

BOARD MEMBER HOT TOPICS

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POWERS AND DUTIES OF BOARD AND SUPERINTENDENT

POWERS AND DUTIES

- ❑ Board develops educational policies for the school district.
- ❑ Board reviews district policies on an annual basis and revises as needed.
 - Superintendent administers (carries out) local board's policies, state and federal requirements and applicable laws, including the Public School and rules of the PED.

EXAMPLE

- ❑ According to the ESSA: “RULE OF CONSTRUCTION ON PARENT RIGHTS.—Nothing in this paragraph [relating to academic assessments] shall be construed as preempting a State or local law regarding the decision of a parent to not have the parent's child participate in the academic assessments under this paragraph.” 20 U.S.C. § 6311 (b)(2)(K).
- ❑ Board develops a policy permitting opt-out of PARCC.
- ❑ Due to pressure to meet the 95% participation requirement, the superintendent adopts procedures that effectively prevent parents from opting out.

POWERS AND DUTIES

- ❑ Board employs the superintendent, fixes the superintendent's salary, and evaluates the superintendent.
 - Superintendent administers and supervises the school district.
 - Superintendent employs, fixes the salaries of, assigns, terminates or discharges all employees of the school district.
- ❑ Board conducts termination and discharge hearings. See NMSA 1978, §§ 22-10A-24, 22-10A-27.

DELEGATION

- ❑ Board delegates administrative and supervisory functions to the local superintendent.
- ❑ Board refrains from involvement in delegated administrative functions.
 - Superintendent performs other duties as required by law, the PED or the local school board.

ISSUES FOR CONSIDERATION

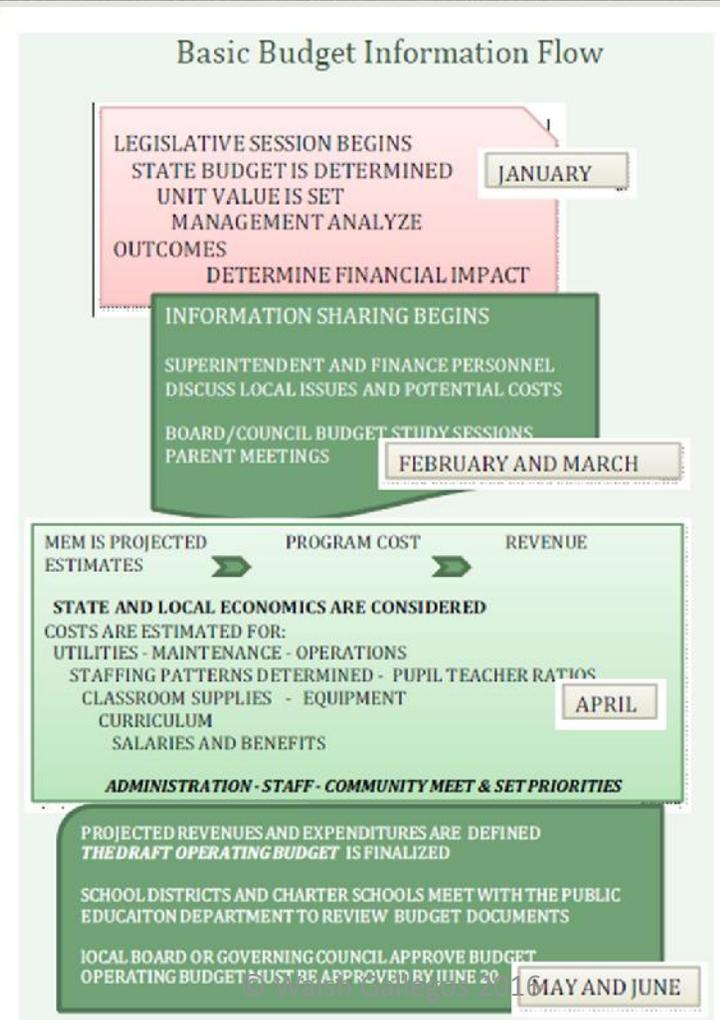
- ❑ What does it mean that the board supervises the superintendent and the superintendent supervises the district and its employees?
- ❑ How does the board gain insight into the superintendent's performance, particularly in the area of personnel management, in order to evaluate him or her, without overstepping its boundaries?
 - Board members set boundaries that respect the chain of command
 - Superintendent communicates with the board regarding handling of concerns
 - Board seeks 360-degree feedback as part of its evaluation process
 - Superintendent is held accountable for outcomes

