



2021 NMSBA Leadership Retreat

Who Governs Public Schools and does Local Control exist?

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July 10, 2021

Board Member Oath

- Section 22-5-9.1 of the Public School Code
 - All elected or appointed members of local school boards shall take the oath of office prescribed by Article XX, Section 1 of the constitution of New Mexico.
- Constitution of the State of New Mexico
 - Article XX, Section 1
 - Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the [C]onstitution of the United States and the constitution and laws of this [S]tate, and that he [or she] will faithfully and impartially discharge the duties of his [or her] office to the best of his [or her] ability.

Powers of the Board

- Section 22-5-4 of the Public School Code:
- A local school board shall have the following powers or duties:
 - A. **subject to the rules of the department,** develop educational policies for the school district;
 - B. employ a local superintendent for the school district and fix the superintendent's salary;
 - C. review and approve the annual school district budget;
 - D. acquire, lease and dispose of property;
 - E. have the capacity to sue and be sued;

Powers of the Board (Continued)

- Section 22-5-4 (cont.)
 - F. acquire property by eminent domain
 - G. issue general obligation bonds
 - H. provide for repair & maintenance of property
 - I. subpoena witnesses for school hearings
 - J. contract for expenditure of funds under Procurement Code, except for salaries

Powers of the Board (Cont.)

- Section 22-5-4 (cont.)
 - K. adopt rules for administration of all powers and duties of the board
 - L. accept or rejects gifts to the District
 - M. offer and pay rewards for information regarding theft, defacement or destruction to school property; and
 - N. approve use of private company to provide education

Statutory Powers of the Superintendent

- Section 22-5-14 of the Public School Code
- Superintendent is the chief executive officer
- Carry out educational policies and **rules of PED** and the local board
- Administer and supervise the School District
- Employ, fix salaries of, assign, terminate or discharge all employees of the School District
- Prepare budget for review and approval by Board of Education

PED's Authority

Under the New Mexico Constitution at Article XII, Section 6, subsection D, the PED Secretary is a cabinet secretary of the State of New Mexico who “shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.” See N.M. Stat. Ann. § 22-8-4(A) (1988) (“...the department shall: ... prescribe the forms for and supervise and control the preparation of all budgets of all public schools and school districts”).

The PED Secretary has statutory authority over the State's public schools “except as otherwise provided by law.” See N.M. Stat. Ann. § 22-2-1(A) (2004) (“The secretary is the governing authority and shall have control, management and direction of all public schools, **except as otherwise provided by law.**”).

Pending Lawsuit

**STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT**

BOARD OF EDUCATION FOR THE GALLUP-MCKINLEY COUNTY SCHOOLS; BOARD OF EDUCATION FOR THE LOGAN MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE MORA INDEPENDENT SCHOOL DISTRICT; BOARD OF EDUCATION FOR THE ELIDA MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE CAPITAN MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE MOUNTAINAIR PUBLIC SCHOOLS; BOARD OF EDUCATION FOR THE ANIMAS PUBLIC SCHOOLS; BOARD OF EDUCATION FOR THE CARRIZOZO MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE CLAYTON MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE FORT SUMNER MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE GRADY MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE MOSQUERO MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE ROY MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE TRUTH OR CONSEQUENCES MUNICIPAL SCHOOLS; BOARD OF EDUCATION FOR THE EUNICE PUBLIC SCHOOLS; BOARD OF EDUCATION FOR THE FLOYD MUNICIPAL SCHOOLS; and GOVERNING BOARD FOR MISSION ACHIEVEMENT AND SUCCESS CHARTER SCHOOL,

Plaintiffs/Petitioners,

V.

No. D-101-CV-2020-02194
Judge: Matthew Justin Wilson

RYAN STEWART, ED.L.D., in his official capacity as SECRETARY, NEW MEXICO PUBLIC EDUCATION DEPARTMENT and the NEW MEXICO PUBLIC EDUCATION DEPARTMENT,

Defendants/Respondents.

Categories of Allegations

- The PED issued “guidance” documents, including e-mails were issued as *de facto* regulations with the force and effect of law in violation of the State Rules Act rendering them void, as a matter of law;
 - December 2020 Emergency Regulations are vague and depend entirely on guidance documents
- PED directives violate the State’s constitution against anti-donations, including paying employees for no services rendered, donating supplies to private third parties and directing the operation of school buses to provide donated meals;
- The PED has illegally and improperly interfered in local personnel systems in violation of law and in violating the rights of local employees;

Categories of Allegations

- Challenge the PED's interference in local procurements and local boards of finance that are possessed by the School Districts in violation of State law;
- PED's *de facto* regulations entitled directives or "guidance" documents created a category of student that is deprived of a public education to which the School Districts wish to service but cannot do so due to the *ultra-vires* assertion of authority by the PED;
- The PED illegally withheld federal CARES Act monies in approving the annual budgets for the School Districts; and
- PED Secretary retaliated against School Districts in personally e-mailing Secretary of Environment Department to charge these school districts with violation of its COVID guidance documents under OSHA.

