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June 8, 2023

Dr. Arsenio Romero  
Secretary of the Public Education Department  
New Mexico Public Education Department  
300 Don Gaspar  
Santa Fe, NM 87501

**RE: Notice to Appeal PEC Decision to Revoke the Charter and  
Charter Contract of La Tierra Montessori School for the  
Arts and Sciences: Finding of Fact and Conclusions of Law**

Dear Secretary Romero:

Pursuant to NMSA 1978, § 22-8B-7, by and through Ortiz & Zamora, Attorneys at Law, LLC, Geno Zamora and Meagan Muñoz, La Tierra Montessori School for the Arts and Sciences (“School”) hereby provides notice and argument in support of appeal regarding the Public Education Commission’s (“PEC”) decision for revocation of its Charter and Charter Contract on April 20, 2023, on the grounds that the Commission’s action was arbitrary and capricious, as well as not in accordance with state law, specifically, NMSA 1978, § 22-8B-12.

**I. Statement of Facts:**

Since February 2022, the School has received correspondence from the Charter Schools Division (“CSD”) of the New Mexico Public Education Department (“NMPED”) regarding concerns of missed deadlines and non-responsiveness. *See Exhibit A: Technical Assistance letter 2/16/22.* In response to the ongoing issues identified by the PEC and CSD, including the removal of an unauthorized Pre-K Program, the School’s Governing Council sought to remove the Head Administrator, while still receiving directives from PEC to work with CSD to form a Corrective Action Plan through August 2022 with the help of the School’s business manager and legal counsel. *See Exhibit B: Intent to Take Action 7/25/22; Exhibit C: Notice of Concern 8/29/22.* Since February 2022, the School has had three (3) changes to its Head Learner position.

In October 2022, the current Head Learner, Patricia Herrera, was offered a part-time contract to take over the duties of Interim Head Learner at the School by the Governing Council, after former Head Learners, Angela Feathers and Clifford Thompson, were removed from leadership of the School. Ms. Herrera initially started with the School as a Special Education

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instructor until Mr. Thompson left the School. To be clear, from October 2022 to March 2023, the School did not have a full time Head Learner.

In November 2022 and December 2022, the School received correspondence from PEC that the Intervention Ladder was being implemented based on the PEC's conclusion that no evidence of the School implementing school-specific goals and noncompliance with expected outcomes and deadlines. A Corrective Action Plan was to be submitted by January 2023. *See Exhibit D: Amended and Updated Notice of Concern 11/15/22; Exhibit E: Notice of Possible Revocation 12/20/22.*

In late January 2023, a safety audit was completed for the School by POMS and Associates that raised concerns of playground safety and building conditions. In response, the School began to identify the means through which these concerns could be addressed, including securing entry to the School, and shutting down playground access. In addition, a CSD Site Visit was conducted, and concerns were communicated to the School, including staffing, special education, and instruction/supervision. In response the Governing Council continued to work with CSD to create a Corrective Action Plan, while the School received guidance from the Special Education Bureau of NMPED to address these issues. *See Exhibit F: Notice of Site Visit 1/23/23; Exhibit G: POMS Reports; Exhibit H: LTMAS Issues and Concerns for Hearing 4/5/23; Exhibit I: PED SPED Corrective Action Plan 2/8/23.*

Since February 2023, the reported concerns from the safety audit began to be addressed, including displaying appropriate safety signage, securing the campus doors, working with the building owners to address inadequate building conditions, and removing tenants from campus. *See Exhibits 2A Office Signage [Bates LT\_0203 – LT\_0204], Posted Evacuation Sign [Bates LT\_0269], Safety Data Sheets [Bates LT\_0282 – LT\_0287]; Exhibits 2A Door Alarm 1-2 [Bates LT\_0126 – LT\_0127]; Secure Door 1-7 [Bates LT\_0288 – LT\_0294]; Visitor Check-In 1-5 [Bates LT\_0356 – LT\_0360]; Exhibits 2A Quote for Electrical Work [Bates LT\_0270 – LT\_0275]; Ron Lovato Building Correspondence Bates [LT\_0276 – LT\_0281]; Advanced Remediation Mold Test [Bates LT\_0012 – LT\_0029]; Environment Health Inspection [Bates LT\_0145 – LT\_0149]; Hayes Lab Testing Results Bates [LT\_0152 – LT\_0164]; and Exhibits 2A Lease Termination [Bates LT\_0189 – LT\_0190].* In addition, CSD concerns began to be addressed, including the Head Learner's contract and concerns regarding special education. *See Exhibits 2B Head Administrator Contract [Bates LT\_0361 – LT\_0370], La Tierra Meeting Agenda 3/21/2023 [Bates LT\_0371 – LT\_0372].* These efforts remain ongoing for the School to address each of the concerns indicated by POMS and CSD. *See Exhibit J: Notice of Possible Revocation 2/16/2023.*

