

PUBLIC EDUCATION COMMISSION RULES OF PROCEDURE

I. COMMISSION: ESTABLISHMENT AND AUTHORITY

- A. Constitutional Framework:** The Public Education Commission (the “Commission” or “PEC”) is an elected body established pursuant to Article XII, Section 6 of the New Mexico Constitution. It is an independent agency of the State of New Mexico.
- B. Rule-making authority:** The Commission intends to promulgate rules consistent with the December 6, 2022 letter to Senator O’Neill from the Attorney General, which is attached to these Rules of Procedure and has promulgated Rule 6.2.9 related to procedures for State Authorized Charter Schools.
- C. Creation Authority, Committees:** The Commission may establish committees, standing or ad-hoc, as it shall from time to time deem necessary to carry on its work. Standing committees may only be created by the Commission as a whole upon a majority vote during a regularly scheduled meeting of the body. Ad-hoc committees may be formed at discretion of the Chairperson or by a majority vote of the Commission. Committee members shall be appointed by the Chairperson. The Chairperson shall be an ex-officio member of all committees. If a committee consists of 6 or more members, then, that committee meeting shall comply with the Open Meetings Act.
- D. Effective Dates:** These Rules shall become effective upon their adoption by the Commission. Rules of Procedure adopted by the Commission shall remain in effect unless amended or suspended by a two-thirds vote of the Commission during a scheduled meeting for good cause shown. The Chair may allow a vote on an amendment to be done in an alternative manner in an exceptional circumstance.

II. MEMBERS: DUTIES AND CONDUCT

A. Duties of Commission Members (“Commissioners”):

1. It is the policy of the Commission to encourage the active participation of all Commissioners in all aspects of the Commission’s activities, including active service in the leadership. Commissioners are expected to attend all regular, special, and emergency Commission meetings.
2. Pursuant to NMSA 22-8B-5.3, Commissioners shall investigate nationally recognized principles and standards for quality charter authorizing, which may include attendance at conferences provided by national and local entities with expertise on charter practices. There shall be a standing item

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information obtained at these conferences or through other sources.

3. Commissioners are expected to educate themselves regarding issues and requirements concerning education in New Mexico. Commissioners are further expected to avail themselves of educational opportunities to keep abreast of such issues, including training conducted by the Public Education Department (the “Department” or “PED”) and trainings for local school board members. It is expected that Commissioners will express themselves both as individuals and as representatives of the Commission. When a Commissioner expresses an opinion or articulates a position on an issue related to Commission business, the Commissioner shall clearly state whether he, she or they is/are speaking as an individual or as a representative of the Commission. Unless otherwise delegated by the Commission, the Chairperson shall act as the default representative of the Commission. However, in legislative affairs or meetings with the PED Secretary, the Chairperson must be clear in all communications when the Chairperson is speaking for the Commission, as representative of at least a majority of the Commissioners. Otherwise, the Chairperson shall indicate that any opinions stated are personal opinions.

B. Code of Conduct:

1. The Commission, and each Commissioner, is expected to conduct business in a professional manner with respect between and among individual Commissioners. The expectation of respectful behavior extends to comments made during committee meetings, in interactions related to the oversight of schools, and interactions with members of the public and staff. The Chair may direct any Commissioner to consider the Code of Conduct when making comments or conform to the Code of Conduct, if necessary.
2. Each Commissioner should answer questions from his, her or their constituents or assist in resolving problems arising within his, her or their district in conformity with Commission guidance. Commissioners who receive inquiries related to a school from constituents other than their own may discuss the matter with the Commissioner from which the constituent resides. Responses to inquiries addressed to or affecting the Commission, as a whole, may be coordinated by the Chairperson, as needed. Any Commissioner may respond to any general inquiry directed to them by a member of the public.

C. Conflict of Interest: No Commissioner shall engage in any activity which gives rise to a conflict of interest or the appearance of a conflict of interest with the performance of his, her or their duties as a Commissioner. In addition to other statutory requirements, Commissioners are subject to the provisions of the Governmental Conduct Act (Section 10-16-1 et seq. NMSA 1978). It is unlawful for a public officer or employee to take an official act for the primary purpose of enhancing his, her or their own financial interest or financial position, nor shall a

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common to other members of the Commission.

