



2022 NMSBA Leadership Retreat

Who Governs Public Schools and does Local Control exist?

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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

24 school districts with 96 board members

**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

- The fundamental issue at stake in this lawsuit is whether there remains local control of public schools in New Mexico. The long-standing tradition of local control of public schools is not limited to New Mexico, it is an American Tradition.
- More important, local school boards predate Statehood and the creation of the PED as the governmental entities controlling public education in the State. *See Board of Education of City of Socorro v. Robinson*, 7 N.M. 231 (N.M. Terr. 1893) (seeking tax revenue from the sale of alcohol to fund local schools).

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.

Observation

- 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.

Alarcon Case

- 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

Mediation/Legislative Solution

- PED and School Districts as committee to meet with Legislators to ask Legislature to clarify language and decide if there is local control of public schools and to what extent it exists
 - Litigation stayed
 - Lawsuit would be over if new legislation becomes law
- PED rejects settlement and wants litigation to continue

Mediation/Legislative Solution

- School Districts meet with Legislators
 - Sens. Stewart, Soules, Brandt and Reps. Sweetser, Kane, Romero, Chatfield, and Dennis Roch (Logan Supt), JoAnn Mitchell (Charter Leader) and Mike Hyatt (Gallup Supt).
- Gwen Perea-Warniment, in her new role as Director of the LESC, has committed to try to reconvene the lawmakers we met with to continue exploring a possible legislative solution.

Most Important Legislative Session as to Public Schools since 2003

- Will Local Control Exist?
 - PED controls finance
 - PED controls instruction
 - PED controls personnel
 - PED adjudicates and directs all public complaints State-wide
 - PED can remove elected officials
- Will PED control all aspects of public education?
 - Will school boards become ceremonial?
 - PED controls areas of policy and finance school boards can operate within?
 - Will local superintendents be just agents of the PED?
 - PED controls personnel and interaction with labor unions.

Questions



Contact Information



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