POWERS AND DUTIES

- Superintendent prepares the school district budget for review and approval by the local school board and the department.
- Finance subcommittee makes recommendations to the board regarding annual budget preparation and oversight.
- Board reviews and approves the annual school district budget.
- Board is responsible for oversight of revenue and expenditures within the district budget.
 - Superintendent is accountable for budget management.

WHAT DOES THE BUDGET PROCESS LOOK LIKE?

SEE NM MANUAL OF PROCEDURES FOR PUBLIC SCHOOL ACCOUNTING AND BUDGETING, PAGE 9



WHAT HAPPENS IF THE BOARD FAILS TO SUBMIT A BUDGET?

- ❑ “If a local school board fails to submit a budget pursuant to this section, the department shall prepare the operating budget for the school district for the ensuing fiscal year. A local school board shall be considered as failing to submit a budget pursuant to this section if the budget submitted exceeds the total projected resources of the school district or if the budget submitted does not comply with the law or with rules and procedures of the department.” NMSA 1978, § 22-8-6 (D).

POWERS AND DUTIES

- ❑ Board has the capacity to sue and be sued.
 - What does this mean?
 - How is it carried out?
 - Can and should it be delegated?

TRANSGENDER STUDENTS AND EMPLOYEES

SOME TERMINOLOGY

- ❑ Biological sex: sex assigned at birth and written on baby's birth certificate, based on physical characteristics (e.g. genitals).
- ❑ Gender: socially constructed roles, behaviors, activities, and attributes that are often labeled as "masculine" and "feminine."

SOME TERMINOLOGY (CONTINUED)

- Gender identity: generally, an individual's personal, internal sense of being male, female, or something else.
 - NM Humans Rights Act: "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth." (only for employment, housing, credit, public accommodations and union membership)

SOME TERMINOLOGY (CONTINUED)

- ❑ Transgender Student, according to OCR, is “a student who consistently and uniformly asserts a gender identity different from the student’s assigned sex [at birth], or for which there is documented legal or medical evidence that the gender identity is sincerely held as part of the student’s core identity.”

OCR's POSITION

- ❑ “OCR has advised at least one school district that Title IX requires schools to provide transgender students with full access to locker rooms and bathrooms that align with gender identity, but has not provided any formal guidance on the issue.” *See National School Boards Association 2016 Transgender Students in Schools, p. 14.*

RECENT LITIGATION

- ❑ In April 2015, a federal court in Pennsylvania ruled Title IX's language does not provide a basis for a transgender status claim, and so the University of Pittsburgh's "policy of requiring students to use sex-segregated bathroom and locker room facilities based on students' natal or birth sex, rather than their gender identity, does not violate Title IX's prohibition of sex discrimination."
- ❑ In September 2015, a federal court in Virginia ruled that Title IX's regulations allow schools to maintain separate bathrooms based on sex as long as the bathrooms for each sex are comparable; therefore, the district did not violate Title IX by requiring the transgender student to use either unisex private restrooms or the bathrooms of the student's birth sex.
- ❑ Both of these decisions are on appeal.

BEST PRACTICES BASED ON OCR'S RULINGS

- ❑ A case-by-case approach to address requests and arrangements for transgender students.
- ❑ Dress codes should be interpreted to permit students to dress according to their gender identity, but not in a manner different from their identified gender, or in a manner that is going to cause a “substantial disruption” or “impinge on the rights of” other students (the fears or behavior of the district or other students typically should not be the “disruption”).
- ❑ Names and pronouns used in school should be consistent with the student’s and parents’ preference, to the extent permitted by law.