D. Ethical Conduct: Each Commissioner shall respect the ethical duties of holding a publicly elected office. The New Mexico State Ethics Commission oversees and enforces ethical conduct of elected officials, including PEC Commissioners.

III. OFFICERS: SELECTION AND DUTIES

A. Officers:

1. Chairperson.

- a.** The Chairperson shall call to order and preside at Commission meetings pursuant to the Commission's adopted parliamentary rules and all applicable regulations. To address the Commission, a Commissioner or member of the public must be recognized by the Chairperson. The Chairperson shall rule on motions, moderate the floor during debate, and conduct meetings in a manner to maintain decorum and discussion.
- b.** When the Chairperson wishes to speak, except in cases of providing order, the Chairperson joins the queue and then takes his, her or their turn as appropriate.
- c.** The Chairperson shall direct and request the work of counsel for the Public Education Commission consistent with the vote or requests of the Commission and the Executive Committee, except as set forth in section 2.c., duties of the Vice Chairperson, below.
- d.** The Chairperson shall review and finalize the agenda for each Commission meeting containing items put on the agenda and approved by the Executive Committee. In finalizing the agenda, any substantive changes must be approved by the Executive Committee and any technical changes must be approved by the Chairperson.

2. Vice-Chairperson.

- a.** The Vice-Chairperson, in the absence of the Chairperson or at the request of the Chairperson in his, her or their place, shall serve in the interim as Chairperson and assume such powers and duties thereof.
- b.** The Vice-Chairperson shall oversee and lead the contract negotiations with new and renewing schools, and direct staff and counsel to prepare and assist in the negotiations as needed.

3. Secretary of the Commission ("Secretary").

- a.** The Secretary will call the roll, including roll call votes, at each Commission meeting and perform other duties as otherwise

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established or agreed upon with the Chairperson.

- b. The Secretary, in the absence of the Chairperson and Vice Chairperson or at the request of the Chairperson, shall serve in the interim as Chairperson and assume such powers and duties thereof.

B. Selection of Officers:

1. Officers shall be elected at the annual meeting of the calendar year. Officers shall be elected for a term of one (1) year and will serve until the annual election the subsequent calendar year, except in the case of resignation or removal from office. The acting Chairperson shall preside over the election unless the duty is delegated to another officer. In the event the acting Chairperson accepts a nomination, he, she or they shall delegate the duty to preside over the election of the position in which the acting Chairperson is being considered for.
2. The Chairperson shall be elected first, followed by the Vice- chairperson and Secretary. Nothing shall prohibit a member from running for more than one officer position so long as no member accepts or serves in more than one position at a given time.
3. Each position requires a nomination. Nominations may either be offered by another member of the commission or by self- nomination. The nominated Commissioner shall either accept or decline the nomination. No second is required for a nomination. After nominations are closed, Commissioners shall record their votes in a manner consistent with the Open Meetings Act. Officers shall be elected by a majority vote. In the event that no candidate receives a majority, a runoff vote shall be conducted between the two (2) candidates receiving the greatest number of votes. In the event that a tie persists after three (3) ballot attempts to elect any officer, the winner shall be decided by an equal game of chance, such as a roll of dice, coin toss, or card draw. The results from this game of chance shall be verified by a roll call attestation by the Commission.
4. Officers elected at an annual meeting shall take office upon the conclusion of the meeting. Officers elected at any other meeting shall take office immediately upon election.
5. Any vacancies shall be filled pursuant to the rules above at the next regular commission meeting so long as such notice is provided pursuant to the Open Meetings Act.

IV. EXECUTIVE COMMITTEE:

- A. Membership and Organization.** The Executive Committee shall be composed of the officers of the Commission.

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- B. Responsibilities.** The Executive Committee will perform the following, as

directed by the Commission:

1. Perform governmental relation functions on behalf of the Commission without prior discussion and direction of the Commission.
2. Assist the Commission in making policy recommendations to the Secretary of Public Education regarding legislative initiatives in support of public education. Recommendations to the Secretary must be discussed at a public meeting as an agenda item and approved by a majority of the Commission.
3. Meet with the Commission's legal counsel to discuss legal advice provided on behalf of the Commission. Any formal legal actions must be discussed at a public meeting as an agenda item and approved by a majority of the Commission.
4. Establish and approve the agenda for each Commission meeting, including work sessions, or study sessions which shall then be finalized by the Chairperson and approved by the Commission in an open meeting.
5. Approve or deny requests for services and reimbursements from legal counsel.
6. Any other function delegated to it by a majority vote of the Commission.