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In March 2023, the POMS report and CSD concerns were listed by the PEC as additional items for the School to address along with the items previously identified, approximately one (1) month since the School received written notice of these issues. *See Exhibit H: LTMAS Issues and Concerns.* Further, the Head Learner's part-time contract and academic concerns were added by the PEC for the School to address as well. *See Exhibit K: Notice of Intent to Revoke 3/5/2023.* The current Head Learner, Patricia Herrera, has been in her position full time since March 2023. Within two (2) weeks, on March 16, 2023, the School received Notice of Intent to Revoke the Charter from the PEC, listing reasons as: 1) failure to conduct tribal consultation and 2) violations of contract terms, including items previously listed as well as fiscal concerns. *See Exhibit L: Notice of Intent to Revoke 3/16/2023.*

On April 20, 2023, the School attended a Hearing for Revocation with the PEC. At the hearing, the School presented evidence of work done to address issues identified in the POMS safety audits and CSD Concerns since late January 2023, less than three (3) months prior to the hearing. This evidence is provided as exhibits and includes, evidence of playground closure, efforts to address building conditions, proper signage displayed, training, SPED logs, and communication to parents. *See LTMS Exhibit List [Bates LT\_0001 – LT\_0487].* The School also presented a Corrective Action Plan with specific deadlines for compliance of each of the concerns identified by CSD and POMS. *See Exhibit M: LTMAS Proposed Corrective Action Plan.*

At the time of the hearing, the school had addressed each of the concerns listed in the POMS Safety Audit and was working to make progress on other concerns that could not be remedied as immediately based on statutory processes and procurement procedures. To note, some other corrective actions had due dates that occurred well after the April 20<sup>th</sup> hearing, including deadlines for the SPED Corrective Action Plan. *See Exhibit I: PED SPED Corrective Action Plan.*

On May 9, 2023, the School received the written decision of the PEC in support of revocation providing that the grounds for revocation were based on a failure of the School to conduct tribal consultation and violation of the School's contract terms. *See Exhibit N: PEC Decision to Revoke Charter 5/9/23.*

## II. Statement of Reasons:

1. The School has worked diligently to address concerns brought to light that occurred under the former Head Learner, Angela Feathers, including her removal, implementation of financial and safety audits, and working with CSD to create a Corrective Action Plan.

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2. The School has not been given the opportunity to timely address these concerns, as required by NMSA 1978, § 22-8B-12 (L)(2), while simultaneously continuing to operate the School with an administrative office comprised of two (2) staff members, amounting to arbitrary and capricious action by the PEC.

3. The School has not been afforded the opportunity to consult with the PEC and Ohkay Owingeh Pueblo prior to revocation as required by NMSA 1978, § 22-8B-12 (N) and § 22-8B-12.2 (C) and (D).

**III. Argument in Support of Appeal:**

- a. The PEC’s action to revoke the School’s Charter was arbitrary and capricious based on insufficient time given to the School to address concerns without consideration of changes at the School, including the duty of staff to support operation of day-to-day activities for the School.**

At issue in this appeal is whether the PEC acted arbitrarily and capriciously in their decision to revoke the School’s Charter without allowing sufficient time for School staff to address the continuous concerns brought to light since August 2022. Instead, moving forward with revocation for reasons the School was not given sufficient notice of before the revocation hearing in April 2023, such as tribal consultation. The School’s efforts to cooperate with the directives given by the PEC and CSD, such as safety and financial audits, academic concerns, and site visits were only acknowledged by PEC and CSD to further hinder the School from avoiding revocation.

