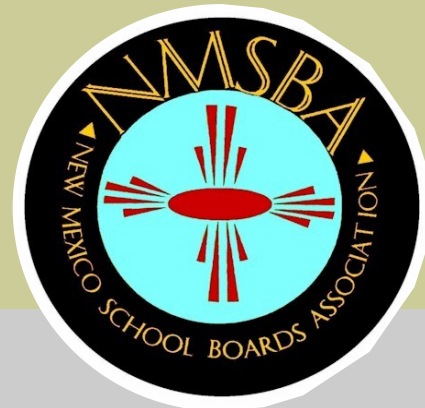


2017

NMSBA

38th
Annual

SCHOOL
LAW
CONFERENCE



SPONSORED BY:

THE NEW MEXICO SCHOOL BOARDS ASSOCIATION

AND PRESENTED BY:



June 2-3, 2017
Albuquerque, New Mexico

TABLE OF CONTENTS

PAGE

AGENDA	i-iii
DESCRIPTION OF BREAK-OUT SESSIONS	iv-ix
PROGRAM GRID	x-xi

MATERIALS PRESENTED IN THE FIRST GENERAL SESSION:

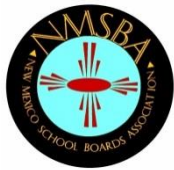
Legislative and Judicial Update	1
Board Empowerment-What School Boards Can Legally Do	2

MATERIALS PRESENTED IN THE SECOND GENERAL SESSION:

National School Boards Association Update	3
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Break-Out Sessions

I. <i>SOCIAL MEDIA: What Are The Limits On Employee Discipline?</i>	4
II. <i>CONFLICTS OF INTEREST, NEPOTISM, BOARD ETHICS AND THE GOVERNMENTAL CONDUCT ACT</i>	13
III. <i>INVESTIGATING STUDENT & EMPLOYEE MISCONDUCT: Ten Steps To Getting It Right</i>	22
IV. <i>TECHNOLOGY, BROADBAND & CYBERSECURITY: Keeping Your Virtual Campus Secure</i>	29
V. <i>HIRING, MANAGING & FIRING THE SUPERINTENDENT</i>	35
VI. <i>FROM POLICY TO PRACTICE: 10 Reasons To Put Your Policies Into Play</i>	41
VII. <i>NAVIGATING THE LEAVE MAZE: FMLA, ADA, USERRA and Worker's Compensation</i>	47
VIII. <i>ISSUES AND CHALLENGES IN CONTEMPORARY INDIAN EDUCATION</i>	55
IX. <i>DE MINIMIS: What Does It Mean In Light Of The New U.S. Supreme Court Decision?</i>	56
X. <i>THE PROCESS OF COLLECTIVE BARGAINING – What Does It Mean?</i>	61
XI. <i>WHEN THE GAVEL STRIKES: Conducting Effective & Legally Compliant Board Meetings</i>	64
XII. <i>THE TOP 10 WAYS TO AVOID AN EEOC COMPLAINT</i>	73
XIII. <i>BULLYING BEHAVIOR: Where Are We In 2017?</i>	80
XIV. <i>RESTRAINT: Know When to Hold 'Em</i>	87
XV. <i>MONEY CAN'T BUY HAPPINESS, BUT IT CAN BUY A NEW ROOF, AN ACTIVITY BUS, NEW COMPUTERS</i>	93
XVI. <i>WHISTLEBLOWER PROTECTION ACT – The Weapon of Choice</i>	100
XVII. <i>IMMIGRATION ISSUES – UNDOCUMENTED CHILDREN IN THE PUBLIC SCHOOLS</i>	105
XVIII. <i>LET'S GET IT RIGHT: IPRA and OMA</i>	111
XIX. <i>REGULAR AND SPECIAL EDUCATION STUDENT DISCIPLINE</i>	120
XX. <i>BUDGET ISSUES AND REDUCTION-IN-FORCE</i>	126
XXI. <i>SEARCH AND SEIZURE OF STUDENTS: Top 10 Laws N.M. School Leaders Must Know</i>	136
XXII. <i>EFFECTIVE WRITTEN DISCIPLINE AND EVALUATIONS</i>	143
XXIII. <i>TITLE IX AND THE NEW MEXICO ATHLETICS EQUITY ACT</i>	150
XXIV. <i>STUMP THE LAWYERS</i>	158



