexico Public Education Commission (“PEC”), by and through their attorneys, Matthews Fox, P.C. (Susan Fox), and pursuant to NMSA 1978, §22-8B-9(A) and (C), hereby give notice to the Secretary of the New Mexico Public Education Department (“Department” or “NMPED”) of an impasse relating to the charter renewal contract between the parties. Pursuant to NMSA 1978 §22-8B-9(A), the School declares an impasse and submits the matter of the charter contract to the Secretary to finalize.

On April 6, 2021, the School appealed to the District Court the March 19, 2021 Order of the Secretary of the New Mexico Public Education Department (“Secretary”) affirming the decision of the PEC to not renew the School’s current charter. On February 15, 2022 the Court rendered its decision on the appeal, reversing the Order of the Secretary. On April 4, 2022, pursuant to the Court’s decision, ordered the reversal of the PEC’s decision denying the School’s charter renewal, and ordered that the PEC and the School enter into a contract for a term to begin on July 1, 2022.

Charter contract negotiations between representatives of the parties took place on April 29, 2022. The PEC representatives required that conditions be placed on the School as part of the contract, one of which was a condition that 68 percent of the School's funds be dedicated to instructional spending under certain accounting classifications. Explaining that the School's current reduced enrollment made such an immediate percentage increase impracticable, School representatives at that negotiation attempted to get that percentage reduced, to no avail. Also at that negotiation, a PEC subcommittee member indicated that he would be asking the PEC as a whole to grant a three-year charter rather than a five-year charter at its next public meeting.

On May 5, 2022, the PEC submitted its *Request for Clarification of Decision and Order*, requesting clarification of the Decision and Order of the Secretary with regard to whether the charter renewal term was to be for a five-year term, whether NMSA 1978 Section 22-8B-12 applied, or whether the PEC could modify the term of the contract as part of the conditions identified by the Secretary. The School submitted its *Response to the Commission's Request for Clarification of the Secretary's April 4, 2022 Decision and Order* on May 16, 2022, requesting that the Secretary confirm the School's position that the School is entitled to a five-year charter term, pursuant to the Charter Schools Act, Section 22-8B-12(A), which provides in pertinent part that "[a] charter may be renewed for successive periods of five years each. Approvals of less than five years may be agreed to between the charter school and the chartering authority".

On May 20, 2022, the PEC voted 5-3 in favor of a charter contract with a three-year term for this School, and approving the Charter Contract, the Performance Framework, and the associated "conditions" in the form attached hereto as Exhibit A. On May 26, 2022, the Secretary issued his *Order on Request for Clarification of Decision and Order*, stating that "[t]he Secretary interprets the decision of the District Court to intend for there to be a renewal of a charter term for five years

as is provided to other charter schools”, and ordering that “the Decision and Order of the Secretary should be construed as being for a charter for a five-year term in accordance with the decision of the District Court.” However, as of May 20, the PEC had already voted to offer a three-year term to the School, rather than a five-year term. Shortly after receipt of the Secretary’s clarification order, counsel for the School wrote to counsel for the PEC, asking whether the PEC would be willing to hold a special meeting to amend its proposed contract to a five-year term, in light of the Secretary’s clarification and Order. Counsel for the PEC indicated to counsel for the School that the PEC was unwilling to hold such a meeting, and apparently is unwilling to amend its proposed contract to conform to the five-year term confirmed by the Secretary.

On May 31, 2022, the School’s Governing Council unanimously voted to approve the Charter Contract, the Performance Framework, and the associated conditions , with two amendments to the documents approved by the PEC: (1) the three-year term was changed to a five-year term; and (2) the instructional spending condition was changed from 68 percent to 60 percent, effective at such time that the School’s enrollment has reached 160 students or more. Recognizing that the PEC’s approved documents did not contain these amendments, the Governing Council further voted unanimously to submit this charter contract impasse appeal to the Secretary.

The PEC’s proposed three-year charter is contrary to the Secretary’s *Order on Request for Clarification of Decision and Order*, the District Court’s *Decision and Order*, and Subsection 12(A) of the New Mexico Charter Schools Act. A shorter term goes beyond the Secretary’s conditions in his Decision and Order, and is contrary to law.¹ The School has not agreed to a shorter renewal term. The School thus declares an impasse on this issue, and asks the Secretary to, on an expedited basis given the Secretary’s recent *Order on Request for Clarification of Decision and*

¹ Section 22-8B-7(B) provides that the Secretary’s decision on a renewal appeal “shall be final”, e.g. the PEC has no power to modify the term confirmed by the Secretary and applicable law.

