

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

December 6, 2022

The Honorable Bill B. O'Neill
New Mexico State Senate, District 13
343 Sarah Lane N.W., Apt. D
Albuquerque, New Mexico 87114

Re: Request for Opinion - Public Education Commission Required by Law to Follow State Rules Act

Dear Senator O'Neill:

You have asked the Office of the Attorney General for an opinion as to whether the Public Education Commission is required by law to follow the provisions of the State Rules Act, NMSA 1978, §§ 14-4-1 to -11 (1967, as amended through 2019), when issuing a rule as that term is defined in NMSA 1978, Section 14-4-2(F) (2017). More specifically, you have asked us to opine on:

- (1) whether the Public Education Commission is required to follow the State Rules Act before the resolutions, standards, procedures, directives and policies it adopts affecting the rights of state-chartered charter schools are enforceable; and
- (2) whether it is the responsibility of the Public Education Commission to request that the Public Education Department promulgate rules on its behalf, in the absence of a specific legislative act conferring on the Public Education Commission the express power to enact rules and regulations governing state-chartered charter schools.

As a point of beginning, Section 14-4-2(F) in relevant part defines "rule" as:

any rule, regulation, or standard, including those that explicitly or implicitly implement or interpret a federal or state legal mandate or other applicable law and amendments thereto or repeals and renewals thereof, issued or promulgated by any agency and purporting to affect one or more agencies besides the agency issuing the rule or to affect persons not members or employees of the issuing agency, including affecting persons served by the agency. An order or decision or other document issued or promulgated in connection with the disposition of any case or

agency decision upon a particular matter as applied to a specific set of facts shall not be deemed such a rule, nor shall it constitute specific adoption thereof by the agency ...

By definition, then, a “rule” has two aspects under the State Rules Act: it either specifically or impliedly carries out or construes a legal imperative or requirement, whether federal or state, conveying the meaning, or having the appearance, of affecting (a) agencies other than the one issuing the rule; or (b) persons not a part of, or employed by, the agency issuing the rule, including persons for whom the promulgating agency performs duties or provides services.

Our state’s two highest appellate courts have variously interpreted the meaning of “rule” under the State Rules Act.¹ In *Bokum Resources Corp. v. New Mexico Water Quality Control Commission*, 1979-NMSC-090, 93 N.M. 546, the Supreme Court wrote:

We are faced with considerable confusion because of nomenclature. Although the Court of Appeals makes a distinction between “standards” and “regulations”, the State Rules Act, [Section] 14-4-1, N.M.S.A. 1978, *et seq.*, does not. The statutory designation for an enactment by an agency designed to have the force and effect of law and to control the actions of persons who are being regulated by the agency is a “rule”. In Section 14-4-2(C), the State Rules Act defines “rule” as meaning any “rule, **regulation**, order, **standard**, statement of [p]olicy . . .”

Id. ¶ 41. (Emphasis in the original.)

In *Livingston v. Ewing*, 1982-NMSC-110, 98 N.M. 685, our state’s highest court held that a resolution of the Board of Regents of the Museum of New Mexico permitting only Indians to sell handicrafts under the portal of the Palace of the Governors was a rule within the meaning of the State Rules Act for purposes of its promulgation:

It is not merely an announcement to the public of past or present practice or understanding, or tentative intentions for the future. It is a statement asserting a standard of conduct which has the force of law; it affects the rights or obligations of those who fall within its ambit (internal citation omitted).

Id. ¶ 9.

The Court of Appeals in *State v. Joyce*, 1980-NMCA-086, ¶ 6, 94 N.M. 618, determined that a statement of policy by the Board of Regents of the Museum of New Mexico reserving a particular area exclusively for Indian merchants selling genuine handmade Indian arts and crafts was a “rule”

¹ The Office of the Attorney General has opined on this question as well. If a policy manual or directive contains statements of policy purporting to affect one or more agencies besides the agency issuing the manual or to affect persons not members or employees of the issuing agency, it must be filed in accordance with the State Rules Act. N.M. Att’y Gen. Op. No. 93-1 (Jan. 5, 1993), 1993 WL 364396.

within the meaning of the State Rules Act. In so ruling, the Court wrote:

The State's argument that the policy established by the Board of Regents is not a "rule" within the meaning of the Act is frivolous. It is without question that the statement of policy by the Board of Regents was a "rule."

The State argues that the "lawfulness of the museum 'policy' is not determined by the State Rules Act." The State's argument here misses the point ... Given the constitutionality of the policy, it was not enforceable until it was properly filed ... Until the rule was filed in compliance with the State Rules Act, criminal trespass charges under [Section] 30-20-13 [NMSA 1978], were not a means available to the State ...

