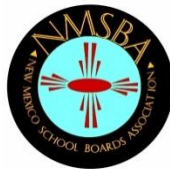


2016 LEGISLATIVE AND JUDICIAL UPDATE

2016 NMSBA School Law Conference



Presented by:

Charlotte H. Hetherington

R. Daniel Castille

John F. Kennedy



CUDDY & McCARTHY, LLP
Attorneys at Law

STATE STATUTES

GENERAL APPROPRIATIONS ACT

- ⦿ Bill contains \$2.759 billion in funding for public education for FY17, which is a 0.2% increase over current year funding. Contains \$5.4 million for a \$2,000 minimum salary increase for level 2 and level 3 teachers. Holds transportation funding flat and reduces instructional materials by \$1.25 million. Includes language that prohibits districts from using SEG funds for lawsuits against the state in new fiscal year.

STATE STATUTES

- ⦿ H 97 REMOVE SOME SCHOOL READINESS TESTS--- Amends NMSA 22-2C-4.1
- ⦿ Removes the ninth and 10th grade short-cycle diagnostic assessments in reading, language arts, and mathematics from the state's readiness assessment system.

STATE STATUTES

- ⦿ H 104 ADD LIFESAVING SKILLS TRAINING TO CURRICULUM; Amends NMSA 22-13-1.
- ⦿ Requires PED to incorporate lifesaving skills training, including hands-on cardiopulmonary resuscitation (CPR) training, use of an automated external defibrillator (AED), and performance of the Heimlich maneuver on choking victims into health education courses for first through 12th grade students.

STATE STATUTES

- ◉ S 81a K-5 PLUS PILOT PROJECT
- ◉ Adds a new section to the Public School Code to create a four-year K-5 Plus pilot project that adds an additional 25 instructional days for all students in grades Kindergarten through 5 with priority given to public schools that have a current K-3 Plus program. The K-5 Plus pilot project will measure the effect of additional instructional time on literacy and numeracy. The purpose of the bill proposes to narrow the achievement gap, prepare elementary students for middle and high school, improve truancy and dropout rates, and increase students' cognitive skills. Language in the bill states funding for K-3 Plus includes funds to pilot K-3 Plus in fourth and fifth grades in schools that voluntarily implement a school-wide program that extends the school year by a minimum of 25 additional days for students in kindergarten through fifth grade.

STATE STATUTES

- ◉ S 137aa STUDENT ATHLETE BRAIN INJURY PROTOCOLS; amends NMSA 22-13-31
- ◉ Extends period during which athlete barred from participation to 240 hours from the hour of the head injury, and only when no symptoms and written medical release from licensed healthcare professional;
- ◉ Requires all coaches to receive specific training on brain injuries and brain injury protocols
- ◉ Requires NMAA in consultation with brain injury advisory council and districts to establish brain injury protocols
- ◉ Requires districts to provide brain injury information form to students and parent/guardian and receive signatures on the form each school year prior to participation
- ◉ As a condition of permitting non-scholastic youth athletic activity on district property, Superintendent shall require person offering activity to certify that the activity will follow the statutory brain injury protocols.
- ◉ Defines “licensed health care professional” who may release student to return to participation

STATE STATUTES

- ⦿ S 144a “BREAKFAST AFTER THE BELL PROGRAM”; amends NMSA 22-13-13.2
- ⦿ Amends the Public School Code to clarify provisions of the Breakfast After the Bell Program to include flexibility for schools to serve breakfast before the instructional day begins provided the school also offers breakfast after the start of the instructional day in a location of the school's choice.

STATE STATUTES

- ◉ S 306 SCHOOL FUNDING FLEXIBILITY & WAIVERS; amends NMSA 22-1-10;
- ◉ Amends the Public School Code to reinstate, for the 2016-2017 through 2018-2019 school years, a provision that allows the Secretary of Public Education to waive certain requirements pertaining to individual class load, teaching load, length of school day, staffing patterns, subject areas, and purchases of instructional materials for public schools that need financial flexibility to meet decreased support.
- ◉ Requires the PED to monitor the waivers and report to LESC and the Legislative Finance Committee any issues or actions of a school district that appears to adversely affect student learning.
- ◉ It also repeals the phase-in of requirements after the 2010 economic downturn.

