



# Local Control

*What Does it Mean?*

*What Are its Limits?*

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# Local Control – Federal

- “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.” *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974).

# Local Control as Between State PED and Local Boards: Takeaways.

- Local board control is not inherent. It is granted.
- Public schools are heavily regulated.
- PED can't do what it is not authorized to do but it is authorized to do a lot.
- Case law is undeveloped. The contours of State v. Local power have not all been worked out by courts, and are subject to change by legislation.
- If you want fundamentally more local control, need to get it by legislation or constitutional amendments.
- Emergency powers further erode local control in a declared emergency.
- Current lawsuit against PED may help better define outlines of local control and result in greater local control (under existing law).



## New Mexico Constitution Article XII, Section 1

A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.

N.M. Const. art. XII, § 1

# New Mexico Constitution

## Article XII, Section 3

- **§ 3. Private school funding**
- The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.

# New Mexico Constitution

## Article XII, Section 3: Cases interpreting “control” provision

- “We interpret ‘control’ to mean control over the curriculum, disciplinary control, financial control, administrative control and, in general, control over all of the affairs of the school.” Prince v. Bd. of Ed. of Cent. Consol. Indep. Sch. Dist. No. 22, 1975-NMSC-068.
- “To be sure, there is no doubt, in our own minds, that the state maintains a great degree of control over local school districts.” State ex rel. Stratton v. Roswell Indep. Sch., 1991-NMCA-013.
- These cases don’t directly address the question of State or Local control of public schools.

# New Mexico Constitution

## Article XII, Section 6

- A. There is hereby created a “public education department” ... that shall have such powers and duties as provided by law.
- D. The secretary of public education 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.
- *[Originally, this Constitutional provisions created a State Board of Education which “shall have the control, management and direction of all public schools, under such regulations as may be provided by law.”]*

# The New Mexico Constitution and Local School Boards

- The NM Constitution does not create or provide for the creation of local school boards or school districts, or their relationship to PED, but it provides some rules (implying that they are Constitutionally necessary):
  - Requires most school district debt to be approved by voters at an election and caps total district debt. N.M. Const. art. XII, § 3
  - Provides for the recall of school board members for malfeasance or misfeasance in office or violation of the oath of office. N.M. Const. art. XII, § 14.
  - Allows voters in districts over two hundred thousand to choose to have a local school board composed of seven members representing single member districts. N.M. Const. art. XII, Section 15.



## More Local School Boards Constitutional References (Cont.)

- Provides that judgments against school districts, school boards, or school board members in their official capacity shall not be satisfied by execution on their assets but by payment from the county treasurer. (also applies to other local govt's and officials). N.M. Const. art. VIII, § 7
- Requires school board members (and other county or local government officials) to be residents of the political subdivision or district for which they are elected. N.M. Const. art. V, § 13

# Local School Boards Constitutional References (Cont.)

## Summary

- Local School Boards are not guaranteed a specific role in education in the New Mexico Constitution.
- Essentially, the Constitution leaves it to the Legislature to determine the various roles between PED and local boards.
- The Legislature has the power to determine the various roles/relationships between the Public Education Department and local school boards.

# PUBLIC EDUCATION DEPARTMENT (PED) STATUTORY AUTHORITY

Secretary of PED shall:

“[H]ave control, management and direction of all public schools, except as otherwise provided by law.” NMSA 1978, Section 22-2-1(A)(2007).

(Similar powers were previously in the State Board of Education)

## PED Statutory Authority (Cont.)

PED May:

“(1) adopt, promulgate and enforce rules to exercise its authority and the authority of the secretary; (2) enter into contracts to carry out its duties; (3) apply to the district court for an injunction, writ of mandamus or other appropriate relief to enforce the provisions of the Public School Code . . . or rules promulgated pursuant to the Public School Code; (4) waive provisions of the Public School Code as authorized by law.” Section 22-2-1(B)(1)-(4).

# PED Statutory Authority (Cont.); NMSA 1978, Section 22-2-2

- PED duties include:
  - Determine policy for the operation of all public schools and vocational education programs in the state.
  - Supervise all schools and school official coming under its jurisdiction including taking over control or management of a district that fails to meet requirements of law or PED rules or standards, and suspending the board and superintendent.
  - Prescribe courses of instruction to be taught in all public schools in the state.
  - Provide technical assistance to local boards and districts.
  - Determine qualifications for and issue licenses to teachers, ISPs, and administrators.
  - Deny or revoke a license for incompetency, moral turpitude, or other good cause.
  - Solicit input from local boards and districts in formulating and implementing rules.

## PED Statutory Authority (Cont.); Public Education Department Act NMSA 1978 § 9-24-8

- 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.”

## PED Statutory Authority (Cont.); May Suspend Local Board, Superintendents, and Principals; NMSA 1978 § 22-2-14

- The procedures for suspending a local board, superintendent, or principal are set forth in statute and regulation. NMAC 6.30.6.
- These procedures typically include notice of the problem by PED, an opportunity to cure, and a public hearing prior to suspension.
- However, the Secretary *may suspend before a hearing* if the district has been given notice of disapproval, and the PED has sufficient reason to believe that the educational process in the district is so severe that it warrants immediate suspension (with the hearing to be held later).

# Local Board Statutory Authority

- NMSA 1978, Section 22-5-4:
- 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;



# Local Board Statutory Authority (Cont.)

## 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, except for salaries.

# Local Board Statutory Authority (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. pay rewards for information regarding theft, defacement or destruction to school property

# Local Board Statutory Authority: Public School Finance Act

- The Board of Education is charged under the Public School Finance Act with the duty to safeguard public funds associated with the School District. NMSA § 22-8-38 and 22-8-40.
- Under NMSA § 22-8-38 the Board of Education is ultimately responsible for accounting and control of public funds intended to support and operate the School District.
- PED still supervises and controls, and approves, District budgets (NMSA 1978 § 22-8-4, 11), and may suspend the local board as a Board of Finance if it “reasonably believes there is mismanagement, improper recording or improper reporting of public school funds under the local school board's or governing body of a state-chartered charter school's control.” NMSA 1978 § 22-8-39

## Recent 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.

## Recent 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.”

## Emergency Powers Further Restrict Local Board Control During a Declared Emergency

- The All Hazard Emergency Response Act (NMSA 1978 Sections 12-10-1 through 12-10-10) 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.

# Emergency Powers Further Restrict Local Board Control During a Declared Emergency

- 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.**

# Emergency Powers Further Restrict Local Board Control During a Declared Emergency

- 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.



# Emergency Powers Further Restrict Local Board Control During a Declared Emergency

- 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.”

# Emergency Powers Further Restrict Local Board Control During a Declared Emergency

- 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, 2020:** Complaint for Declaratory and Injunctive Relief and Petition for Writ and Alternative Writ of Mandamus filed with 8 School District plaintiffs. Complaint has been amended three times and now 24 Districts are 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.
- Injunctions have not been granted but case is pending

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

- PED has issued an Emergency Regulation, amended several times, to formally require districts and schools to follow 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 have changed.

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

- PED has no authority to issue 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 safe-guards 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.

# Final Thoughts

- Although the PED has a large level of control over the operations of local school boards, PED's authority is still curtailed by the laws and regulations mentioned above, in addition to court decisions.
- There is always potential for legislation in the future to change the relationship with Boards and the PED.
- Ideally, local boards and PED work together in partnership for the benefit of the students of New Mexico.



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