V. MEETINGS:

- A. Annual Meeting:** The annual meeting shall be the first regular meeting of each calendar year to elect officers. If the Commission is unable to conduct an election, the prior year's officers shall serve until an election can be conducted at the Commission's earliest opportunity.
- B. Regular Meetings:** The regular meetings and working sessions of the Commission shall be held each month, on the third Thursday and following Friday, unless otherwise ordered by the Commission or dictated by other events or religious holidays or observances. The Commission should establish the dates of the regular meetings, work sessions and study sessions for the year no later than the annual meeting. The Commission may change the calendar during the year as needed. Said changes must be posted. The Commission shall comply with minimum meeting requirements pursuant to NMSA 1978, Section 9-24-9 (2004).
- C. Special Meetings:** Special meetings may be called by the Chairperson or upon the written request or vote of a majority of the Commission.
- D. Executive Session:** The Commission may hold executive (closed) sessions as provided by the Open Meetings Act. The Commission will not enter

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initial application approval/denial or revocation of charter schools unless the privacy rights of an individual may be compromised.

E. Telephonic or Video Participation:

1. In person attendance of Commissioners is encouraged.
2. Unless exceptional circumstances exist or formal guidance to the contrary is provided by the attorney general, regular meetings will be held in a hybrid format allowing both in-person and virtual attendance for Commissioners and those participating in a meeting. The Chair will determine whether working sessions and special meetings will be hybrid or virtual only.
3. Telephonic or video attendance must comply with the Open Meetings Act.
4. Video attendance means a Commissioner is participating by simultaneous remote electronic means and is visually present as confirmed by the Chair. Video attendance counts as attendance for the purposes of establishing a quorum, doing business, voting on a motion or the receipt of per diem.
5. Even if permitted by the Chairperson, telephonic or video attendance shall not be permitted, if each member participating by conference telephone cannot be identified when speaking, all other attending Commissioners are not able to hear each other at the same time, and members of the public attending the meeting are not able to hear the Commissioner(s) attending by telephone or video. If technological malfunctions prevent all members from hearing each other or from the public hearing the telephonically or video attending member(s), then that attending member(s) must be withdrawn from further participation until the malfunction is corrected. The record of the Commission will reflect these circumstances if they occur.
6. The guidance set forth above and consistent with informal guidance by the attorney general shall be posted with the meeting agendas for regularly scheduled PEC meetings.

F. Quorum: Per statute, a majority of the total membership of the Commission shall constitute a quorum.

G. Public Notice:

1. Open Meetings Act. The Commission shall comply with all requirements pursuant to the New Mexico Open Meetings Act.
2. Minutes. Minutes shall be kept of all Commission meetings in accordance with the Open Meetings Act. The Commission must formally approve all minutes before they become an official record of the body.

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3. The Commission shall ensure that a certified transcript of a Regular monthly meeting or Special meeting is prepared. This certified transcript shall be the

document provided at the next meeting to be approved as the minutes of the meeting and, once approved, shall be the official record of the meeting.

4. The Commission shall provide summary minutes of working sessions and provide a link to a recorded version of the working session in the summary minutes. The Commission shall also provide a link to a recorded version of the Regular monthly meeting or Special meeting as a convenience to the public and not for any other purpose.

H. Agenda:

1. The Executive Committee is responsible for establishing the agenda for each meeting of the Commission, and the Chairperson is responsible for approval the final version to be posted consistent with the agenda established by the Executive Committee.
2. Individual Commissioners may make a written request to the Executive Committee to include items on the next month's agenda that were not previously discussed at a Commission meeting. If at least two (2) Commissioners make a written request to the Executive Committee to include the same item on the next month's agenda, the item shall be included on the agenda. Written agenda requests must be received before the meeting of the Executive Committee in which Executive Committee makes its final decision on the posted agenda for the next meeting. Alternatively, any two Commissioners may propose an agenda item during the "New Business" section of any regularly scheduled meeting of the PEC and identify the PEC meeting date during which they would like the agenda item heard.
3. An individual or representative of an organization seeking to have the Commission consider an item as a noticed agenda item may make a written request to the Executive Committee at least ten (10) business days prior to the start of the meeting. The decision to include the request on the next meeting's agenda shall be determined at the discretion of the Executive Committee.
4. If the Executive Committee does not include on the next meeting's agenda, an item requested by an individual or representative of an organization, that item may be considered for inclusion on the subsequent meeting's agenda by a vote of a majority of the Commission.
5. At the beginning of each meeting, the proposed agenda will be voted on, and may be amended consistent with the Open Meetings Act, by a majority of the Commission.