NEW MEXICO SCHOOL BOARDS ASSOCIATION
Thirty-Eighth Annual School Law Conference
June 2-3, 2017
The Hotel Albuquerque, Albuquerque, New Mexico

CONFERENCE AGENDA

Thursday, June 1, 2017

12:00 – 2:00 p.m.	NMSBA Executive Board Meeting	(Fireplace Room)
3:00 – 5:00 p.m.	NMSBA Board of Directors Meeting	(Alvarado A&B)
3:00 – 5:00 p.m.	New Board Member Early Bird Session <i>Presented by John F. Kennedy and Dr. Hugh Prather</i>	(Alvarado D)
3:00 – 5:00 p.m.	Exhibitor Set-Up	(Atrium - North)
4:00 – 6:00 p.m.	Early Registration	(Atrium - North)

Friday, June 2, 2017

7:00 a.m. – 5:00 p.m.	Registration	(Atrium - North)
7:00 – 8:00 a.m.	Breakfast <i>Sponsors: George K. Baum & Co.</i>	(Atrium & Outside Portal)
7:00 a.m. – 5:00 p.m.	<i>Exhibit Area Open</i>	(Atrium – North)

FIRST GENERAL SESSION

8:00 – 8:45 a.m.	Call to Order	Linda Trujillo NMSBA President
	Presentation of Colors	Santa Fe High NJROTC
	Pledge of Allegiance	Ramon Montaña NMSBA President-Elect
	Salute to the New Mexico Flag	Pauline Jaramillo NMSBA Vice-President
	Welcome and Introductions Region Meeting Attendance Awards	Linda Trujillo NMSBA President
8:45 – 9:15 a.m.	Legislative and Judicial Update	John F. Kennedy and Patricia Salazar Ives, Cuddy & McCarthy, LLP
9:15 – 10:15 a.m.	Board Empowerment – What School Boards Can Legally Do	Andrew M. Sanchez and Charlotte H. Hetherington Cuddy & McCarthy, LLP
10:15 – 10:30 a.m.	Break - <i>Exhibit Area Open</i> <i>Sponsors: Hutchinson, Shockey, Erley & Co.</i> <i>GenQuest, Inc.</i>	(Atrium – North)

SECOND GENERAL SESSION

10:30 – 11:30 a.m.	National School Board Association Update	(Alvarado Ballroom)
		The Honorable Kevin Ciak NSBA National President
12:00 – 1:00 p.m.	Scholarship Announcement Lunch (paid event)	(Franciscan Room)

Friday, June 2, 2017, Continued

BREAK-OUT SESSIONS I

1:30 – 2:30 p.m.	I.	Social Media: What Are The Limits On Employee Discipline?	(Salons A, B & C)
	II.	Conflicts of Interest, Nepotism, Board Ethics and the Governmental Conduct Act	(Salon D)
	III.	Investigating Student and Employee Misconduct: Ten Steps To Getting It Right	(Salon E)
	IV.	Technology, Broadband & Cybersecurity: Keeping Your Virtual Campus Secure	(Salons F, G & H)
2:30 – 3:00 p.m.		Break - Exhibit Area Open <i>Sponsors: Hutchinson, Shockey, Erley & Co. GenQuest, Inc.</i>	(Atrium – North)

BREAK-OUT SESSIONS II

2:45 – 3:45 p.m.	V.	Hiring, Managing & Firing the Superintendent	(Salon A, B & C)
	VI.	From Policy to Practice: 10 Reasons to Put Your Policies Into Play	(Salon D)
	VII.	Navigating the Leave Maze: FMLA, ADA USERRA, and Worker's Compensation	(Salon E)
	VIII.	Issues and Challenges in Contemporary Indian Education	(Salons F, G & H)
	IX.	<i>DE MINIMIS</i> : What Does It Mean In Light of the New U.S. Supreme Court Decision?	(Franciscan Room)
3:45 – 4:00 p.m.		Break - Exhibit Area Open <i>Sponsors: Hutchinson, Shockey, Erley & Co. GenQuest, Inc.</i>	(Atrium – North)