The Remedy Sought

- Declaratory Judgment
 - The Court determines the scope and effect of the statutory authority of the Parties and whether there is local control of school districts
- Injunctive Relief
 - Require the PED to follow the State Rules Act and not violate the authorities of the local boards and superintendents
- Writ of Mandamus
 - Require the PED Secretary not violate the authorities of the local boards and superintendents and not retaliate or intimidate.

Status of the Lawsuit

- The Court has denied the School Districts' Petition for a Preliminary Injunction;
 - The Court ruled that there was not a “substantial” likelihood of success for the School Districts as to give an early and complete remedy. However, there is still a chance to succeed.
- The Court has denied two (2) Motions to Dismiss the lawsuit filed by the Attorney General's Office on behalf of the PED and the PED Secretary
 - All the claims are sufficient to warrant a remedy to be given by the Court.
 - The claims are not moot because of in-person instruction.
 - The statutory authority of the PED is not as clear as has been argued to the Court by the PED and as asserted during the pandemic and before by the PED.
- The case will proceed to trial
 - Same District Judge as the *Yazzie/Martinez* Case.

Argument on Statutory Authority

- The PED's argument is that the governance of public schools has never and does not now include local control of public schools by local school boards;
- The PED acknowledges that school boards do have policy-making authority but that authority is subject to and operates only in the space granted by the PED.
- As such, the argument is that the authority of local school boards is now subordinate to that of the PED and subject to its regulation (presumably whether by rule-making by promulgation in the NMAC or by informal "guidance" documents sent by e-mail by the PED secretary at his leisure or political whim or on the website);
- Local boards are now subject to PED oversight and presumably now its discipline and enforcement against school board members and local superintendents.
 - Suspension and replacement

Argument on Statutory Authority

- The PED contends that the statute granting local school boards the authority to set educational policies and control of school district is subject to the “rules of the department.” Section 22-5-4(A)
- PED contends that superintendents are authorized to carry out educational policies and are also subject to the rules of PED. Section 22-5-14(B)(1)
- More important, the PED relies upon Section 22-2-1(A), which states that “[t]he secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law.”).

Argument on Statutory Authority

- The PED contends that the language “except as otherwise provided by law” in Section 22-2-1(A) means little or nothing as the PED’s authority is plenary and complete over all of public education.
- The PED contends that the language that local school boards are subject to the “rules of the department” in Section 22-5-4(A) limits local school boards to the absolute control by the PED;
- PED contends that the language that local superintendents are subject to the rules of PED in Section 22-5-14(B)(1) also limits local superintendents to the absolute control by the PED.

The Importance of Local Governance in Public Schools

- **There are six key reasons why local governance is the best way to advance public education (NSBA):**
 1. Education is not a line item in a school board's budget—it is the only item.
 2. The school board represents the community's voice in public education, providing citizen governance and knowledge of the community's resources and needs, and board members are the policy-makers closest to the student.
 3. The school board sets the standard for achievement in the school district, incorporating the community's view of what students should know and be able to accomplish at each grade level.
 4. The school board is accessible to everyone in the community and is accountable for the performance of the schools in the district.
 5. It is the community member's right as a voter to select new board members who will work diligently to provide an opportunity for students to receive a high-quality education, which will enable them to succeed in their career, college, and life.
 6. The school board is the community's education watchdog, ensuring that taxpayers get the most for their tax dollars.

History of Local Control

- **1647**
The General Court of the Massachusetts Bay Colony decrees that every town of fifty families should have an elementary school and that every town of 100 families should have a Latin school.
- **1779**
Thomas Jefferson proposes a two-track educational system, with different tracks in his words for "the laboring and the learned."
- **1785**
The Continental Congress (before the U.S. Constitution was ratified) passes a law that created "townships," reserving a portion of each township for a local school.
- **1790**
Pennsylvania state constitution calls for free public education but only for poor children. It is expected that rich people will pay for their children's schooling.
- **1805**
New York Public School Society to provide education for poor children. These schools emphasize discipline and obedience qualities that factory owners want in their workers.
- **1817**
A petition presented in the Boston Town Meeting calls for establishing of a system of free public primary schools..
- **1820**
First public high school in the U.S. opens in Boston.
- **1827**
Massachusetts passes a law making all grades of public school open to all pupils free of charge.
- **1837**
Horace Mann becomes head of the newly formed Massachusetts State Board of Education.
- **1848**
Massachusetts Reform School at Westboro opens, where children who have refused to attend public schools are sent. This begins a long tradition of "reform schools," which combine the education and juvenile justice systems.
- **1851**
State of Massachusetts passes first its compulsory education law..
- **1865-1877**
During Reconstruction African Americans assist in rewriting state constitutions after Civil War to guarantee free public education.
- **1893-1913**
Size of school boards in the country's 28 biggest cities is cut in half. Most local district (or "ward") based positions are eliminated, in favor of city-wide elections.
- **1896**
Plessy v. Ferguson decision. The U.S. Supreme Court rules that southern states and local communities can pass laws requiring racial segregation in public schools
- The long standing tradition of local control of public schools is not limited to New Mexico it is actually an American Tradition.
- In fact, local school boards predate Statehood, as the governmental entities controlling public education. See *Board of Education of City of Socorro v. Robinson*, 7 N.M. 231 (N.M. Terr. 1893).