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I. Public Comment:

1. The Commission shall include an opportunity for public comment during each regular meeting at the beginning of each meeting or during the discussion

on each noticed agenda item. Public comment shall be limited to three (3) minutes per person or decreased to no less than two (2) minutes at the discretion of the Chairperson dependent on the number of signed in participants. At the discretion of the Chairperson time may be extended.

2. The Commission shall include an opportunity for public comment at hearings for new applicants, renewal hearings and revocation hearings.
3. The Chairperson may allow for public comments under the following parameters:
 - a. maintain consistent time limitations for presentation;
 - b. at the discretion of the Chair, discourage, and, if necessary, rule multiple or repetitious presentations out of order; and
 - c. rule out of order presentations that are a matter of pending litigation, disruptive to the conduct of the meeting, outside the Commission's scope of business or authority, or contain information that is confidential under applicable law.
 - d. The Chairperson shall identify the ground rules for participation in public comments.

J. Action by the Commission; Voting:

1. Recusal and Abstention. A Commissioner shall, before the consideration of any agenda item, disclose whether he or she has any financial interest in that agenda item, and whether there are any facts which would give rise to undue influence, or an appearance of undue influence, as considered under the Governmental Conduct Act, Gift Act, or Procurement Code with respect to that agenda item.
 - a. A Commissioner shall recuse himself, herself or themselves from the discussion, consideration and voting on any issue in which he, she or they has/have a financial interest, a conflict of interest, the appearance of a conflict of interest, undue influence, or the appearance of undue influence.
 - b. In the event that a Commissioner, who has disclosed a financial interest, or a conflict of interest or undue influence, or the appearance of one, does not recuse himself, herself or themselves, the Commission may, by a vote of a majority of members present,

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require the Commissioner making the disclosure to recuse himself, herself or themselves.

- c. A Commissioner should consider whether to recuse himself, herself or

themselves from a vote if the Commissioner has entered into a discussion and rendered an opinion outside of a PEC meeting with a school about the topic that involves a pending authorization, contract decision, or another vote that may become before the Commission in the current school year.

d. A recused Commissioner shall not participate in the discussion or consideration with respect to that agenda item, shall not attend any portion of a closed session involving the agenda item, and shall not vote on such agenda item. A Commissioner must state his, her or their intent to recuse and his, her or their reason for the recusal prior to the agenda item discussion. A Commissioner may abstain from a vote but may participate in the discussion.

e. If a Commissioner refuses to recuse himself, herself or themselves a simple majority of the members attending the meeting at which the vote is conducted may require that Commissioner to recuse himself, herself or themselves.

2. Action. The Commission shall proceed by motion. Any Commissioner, including the Chairperson, may make a motion. Motions require a second by another Commissioner before debate or a vote, except as otherwise adopted by the Commission.

3. Debate.

a. After a motion is seconded, if requested the Chairperson or court reporter shall restate the motion and then open the floor for debate.

b. The Chairperson shall recognize all Commissioners who wish to engage in the debate in the order in which they indicate a desire to address the body.

c. The Chairperson is granted the discretion to continue debate and to disallow points off topic. After all Commissioners who wanted to speak have spoken at least once, any Commissioner may "call the question", triggering a vote to end the debate.

4. Voting.

a. The Chairperson shall call for the negative vote, no matter how unanimous the affirmative vote may appear.

b. It is the duty of each Commissioner who has an opinion to express it

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by vote. Each Commissioner is entitled to one (1) vote and may not delegate voting rights to any other person.