BEST PRACTICES BASED ON OCR'S RULINGS (CONTINUED)

- ❑ Restrooms and locker rooms are a case-by-case determination, but absent a legitimate safety concern (which the school may be required to remedy), it may be necessary to permit a transgender student to use the facilities of the sex with which the student identifies. OCR is currently at odds with two recent cases on appeal.
- ❑ Athletics. NM Athletics Association: "Participating students are required to compete in the gender listed on their original or amended birth certificate."
- ❑ Educational records. Generally, as for all students, the "official record" is not changed unless the student's name is legally changed; however, a transgender student's preferred name can, and should, be used for district-related purposes in the same way as any other student's "nick-name." Again, state laws will vary.

HEADLINE: “APS DID THE BRAVE AND RIGHT THING”

ALBUQUERQUE JOURNAL (3/17/16)

- ❑ According to the article, about 100 people “packed the meeting to advocate for a proposed APS procedural directive designed to protect transgender kids from discrimination.”
- ❑ Under the terms of the proposed procedural directive, “transgender students can dress in accordance with their gender identity and be addressed by the name and gender pronoun of their choosing...they can also use restrooms and locker rooms that match their gender identity.”
- ❑ “The directive was crafted to adhere to Title IX, federal law that prohibits sex discrimination.”
- ❑ “The APS board policy committee discussed the directive on March 9.... It has now gone to the superintendent’s leadership committee for final consideration.”

EMPLOYEES

- ❑ Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on sex, but does not expressly prohibit employment discrimination on the basis of transgender status.
- ❑ In April 2012, the EEOC ruled that discrimination against transgender employees is a form of sex discrimination that violates Title VII.
- ❑ Seventeen states, including New Mexico, the District of Columbia, and more than 160 localities across the United States, have laws that expressly prohibit employment discrimination based on gender identity and expression.
- ❑ Many federal courts have more recently concluded that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, also bars intentional discrimination against an applicant or employee based on gender identity, change of sex, and/or transgender status.

BEST PRACTICES (FROM THE OFFICE OF PERSONNEL MANAGEMENT)

- ❑ Confidentiality and Privacy: Treat transition with as much sensitivity and confidentiality as any other employee's significant life experiences, such as hospitalization or marital difficulties.
- ❑ Dress and Appearance: Once an employee has informed the district about his or her transition, the applicable dress codes should be consistent with the employee's gender identity.
- ❑ Names and Pronouns: Use the name and pronouns appropriate to the employee's expressed gender, including in communications with others regarding the employee. Continued intentional misuse of the employee's preferred name and pronoun could constitute intentional discrimination.

BEST PRACTICES (FROM THE OFFICE OF PERSONNEL MANAGEMENT) (CONTINUED)

- ❑ Restrooms and Locker Rooms: Absent a valid legal reason, once a transgender employee has begun living and working full-time as the gender with which he or she identifies, allow access to restrooms and locker room facilities of the employee's choice, including those consistent with his or her gender identity.
- ❑ Recordkeeping: The employee's personnel records and other employment records should be changed to show the employee's new name and gender, once the employee has begun working full-time in the gender role consistent with the employee's gender identity.

BULLYING

BULLYING AND DISTRICT LIABILITY - NEW MEXICO TORT CLAIMS ACT

- ❑ Section 41-4-2 of the Tort Claims Act provides, in part: “[I]t is declared to be the public policy of New Mexico that governmental entities and public employees shall only be liable within the limitations of the Tort Claims Act ...” The Act grants qualified immunity from legal liability and suit for personal injury, wrongful death, and property damage caused by the negligence of a governmental entity (including school districts) and public employees while acting within the scope of their duties. NMSA 1978, § 41-4-4(A).
- ❑ Exception: In the operation or maintenance of any building, public park, machinery, equipment, or furnishings, NMSA 1978, § 41-4-6.