Observation

- Having the Court rule that the PED has now and has always had unlimited or overriding statutory authority and control over all the public schools, including the authority to create, set, control, limit, override and alter all local policies, personnel systems and procurement, will come as a surprise to school boards and local superintendents and to the expectations of the public who have voted in school board elections, attended meetings of their local school boards and interacted with local superintendents to now find that local school boards and local superintendents simply have no authority except that allowed by the PED over the local public schools that they purportedly govern and administered.
- All board members and superintendents are now considered to be *de facto* employees and subordinates of the PED.
- Now, it appears and the PED has enabled, through its most recent actions, that the public must now go to the PED to seek a remedy or lodge a complaint about public education, and it will provide a remedy by directives to local schools.

Alarcon Case

- *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ.*, 2018-NMCA-021, 413 P.3d 507 (N.M. Ct. App. 2018), *cert. denied*, 2018-NMCERT-001 (N.M. 2018)
- In *Alarcon* case at Paragraph 61, the Albuquerque Public Schools argued that the language “subject to the rules of the department” had the same broad statutory authority the PED argues here, and as such, it argued that the school board was limited in its policy-making authority and could not hear terminations or discharges unless the PED allowed it in light of HB 212.
- However, the Court of Appeals in Paragraph 62 rejected that argument and reiterated that school boards are policy-making entities under statute and that they govern the local school districts.
- In harmonizing the various statutes, the Court of Appeals at Paragraph 63, stated, “To accept the School District’s arguments on their face requires us to conclude that ‘Section 22-1-2(H), defining the school board as ‘the policy-setting body’ of the school district, is mere surplusage to 22-5-4 (A), in providing that among the ‘powers and duties’ of a school board is, ‘subject to the rules of the department, to develop educational policies for the school district.’ This interpretation violates a fundamental principle of statutory construction, that we are to give effect to all parts of statutes, particularly when they are enacted together.”

Alarcon Case (con't)

- It is important to note here that the Court of Appeals did not hold that the PED had plenary control over all public education or other education policies of the State. It actually said in Paragraph 64 that PED's authority only "appears to be exclusive and plenary" and the goes on to hold at Paragraph 65 that local school boards have exclusive statutory authority in the area of establishing the employment terms and conditions of school employees for collective bargaining and that "[g]ranting a school board such authority is not a limitation, but an express recognition that each local board is a **partner** with the public education department in making education policy for that particular school district by taking into account the state's multicultural diversity to achieve student success."
- The Court goes on to list other areas in which local school boards have exclusive statutory authority

School Districts' Argument

- The Court should conclude that the powers and duties granted to school boards in Section 22-5-4(A) are in addition to, and not a limitation, on the general power of the PED to enact policy for the school district recognized in Section 22-1-2(H).
- The best consistent and harmonious interpretation of all the statutes pertaining to public schools is that the PED can regulate and control any aspect of public schools if it is related to federal and State funding or is required in order for the State to receive federal funding of public schools.
 - There is no conflicts, for example, states can freely regulate their own traffic laws, but in order to obtain federal highway construction funds it must limit speed to 75 miles per hour or 55 miles per hour.

School Districts' Argument

- The real foundation of the PED's statutory authority is actually founded in financial matters, as described in the State's Constitution.
 - Under the Constitution at Article XII, Section 6, subsection D, the Secretary is a cabinet secretary of the State of New Mexico who “shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.” See N.M. Stat. Ann. § 22-8-4(A) (1988) (“...the department shall: ... prescribe the forms for and supervise and control the preparation of all budgets of all public schools and school districts”).
- The real reach and application of the PED's statutory authority is entwined with federal legislation amending and reauthorizing of the Elementary and Secondary Education Act of 1965 (“ESEA”), including the No Child Left Behind Act of 2001 (“NCLB”). The Legislature enacted and amended the statutes to ensure the State could continue to receive federal funding through ESEA, such as under Title I ESEA funds.
 - The intent of the ESEA was to support and further local control of public schools

Pandemic-related Arguments

- The PED gained no additional authority because of the State's efforts to mitigate the pandemic.
- Without any statutory authority under the public health emergency statutes, the PED's actions during the pandemic must be authorized by the existing statutes.
- As such, the PED acted illegally in violation of the State Rules Act rendering all the Departments' directives, guidance and "mandatory" recommendations to local school districts invalid and unenforceable, as a matter of law.