Id. ¶¶ 6, 7.

Next, as used in the State Rules Act, "agency" means "any agency, board, commission, department, institution or officer of the state government except the judicial and legislative branches of the state government." NMSA 1978, § 14-4-2(A) (2017). "Person" is defined under the State Rules Act to include "individuals, associations, partnerships, companies, business trusts, political subdivisions and corporations." NMSA 1978, § 14-4-2(B) (2017).

Article 12, Section 6(A) of the New Mexico Constitution in applicable part reads: "There is hereby created ... a 'public education commission' *that shall have such powers and duties as provided by law.*" (Emphasis added).² When not specified in the New Mexico Constitution, "such powers and duties as provided by law" are those granted by statute. *New Mexico v. Armijo*, 2016-NMSC-021, ¶ 21, 375 P.3d 415; *In accord, State v. Griffin*, 1994-NMSC-061, ¶ 3, 117 N.M. 745.

² Chapter 143, Section 1 of New Mexico Laws of 2003 contained certain temporary provisions, effective until July 1, 2004. Chapter 143, Section 3 of New Mexico Laws of 2003 made the provisions of that Act contingent upon the adoption of an amendment to Article 12, Section 6 of the New Mexico Constitution. Constitution Amendment 1, which contained proposed amendments to Article 12, Section 6 of the New Mexico Constitution, was adopted at a special election held September 23, 2003. However, Chapter 143 of Laws of 2003 was repealed in its entirety by Chapter 27, Section 29A of New Mexico Laws of 2004. It is noteworthy that Section 1 of the repealed Act in part provided:

TEMPORARY PROVISION.--Until July 1, 2004:

A. ... The secretary of public education shall perform those duties and exercise those powers provided by law for the superintendent of public instruction or the state board of education ...; provided, however, that:

(1) *the secretary shall not establish new policy for the public schools without first consulting with the public education commission ...* (Emphasis added).

And, the applicable part of NMSA 1978, Section 9-24-9(A) (2004) provides:

The “public education commission” is created pursuant to Article 12, Section 6 of the constitution of New Mexico. The commission shall be administratively attached to the department, with administrative staff provided by the department ... The commission shall advise the department on policy matters *and shall perform other functions*³ *as provided by law*.

(Emphasis added.)

The phrase “provided by law” when used by the Legislature has been construed to mean *provided by statute*. *McCasland v. Miskell*, 1994-NMCA-163, ¶ 19, 119 N.M. 390, citing *Trujillo v. Tanuz*, 1973-NMCA-048, ¶ 26, 85 N.M. 35; *In accord, State v. Watson*, 1971-NMCA-104, ¶ 25, 82 N.M. 769; *Cf. Kane v. City of Albuquerque*, 2015-NMSC-027, ¶ 57, 358 P.3d 249 (holding that the phrase “except as otherwise provided by law” in NMSA 1978, Section 10-7F-9 (2010) did not preempt municipal employment regulations).

The “powers and duties” and “other functions” of the Public Education Commission, “as provided by law,” relevant to the present questions are primarily, if not solely, contained in the Charter Schools Act, NMSA 1978, §§ 22-8B-1 to -17.1 (1999, as amended through 2019).⁴ The Public Education Commission’s “powers and duties” are expressly set forth in NMSA 1978, Section 22-8B-16 (2007):

The commission shall receive applications for initial chartering and renewals of charters for charter schools that want to be chartered by the state and approve or disapprove those charter applications. The commission may approve, deny, suspend or revoke the charter of a state-chartered charter school in accordance with the provisions of the Charter Schools Act ...

NMSA 1978, Section 22-8B-2(B) (2015) defines “chartering authority” as “either a local school board or the [Public Education] [C]ommission.” Accordingly, under NMSA 1978, Section 22-8B-5.3 (2012) other “powers and duties,” or “functions,” of the Public Education Commission are to:

A. evaluate charter applications;

³ *Black’s Law Dictionary* (11th Ed. 2019) defines the term “function” in the singular as an “[a]ctivity that is appropriate to a particular business or profession.”

⁴ Others not immediately pertinent here are contained in NMSA 1978, Section 21-2-6(A)(2) (2007) (Statewide planning; participating agencies and persons); NMSA 1978, Section 22-15C-10(B) (2009) (Reports; budgets); and NMSA 1978, Section 22-24-5(J) (2021) (Public school capital outlay projects; application; grant assistance).