ENCINIAS V. WHITENER LAW FIRM, P.A., 2013-NMSC-003

- ❑ The New Mexico Supreme Court has interpreted the “maintenance and operation of a building” exception to property not owned by a school but over which the school exercised some control. The plaintiff was a student who was badly beaten by a high school classmate. The fight took place in an area adjacent to school property that had been cordoned off by the school to allow students to patronize food vendors and was monitored by school personnel. The Court noted an affidavit by the school’s assistant principal that referred to the area as a “hot zone” due to the history of problems, including fights, which the Court called a pattern of violence that might create an unsafe condition on the premises.

HOW DOES STATE LAW ADDRESS BULLYING?

NMSA 1978, § 22-2-21

- ❑ Every school board is required to promulgate and every district must implement a bullying prevention policy including a cyberbullying prevention policy.
- ❑ “Cyberbullying” means electronic communication that:
 - (1) targets a specific student;
 - (2) Is published with the intention that the communication be seen by or disclosed to the targeted student;
 - (3) is in fact seen by or disclosed to the targeted student; and
 - (4) creates or is certain to create a hostile environment on the school campus that is so severe or pervasive as to substantially interfere with the targeted student's educational benefits, opportunities or performance.

HOW DOES STATE LAW ADDRESS BULLYING?

NMSA 1978, § 22-2-21

- ❑ Cyberbullying prevention policies must require that:
 - (1) licensed school employee training on how to recognize signs that a person is being cyberbullied;
 - (2) any licensed school employee who has information about or a reasonable suspicion that a person is being cyberbullied report the matter immediately to the school principal or the local superintendent or both;
 - (3) any school administrator or local superintendent who receives a report of cyberbullying take immediate steps to ensure prompt investigation of the report; and

HOW DOES STATE LAW ADDRESS BULLYING?

NMSA 1978, § 22-2-21

- ❑ Cyberbullying prevention policies must require that:
 - (4) school administrators take prompt disciplinary action in response to cyberbullying confirmed through investigation. Disciplinary action taken pursuant to this subsection must be by the least restrictive means necessary to address a hostile environment on the school campus resulting from the confirmed cyberbullying and may include counseling, mediation and appropriate disciplinary action that is consistent with the legal rights of the involved students.
- ❑ See also Bullying Prevention Requirements as set out in 6.12.7.1 through 6.12.7.8 NMAC.

HOW DOES FEDERAL LAW ADDRESS BULLYING?

- ❑ What schools call “bullying” is often also “discriminatory harassment” that violates federal law.
- ❑ If the bullying is based on a protected characteristic, it could fall under one of the following federal anti-discrimination laws:
 - Title IX, which prohibits discrimination and harassment on the basis of sex and gender;
 - Title VI, which prohibits discrimination and harassment on the basis of race, color or national origin; and
 - Section 504 and the ADA, which prohibit discrimination and harassment on the basis of disability.
- ❑ OCR is the enforcement agency for these federal laws.

OCR GUIDANCE (STEPS THAT MAY BE REQUIRED)

- Separation, with minimal disruption to victim
- Counseling
- Disciplinary action
- Training or other interventions to ensure that “all students, their families, and school staff” are informed
- Compensatory services to the victim
- Wide dissemination of policies and procedures
- Wide distribution of contact information for Title IX and Section 504 coordinators
- Assurance of non-retaliation and follow up inquiries with victim and family

CYBERBULLYING TWITTER/SOCIAL MEDIA

ROSARIO V. CLARK CNTY. SCH. DIST., 2013 WL 3679375 (D. NEV. 2013)

- ❑ Student was on the basketball team. After the last game of the season, he posted offensive/confrontational tweets about school officials. The student was disciplined for cyberbullying.
- ❑ Court held:
 - ❑ The speech was not protected by the First Amendment because it was obscene.
 - ❑ School officials have the authority to discipline students for off-campus speech where it is foreseeable that the speech will reach campus and cause a substantial disruption.
 - ❑ School officials did not violate the student's Fourth Amendment rights because the student had a "public" privacy setting on his twitter account and, therefore, did not have a reasonable expectation to privacy for his Twitter posts.

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