- c. A Commissioner who does not have adequate information on which to judge the merits of a matter or who is simply unable to make a decision in the matter may abstain from voting.
 - i. Although a member cannot be compelled to vote, abstentions generally should be the exception.
 - ii. Any abstention shall be noted to the body. An abstention must be noted before any Commissioners begin voting. An explanation for the abstention shall be given at the time the Commissioner indicates the abstention.
 - iii. Abstentions shall not be counted in the tally of the vote unless the vote requires approval based on the number of the entire body.
- d. Roll Call Votes. When required, roll shall be called by the Secretary or, in the absence of the Secretary, a Commissioner as designated by the Chairperson, and the vote of each Commissioner shall be announced and noted in the record.
- e. Division. Any member may verify a voice vote or vote by a show of hands by calling “division” during or immediately thereafter a vote.

K. Inclement Weather Policy:

1. In the event of inclement weather, the Chair may decide to hold the meeting in a virtual format only at the same date and time as scheduled.
2. In the event of inclement weather delays and closures affecting those who may be on the agenda of the Commission, the Chair may direct that the Commission to delay the start time of the meeting.
3. In the event that the Chair cancels a meeting due to inclement weather, the meeting shall be rescheduled to meet within ten (10) business days and noticed in compliance with the Open Meetings Act.
4. In the event of a scheduling change taken pursuant to this section, the Chair shall ensure that any change is published on the PEC website where the agenda is posted.

VI. PARLIAMENTARY AUTHORITY:

These Rules of Procedure are the rules by which the Commission conducts its business. These rules may be revised twice annually, pursuant to the rules

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below. For circumstances not covered by these rules, the Chair may at his, her or their discretion employ any commonly known rules of parliamentary order, such as Robert’s Rules of Order to manage the business of the Commission.

VII. REIMBURSEMENT:

- A.** Commissioners shall be reimbursed as provided in the Per Diem and Mileage Act for related expenses incurred in the discharge of official duties, including attending
1. Regular PEC meetings,
 2. Special PEC meetings,
 3. PEC working sessions,
 4. PEC subcommittee meetings for members appointed to the subcommittee by the Chair,
 5. Outside meetings in which a PEC member has been appointed by the Chair as a liaison for the PEC and
 6. National or local conferences related to nationally recognized principles and standards provided by national and local entities with expertise on charter practices.
- B.** For purposes of the Per Diem and Mileage Act reimbursement, attendance as a Liaison on behalf of the Commission will be reimbursed as long as:
1. The business is conducted for the purpose of fulfilling the obligations of Commission.
 2. A Liaison will only be reimbursed for travel if he, she or they is/are the Liaison or one of the Liaisons or he, she or they was/were asked to attend a meeting as a Liaison.
 3. A Liaison should only attend a meeting if information will be transmitted or if business will be conducted that is reasonably related to the business of the Commission and shall join a subcommittee that will require reimbursement only if that work is approved by the Executive Committee.
- C.** Any other reimbursable activity of a Commissioner requires prior authorization by the Executive Committee. Reimbursement will only be approved if attendance constitutes business of the Commission as a whole.
- D.** Public funds shall be paid out under the Per Diem and Mileage Act only in compliance with the Act's requirements. Commissioners must provide a certification and receipts if required by the NM Department of Finance and Administration (DFA).
- If a Commissioner attends a meeting that qualifies for reimbursement, that Commissioner shall provide an agenda for the meeting from the person or entity convening the meeting or a link to the meeting agenda with the reimbursement

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request unless the meeting is set up through the Charter Schools Division.

- E.** Out-of-State Travel: Out-of-state travel will be subject to budgetary availability and discussion by the Commission and consensus by the members.

VIII. EFFECTIVE DATE, AMENDMENTS, AND REVISIONS:

- A.** Rules of Procedure shall remain in effect until amended or modified.
- B.** The Executive Committee may initiate amendments or revisions to the Rules of Procedure by placing the item on the agenda. The text of such proposed amendments or revisions shall be provided in writing to the Commissioners at least seven (7) days prior to the meeting at which the amendment or revision will be considered. Unless exceptional circumstances exist, any amendments or revisions will be on the agenda for two PEC monthly meetings either on the working session or regular meeting agenda or both. A vote may be taken at the second meeting after the second reading.
- C.** Amendments to the Rules of Procedure may be proposed by any Commissioner pursuant to the process set forth in Section V. H. above.
- D.** These rules may be amended by a simple majority of the members attending the meeting at which the vote is conducted.
- E.** These Rules or any amendments thereto shall become effective upon adoption by the Commission.

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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

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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”

¹The 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.

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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).

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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 functions³ 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).

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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].”

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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.

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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,

Sánchez

Robert F.

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