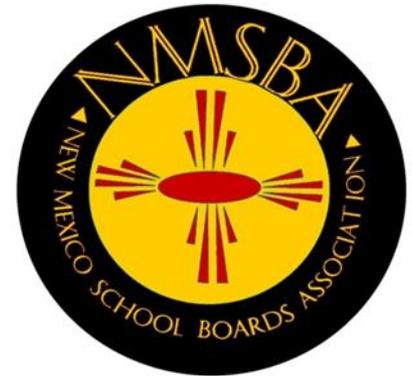


What Authority Does the Board Have and How Should It Be Exercised?

NMSBA
2018 Board Member Institute
February 9, 2018

Presented by:
Andrew M. Sanchez
John F. Kennedy



CUDDY & McCARTHY, LLP

Attorneys at Law

Board Member Oath

- Section 22-5-9.1 of the Public School Code
 - All elected or appointed members of local school boards shall take the oath of office prescribed by Article XX, Section 1 of the constitution of New Mexico.
- Constitution of the State of New Mexico
 - Article XX, Section 1
 - Every person elected or appointed to any office shall, before entering upon his duties, take and subscribe to an oath or affirmation that he will support the constitution of the United States and the constitution and laws of this state, and that he will faithfully and impartially discharge the duties of his office to the best of his ability.

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, 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. pay rewards for information regarding theft, defacement or destruction to school property

PED Regulations

Powers of the Board (cont.)

- § 6.29.1.9(A) NMAC
 - Employ and evaluate the local superintendent.
§ 6.29.1.9(A)(2) NMAC
 - Delegate administrative and supervisory functions to the local superintendent.
§ 6.29.1.9(A)(4) NMAC
 - Refrain from involvement in delegated administrative functions.
§ 6.29.1.9(A) (5) NMAC
 - Ensure that district funds are appropriately managed and disbursed.
§ 6.29.1.9(A)(9) NMAC
 - Be responsible for oversight of revenue and expenditures within the district budget.
§ 6.29.1.9(A)(11) NMAC

Statutory Powers of the Superintendent

- ❑ Section 22-4-14 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 Regulations

Powers of the Superintendent

- § 6.29.1.9(B) NMAC
 - Administer local board policies and state and federal regulations including the Public School Code.
§ 6.29.1.9(B)(1) NMAC
 - Attend all board meetings or, when necessary, designate a licensed administrator to attend.
§ 6.29.1.9(B)(4) NMAC
 - Accountable for budget management; expenditure of funds and all other district business.
§ 6.29.1.9(B)(2) NMAC
 - Ensure that school patrons and the public are informed and involved in the acquisition, planning, and development of school facilities, and that students are provided with adequate facilities which conform to state and federal mandates.
§ 6.29.1.9(B)(5) NMAC
 - Be accountable for student safety.
§ 6.29.1.9(B)(6) NMAC

Public Education is Highly Regulated

Board governance exists where PED regulations allow or do not address:

- Local control of education:
 - *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (there is a “deeply rooted” American tradition of “local control over the operations of schools” which “has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”);
 - The Board of Education is charged under the Public School Finance Act with the duty to safeguard public funds associated with the School District. *See* N.M. Stat. Ann. §§ 22-8-38 and 22-8-40 (1978).
 - Under N.M. Stat. Ann. § 22-8-38 (1978), the Board of Education is ultimately responsible for the accounting and control of public funds intended to support and operate the School District.

Public Education is Highly Regulated

- PED's authority over public education:
 - The Legislature found “that the public school governance structure needs to change to provide accountability from the bottom up instead of the top down.” N.M. Stat. Ann. § 22-1-1.2(F) (2007).
 - The Secretary has the statutory authority to suspend the local board of education and/or the local superintendent of schools for non-compliance with State law and with PED regulations and standards. *See* N.M. Stat. Ann. § 22-2-2(C) (2004).
 - The PED could maintain the suspension of the local school board and/or the local superintendent until such time as it is ensured of the local school district's future compliance with law and its regulations and standards. In the interim, the PED will take over the governance and operation of the local school district.
 - A PED representative will act as both the local board of education and/or the local superintendent until the non-compliance is remedied to the complete satisfaction of the PED. *See* N.M. Stat. Ann. § 22-2-14(F) (2004).
 - The complete process for removal and suspension is set forth in Section 22-2-14 of the Public School Code.