BREAK-OUT SESSIONS III

4:00 – 5:00 p.m.	X.	The Process of Collective Bargaining - What Does It Mean?	(Salons A, B & C)
	XI.	When the Gavel Strikes: Conducting Effective and Legally Compliant School Board Meetings	(Salon D)
	XII.	The Top 10 Ways to Avoid an EEOC Complaint	(Salon E)
	XIII.	Bullying Behavior: Where Are We in 2017?	(Salons F, G & H)
	XIV.	Restraint: Know When to Hold 'Em	(Franciscan Room)
5:00 – 7:00 p.m.		RECEPTION <i>Sponsors: Honeywell Inc.</i>	(Atrium – North)

Saturday, June 3, 2017

7:00 – 10:00 a.m.	Registration	(Atrium – North)
7:00 – 8:30 a.m.	Breakfast <i>Sponsors: CES-Cooperative Education Services</i>	(Atrium & Outside Portal)
7:00 – Noon	Exhibit Area Open	(Atrium – North)

BREAK-OUT SESSIONS I

8:30 – 9:30 a.m.	XV. Money Can't Buy Happiness, But It Can Buy a New Roof, an Activity Bus, New Computers ...	(Salons A, B & C)
	XVI. Whistleblower Protection Act – The Weapon of Choice	(Salon D)
	XVII. Immigration Issues - Undocumented Children In the Public Schools	(Salon E)
	XVIII. Let's Get It Right: IPRA and OMA	(Salons F, G & H)
	XIX. Regular and Special Education Student Discipline	(Franciscan Room)
9:30 – 9:45 a.m.	Break - Exhibit Area Open <i>Sponsors: Hutchinson, Shockey, Erley & Co. GenQuest, Inc.</i>	(Atrium – North)

BREAK-OUT SESSIONS II

9:45 – 10:45 a.m.	XX. Budget Issues and Reduction-In-Force	(Salons A, B & C)
	XXI. Search and Seizure of Students: Top 10 Laws N.M. School Leaders Must Know	(Salon D)
	XXII. Effective Written Discipline and Evaluations	(Salon E)
	XXIII. Title IX and the New Mexico Athletics Equity Act	(Salons F, G & H)
	XIV. Restraint: Know When to Hold 'Em	(Franciscan Room)
10:45 – 11:00 a.m.	Break - Exhibit Area Open <i>Sponsors: Hutchinson, Shockey, Erley & Co. GenQuest, Inc.</i>	(Atrium – North)
11:00 – Noon	STUMP THE LAWYER	(Salons D & E)
12:00 Noon	ADJOURN THE 2017 SCHOOL LAW CONFERENCE	

BREAK-OUT SESSIONS

June 2 – 3, 2017

I. SOCIAL MEDIA: What Are The Limits On Employee Discipline?

Salons A, B & C - Friday, June 2, 2017, 1:30 p.m. – 2:30 p.m.

Presenters: Andrew M. Sanchez and Evelyn A. Peyton – Cuddy & McCarthy, LLP

Everyone has seen or heard horror stories about school employees behaving badly on-line. Social media can cause major disruptions and may result in legal liability for public schools. Regulating on-line conduct can be tricky given the First Amendment's protection of freedom of speech. Attend this presentation to learn about what schools can do to control employees' on-line misconduct without violating anyone's free speech rights.

Presentation of special interest to: School Board Members, Superintendents and Administrators.

II. CONFLICTS OF INTEREST, NEPOTISM, BOARD ETHICS AND THE GOVERNMENTAL CONDUCT ACT

Salon D – Friday, June 2, 2017, 1:30 p.m. – 2:30 p.m.

Presenters: R. Daniel Castille and Andrea Salazar – Cuddy & McCarthy, LLP

This session will address how good faith compliance with the nepotism laws, Board Member's Code of Conduct, the Governmental Conduct Act, and the conflict of interest provisions of the Public School Code will assist the Board in promoting transparency and public confidence in the conduct of District business.