- B. actively pursue the utilization of charter schools to satisfy identified education needs and promote a diversity of educational choices;
- C. approve charter applications that meet the requirements of the Charter Schools Act;
- D. decline to approve charter applications that fail to meet the requirements of the Charter Schools Act or are otherwise inadequate;
- E. negotiate and execute, in good faith, charter contracts that meet the requirements of the Charter Schools Act with each approved charter school;
- F. monitor, in accordance with the requirements of the Charter Schools Act and the terms of the charter contract, the performance and legal compliance of charter schools under their authority;
- G. determine whether a charter school merits suspension, revocation or nonrenewal; and
- H. develop and maintain chartering policies and practices consistent with nationally recognized principles and standards for quality charter authorizing in all major areas of authorizing, including:
 - (1) organizational capacity and infrastructure;
 - (2) evaluating charter applications;
 - (3) performance contracting;
 - (4) charter school oversight and evaluation; and
 - (5) charter school suspension, revocation and renewal processes.

Through enabling statutes, the Legislature may delegate rule-making power to administrative agencies. *See, New Energy Economy, Inc. v. Shoobridge*, 2010-NMSC-049, ¶ 14, 149 N.M. 42. None of the above statutes pertaining to the creation, powers or functions of the Public Education Commission contain any express language authorizing it to adopt, promulgate or enforce rules to exercise its authority.⁵

It is the Legislature, not the administrative agency, which generally declares the policy and establishes primary standards to which the agency must conform. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343. In an earlier case, *State ex rel. State Park & Recreation Comm'n v. New Mexico State Authority*, 1966-NMSC-033, 76 N.M. 1, the Supreme Court was more specific:

The legislature has declared the policy and established primary standards to which the agencies must conform ... [S]tate agencies are delegated only that power necessary to the accomplishment of the purposes of the statute. Beyond that, it does not delegate legislative power or confer executive or judicial authority.

Id. ¶ 27.

⁵ In contrast, NMSA 1978, Section 22-2-1(B)(1) (2004) expressly authorizes the Public Education Department to “adopt, promulgate and enforce rules to exercise its authority and the authority of the [Secretary of Public Education].”

Agencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes. *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-042, ¶ 20, 140 N.M. 440; *PNM Elec. Servs. v. Pub. Util. Comm'n*, 1998-NMSC-017, ¶ 10, 125 N.M. 302; *Law v. New Mexico Human Servs. Dep't*, 2019-NMCA-066, ¶ 23, 451 P.3d 91, *cert. denied* (Aug. 1, 2019).

The authority of an administrative agency “to promulgate rules and regulations must be found in and is limited by statute.” *Winston v. New Mexico State Police Bd.*, 1969-NMSC-066, ¶ 3, 80 N.M. 310. An administrative agency may not exercise authority beyond the powers that have been granted to it. *Kilmer v. Goodwin*, 2004-NMCA-122, ¶ 24, 136 N.M. 440; *Piedra, Inc. v. N.M. Transportation Commission*, 2008-NMCA-089, ¶ 17, 144 N.M. 382. *Cf. Foster v. Board of Dentistry*, 1986-NMSC-009, ¶ 8, 103 N.M. 776 (“When rulings by administrative agencies are not in accord with the basic requirements of the statutes relating to those agencies, the decisions of the agencies are void.”).

There are, however, a line of New Mexico appellate court cases holding that while the Legislature may have not provided express authority to an agency to promulgate rules and regulations, the agency may have implied power to issue rules and regulations to carry out its statutory duties. “The authority of an administrative agency is not limited to those powers expressly granted by statute, but includes, also, all powers that may fairly be implied therefrom.” (internal quotation marks omitted). *AA Oilfield Serv., Inc. v. New Mexico State Corp. Comm'n*, 1994-NMSC-085, ¶ 9, 118 N.M. 273; *See also, Howell v. Heim*, 1994-NMSC-103, ¶ 8, 118 N.M. 500 (“The agency’s authority is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication.”); *Wimberly v. New Mexico State Police Bd.*, 1972-NMSC-034, ¶ 6, 83 N.M. 757.

The authority of an administrative body to enact regulations, therefore, extends not only to the powers expressly provided by the Legislature, but also to those that may be fairly implied from such powers. *Redman v. Board of Regents of New Mexico School for Visually Handicapped*, 1984-NMCA-117, ¶ 9, 102 N.M. 234, *cert. denied* 102 N.M. 225, 693 P.2d 591 (Jan.14, 1985) (decided under prior law); *Tri-State Generation & Transmission Ass’n, Inc. v. D’Antonio*, 2011-NMCA-015, ¶ 35, 149 N.M. 394, *rev’d on other grounds*, 2012-NMSC-039, ¶ 35, 289 P.3d 1232.

