

CORONAVIRUS RELIEF LEGISLATION & UPDATES ON STATE EDUCATION LITIGATION

NMSBA 2021 Virtual Board Member Institute

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Coronavirus Response and Relief Supplemental Appropriations Act

- Signed into law on December 27. Re-upping of CARES Act funding. With respect to schools, already considered a “down payment” or “bridge funding” and more is proposed and expected. Biden proposing \$130B for K-12
- Provides \$82 Billion for K-12 Schools and post-secondary institutions to be distributed through three programs established by CARES Act
 - Governors Emergency Education and Relief Fund (GEER II) (\$4.1 Billion);
 - Elementary and Secondary School Emergency Relief fund (ESSER II) (\$54.3 Billion);
 - Higher Education Emergency Relief Fund (HEER) (\$22.7 Billion)

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II Funds

- Of the ESSER II funds, approximately \$436mm allocated to NM. Of that, the minimum distribution to LEAs is \$392mm; maximum State reservation is \$43.5mm and \$2.17mm for State administration;
- Funds distributed by State to LEA's in the same basic way as Title I funds so high poverty districts and schools will generally get more. It appears that PED has determined the distribution amounts to individual LEAs as of 2/3/21 for a total of \$390,442,791.
- No longer a requirement to provide “equitable services” to non-public schools. Non-public schools may be eligible for separate program.
- May be used for pre-award costs dating back to 3/13/20.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Any activity authorized by the ESEA, including the Native Hawaiian Education Act and the Alaska Native Educational Equity, Support, and Assistance Act (20 U.S.C. 7511 et seq.; 7541 et seq.), the Individuals with Disabilities Education Act (20 U.S.C. 1400 et seq.), the Adult Education and Family Literacy Act (20 U.S.C. 9201 et seq.), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. 2301 et seq.) (commonly referred to as the “Perkins Act”), or subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.).

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Coordination of preparedness and response efforts of local educational agencies with State, local, Tribal, and territorial public health departments, and other relevant agencies, to improve coordinated responses among such entities to prevent, prepare for, and respond to coronavirus.
- Providing principals and other school leaders with the resources necessary to address the needs of their individual schools.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Activities to address the unique needs of low-income children or students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and foster care youth, including how outreach and service delivery will meet the needs of each population.
- Developing and implementing procedures and systems to improve the preparedness and response efforts of local educational agencies.
- Training and professional development for staff of the local educational agency on sanitation and minimizing the spread of infectious diseases.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Purchasing supplies to sanitize and clean the facilities of a local educational agency, including buildings operated by such agency.
- Planning for, coordinating, and implementing activities during long-term closures, including providing meals to eligible students, providing technology for online learning to all students, providing guidance for carrying out requirements under the IDEA and ensuring other educational services can continue to be provided consistent with all Federal, State, and local requirements.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Purchasing educational technology (including hardware, software, and connectivity) for students who are served by the local educational agency that aids in regular and substantive educational interaction between students and their classroom instructors, including low-income students and students with disabilities, which may include assistive technology or adaptive equipment.
- Providing mental health services and supports.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Planning and implementing activities related to summer learning and supplemental afterschool programs, including providing classroom instruction or online learning during the summer months and addressing the needs of low income students, students with disabilities, English learners, migrant students, students experiencing homelessness, and children in foster care.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Addressing learning loss among students, including low-income students, children with disabilities, English learners, racial and ethnic minorities, students experiencing homelessness, and children and youth in foster care, of the local educational agency, including by--
 - A) Administering and using high-quality assessments that are valid and reliable, to accurately assess students' academic progress and assist educators in meeting students' academic needs, including through differentiating instruction; B) Implementing evidence-based activities to meet the comprehensive needs of students; C) Providing information and assistance to parents and families on how they can effectively support students, including in a distance learning environment; D) Tracking student attendance and improving student engagement in distance education.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- School facility repairs and improvements to enable operation of schools to reduce risk of virus transmission and exposure to environmental health hazards, and to support student health needs.
- Inspection, testing, maintenance, repair, replacement, and upgrade projects to improve the indoor air quality in school facilities, including mechanical and non-mechanical heating, ventilation, and air conditioning systems, filtering, purification and other air cleaning, fans, control systems, and window and door repair and replacement.