FEDERAL STATUTES

- ◉ Every Student Succeeds Act (“ESSA”)
- ◉ Repeals AYP and replaces with statewide accountability system
- ◉ Maintains annual statewide assessments in reading and math in grades 3-8, and once in high school, as well as science tests given 3x between grades 3 and 12
- ◉ Affirms state control of academic standards. Feds cannot mandate or incentivize particular standards.

FEDERAL STATUTES- ESSA CONT'D.

- ◉ Transfers responsibility to states to ID and provide support in struggling schools; prohibits feds from interfering in state and local accountability and school improvement activity
- ◉ Elevates English Language Proficiency as component of accountability
- ◉ Maintains maintenance of effort and would allow flexibility to states for equitable distribution of funds

FEDERAL STATUTES- ESSA CONT'D.

- ⦿ Eliminates high quality teacher (HQT) requirement in NCLB.
- ⦿ Provides resource to states and districts to support ELL, native populations, rural districts, homeless students; updates Impact Aid.
- ⦿ Expands Charter School Program but enhances accountability
- ⦿ Requires Dept. of Education to engage in negotiated rule-making to issue proposed regulations on standards, assessments, and supplement-not-supplant.

PROPOSED STATE REGULATORY AMENDMENT

- ◉ NMAC 6.10.7 is the regulation on standardized testing security issues and irregularities.
- ◉ Includes a subsection making it a prohibitive practice for anyone to “disparage or diminish the significance, importance or use of the standardized tests.”
- ◉ Suit filed against PED in March to prohibit enforcement.
- ◉ PED proposes amendment to regulation to delete the “non-disparagement” provision. Public hearing set for July 5, 2016 in Santa Fe.

FEDERAL REGULATIONS

NEW OVERTIME RULES

- ◉ Department of Labor issues final rule updating overtime regulations under the Fair Labor Standards Act; goes into effect 12/1/2016 (regardless of fiscal year start dates).
- ◉ Increases minimum salary level for otherwise exempt employees (executive, administrative, professional) to \$47,476/yr. (from \$23,660/yr.).
- ◉ Does not impact teachers and administrators who are still not eligible for overtime pay.
- ◉ No change for workers paid hourly (already get OT).
- ◉ Salaried workers who do not primarily perform executive, administrative, or professional duties not affected (already get OT).
- ◉ Minimum salary threshold for highly compensated employees who do not primarily perform executive, administrative, or professional duties increased to \$134,004/yr. (not eligible for OT).
- ◉ Rule will require either increase in salaries or reclassification to non-exempt status.

STATE REGULATORY ACTIVITY AND ENFORCEMENT

- ◉ Ancillary Service Providers and FTE
- ◉ Late in the current school year the PED/SEB began to review FTE calculations for ancillary service providers.
- ◉ Original intent was to have it be applicable back to the 80th day count.
- ◉ After push back by school superintendents and boards of education effective time period set for 2016-2017 school year.

ANCILLARY SERVICE PROVIDERS AND FTE, CONT'D.

- ⦿ Will require additional documentation from school districts to verify services provided to special education eligible students.
- ⦿ Creates a reduction in funding of approximately 30% from current year FTE calculation funding.
- ⦿ Panel discussion in Special Education session at 1:00 to review impact and procedures for 2016-2017.

FEDERAL REGULATORY ACTIVITY AND ENFORCEMENT

WEB ACCESSIBILITY

- ◉ Section 504 of the Rehabilitation Act of 1973 (34 C.F.R. Part 104); Title II of the Americans with Disabilities Act of 1990 (28 C.F.R. Part 35)
- ◉ Require that state and local governments provide qualified individuals with disabilities equal access to their programs, services, or activities
- ◉ School District websites and technology must be accessible by people with disabilities; hundreds of recent enforcement actions
- ◉ Result in resolution agreements: Require ensuring website material compatible with assistive technology, Web-Accessibility Policies and Training, audit and consulting designation of 504/Title II Coordinator, non-discrimination notices, continuous monitoring
- ◉ <http://www.ada.gov/pcatoolkit/chap5toolkit.htm> (contains links to other resources)