Order on the issue of the contract term, finalize a five-year Charter Contract and Performance Framework between the parties, amending Section 3.2 of the Charter Contract accordingly to reflect an expiration date of June 30, 2027. The legal and factual bases for confirmation of a five-term in this contract impasse appeal are stated in the School's *Response to the Commission's Request for Clarification of the Secretary's April 4, 2022 Decision and Order*, which, for efficiency's sake, is incorporated by reference herein as if fully set forth.

Further, although the School recognizes an instructional spending goal of 68% as a desirable goal as a general matter, that percentage is currently impracticable under current enrollment numbers, and essentially sets the School up to fail to meet this condition, which appears to be viewed by the authorizer not as a "goal" but as a *requirement* for continued operation. Such a requirement is not supported by law. The PEC does not have the legal authority to dictate or require certain "budgeted percentages of operational budget". NMSA 1978 §22-8B-3 (Charter Schools Act enacted to allow individual schools to "develop and use site-based budgeting"); §22-8B-4(C)(charter school shall be responsible for its own operation, including preparation of a budget, subject to audits pursuant to the Audit Act); §22-8B-12(D)(charter authorizer to monitor charter school performance, provided it does "not unduly inhibit the autonomy granted to the charter schools that it governs"). Any amendment to a state-chartered charter school's submitted budget must be "pursuant to the Public School Finance Act and the Charter Schools Act." NMSA 1978, §22-8-6.1(A). Neither the Public School Finance Act nor the Charter Schools Act require the instructional spending percentage that the PEC wants to impose here. Moreover, the New Mexico Legislature declined to pass proposed legislation requiring certain budgetary allocations as a matter of law in recent legislative sessions. The operating budgets submitted by the School for SY 2021-22 and the upcoming year have been submitted and approved by the PED in accordance with

NMSA 1978 Section 22-8-6(H). The PEC may “review” the School’s budget, but does not have the authority to prescribe how the School allocates its resources, as it seeks to do via this “condition”. NMSA 1978, §22-8-6.1(A).

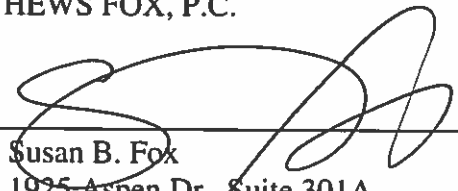
Although the School recognizes that maximizing instructional spending is a laudable and desirable goal, and is committed to so doing insofar as reasonably possible, a 68% requirement is not practicable at this time for this School, whose 2022-23 enrollment is projected to be 87 students, a decline from pre-pandemic, pre-nonrenewal enrollment numbers of 168, and which enrollment numbers the School endeavors to increase over the upcoming charter term. The School has appropriately budgeted for four regular education teachers, one special education teacher, and 2.5 educational assistants for this reduced enrollment, which the School feels is more than adequate to deliver the School’s program and mission. Allocating 68% of the School’s budget to the instructional spending categories set forth in the condition does not consider the School’s fixed costs, which don’t decline due to the decrease in enrollment; this would leave an amount for all remaining functions and school operations that the School believes would be inadequate and irresponsible, until such time as the School’s enrollment reaches 160 students or above. Further, the School’s PED budget analyst has represented to the School that none of her schools submitted budgets that allocated 68% to functions 1000, 2100 and 2200 for the upcoming school year. Until and unless the 68% instructional spending percentage becomes law and is uniformly required and administered, requiring only this School to conform to that percentage is inequitable, as well as being contrary to applicable law. The School therefore also declares an impasse on this issue and asks the Secretary to finalize the instructional spending condition at a 60 percent level, effective at such time as the School’s enrollment reaches 160 students or more.

WHEREFORE, for the reasons stated herein and in the School’s *Response to the*

Commission's Request for Clarification of the Secretary's April 4, 2022 Decision and Order, the School requests that the Secretary finalize the Charter Contract documents attached as Exhibit A in accordance with the amendments passed by the School's Governing Council and as described herein.

Respectfully submitted,
MATTHEWS FOX, P.C.

By: _____



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Expedited Notice of Contract Impasse Appeal and Brief in Support, and referenced exhibits, were served via hand-delivery and email on Dr. Kurt Steinhaus, Secretary of the New Mexico Public Education Department, and one copy by hand-delivery and email on the Chair of the New Mexico Public Education Commission, c/o Options for Parents and Families Division, at the addresses below on June 3, 2022:

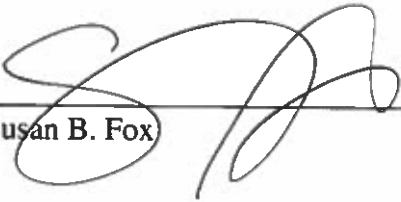
Dr. Kurt Steinhaus, Secretary
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Kurt.Steinhaus@state.nm.us

Rebekka Burt, Chair,
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With copies via electronic mail to:

Aaron Rodriguez, NMPED General Counsel's Office
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Susan B. Fox