

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: *CS/SB 338

51st Legislature, 1st Session, 2013

Tracking Number: .192697.1

Short Title: Define Virtual Charter School & Moratorium

Sponsor(s): Senator Gay G. Kernan and Others

Analyst: Kevin Force

Date: February 25, 2013

**SENATE EDUCATION COMMITTEE SUBSTITUTE FOR
SENATE BILL 338**

Bill Summary:

CS/SB 338 proposes to amend the *Charter Schools Act* to add a temporary provision, establishing a moratorium on initial applications for full-time online charter schools to:

- last from June 1, 2013 to May 31, 2014; and
- give the Public Education Department (PED) and the Legislative Education Study Committee (LESC) a year to:
 - review outstanding questions and issues regarding the impact of full-time online charter schools on New Mexico students and school systems;
 - identify sections of state law that may be related to the establishment of full-time online charter schools; and
 - if necessary, propose changes to law to accommodate and regulate full-time online charter schools.

Finally, the bill contains an emergency clause.

Fiscal Impact:

CS/SB 338 does not contain an appropriation.

Substantive Issues:

During the 2012 interim, the LESC discussed a number of potential issues and questions regarding the establishment and administration of virtual or full-time online charter schools in New Mexico. A basic issue was the definition of the term “school”:

- In 2009, the Public Education Commission (PEC) denied three organizations charters for virtual schools, in accordance with the recommendations of the Assistant Secretary of Education at the time.
- Two of the schools appealed the decision to the Secretary of Public Education, who upheld the denials.

- Although the PEC denied the applications for other reasons, the Assistant Secretary was concerned with the legality of virtual charter schools in general, and sought a legal opinion from the Charter School Division’s counsel, who opined that:
 - New Mexico law contemplated schools as “brick and mortar” buildings with a physical presence in a particular place, tied to “attendance areas,” with “walk zones,” and “allowable class sizes”;
 - the Legislature could have permitted full-time online schools when it passed the *Statewide Cyber Academy Act*, but did not;¹
 - the charter school applicants seemed to rely upon the Secretary’s authority to create virtual schools,² yet any reading of rule to allow full-time virtual schools would conflict with statutory requirements that schools be physical buildings designed to educate students in a particular place;
 - any waivers granted by the Secretary must be based upon law, and no provision of law appeared to afford the Secretary that authority; and
 - the Secretary did not have the power to waive requirements to allow the operation of a virtual charter school in contravention to the plain meaning of statute.³
- In January of 2013, PED’s current General Counsel issued an opinion regarding virtual schools in New Mexico that refuted, point-by-point, the conclusions reached by counsel to the Charter Schools Division in the 2009 opinion discussed above.

The LESC also considered contractual prohibitions in the *Charter Schools Act*, which state that “the governing body [of a charter school] shall not contract with a for-profit entity for the management of the charter school”:

- The term “management” is undefined.
- The Memorandum of Understanding (MOU) between K12, Inc. (K12) and the New Mexico Virtual Academy (NMVA) in Farmington, New Mexico’s first virtual charter school, lists a number of administrative tasks that the K12, a private management corporation, will perform, including:
 - recommending various policies for the operation of the Program;

¹ In an advisory letter issued on February 19, 2008, the Attorney General reached the same conclusions. In addition, a university study of full-time online charter schools in California and Pennsylvania notes that only 10 of the 15 states in which cyber charter schools were operating at the time had explicitly permitted the cyber charter school model.

² The PED rule provides as follows: “Distance learning courses provide an opportunity for schools within the state to expand their course offerings and expand access to learning resources. While distance learning technologies may occasionally be used as full-time educational programming for students in unusual circumstances, asynchronous distance learning shall not be used as a substitute for all direct, face-to-face student and teacher interactions unless approved by the local board of education.”

³ In the 2010 legislative session, LESC-sponsored legislation was introduced that addressed the potential issue of full-time online charter schools. Such schools were defined as “an educational program that uses a proprietary curriculum and that is designed to deliver more than one-half of the program to the student electronically in the student’s home or other site that is not a public school.” The bill specifically excepted the cyber academy and Innovative Digital Education and Learning – New Mexico from that definition, and prohibited full-time online charter schools in New Mexico. Ultimately, action on the bill was postponed indefinitely when the House Rules Committee did not find it to be germane.