Coronavirus Response and Relief Supplemental Appropriations Act: ESSER II allowable uses

- Other activities that are necessary to maintain the operation of and continuity of services in local educational agencies and continuing to employ existing staff of the local educational agency.

Coronavirus Response and Relief Supplemental Appropriations Act: GEER II Funds

- Of the \$4.1 Billion, \$2.75 Billion is for emergency assistance to non-public schools.
 - Emergency support to LEAs that the SEAs deem have been most significantly impacted by the coronavirus to continue to provide educational services to students and to support the ongoing functionality of the LEA.
 - Emergency support to institutions of higher education that the Governor deems have been most significantly impacted by the coronavirus to continue to provide educational services and support the ongoing functionality of the institution.

Coronavirus Response and Relief Supplemental Appropriations Act: GEER II allowable uses

- Provide support to any other institution of higher education, LEA, or education-related entity within the state, including Indian Tribes, and Tribal organizations that the Governor deems essential for carrying out emergency education services to students for authorized activities described in section 313(d)(1) or the HEA; the provision of child care and early childhood education, social and emotional support; and the protection of education-related jobs.

Yazzie/Martinez Lawsuit

The 2019 Judgment entered by the Court ordered the State to address constitutional violations in funding and programs for “At Risk” students which includes students who are economically disadvantaged, ELL students, Native American students and students with disabilities. In July 2020, the Court denied the State’s motion to dismiss the suit based on the Court’s findings that the State had not yet satisfied the Judgment.

In December, 2020, the Plaintiffs filed a motion requesting the Court to order the State to immediately provide funding for technology to at risk students who were adversely impacted by lack of access to remote learning. The Court will hear Argument on this Motion on April 30th.

Yazzie/ Martinez 2021 Legislative Remedies

- The Legislature has introduced a number of remedial bills to address continued funding deficiencies. Grouped by topic, they are:
- **Language-** **HB52** (Bi-lingual Cult. Ed. Advis. Council); **HB84**; (Nat. Am. Lang.); **HB85** (funding for 84); **HB86** (Approp. to Indian Affairs for Lib., Technology, Ed. Resources); **HB100** (Approp. to PED for at risk student college and career readiness); **HB130** (Standards to assure equity in identifying and tracking gifted students; **HB131**(Creates Asst. Sec. Hispanic Ed.); **HB213** (requires districts to establish set asides for special education funds received from state and provide financial assistance/reimbursements to families of special education students who paid for IEP services not delivered by district);

Yazzie/ Martinez 2021, More Legislative Remedies

- **HB219**(PED bi-literacy and oral language task force); **HB227** (Defines “ethnic studies,” establishes standards); **HJR001** (Const. Amend. Authorizes early childhood funding from Permanent Fund).
- **Capital Outlay; Gen. Funding- HB6** (changes in reporting on funding and use of SEG; also addresses Court Decision on Impact Aid allocations); **HB85** (direct funding to Tribes for educational programs and building capacity); **HB101**(expands lottery program to allow table games and sports wagers); **HB175** (SEG hold harmless for school enrollment losses due to pandemic); **HB135** (amends calculation of program units for at risk students); **SB40** (mandates extended school year, sets MEM and appropriation if no Order prohibiting in person instruction); **SB41**(eliminates state and local credits in calculating SEG; changes formula for Cap. Outlay for

Yazzie/Martinez 2021, More Legislative Remedies

- state and local match; includes reporting on use of state and fed. revenue in state educational plan ; **SB144** (redefines educational technology to include off-site broadband connectivity for remote learning);
- **SJR007**; proposes amendment to add 2 mills to statewide mill levy distribution to SEG for all public schools.

Some of the foregoing Bills are also intended to address the recent District Court Decision on disparities in capital outlay funding for Districts with a high percentage of tribal lands.