Pandemic-related Arguments (con't)

- Faced with their illegal activity, the PED now attempts to implement an after-the-fact legal justification by hastily promulgating emergency regulations in December of 2020.
- The results are simply a series of unconstitutionally vague directives that depend entirely on incorporating the countless illegal directives and “guidance” documents and personal e-mails previously promulgated by the PED Secretary for gaining any sense of clarity of what is required under the regulations.

Pandemic-related Arguments (con't)

- It is important to note yet again that there are no Public Health Orders that have declared that the public schools aren't or were unsafe provided that the appropriate safeguards were instituted and taken in order to protect employees and eventually the students attending them.
- The Public Health Orders and the Governor's actions have allowed for school employees to remain on the job in the schools. As such, if the public schools are safe for some employees—they must be safe for all.
- In addition, if the public schools are safe for allowing students in schools for in-person instruction at a 5:1 ratio without reference to mass gathering restrictions of the Public Health Orders than the schools must be safe for all students under similar or identical safety precautions.

Pandemic-related Arguments (con't)

- The PED has prevented and limited the ability of local school districts to perform their Constitutional obligations.
- The PED's illegal emergency regulations offer no citation to any legal authority justifying the limiting of the categories of students who were permitted to return for safely-conducted in-person instruction.
- As such, this illegal act has resulted in students not having Internet access or having inadequate Internet access and/or having no access to computer devices or having inadequate access to computer devices and/or who do not benefit or otherwise flourish in a virtual learning environment have been deprived of their constitutional right to a uniform and appropriate public education in violation of State Constitution.

Pandemic-related Arguments (con't)

- In the statutory authorities that create, control and maintain the personnel systems at each local school district, there is no mention of any statutory authority belonging to the PED to take any action to direct local school personnel or direct the work performed by school employees. See Sections 22-1-2(H); 22-5-4(A); 22-5-11(A); 22-5-14(B)(1) and 22-5-14(B)(3) of the Public School Code; see *also* School Personnel Act, N.M. Stat. Ann. § 22-10A-1 *et. seq.* (2003).
- In addition, even under the Public Employee Bargaining Act (“PEBA”), N.M. Stat. Ann. §§ 10-7E-10 to -11 (2003, as amended through 2005), there is no provision of law granting any role whatsoever for the PED in establishing or defining the terms and conditions of public employment within the State’s public schools.

Pandemic-related Arguments (con't)

- The crux of the PEDs' argument is that it can compel local superintendents to provide specific accommodations (remote) under the New Mexico Human Rights Act ("NMHRA") and the Americans with Disabilities Act of 1990 ("ADA"), as a voluntary benefit under the employer's own initiative.
- However, mandatory and specific accommodations directed by the PED is neither voluntary nor offered by the employer's own initiative. Again, this "directive" is not contained within the emergency regulations, and as such, the PED's directive by e-mail of August 28th is outside of any rule-making requirements is void and unenforceable.

Pandemic-related Arguments (con't)



Pandemic-related Arguments (con't)

- The PED's blanket memorandum directives to continue to pay all school employees with benefits without work performed and in separate directives to provide free meals to non-students and turnover cleaning and supply materials to third parties all violate the Anti-Donations Clause.
- Simply put, good intentions during a public crisis alone are not exceptions to the prohibitions in the State's Constitution.

Pandemic-related Arguments (con't)

- After the Special Session, the PED notified local school districts that it would be reducing the operational funds provided to each school district under the SEG distribution formula by the amount each local school district received from the U.S. Department of Education under the CARES Act.
- The CARES Act provides that ESSER funds may only be spent in accordance with the expenditure of federal Title I funds.
- Following this federal requirement, Federal Title I funds may not be used to supplant or replace State funding.
- As such, the federal funding each local school district received from the CARES Act may not be used by the PED to replace State funding.

Pandemic-related Arguments (con't)

- The PED Secretary acted to intimidate, retaliate and coerce by personally seeking and requesting individually-targeted inspections of local school districts and charter schools by Secretary Kenney of the New Mexico Environment Department, who happen to be parties to the lawsuit and who have challenged the actions of the PED.
- There simply was not any internal processing of potential complaints through its procedures for the exercise of agency discretion by employees/investigators of the Environment Department.
- The reality is that the PED Secretary and his staff undertook and made independent and high-level informal requests to the Secretary of the Environment Department in order to actually circumvent the accepted and promulgated complaint process and the exercise of discretion by the Environment Department.

Questions?



Contact Information



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