An arbitrary and capricious act is a “willful and unreasonable action, without consideration and in disregard of facts or circumstances.” *Plan. & Design Sols. v. City of Santa Fe*, 1994-NMSC-112, ¶ 23, 118 N.M. 707, 713, 885 P.2d 628, 634.

The School did not have consistent, on-site leadership with the ability to respond to all of the concerns raised by PEC and CSD while also managing day-to-day operations at the School until March 2023. Since February 2022, when the CSD issued its first letter of technical assistance, the School has had three (3) changes to its Head Learner position. The current Head Learner, Patricia Herrera, has been in her position full time since March 2023, after former Head Learners, Angela Feathers and Clifford Thompson, were removed from leadership of the School. Ms. Herrera initially started with the School as a Special Education instructor and began helping the School in a Head Learner capacity part time, at .25 FTE, on or around October 2022, when Mr. Thompson left the School. From October 2022 to March 2023, the School did not have a full time Head Learner. During these transitions to solidify leadership for the School, the School received six (6) letters from PEC with each letter noting more items of noncompliance.

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Without appropriate full-time leadership, the School was in a position to be in continuous noncompliance based on the fact that the former Head Learners not only had not addressed these issues prior to Ms. Herrera, but also contributed to the continuous noncompliance at the School, as evidenced by reports made by the School to the PEC and CSD for financial impropriety found during audit compliance.

The School was made aware of specific concerns in January 2023 upon receipt of the CSD Site Visit Report and the POMs safety audit reports, effectively allowing less than three (3) months for the School to make a reasonable attempt to remedy those items before the revocation hearing in April 2023. The timeline set out for the School to take specific action to correct all of the items listed in these reports (in addition to all of the items since August 2022), from learning of these specific concerns at the April hearing, was implausible. For these reasons, once the School began to remedy these concerns and prepare for the hearing, it became more reasonable to develop an updated Corrective Action Plan to organize and address each of the concerns brought to light since August 2022.

The School took action to correct items that could be remedied immediately, while beginning the process on other items that required more time for processes and procedures to take place. For example, POMS identified sublessees as a safety concern. However, statutorily the School had to serve proper notice upon those entities to terminate their sublease and eventually follow court processes to evict. In addition, the removal of playground equipment and attaining new playground equipment must go through a procurement process because the cost is above six thousand (\$6,000) dollars. These concerns could not be addressed by the date of the hearing and there is no evidence that the PEC took these timelines into consideration based on the continued concerns that were not allowed to be addressed before other concerns were brought forward.

The School takes the position that the action by PEC to continue to pile on concerns and issues with each correspondence, as the School actively worked to follow directives for audits and corrective action amid staff changes, is equivalent to holding the School's head underwater while it was trying to breathe. The PEC acted willfully in its continued correspondence to address ongoing issues and add insurmountable items to their concerns with the knowledge that there were changes in leadership taking place at the School. The PEC acted unreasonably in its expectation that a staff of two (2) people, consisting of the Head Learner and Office Manager, could address prior issues and newly found issues while operating the School on a day-to-day basis. The PEC did not consider the years of no accountability from the PEC or former School administrators that led to these issues that the current Head Learner is now having to sort through while continuing to run the day-to-day operations at the School site. The PEC did not consider the length of time it has taken the School to develop these issues, audit these issues and the reasonable time it would take to address these issues in light of deeply-rooted



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mismanagement and the costs associated with each concern. The PEC has disregarded the ongoing leadership changes at the School, the relatively remote access of the School site for major projects, such as playground equipment removal, and the fact that the School followed directives to audit concerns that were then used as further evidence of noncompliance.

Based on these factors, it is the position of the School that the PEC acted arbitrarily and capriciously in their decision to revoke the School's Charter instead of implementing a lesser action or allowing the Corrective Action Plan to be completed prior to revocation.