- exercising a right of first refusal before the school’s governing board makes any third-party procurements for goods or services not covered by the MOU;
- hiring and screening administrative personnel;
- hiring teachers;
- recruiting students and implementing the school’s admissions and enrollment policies;
- preparing forms, handbooks, policies and procedures;
- preparing a proposed annual program budget; and
- most services related to the administration of the school, excepting management of instruction.

Other issues that the LESC examined were the role of the chartering authority and the denial and the subsequent reversal of decisions regarding the establishment of virtual charter schools in New Mexico:

- According to the National Association of Charter School Authorizers (NACSA), “Because of the potential scale involved, authorizing a single high-quality virtual school can provide valuable opportunities to thousands of students – while a single low-quality virtual school can harm thousands.” To emphasize this point, NACSA adds that the potential for cost-savings that virtual charter schools may afford provides “both incentive and opportunity for low-quality operators to *disserve* thousands of students. It is the responsibility of authorizers to carry out due diligence and careful scrutiny to discern the difference” (emphasis in the original).
- NACSA identifies a number of particular points that chartering authorities should consider in reviewing applications for virtual charter schools, among them:
 - expertise in educational technology: if the chartering authority lacks such expertise, experts in online schooling should be included among those who review the applications;
 - contracts with school management organizations: if the governing board plans to contract with a company for the virtual educational program, the school’s governing board must have sufficient technological expertise to oversee the operations of the service provider;
 - performance record of school replicators: if the application comes from a company with experience elsewhere, authorizers should examine the applicant’s track record;
 - data management systems and academic reporting: to ensure that the chartering authority can monitor the virtual charter school effectively, there should be a “data bridge” between the authorizer and the school to provide timely information about academics, operations, and finances;
 - larger scale: given the capacity of virtual charter schools to expand their services, authorizers should require evidence that, if the school proposes to expand, it can do so without sacrificing student learning; and
 - special education services: because virtual charter schools have the same responsibility under the *Individuals with Disabilities Education Act* as other schools, authorizers must ensure that all individualized education programs are modified to accommodate the virtual learning environment and that, in the absence of a traditional school building, other facilities are available for any pull-out services that may be needed.

Finally, the committee reviewed potential areas to address in law both to accommodate and to regulate virtual charter schools, including:

- Attendance and school hours. Some states apply their compulsory attendance laws to students in virtual charter schools, but the problem of verifying that the student actually attended instruction and completed the necessary work must still be addressed.
- Teacher Qualifications. It is reasonable to require New Mexico certification for teachers at virtual schools, but should additional requirements, such as an “online teaching endorsement,” be applied to such teachers, as well?
- Assessments. How shall assessments for students in a virtual school be proctored and administered? Where and when should the exams take place? Consider the NMVA: its attendant learning center can accommodate only a few students at a time. Should students sit for assessments in staggered administration at the learning center, or can they be proctored at home?
- Academic Accountability. Given that some studies have indicated that students at virtual schools underperform when compared with their peers at more traditional schools, how shall virtual schools be held accountable for the performance of their students? How shall virtual schools be included in the requirements of the *A-F School Grading Act* and accompanying rules?
- Funding. How shall virtual charter schools be factored into the state funding formula and equalization grant? Virtual schools frequently have lower overhead costs. Further, they can potentially draw students from across school districts, other than the one in which they may be located. How will the potential impact on school district funding be addressed and, if necessary, mitigated? What percentage of funding may be held back for administrative costs?
- Audits. How often shall virtual schools perform internal audits, or be subject to external audits? What financial and audit information should be published on a school’s website?
- Performance contracts. As noted in the discussion of the MOU between NMVA and K12, the statutory prohibition against school management by a for-profit entity lacks a definition for “management.” What activities should a for-profit company be permitted or disallowed? How much involvement is too much, for purposes of New Mexico statute? Should an authorizing body be made party to such contracts? Under what circumstances might a contract be revoked or suspended? Should contractual negotiations for virtual charter schools be subject to public hearing in appropriate districts?
- Oversight. How often and to whom shall virtual school administrators submit reports on academic progress, attendance and other issues? Where and how shall these reports be made available to the public?