Board of Education of Gallup-McKinley, et al. v. PED Secretary/PED: A case about local control v. State power in emergency and non-emergency times

- The NM Constitution requires the establishment and maintenance of a “uniform system of free public schools sufficient for the education” of school age children.” N.M. Const. art. XII, § 1.
- The NM Constitution also creates the Public Education Department which “shall have such powers and duties as provided by law,” with a secretary 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.” N.M. Const. art. XII, § 6.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: School Boards in the NM Constitution

- The NM Constitution does not spell out the role of local school boards, or their relationship to the PED, and only specifically addresses school boards by providing parameters for recall of board members and making provision for a large district to have 7 members elected for single member districts. N.M. Const. art. XII, §§ 14, 15.
- By mentioning school boards, that implies that they are constitutionally necessary; i.e., that they probably cannot be legislated out of existence, but they are not granted a particular role in education by the Constitution. Essentially, the Constitution leaves it to the Legislature to determine the various roles between PED and local boards.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: The Public School Code

- The Public School Code (“PSC”) states that the PED Secretary “**shall have control, management and direction of all public schools, except as otherwise provided by law.**” NMSA 1978 § 22-2-1. PED is also required to “determine policy for the operation of all public schools.” NMSA 1978 § 22-2-2(B).
- PSC defines “local school board” as “the policy-setting body of a school district.” NMSA 1978 § 22-1-2. The statute defining the powers and duties of local school boards grants them the authority to “subject to the rules of the department, develop educational policies for the school district.” NMSA 1978 § 22-5-4. That at least implies that a local board’s power to determine policy in the district is constrained by parameters set by the PED.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Public School Code, cont'd.

- PED is required to “solicit input from local school boards and school districts in the formulation and implementation of department rules.” NMSA 1978 § 22-2-2(S).
- The Public Education Department Act states that “Unless otherwise provided by statute, no rule affecting any person or agency outside the department shall be adopted, amended or repealed without a public hearing on the proposed action before the secretary or a hearing officer designated by the secretary.”
- The Secretary is, however, authorized to “take administrative action by issuing orders and instructions, not inconsistent with law, to ensure implementation of and compliance with the provisions of law for which administration or execution he is responsible and to enforce those orders and instructions by appropriate administrative action in the courts.” NMSA 1978 § 9-24-8(B)(5) and (D).

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Public School Code, cont'd.

- PED's duty to supervise all schools includes “taking over the control and management of a public school or school district that has failed to meet requirements of law or department rules or standards, and, until such time as requirements of law, standards or rules have been met and compliance is ensured, the powers and duties of the local school board and local superintendent shall be suspended,”
- and the duty to “deny, suspend or revoke a license according to law for incompetency, moral turpitude or any other good and just cause.” NMSA 1978 § 22-2-2(B) and (K).

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Case law: Alarcon v. Albuquerque Pub. Sch. Bd. of Educ., 2018- NMCA-021

- “The public education department has what appears to be exclusive and plenary control over all education policies of the state. It was created pursuant to Article XII, Section 6 of the New Mexico Constitution. See NMSA 1978, Section 9-24-9 (2004). Among its far reaching statutory powers is the power to “determine policy for the operation of all public schools and vocational education programs in the state,” to “supervise all schools and school officials coming under its jurisdiction,” and to “prescribe courses of instruction to be taught in all public schools in the state, requirements for graduation and standards for all public schools[.]” Section 22-2-2(B), (C), (D). To achieve these ends, the secretary of education “shall have control, management and direction of all public schools, except as otherwise provided by law.” Section 22-2-1. These statutes can be read as excluding a local school district from having *any* authority to enact educational policy for its own school district.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Case law: Alarcon v. Albuquerque Pub. Sch. Bd. of Educ., 2018-NMCA-021