- b. The PEC did not act in accordance with law when the PEC itself failed to conduct tribal consultation with the School and Ohkay Owingeh Pueblo prior to revoking the School's Charter as required by NMSA 1978, §22-8B-12(N) and § 22-8B-12.2(C) and (D).**

State law requires tribal consultation be conducted prior to the closure of any charter school located on tribal land. Although the School acknowledged at the April 2023 hearing that tribal consultation with the Director of Education for the Ohkay Owingeh Pueblo, Ms. Aileen Lopez, had not been carried out by the current Head Learner or any prior Head Learner, the School did not agree to forgo the requirements under state law that the PEC must follow prior to moving forward with revocation. Further, the PEC did not present any evidence, through its Director of Education, that the Pueblo of Ohkay Owingeh had been consulted regarding closing the School and that the Pueblo agreed with the closure. The School's position is that the PEC did not act in accordance with state law when it made the decision to revoke the School's Charter prior to the PEC consulting with the tribe and without following the specific steps laid out in state law. For these reasons the decision to revoke the School's Charter should be rescinded.

Under NMSA 1978, §22-8B-12(N) the law states, "If a chartering authority suspends, revokes, or does not renew the charter of a charter school located on tribal land, the chartering authority and charter school shall consult with the tribe pursuant to Subsections C and D of Section 3 of this 2019 act." Subsection C of the 2019 act, located in state law as, NMSA 1978, §22-8B-12.2(C) states, "Whenever a charter school authorizer is contemplating closing a charter school on tribal land, for any reason, it shall consult with tribal leaders and members and families of students attending the charter school." Subsection D of the 2019 act, noted as NMSA 1978, §22-8B-12.2(D) states, "Consultation shall include, among other actions, open meetings in which the charter school authorizer and the head administrator of the charter school explain: (1) the reasons for closing the charter school; (2) the reasons why the charter school has not or cannot provide additional resources to keep the charter school open; (3) locations of other public schools in the vicinity to which student will be sent and the plan to transport students to those schools; (4) how the public school receiving new students will consult with

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tribal leaders and members and families of students attending the public school related to: (a) culturally and linguistically responsive school policies; (b) rigorous and culturally meaningful curricula and instructional materials; (c) sensitivity to the tribe's calendar of religious and other tribal obligations when making the school calendar; and (d) professional development for school personnel at the public school to ensure that the best practices used in teaching, mentoring, counseling, and administration are culturally and linguistically responsive to students; (5) how the educational outcomes for the Indian students will be improved by attending another public school; (6) plans for the public school buildings that will be left empty by the closure; and (7) any other matters the charter school governing body and head administrator believe provide an adequate explanation of the reasons for closing the charter school.”

The School has at least three (3) Native students that attend, as of May 31, 2023, and there has been no evidence presented, at the April 2023 hearing or otherwise, that PEC, as the charter school authorizer, conducted the required consultation with tribal leaders, members, or families of those students during or before its contemplated action to close the School. At the April 20<sup>th</sup> hearing, Counsel for the School was only informed, by Counsel for the PEC, that the Director of Education for Ohkay Owingeh Pueblo might testify that she had not been consulted by the School. Ultimately, the Director was unable to testify and no document was introduced in place of her testimony. Separately, the School accepted that it had not been in contact with the Director.

Based on the PEC's action to revoke the School's charter on April 20, 2023, without conducting the required consultation in state law, it is evident that the PEC did not act in accordance with state law prior to or in contemplation of their decision for revocation. For these reasons, the PEC's decision to revoke should be rescinded and the appeal from the School should be granted.

**IV. Conclusion:**

In sum, the School was given an impossible task when it simultaneously received numerous directives from multiple, different agencies, all demanding immediate improvements, with the expectation for the day-to-day operations to be maintained under new leadership. In addition, the PEC cited failure to conduct tribal consultation as a basis for revocation of the School's Charter. However, the PEC itself did not operate in accordance with state law by failing to consult with tribal leaders, members, and the families of students attending the School prior to or in contemplation of closure.

Given the impossibility of completing the directives in the time given, the disregard for the progress the School made by the time of the April 20<sup>th</sup> hearing, and the PEC's own failure


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to adhere to tribal consultation requirements, it is clear that the decision made by the PEC to revoke the School's charter was arbitrary and capricious and not in accordance with state law. Therefore, the revocation of the School's Charter should be overturned.

Respectfully submitted,

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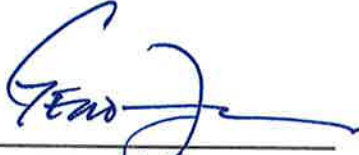
**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 8<sup>th</sup> day of June, 2023, a copy of the foregoing witness list was emailed to the following parties or counsel of record:

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