The Court of Appeals in *New Mexico Dep’t of Health v. Ulibarri*, 1993-NMCA-048, 115 N.M. 413 wrote:

We agree with the basic proposition that an administrative agency must act within its statutory powers; however, we disagree that our interpretation of the Department’s rules necessarily results in the agency going beyond its statutory powers. The authority of an administrative agency in making rules or regulations is not limited to those powers expressly granted by statute, but includes all powers that may be fairly implied therefrom.

Id. ¶ 8.

In the present case, although the Legislature did not grant the Public Education Commission express authority to issue rules and regulations governing the operation and oversight of state-chartered charter schools, a court could reasonably find that its authority to do so may be fairly implied from the “powers and duties” expressly set forth in NMSA 1978, Section 22-8B-16 and those “functions” specified in NMSA 1978, Section 22-8B-5.3.

To consider that the Public Education Commission has that implied power or authority, however, is also to posit that it, as an “agency” within the meaning of that term under the State Rules Act, is engaging in rulemaking and its actions in issuing (or adopting) resolutions, standards, procedures, directives and policies affecting the rights of state-chartered charter schools (*i.e.*, “agencies other than the one issuing the rule”) and their public school students (*i.e.*, “persons not a part of, or employed by, the agency issuing the rule, including persons served by the promulgating agency”) then constitute “rules,” or fairly fall within the ambit of the State Rules Act, and their issuance must comply with the requirements of that Act in order to be valid. *See, Joyce*, 1980-NMCA-086, ¶ 9 (“Failure to follow the State Rules Act caused the policy to be invalid and unenforceable under the terms of [Section] 14-4-5 [NMSA 1978].”); *Bokum Resources Corp.*, 1979-NMSC-090, ¶ 42 (“Thus, it is clear that the standards contained in the regulations adopted by the Commission, after the required notice, hearing and filing, are exactly what the Legislature calls them: ‘rules.’ A standard is a rule, if the proper procedure has been followed in promulgating it. If the ‘standards’ adopted by the Commission in this case did not constitute rules under the State Rules Act, they would have no efficacy, validity or enforceability. [Section] 14-4-5, N.M.S.A. 1978.”).

It follows, therefore, that if the proper procedures under the State Rules Act have not been followed in issuing a “rule,” then it is not a “rule,” and therefore not enforceable. *Princeton Place v. New Mexico Human Servs. Dep’t, Med. Assistance Div.*, 2018-NMCA-036, ¶ 29, 419 P.3d 194, *cert. granted* (May 21, 2018). (“Additionally, under the State Rules Act, in order to have any ‘efficacy, validity or enforceability,’ a rule must be submitted by the promulgating agency to the state records administrator for publication.”). Moreover, NMSA 1978, Section 14-4-5(A) (2017) of the State Rules Act expressly provides:

Except in the case of an emergency rule, no rule shall be valid or enforceable until it is published in the New Mexico register as provided by the State Rules Act.

On that same point, we also refer to NMSA 1978, Section 12-8-5(A) (1969) (“Each agency shall file each rule, amendment or repeal thereof, adopted by it, including all [existing] rules ... according to the State Rules Act ...”); NMSA 1978, Sections 14-4-3(A) and (B) (2017) (“Each agency promulgating any rule shall place the rule in the format and style required by rule of the state records administrator and shall deliver the rule to the state records administrator ... [who] shall maintain a copy of the rule as a permanent record open to public inspection during office hours, on the website of the records center, published in a timely manner in the New Mexico register and compiled into the New Mexico Administrative Code.”).

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With respect to your second question, insofar as the Public Education Commission's authority to issue (or adopt) rules and regulations governing the operation and oversight of state-chartered charter schools and their public school students may be fairly implied from the "powers and duties" expressly set forth in NMSA 1978, Section 22-8B-16, and its "other functions" as listed in NMSA 1978, Section 22-8B-5.3, the Public Education Commission is not compelled by statute to ask the Public Education Department to issue rules and regulations on its behalf, notwithstanding the absence of a specific legislative act.

You have requested a formal opinion on the questions discussed above, pursuant to NMSA 1978, Section 8-5-2(D) (1975). Please note that such an opinion is a public document available to the general public. Although we have provided you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, and not subject to an attorney-client privilege. Consequently, we may provide copies of this letter to the general public.

Sincerely,

Robert F. Sanchez

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Robert F. Sánchez
Assistant Attorney General