



# **2022 NMSBA ANNUAL CONVENTION**

## **Parent Attempts to Opt-Out of Curriculum and Teachers, including Review of CRT and Parent-rights**

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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;**

# 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

# 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.**”).

# 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 Public Education

- The long-standing tradition of local and state 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).

# History of Public Education

- Parental rights, like other rights under common law, were derived from Judeo-Christian standards, which allowed parents, especially fathers, to exercise extensive authority over children.
- Parental authority was believed to be derived from God and nature because “God had ordained it and nature had displayed it”. It meant children were required to comply with parental authority because “parents knew what was best for their children”.
- The view that parents, more than anyone else, are innately concerned with the best interests of their children is a crucial common law principle. Common law was brought to America with the colonists and became the foundation of American law.
- During the early years of the Nation, natural law arguments in favor of parental authority and parents’ rights prevailed.

# History of Public Education

- Children were expected to learn to read and write so they could understand the Bible, which was their early textbook.
- The Massachusetts Law of 1647 enacted the first public school system in America, requiring towns of 50 families to hire a school master.
- This 17th century law signaled a shift toward the burden of educating the populace as more of a social responsibility.
- In the Colonies, education was almost completely under the private funding and control of prevailing Protestant sects.
- The religious beliefs played an important role in the development of education, even though poor children were often uneducated since families needed them to work in order to survive.
- Public schools became more prevalent due to a gradual shift from church control of private schools and the gradual shift of control of the education of children to public officials.



# Purpose of Public Education by the Courts

- Supreme Court Justice Brennan expressed the current view of the purpose of public education in *Abington School District v. Schemp* (1963):
  - **It is implicit in the history and character of American public education that public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic. (pp. 241-242, Justice Brennan concurring)**

# Secular Public Education

## Abington School District v. Schempp (1963)

- Edward and Sidney Schempp were parents who filed a lawsuit challenging the Pennsylvania Public School Act, which required a reading of 10 Bible verses, followed by a recitation of the Lord's Prayer at the opening of each school day. The exercises were closed with the flag salute and other announcements.
- The Court found that the reading of the verses constituted a religious observance in effect and thus was prohibited under the Establishment Clause of the First Amendment.
- The availability of excusal or exemption simply had no relevance to the legality of the statute. These practices were essentially religious exercises designed, at least in part, to achieve religious aims through the use of public school facilities during the school day.

# Secular Public Education (exception)

*Wisconsin v. Yoder* (1972)

- The Court held that a state's interest in universal education is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as the traditional interest of parents with respect to the religious upbringing of their children, so long as the parents prepare the children for additional obligations. (p. 215)
- The State of Wisconsin maintained its interest in “establishing and maintaining an educational system [that] overrides the defendants’ right to the free exercise of their religion” (*Wisconsin v. Yoder*, 1972, p. 213). Wisconsin believed the Amish way of life, no matter how admirable and virtuous, should not prevent the reasonable regulation of education.

Chief Justice Burger, delivered the Court's opinion:

- The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition. (p. 232)

# Secular Public Education (exception)

*Wisconsin v. Yoder* (1972)

- *Yoder* seems to be the most notable exception to judicial ratification of compulsory attendance laws. The Court's decision was primarily motivated by concern about the possible destruction of the community's almost 300-year-old way of life.
- For the time being, It is clear that for religious groups other than the Amish, the federal courts have consistently denied religious-based applications for exceptions to compulsory attendance requirements and ability of parents to out-out .
- First Amendment religious freedom is the current method of attacking other recognized Constitutional rights as supplanting them as more fundamental. *Yoder* allows exceptions.
  - Bakery owner refusing to bake a cake for same-sex wedding
  - Employer not having to pay for birth control as part of health plan
  - Exclude LGBT students

# Parental Rights and Opt-Out

*Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9<sup>th</sup> Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9<sup>th</sup> Cir. 2006)

- The Supreme Court has held that the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).
- This right is commonly referred to as the *Meyer–Pierce* right because it finds its origin in two Supreme Court cases, *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