Presentation of special interest to: New and Veteran School Board Members, Superintendents and Administrators.

III. INVESTIGATING STUDENT AND EMPLOYEE MISCONDUCT: Ten Steps to Getting it Right

Salon E – Friday, June 2, 2017, 1:30 p.m. – 2:30 p.m.

Presenters: Laura M. Castille – Cuddy & McCarthy, LLP; Dr. Kerry Parker - Assistant Superintendent of Human Resources for the Clovis Municipal School District

Join this session to learn a practical approach to investigating allegations of student and employee misconduct, while protecting your school district from further liability and exposure. Who should conduct the investigation? Who should be interviewed in the process of an investigation? What remedies may need to be taken immediately to avoid the potential for further harm? Can a student or employee refuse to answer your investigation questions? What are Garrity Rights anyway? You will learn all of this and more as your presenters take you step-by-step through the process.

Presentation of special interest to: Site Level Administrators, Human Resources Directors, Superintendents, Directors and School Board Members.

IV. TECHNOLOGY, BROADBAND & CYBERSECURITY: Keeping Your Virtual Campus Secure

Salons F, G & H – Friday, June 2, 2017, 1:30 p.m. – 2:30 p.m.

Presenters: Laura Sanchez-Rivét and Y. Jun Roh – Cuddy & McCarthy, LLP

What are "denial-of-service attacks" and how can these affect your network? How do you protect your confidential information? What are your responsibilities under FERPA? Attend this session and find out!

Presentation of special interest to: School Board Members, Superintendents and Administrators.

V. HIRING, MANAGING & FIRING THE SUPERINTENDENT

Salons A, B & C – Friday, June 2, 2017, 2:45 p.m. – 3:45 p.m.

Presenters: John F. Kennedy and Carol S. Helms – Cuddy & McCarthy, LLP

One of the most important functions of the Board is to hire and manage its CEO. One of the most disruptive and distracting tasks for a Board is to fire its CEO. This session will examine considerations and best practices for vetting candidates for the superintendent position; establishing expectations and priorities for the superintendent; providing timely and meaningful feedback to the superintendent; and hopefully, avoiding an involuntary dismissal of the superintendent

Presentation of special interest to: School Board Members and Superintendents.

VI. FROM POLICY TO PRACTICE: 10 Reasons To Put Your Policies Into Play

Salon D – Friday, June 2, 2017, 2:45 p.m. – 3:45 p.m.

Presenters: Laura M. Castille - Cuddy & McCarthy, LLP; Kelt L. Cooper - Superintendent of the Las Vegas City School District

Are your District practices in line with your policies? Do you know? Join this session and improve District efficiency and effectiveness through policy and practice alignment. Operationalized audits of systems and internal practices and the creation of procedural directives will help your District strengthen legal defenses in everything from student/employee disciplinary hearings to special education complaints and financial audits. Get practical tips to implement in your District.

Presentation of special interest to: School Board Members, Superintendents, Directors and Site Level Administrators.

VII. NAVIGATING THE LEAVE MAZE: FMLA, ADA, USERRA, and Worker's Compensation

Salon E – Friday, June 2, 2017, 2:45 p.m. – 3:45 p.m.

Presenters: R. Daniel Castille and Evelyn A. Peyton – Cuddy & McCarthy, LLP

The numerous Federal and State laws that provide for employee leave can bewilder even the most seasoned Human Resources Directors and site-level administrators and it is critical to get it right. The rights granted by these laws are also frequently subject to employee abuse and manipulation. Violations may result in lost wages, back pay, reinstatement, retroactive benefits, and compensatory and punitive damages. This session will help administrators understand the interaction between these laws, and guide them toward a fair and legal result for all concerned.

Presentation of special interest to: Human Resources Directors and Site Level Administrators.

VIII. ISSUES AND CHALLENGES IN CONTEMPORARY INDIAN EDUCATION

Salons F, G & H – Friday, June 2, 2017, 2:45 p.m. – 3:45 p.m.