During the December 2012 and January 2013 interim meetings, the committee reviewed a list of policy options from interim meeting discussions and reports, including:

- prohibition of virtual charter schools;
- delayed approval of other virtual charter schools until outstanding questions and issues can be addressed; and
- review of the *Public School Code* and other parts of state law to identify those sections that may affect or be affected by virtual charter schools and amend or repeal them as needed or enact new sections to accommodate and regulate virtual charter schools.

Although the committee did not endorse any specific legislation, a majority of the members voted to delay the approval of virtual charter schools until outstanding issues can be resolved.

According to the Fiscal Impact Report from the Legislative Finance Committee, SB 338 could limit virtual charter schools from opening in FY 15, but the bill will not have any effect on the opening of virtual charter schools in FY 14.

Background:

According to *Keeping Pace with K-12 Online Learning: An Annual Review of Policy and Practice*, in school year 2010-2011 there were virtual charter schools in 30 states serving approximately 250,000 students altogether. In addition, citing data provided by the Center for Education Reform, the International Association for K-12 Online Learning (*iNACOL*) shows that the number of virtual charter schools has grown from fewer than 50 in 2000 to more than 200 in 2011; and that the number of virtual charter school enrollments has grown from just over 20,000 to more than 140,000 during the same period. Clearly, virtual education is growing as a feature of charter schools nationwide.

In New Mexico, there currently exists one locally chartered virtual charter school, the NMVA, administered by K12. A second one, the New Mexico Connections Charter Academy, applied to the PEC, which denied the application. The Academy appealed the PEC's denial to the Secretary of Public Education, who overturned the decision, thus granting a charter to New Mexico's first state-chartered virtual charter school.

In a summary of research on the effectiveness of K-12 online learning, *iNACOL* notes a meta-analysis by the US Department of Education of some 51 online learning studies conducted in 2009. "The overall results . . . found that, on average, students in online learning conditions performed better than those receiving face-to-face instruction." *iNACOL* also notes, however, that these studies compared *both* virtual and blended learning approaches (in which schools use a combination of online and traditional instruction) to the face-to-face learning environment. The *iNACOL* summary also lists a number of state-specific studies, including one in Florida that found that students in the Florida Virtual School "consistently outperformed their counterparts in Florida's traditional middle and high schools" on such measures as grades, Advanced Placement scores, and the state's standards-based assessment.

On the other hand, a recent review by the National Conference of State Legislatures (NCSL) reports: "When only test scores are considered, traditional public schools consistently outperform charter schools nationwide not only in reading and math proficiency of fourth and eighth graders, but also in mean SAT and ACT scores." The NCSL report adds that virtual charter schools have historically shown lower levels of achievement than traditional charter schools.

Yet another perspective comes from the NACSA: "The formal research is limited, but generally demonstrates that online learning shows no significant difference from traditional physical classrooms Only a selective reading of the audits and studies can lead to a broad conclusion that online charter schools show predominantly good, or bad, outcomes." NACSA then attempts to redefine the question of the effectiveness of virtual charter schools on student achievement: "Students, parents, educators, and authorizers should ask which types of virtual schools work, under what *conditions*, with which *students*, with which *teachers*, and with what *training*" (emphasis in the original).

One final point about the issues associated with virtual charter schools: because virtual schools are a growing part of the public school landscape, educators and policymakers cannot ignore them but instead should anticipate them. As NACSA observes, “Finding the right balance between ensuring quality, and yet not stifling innovation, may be the most difficult challenge that authorizers and policymakers face as they contemplate twenty-first century teaching and learning.”

Committee Referrals:

SEC/SFC

Related Bills:

SB 302 *Home & Charter School Student Program Units*

SB 358 *School Districts Governing Charter Schools*

HB 392 *Public Education Commission as Independent*