# Parental Rights and Opt-Out

- As with all constitutional rights, the right of parents to make decisions concerning the care, custody, and control of their children is not without limitations. In *Prince v. Massachusetts*, 321 U.S. 158 (1944), the Court recognized that parents' liberty interest in the custody, care, and nurture of their children resides "first" in the parents, but does not reside there *exclusively*, nor is it "beyond regulation[by the state] in the public interest." *Id.* at 166.
- For example, the state may restrict parents' interest in the custody, care, and nurture of their children "by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.* (footnotes omitted). See also *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring) (stating that the *Pierce* right "lends no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society"); *Pierce*, 268 U.S. at 534("No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."); *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1042 (9<sup>th</sup> Cir. 2000) (subjecting the *Meyer–Pierce* right to reasonable regulation by the state), *cert. denied*, 532 U.S. 971 (2001).

# Parental Rights and Opt-Out

- The lower courts have recognized the constitutionality of a wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children. *See Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275 (5<sup>th</sup> Cir. 2001) (upholding school district's mandatory school uniform policy); *Hooks*, 228 F.3d at 1036 (upholding state statute denying speech therapy services to home-schooled children); *Hutchins v. District of Columbia*, 188 F.3d 531 (D.C.Cir.1999) (upholding a municipality's curfew ordinance that was only applicable to minors); *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694 (10<sup>th</sup> Cir. 1998) (upholding school district's full-time attendance policy); *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174 (4<sup>th</sup> Cir. 1996) (upholding school district's mandatory community service)

# Parental Rights and Opt-Out

- There are a number of cases that have upheld the constitutionality of school programs that educate children in sexuality and health.
- *See, e.g., Leebaert v. Harrington*, 332 F.3d 134 (2<sup>nd</sup> Cir. 2003) (upholding school district's mandatory health classes against a father's claim of a violation of his fundamental rights); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260(3<sup>rd</sup> Cir. 1998) (upholding school district's consensual condom distribution program); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1<sup>st</sup> Cir. 1995) (upholding compulsory high school sex education assembly program); *Citizens for Parental Rights v. San Mateo County Bd. of Educ.*, 51 Cal.App.3d 1, 124 Cal.Rptr. 68 (Cal. 1975) (upholding school district's non-compulsory health and sex education program against parental challenge).



# Parental Rights and Opt-Out

## The Bottom Federal Line

- The Due Process Clause does protect the parents' right to control their children's upbringing.
- However, the *Meyer–Pierce* right (and the closely related privacy right) does *not* include the “right to restrict the flow of information in the public schools.”
- Parents “do not have a fundamental due process right generally to direct *how* a public school teaches their child.”
- A long list of federal court rulings have provided public schools the right to teach what school boards and administrators determine is appropriate. Parents did not have any constitutional right to opt their children out of public school curriculum. Many states' legislatures have granted parents a statutory right to opt their children out of certain parts of school curricula.

# Parental Rights and Opt-Out

## The Issues

- Someone must fix the curriculum of any school, public or private. In the case of a public school it is far better public policy, absent a valid statutory directive on the subject from the Legislature, that the makeup of the curriculum be entrusted to the local school authorities who are in some sense responsible.
- Curriculum and Instruction should be the exclusive purview of public school administrators adequately trained to create, design and implement student instruction consistent with the purpose for public education to:
  - **educate students as American citizens in an atmosphere free of religious, divisive, or political separatist influences of any sort in an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage of being American that is neither dependent in the belief in God nor an atheistic approach, but simply civic and patriotic values common to all Americans of equality, justice and equal treatment.**

# Parental Rights and Opt-Out

## The State Law

- The federal law provides that public schools have the right and ability to determine curricula.
- However, State laws or statutes provide the only legal option for parents to gain opt-out rights regarding a specific public school curriculum for their children and opt-out of teachers given academic freedom.
- The Federal law is premised on the belief in a system of free public education would sustain the growth of democratic citizenship.
- Public education has made a great difference for the education of all, but the landscape has changed substantially in recent years. While legally parents must send their children to school, they now have more options than ever before including, charter schools, homeschools, and e-schools or Internet-based schools. Even so, nearly 90% of parents continue to send their children to public schools