Panelists: Patricia Salazar Ives – Cuddy & McCarthy, LLP; Derrick J. Lente, New Mexico State Representative, District 65, New Mexico House of Representatives from Sandia Pueblo; Regis Pecos, Co-Director of Leadership Institute and Senior Policy Advisor for the Office of the Majority of the New Mexico House of Representatives; Latifah Phillips, Assistant Secretary of Indian Education for the N.M. Public Education Department; David Atencio, Superintendent of Laguna Department of Education; Roy Herrera, Superintendent of Santa Fe Indian School

Schools serving Native American students face the same issues as all other schools, such as the need for sufficient funding and quality teachers. However, these schools also face unique issues such as differences in language and culture, high suspension and expulsion rates, and the failure to be adequately recognized in public school curriculums. These schools must work with state and federal agencies and other organizations to ensure that their students are properly represented and treated not only in academic

programs, but sports programs, as well. This session provides an opportunity to hear from a panel of distinguished educators, administrators, and state officials on the challenges facing today's state public schools, grant schools, and tribally-controlled schools and solutions to those challenges. The panel will also discuss changes occurring in the Bureau of Indian Education and the Public Education Department and their expected impact on schools, and other important issues.

Presentation of special interest to: School Board Members, Superintendents, Principals and Teachers.

IX. DE MINIMIS: What Does It Mean In Light of the New U.S. Supreme Court Decision?

Franciscan Room – Friday, June 2, 2017, 2:45 p.m. – 3:45 p.m.

Presenters: Jacquelyn Archuleta-Staehlin – Cuddy & McCarthy, LLP

This presentation will review the recent court case of *Endrew v. Douglas County School Dist. RE-1*, which found that the *de minimis* standard of Rowley was no longer appropriate and that in order to provide FAPE, there must be more than a modicum of benefit. The question remaining is, “What does that mean in today’s special education programming?” The presentation will talk about what data to keep and how to measure benefit.

Presentation of special interest to: Special Education Administrators and School Site Administrators.

X. THE PROCESS OF COLLECTIVE BARGAINING – What Does It Mean?

Salons A, B & C – Friday, June 2, 2017, 4:00 p.m. – 5:00 p.m.

Presenters: Andrew M. Sanchez – Cuddy & McCarthy, LLP; Dina E. Holcomb – Holcomb Law Office

This session will cover the essential elements of collective bargaining and the processes related to school districts working with unions. We will discuss what goes into collective bargaining agreements; who negotiates them; what is negotiated; what are the processes generally contained in them and the law that applies to collective bargaining agreements.

Presentation of special interest to: Human Resources Directors, School Board Members, Superintendents and Administrators.

XI. WHEN THE GAVEL STRIKES: Conducting Effective and Legally Compliant School Board Meetings

Salon D – Friday, June 2, 2017, 4:00 p.m. – 5:00 p.m.

Presenters: Patricia Salazar Ives and Carol S. Helms – Cuddy & McCarthy, LLP

Effective school board meetings do not just happen; they require careful planning and preparation, which includes ensuring that applicable laws are followed. They also require that the meeting be conducted in a professional and respectful manner that sets the tone for and provides an example of how all school business should be conducted. This session will help board members and superintendents develop proper agendas, obtain important information from school personnel, parents, student and other members of the school community, and carryout executive sessions in a manner that will avoid complaints and lawsuits. Tips and suggestions will be provided on how to prepare the agenda, provide notice of the meeting or work session, conduct the meeting itself, manage public comment, control executive session discussions, and much, much more.

Presentation of special interest to: School Board Members and Superintendents.

XII. THE TOP 10 WAYS TO AVOID AN EEOC COMPLAINT

Salon E – Friday, June 2, 2017, 4:00 p.m. – 5:00 p.m.

Presenters: R. Daniel Castille and Evelyn A. Peyton – Cuddy & McCarthy, LLP

Can your school district protect itself against EEOC complaints? Complaints are costly and time-consuming for a school district. Do you have a strong anti-harassment policy that is vigorously followed and enforced? Have all your employees been trained on the contents of your policy? Districts can proactively guard against EEOC complaints with clearly described complaint processes and follow through, including a prompt, thorough, impartial and well-documented investigation. Join this session for training on implementing a strong EEO policy and avoiding subjective employment decisions that are based on personal stereotypes or hidden biases. This session will prescribe proactive measures to take to position your district to avoid EEO complaints in your school district.