- “**However**, the purposes of House Bill 212 are to have a “multicultural education system” that “integrates the cultural strengths of its diverse student population into the curriculum[,]” and “recognizes that cultural diversity in the state presents special challenges for policymakers, administrators, teachers and students” and to also change public school governance “from the bottom up instead of from the top down,” Section 22-1-1.2(B)(3), (4), and (F). In order to avoid any question and to be consistent with its purposes, House Bill 212 expressly and explicitly states that a local school board has the “powers or duties” to “develop educational policies for the school district” (that are “subject to the rules of the department”) in Section 22-5-4(A). **Granting 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.**”

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Emergency Powers

- The All Hazard Emergency Response Act (NMSA 1978 Sections 12-10-1 through [12-10-10 NMSA 1978](#)) confers extraordinary powers on the Governor during a disaster/emergency.
- [Governor] shall exercise direction and control over any and all state forces and resources engaged in emergency operations or related all hazard emergency management functions within the state.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Emergency Powers/AHEMA

- The governor, the homeland security and emergency management department and the governing bodies of the political subdivisions of the state are directed to use, in carrying out the provisions of the All Hazard Emergency Management Act, the services, equipment, supplies and facilities of existing departments, offices and agencies of the state and its political subdivisions to the maximum extent practicable, and **the officers and personnel of all departments, offices and agencies of the state and its political subdivisions are directed to cooperate with and extend their services and facilities to the governor or to the department or to the local coordinators of all hazard emergency management throughout the state upon request.**

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Emergency Powers/AHEMA cont'd.

- A. It is the duty of all political subdivisions of the state and their coordinators of the all hazard emergency management programs appointed pursuant to the provisions of the All Hazard Emergency Management Act to comply with and enforce all executive orders and rules made by the governor or under the governor's authority pursuant to law.
- B. Political subdivisions shall meet all state and federal requirements before becoming eligible to participate in state and federal all hazard emergency management assistance programs. They must comply with all state and federal rules and procedures and shall be removed from participation in the assistance programs by the state director of homeland security and emergency management for failure to comply with the rules and procedures or to maintain their eligibility in accordance with prescribed requirements.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Pandemic Executive Orders

- March 11, 2020: Governor declares a public health emergency and invokes powers under the All Hazard Emergency Response and the Public Health Emergency Response Act (Executive Order 2020-004). This Order has been continuously extended.
- EO-004 orders all political subdivisions (i.e., school districts) to comply with and enforce order.
- EO-004 requires all cabinets, departments, and agencies (i.e., PED) to comply with the directives of order and “any instruction given by the Dept. of Health.”

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Pandemic Executive Orders and PED response

- March 13, 2020– Governor issues EO 2020-005 closing public schools through April 6;
- March 26-- extended public school closure for remainder of 2019-20 SY in EO 012.
- Since then, there have been very few orders directly from the Governor related to public schools.
- PED has been issuing directives and guidance (sometimes unclear which) to school districts via Reentry Guidance, Toolkits, Memorandum, conference calls, and emails.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Lawsuit filed

- **October 6:** Complaint for Declaratory and Injunctive Relief and Petition for Writ and Alternative Writ of Mandamus filed with 8 School District plaintiffs. Complaint amended on 10/29 to add 6 districts and a charter school for a total of 15 plaintiffs.
- General allegations are that PED acting outside of its authority and issuing directives contrary to the law; violating the concept of local control.
- November 6: Plaintiffs file a Petition for Preliminary Injunction seeking a quick order, while the case is pending, to restrain the Secretary/PED from illegal acts and acting outside of its authority.
- **Standard for Preliminary Injunction:** 1) petitioners will suffer irreparable injury without injunction; 2) Injunction will not be adverse to public's interest; 3) there is substantial likelihood that petitioners will ultimately win the suit.

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED

- In the interim, the Plaintiffs have filed an amended petition for preliminary injunction, and a second amended complaint adding plaintiffs' and modifying some claims (now 18 plaintiffs). The Plaintiffs have survived one motion to dismiss and the PED has made another motion to dismiss. The Preliminary Injunction motion is fully briefed and awaiting the Court to set a hearing.
- PED has issued an Emergency Regulation and an Amended Emergency Regulation, apparently to codify the directives in the various guidances and to moot allegations in the case that PED may only issue directives to schools through the rule-making process.
- The case is moving slowly and circumstances on the ground are changing

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Specific Allegations

- PED has no authority to issues directives to districts via “guidance documents” outside the rule-making process.
- The emergency regulations were illegally issued;
- PED violated the anti-donation clause by mandating districts pay non-working employees, the use of district employees and resources to provide meals to students and non-students, and directing districts to turn over cleaning and paper supplies to private child-care facilities.

