

From: pmatthews@matthewsfox.com
To: [FeedBack, Rule, PED](#)
Cc: sfox@matthewsfox.com
Subject: [EXTERNAL] Comments on 6.2.9 NMAC
Date: Sunday, June 18, 2023 5:14:31 PM
Attachments: [MATTHEWS FOX COMMMENTS ON PROPOSED 6.2.9 NMAC.pdf](#)

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Dear Policy and Legislative Affairs Division:

Please find attached comments to the proposed rule, 6.2.9 NMAC.

Thank you for your consideration.

PATRICIA MATTHEWS

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Susan Barger Fox
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June 18, 2023

Via Email

Rule.Feedback@ped.nm.gov

Policy and Legislative Affairs Division
New Mexico Public Education Department
300 Don Gaspar Avenue, Room 121
Santa Fe, New Mexico 87501

Re: *Matthews Fox, P.C. Comments on proposed new rule NMAC 6.2.9
(PEC rule for state-chartered charter schools)*

Dear NMPED Policy and Legislative Affairs Division:

Matthews Fox, P.C. represents numerous state-authorized charter schools and submits the following comments on the proposed new rule, 6.2.9 NMAC.

Comment #1 We propose that 6.2.9.7(W) NMAC should be revised to add a review for compliance with a charter condition as part of the Phase I Annual Report in accordance with the charter contract term that requires monitoring pursuant to specific criteria each year the condition is in effect. The term “condition” is defined by the rule as a material term of the charter contract; however, the Commission’s charter contract now requires a school to complete, and the Charter Schools Division (“Division”) to monitor, specific indicators of compliance with the condition using a monitoring rubric. This added language would make it clear that review of the condition compliance is part of the annual site visit.

We propose that paragraph 6.2.9.7(W) NMAC add the words “including any condition(s)” after “(1) the charter contract terms.”

Comment #2. We propose that 6.2.9.7 (Y) NMAC should be revised to include, as one of the procedures to be adopted by the Commission, an “annual site visit and renewal site visit protocols to be employed by the division, including a list of documents to be provided by the school at the annual or renewal site visit.” NMSA 1978, §22-8B-9(B)(7) mandates that the charter contract include, “the criteria, processes and procedures that the chartering authority will use for ongoing oversight of operational, financial and academic performance of the charter school.” In addition, the charter contract must also include, “the process and criteria that the chartering authority intends to use to annually monitor and evaluate the fiscal, overall governance and student performance of the charter school, including the method that the chartering authority intends to use to conduct the evaluation as required by Section 22-8B-12 NMSA 1978.” Thus, a plain reading of the statute makes clear that it is the Commission in consultation with the charter schools that must establish the “processes and procedures” that will be used to assess whether the schools are meeting their contractual requirements. The site visit protocol must be clearly linked to the state charter

school's contractual requirements; *i.e.*, whether it is meeting the academic, operational and financial requirements spelled out in the performance framework. It is the Commission's responsibility to ensure that a school's performance is assessed in a transparent manner and consistent with the terms of the charter contract. The Division has the authority identified in NMSA 1978, §22-8B-17 which does not include determining what and how to assess whether the state charter schools are meeting the contract obligations.

Many of our state-charter school clients have complained that the protocol for site visits can change without notice, include observations and criticisms that are not linked to any Commission or legal criteria for demonstrating state charter school performance and, consequently, create a process during site visits that does not foster transparency about the criteria the Commission will employ when assessing the success of a particular charter school. The language originally proposed by the Commission, but omitted by the Department, if inserted in the proposed rule will make it clear that the Commission, not the Division can determine what information is relevant for assessing a school's performance. Further, that the schools are ensured more transparency and advance notice because site visit will be established through the procedures established by the new rule. Clearly, the Commission will rely heavily on the expertise of the Division to assist in establishing site visit protocols, but in the end the Commission not the Division has statutory authority and a contractual obligation to ensure that the charter schools are assessed consistently with the criteria set forth in the charter contract.

Comment #3. In subsection 6.2.9.8(A) NMAC, we recommend that the words "web page" be changed to "website."

Comment #4. In 6.2.9.11(A) NMAC a new sub paragraph (8) was added by the Department. This provision creates ambiguity as the rule has been drafted in a manner to identify the possible notices and actions that might be taken by the Commission or the Division. NMAC 6.2.9.11(B) makes it clear that the list of the documents that make of the record, shall not be determinative of the complete record on appeal. The purpose of this subparagraph was to ensure that a party could add relevant documents to the record on appeal to support their relative position. Thus, subparagraph (8) is vague which creates confusion as to what the Commission will consider when making its high stakes decisions.

Comment #5. We suggest that the words "including any conditions" be added at the end of NMAC 6.2.9.12(B)(1), for the reasons stated in Comment #1

Comment #6. In NMAC 6.2.9.12(C)(3)(a) last sentence of the paragraph reads:

The phase 2 annual report shall contain the division's initial assessment as to school's performance according to the rating set forth in each completed section of the performance framework, and *may* contain the division's recommendation to the commission regarding the commission's annual report notice, including the specific type of notice that the division is recommending be issued, its factual basis for that recommendation, and the recommended time frame for completion of the corrective action."

The term "may" should be replaced by "shall" or "will."

The Division is required to provide recommendations to the Commission by statute. Subsection 22-8B-17(D) provides that "[t]he division **shall** ... D. make recommendations to the commission regarding the approval, denial, suspension or revocation of the charter of a state-chartered charter school." The Phase 2 Annual Report is the charter school's last opportunity to submit a written response to the Division's report about its performance. If the Division were to wait until the Final Annual Report to issue its recommendations to the Commission, the charter school would be denied the opportunity to provide a written response to the Division's recommendation and reasons supporting its recommendations.

In addition, the Charter Schools Act does not permit the Division to dictate Commission procedures; *i.e.*,

when the Commission believes it is appropriate for a charter school to be informed of the Divisions' recommendation, only that it must provide a recommendation. The totality of the proposed rule is an effort by the Commission to afford transparency and adequate due process and, apparently, the Commission deems it appropriate to require the Division's recommendations to come in the Phase 2 Annual Report and not to wait until the Final Annual Report issued.

Comment #7. NMAC 6.2.9.16 does not include the statutory requirements of tribal consultation prior to revoking a charter school's contract. NMSA 1978, §22-8B-12.2(C) and (D). The follow proposed language is offered:

If the commission is contemplating revoking a state charter school's contract, which school is located on tribal land, it shall comply with the requirements of NMSA 1978, Section 22-8B-12.2(C) and (D) prior to issuing a notice of intent to revoke.

Thank you for considering our comments.

Sincerely yours,
MATTHEWS FOX, P.C.

Patricia Matthews

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Matthews
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By: _____
Patricia Matthews

Cc: Clients

From: pmatthews@matthewsfox.com
To: [FeedBack, Rule, PED](#)
Subject: [EXTERNAL] FW: Comments on 6.2.9 NMAC
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By: _____
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