Governance v. Administration

- The Board Governs
 - Legislative Function – Adopts Policies
 - Power of the pocket book
 - Quasi-Judicial – Student & Employee Hearings
 - Supervise the Superintendent
- The Superintendent Administers
 - Employee of the Board of Education
 - Supervises & directs work of employees
 - Administers the day-to-day functions
 - Follows policies adopted by the Board



Communication

Open, Honest and Frank Communications:

- ❑ Board and Superintendent
- ❑ Individual Board members and Superintendent
- ❑ Between & among Board members
- ❑ With Parents / Community / Employees
- ❑ Chain of Command with Employees

Supervising the Superintendent

Superintendent is the expert in education and is the employees' leader:

- Inherent in the authority of the Board of Education to employ its Superintendent is the authority to supervise and monitor the Superintendent.
 - *Martens v. MCL Const. Corp.*, 347 Ill. App. 3d 303, 313–14, 807 N.E.2d 480, 488 (Ill. App. Ct. 2004) (“[W]hereas the essence of employment is that the employee submits to the employer’s right to monitor and direct the details of the work in exchange for wages.”).
 - *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938 (7th Cir. 1986) (“an essential element of the employment relationship is thus the employer’s monitoring of the employee’s work”);
 - *Heck v. Simplexgrinnell LP*, 2016 WL 704811, at *3 (N.D. Ill. Feb. 23, 2016) (“an “employee submits to the employer’s right to monitor and direct the details of the work in exchange for wages.”);
 - *Clark Cty. Sch. Dist. v. Local Gov't Emp. Mgmt. Relations Bd.*, 90 Nev. 442, 449, 530 P.2d 114, 119 (NV. 1974) (local school has right to direct its employees);
 - *Sioux City Cmty. Sch. Dist. v. Pub. Employment Relations Bd.*, 2002 WL 595247, at *3 (Iowa Ct. App. Mar. 13, 2002) (same).
 - *Rock v. Levinski*, 791 F.3d 1215, 1219 (10th Cir. 2015) (“Government employers, like private employers, need a significant degree of control over their employees’ words and actions; without it, there would be little chance for the efficient provision of public services.”) (quoting *Lane v. Franks*, —U.S. —, 134 S.Ct. 2369, 2377 (2014)).

- Must comply with School Personnel Act

Directing the Superintendent

Direction must come from the Board as a governing body at its meetings, and time should be allocated for this at meetings, and such discussions may, depending on subject matters, be held in executive session:

- The Board of Education must act, as a whole, to direct the Superintendent.
 - N.M. Stat. Ann. §§ 10-15-2(A) and 10-15-3(A) (1997) (no action of the local board of education can occur outside of a duly called public meeting under the New Mexico Open Meetings Act in which a quorum of the local school board is present and a vote is taken on the proposed action);
 - *Swinney v. Deming Bd. of Educ.*, 117 N.M. 492, 494, 873 P.2d 238, 240 (N.M. 1994) (any attempt by a local board of education to take an action which is in conflict with a state statute, the action would be “*ultra vires* and void” and will not prevail).
 - Actions of Individual Board Members outside of a duly-called open meeting have no authority, including to direct the Superintendent.
- Board policies are an action of the whole and can constitute direction.

Code of Ethics

The citizens in my community have elected me to represent them. As a member of my local board of education, I will strive to improve public education for all children, and to that end, I will

- * **Attend all scheduled board meetings** insofar as possible;
- * **Recognize that I have no legal authority outside the board meetings,** and that all decisions of the board will be made at a public meeting where a quorum of the board is present and only after a thorough review of all the available information;
- * **Work in harmony with the rest of the board members** to always promote and preserve the integrity of the board;



Code of Ethics, Continued

- * **Avoid speaking on behalf of the board** except at those times when the board, by official action, authorizes me to do so, and respect the confidentiality of information that is privileged under applicable law;
- * **Upgrade my performance as a board member** by informing myself about current educational issues by individual study and through participation in programs provided by the local school district and by the state and national school boards associations;
- * **Support the employment of those persons best qualified** to serve as school staff and make every effort to ascertain that all employees are properly remunerated for their services, and that they are dealt with fairly in the performance of their duties;

Code of Ethics, Continued

- * **Avoid being placed in a position of conflict of interest** and refrain from using my board position for personal or partisan gain;
- * **Accept that my primary function is to establish policy** by which schools are administered, and that the actual administration of the education program is delegated to the superintendent and his staff;
- * **Welcome and encourage active participation by citizens** for better understanding of their needs and improvement of relations with the public that I serve;
- * **Strive to promote and perpetuate our democratic way** of life;
- * Remember that my first and greatest concern must be the **fair and equal educational opportunities** for all students attending public school.