FEDERAL REGULATORY ACTIVITY AND ENFORCEMENT

TRANSGENDER STUDENTS AND TITLE IX

- ◉ Title IX bans sex-based discrimination in educational programs and activities that receive federal funds
- ◉ Dept. of Justice and Dept. of Education issued guidance making clear that a student's gender identity is the student's sex for purposes of Title IX
- ◉ Applies to identification documents, names and programs; sex-segregated activities and facilities; privacy and educational records
- ◉ More detail during General Session

STATE CASES

- ◉ Nat'l Educ. Ass'n of New Mexico v. Santa Fe Pub. Sch., 2016-NMCA-009
- ◉ Section 22-10A-27(B) gives a school employee who has been served a notice of intent to recommend discharge the discretion to elect to request a hearing by making a written request within five working days of the discharge notice.
- ◉ Court holds that employee who requested a hearing after seven days is entitled to a presumption that the departure from the statutory rules is harmless error unless a district can demonstrate it is prejudiced by the delay.
- ◉ Creates uncertainty over finality of discharges.

FEDERAL CASES

- ◉ *Bell v. Itawamba County School Board* (5th Cir. 2015)- student online, off-campus free speech case
- ◉ Bell recorded and posted rap to protest alleged sexual harassment by coaches of female students; lyrics used coaches' names and contained violent imagery like "I'm going to hit you with my ruger," "going to get a pistol down your mouth/Boww," "middle fingers up in your want to cap that ___."
- ◉ the *Tinker* rule, that conduct by a student, which materially disrupts classwork or involves substantial disorder or invasion of the rights of others, is not protected by the First Amendment, applies when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when speech originated off campus;
- ◉ student's recording threatened, harassed, and intimidated the teachers/coaches and was directed at school community, and was thus subject to *Tinker* rule; and student's recording reasonably could have been forecast to cause a substantial disruption of the school.
- ◉ HENCE, district did not violate Bell's free speech rights by suspending him from school for off-campus, online speech.
- ◉ Supreme Court refuses to hear appeal; still no Supreme Court guidance on off campus, online speech rights of students.

FEDERAL CASES

- ◉ *G.G. ex rel. Grimm v. Gloucester County School Board* (4TH Circuit 2016)
- ◉ Case about deference courts give to federal agency's interpretation of laws it enforces
- ◉ Holds that OCR's Dear Colleague letters interpreting the Title IV regulation that permits sex segregated restrooms to require schools to treat transgender students consistent with gender identity is entitled to deference (i.e., the agency interpretation becomes the law)

PENDING STATE CASES

- ⦿ SUFFICIENCY FUNDING Cases: Martinez, et al. v State, et al. and Yazzie, et al. v. State et al. These cases challenge the state's funding formula and practices as being unconstitutional under Article XII Section 1, which requires the state to establish and maintain a system of free public schools sufficient for the education of all school age children in the state.
- ⦿ These consolidated cases are in the discovery phase. Depositions are being scheduled for the parties as well as “Focus Districts”. Focus Districts are intended to be representative of the broad range of Districts in the state and have been subject to many of the same requirements as parties, including depositions. The Focus Districts have been untiringly gracious in their contributions to the facts which both sides want to prove.
- ⦿ The cases are now set for trial in 2017.

PENDING STATE CASES

- ◉ *State of NM ex rel. The Honorable Mimi Stewart, et al v. NM Public Education Dept.*
- ◉ In December, Judge Thomson in First Judicial District finds that, contrary to statutory requirements, PED's teacher evaluation system is not "highly objective" and "uniform statewide."
- ◉ Issues a preliminary injunction against the use of the evaluation system (Sections H through O of NMAC Section 6.69.8.11) to negatively impact teacher license.
- ◉ Trial to determine whether there will be a permanent injunction postponed to October 2016
- ◉ PED reworking evaluation methodology

QUESTIONS?

Contact us:



CUDDY & McCARTHY, LLP
Attorneys at Law

Charlotte H. Hetherington
chetherington@cuddymccarthy.com

R. Daniel Castille
dcastille@cuddymccarthy.com

John F. Kennedy
jkennedy@cuddymccarthy.com

(505) 988-4476

(888) 977-3814