# Parental Rights and Opt-Out

## The State Law (Con't)

- Federal judicial support of all public schools was reinforced the holding “If we are to eliminate everything that is objectionable to any religious group or inconsistent with any of their doctrines, we will leave public schools in shreds.” *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 690 (7<sup>th</sup> Cir. 1994), quoting *McCullum v. Board of Educ.*, 333 U.S. 203, 235 (1948) (Jackson, J. concurring).
- As the right to a public education is a state-generated right, the states control their own public education system. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).
- As part of New Mexico’s Federal Enabling Act and New Mexico’s Constitution, the local school districts are mandated to provide a general and uniform public education for all New Mexico citizens, including to those on portions of the Native American lands within the State of New Mexico. See Act of June 20, 1910, 36 Statutes at Large 557, Chapter 310, § 2; N.M. Const. Art. XII, §§ 1 and 3; N.M. Const. Art. XXI, § 4; N.M. Stat. Ann. § 22-1-4(A) (2015);

# Parental Rights and Opt-Out

## **Parental Rights and Opt-Out will be decided locally.**

- Clearly, the Legislature can create statutorily granted parental rights, including the ability to opt-out of curriculum and teachers;
- If the PED does have plenary power over public education supplanting local control, the PED could simply promulgate regulations directing local school board to grant or suspend locally-granted parental rights, including the ability to opt-out of curriculum and teachers;
- If there is local control, local school boards can create policies to grant parental rights, including opt-out of non-mandatory curriculum and of teachers:
  - Core subject matter courses must be taught for State to receive federal funding
  - Legislature could mandate mandatory curriculum as a condition of funding

# CRITICAL RACE THEORY

## What is it and what it is not?

- It was formally limited to a law school level academic course to discuss the legal aspects of systemic racism;
- Currently, the ideology known as Critical Race Theory (“CRT”), allegedly teaches that white people are evil or oppressors and that our nation’s institutions are inherently racist, and it has taken on a life of its own as general political position;
- The study of concepts in history like systemic racism, white privilege and male privilege cannot be accomplished by regulation apply today’s standards to the times in which the events occurred, including understanding the social, economic and political frameworks of the time. As Justice Stevens observed, ‘[i]t is hardly a novel insight that history is not an objective science .... The historian must choose which pieces to credit and which to discount, and then must try to assemble them into a coherent whole.’ ” *McDonald v. City of Chi.*, 561 U.S. 742, 907 (2010) (Stevens, J., dissenting)).
  - Education is not indoctrination
  - Objective and accurate portrayal of history is not CRT
  - Being educated is not being “woke”

# CRITICAL RACE THEORY

## What is it and what it is not?

- The call for only balanced and equal discussion of both sides to the most controversial issues and topics of our past history is unsustainable as a policy or as regulation or law;
- For example, it is wrong to be teaching students that all white people or all law enforcement officers are inherently evil. In addition, no one would seriously assert to any student that each and every part of American history is inherently and necessarily racist, misogynist and homophobic. Mandating the teaching of both sides is tantamount to claiming that civil rights heroes in our history such as Martin Luther King Jr. and others were actually simply anti-Black racists or those who protested for police reform when a black man was murdered by a police officer as anti-law enforcement anarchists or that Harvey Milk and others were simply anti-gay and heterosexual phobic — claims most would correctly assess to be ridiculous when examining history .

# CRITICAL RACE THEORY

## What is it and what it is not?

- We certainly can agree from the events in history that there are groups of our fellow Americans who only obtain equality and equal rights through judicial decisions of the United States Supreme Court interpreting the Constitution or through landmark legislation and all through some form of civil unrest.
- From the women's right to vote through the legalization of same sex marriages, civil rights movements and been pivotal events in our shared American history and in any examination in the classroom of our progress as a society.
- Moreover, a willingness to engage in fact-based scholarship on even the worst elements of America's past is a good indicator of a healthy democracy. As such, civil rights movements logically would dominate in classroom discussions from time to time or be the focus of the curriculum by individual teachers.



# Questions



# Contact Information



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