Open Meetings Act

- ❑ Board (quorum) must meet, discuss & take action in open meeting
- ❑ Notice of meetings
- ❑ Executive Sessions
- ❑ Public Involvement
- ❑ Minutes of meetings
- ❑ Rolling Quorum (e-mail, telephone, etc.)

NMSBA Procedures for Conduct of Meetings

- NMSBA Website www.nmsba.org
- Efficient and Effective Meetings



Board Member Bill of Rights

The School Board recognizes that good governance depends on each Board member being able to expect the following in a manner consistent with Board Policy:

On joining the School Board . . .

1. A thorough orientation to the Board, including the Board's governing process, ie. the work the Board chooses to do, and how the Board chooses to do the work
2. A thorough orientation to the District's operations, finance and structures.
3. Access to the District's School Board Policy Manual, the Board's regular meeting minutes for the past year, material explaining the Board's roles and responsibilities and other information that might facilitate a better understanding of District operations



Board Member Bill of Rights

Before a meeting...

1. Notification of Board meetings and receipt of meeting agendas, at the same time that other Board members receive theirs and consistent with Board policy
2. An opportunity to propose the addition of pertinent items to the agenda
3. The timely receipt of information before each meeting that will enable the Board member to make informed decisions



Board Member Bill of Rights

During a Meeting

1. Board meetings that start on time, stay on task and end at reasonable times
2. Unless restricted by Board policy, the opportunity to question the appropriateness of any item on the agenda, to request the removal of an item from a consent agenda for independent consideration and to propose changes before the agenda is approved, consistent with legal constraints
3. The opportunity to make and second motions regarding agenda items, and to move to defer any agenda item or to enter into closed session as allowed by law
4. An opportunity to request the justification, alternatives and consequences for items presented for a decision and to participate in full and free discussion before voting

Board Member Bill of Rights

During a Meeting, Continued

5. The opportunity to express opinions during a Board meeting without interruption and ridicule, as well as civil and respectful treatment by all other School Board members and staff members
6. The opportunity to speak candidly during a legally-called closed session, without concern for being quoted or having confidentiality breached after the meeting
7. The opportunity to remind other Board members of policy and legal responsibilities, including those imposed by the Open Meetings Act, without fear of reprisal. This includes the ability to suggest that the Board or an officer, whichever is appropriate according to Board policy, consult with the Board attorney about the legality of current or planned action or procedure

Board Member Bill of Rights

During a Meeting, Continued

8. The opportunity to request to explain a vote or to append a statement to the minutes as to such vote when they are approved
9. The opportunity to suggest the correction of any inaccuracies in the minutes before their approval and, if the changes are not made, the opportunity to enter a minority view to the minutes
10. The opportunity to participate in the process of selecting officers when the Board reorganizes at an open meeting
11. The opportunity to participate in all policy-making functions, including suggesting changes to Board rules and processes

Board Member Bill of Rights

In general...

1. Similar opportunities afforded other members of the Board, including the opportunity to have expenses reimbursed, pursuant to Board policy for attending non-District meetings and educational opportunities
2. A professional relationship with the Superintendent, characterized by mutual respect
3. The receipt of timely, accurate responses from the Superintendent to reasonable inquiries

Board Member Bill of Rights

In general, continued ...

4. The opportunity to express personal opinions and viewpoints provided no attempt is made to undermine Board action, misrepresent the majority Board opinion, or otherwise violate Board policy or this “School Board Member Bill of Rights”
5. The opportunity to participate in regular Board self-evaluation
6. Access to relevant data pertaining to district and Board performance

CONTACT INFORMATION

- Andrew M. Sanchez
 - asanchez@cuddymccarthy.com
 - Telephone (505) 888-1335
- John F. Kennedy
 - jkennedy@cuddymccarthy.com
 - Telephone (505) 988-4476



CUDDY & McCARTHY, LLP

Attorneys at Law