Board of Education of Gallup-McKinley, et al, v. PED

Secretary/PED: Specific Allegations

- Stepping on local board authority to establish and control bus routes; requiring specific air filters in HVAC systems, and mandating which employees must, and which must not, work in-person and their duties.
- Acting outside its authority by mandating surveillance testing of employees
- Directing who can open to in-person learning;
- Depriving students of their NM Constitutional right to and a free and sufficient education, particularly those without internet access;
- Reducing SEG by amount of CARES Act funding received by districts;
- Abuse of power and retaliation by prompting the NM Environment Department to inspect districts perceived to be non-complying;
- Emergency orders don't give PED this authority;

Board of Education of Gallup-McKinley, et al, v. PED Secretary/PED: Specific Allegations

- The case does not seek to challenge the science or the necessary safeguards for addressing Covid-19.
- Case does not appear to challenge the Governor's authority under the emergency powers; appears to concede for most of the issues, that Governor could do the things PED is attempting to do under emergency power.
- Main purpose of action is to get a judicial determination regarding local control of school districts and charter schools. Much of the concern is that PED will attempt to hold on to its claimed pandemic powers in the post-pandemic world.

Zuni Public School District, et al. v. State; Round II in Challenging Funding Formulas for Capital Improvements

In 2013 Zuni, Gallup-McKinley and Grants-Cibola County District Boards of Education reopened a case which was first filed in 1998 and brought a new challenge to the system which the State had developed to address disparities in capital outlay funding after the Districts won Round I.

The new claims alleged that the State still failed to meet the Constitutional requirements for providing a uniform and adequate system of funding capital improvement needs and that the failure imposed on the students in the Plaintiff Districts, and on the Districts themselves, a distinct educational disadvantage because the system allowed property rich districts to build better facilities at a lower tax payer cost than property poor districts.

Zuni v. State, Round II

- After trial, the District Court agreed with the Plaintiffs and entered a Decision in December, 2020 that found the current statutory schemes for funding and for approving the designing and contracting capital improvements in districts is not “uniform” as required by Article XI, Section 1 because the funding scheme is directly to the property wealth in districts and allows property wealthy districts to raise more money, at their discretion, while paying lower tax rates. As a result, property poor districts are mostly or entirely dependent on the state for building funds.
- The Court also concluded that state capital funding was determined by statutory adequacy standards that had no

Zuni v. State, Round II, cont'd.

relation to a district's actual facility needs or the unique needs of students in a local district.

- The Court requires the State to bring the Public School Capital Outlay Act (PSCOA) and the Public School Capital Improvements Act (2 mill levy/SB 9) (PSCIA) into constitutional compliance.
- The Court relied on the jurisdictional findings in the Martinez/Yazzie case to find that there was jurisdiction to address and resolve the claims of unconstitutionality.
- The Court found that the statutory funding schemes themselves created constitutional invalid disparities and

Zuni v. State, Round II, cont'd.

that Article IX, Section 11 of the Constitution (which permits the creation of debt by issuing bonds and imposing mill levies) did not authorize the creation of a statutory scheme that, itself, caused gross disparities in capital funding.

- The State has asked the Court to reconsider its Decision because of statutory changes since trial in 2016-2018. These changes include amendments to the PSCOA and PSCIA in 2019 and 2020. This motion was filed on January 28, 2021 and has not yet been heard.
- It is true that there have been changes since this case was tried, but we must stay tuned to find out if the legislature has finally solved the capital funding dilemmas of the Plaintiffs and other property poor districts.

Questions & Comments

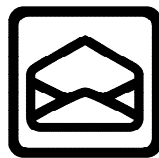
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