Presentation of special interest to: Human Resources Directors and Staff, Principals and Department Coordinators and Directors, Superintendents and Hiring Staff.

XIII. BULLYING BEHAVIOR: Where Are We In 2017?

Salon F, G & H – Friday, June 2, 2017, 4:00 p.m. – 5:00 p.m.

Presenters: Charlotte H. Hetherington and Laura Sanchez-Rivét – Cuddy & McCarthy, LLP

A look backward and forward in school progress on prevention of bullying and protection of vulnerable students. The focus is on students and adults who bully.

Presentation of special interest to: Superintendents, Administrators and School Board Members who have roles in prevention, investigation and discipline.

XIV. RESTRAINT: Know When To Hold ‘Em

Franciscan Room – Friday, June 2, 2017, 4:00 p.m. – 5:00 p.m.

Franciscan Room – Saturday, June 3, 2017, 9:45 a.m. – 10:45 a.m.

Presenters: Jacquelyn Archuleta-Staehlin, Laura M. Castille and Andrea Salazar – Cuddy & McCarthy, LLP

This program will review the requirements under the newly signed state law regarding restraint of all students. The discussion will also cover what types of documentation is needed and who that documentation should be shared with, following the use of restraint. It will also present when and when not to consider restraint, who should perform the restraint and what other options there are.

Presentation of special interest to: Special Education Administrators and School Site Administrators, including Principals and Assistant Principals.

XV. MONEY CAN’T BUY HAPPINESS, BUT IT CAN BUY A NEW ROOF, AN ACTIVITY BUS, NEW COMPUTERS ...

Salons A, B & C – Saturday, June 3, 2017, 8:30 a.m. – 9:30 a.m.

Presenters: Patricia Salazar Ives and Charlotte H. Hetherington – Cuddy & McCarthy, LLP

The current budget shortfalls and cutbacks on funding have districts looking for money to repair roofs, purchase activity buses, purchase new computers, and other equipment needed to run their schools. This session will review alternative sources of revenue including General Obligation Bonds, SB 9 and HB 33 mill levies, education technology lease-purchase arrangements, land and building acquisitions through Lease Purchase Act financings and guaranteed energy savings performance contracts to address these needs. It will also address common mistakes made during the election process that could impair the issuance of bonds, the implementation of taxes, and the approval of lease-purchase arrangements and other contracts, or lead to an IRS audit.

Presentation of special interest to: School Board Members and Superintendents.

XVI. WHISTLEBLOWER PROTECTION ACT – The Weapon of Choice

Salon D – Saturday, June 3, 2017, 8:30 a.m. – 9:30 a.m.

Presenters: Andrew M. Sanchez – Cuddy & McCarthy, LLP; Elizabeth L. German and Jason M. Burnette – German + Burnette & Associates, LLC

This session will discuss the employment statute that is gaining popularity among attorneys who are suing on behalf of employees. We will discuss the provisions of the statute which provides extraordinary and expensive relief to employees who claim that they were fired, demoted or disciplined for reporting unlawful conduct by their employer. Every employer should know what it can do to minimize exposure to such claims, and this session will assist you.

Presentation of special interest to: School Board Members, Superintendents and Administrators.

XVII. IMMIGRATION ISSUES - UNDOCUMENTED CHILDREN IN THE PUBLIC SCHOOLS

Salon E – Saturday, June 3, 2017, 8:30 a.m. – 9:30 a.m.

Presenters: John F. Kennedy and Y. Jun Roh – Cuddy & McCarthy, LLP

This breakout session will review the common misconception regarding undocumented students. The session will discuss the pertinent laws applied to local public school districts including civil rights, residency requirement, protection of the undocumented student, ICE investigations, and disclosure of student records. It will also include a brief discussion on foreign exchange students

Presentation of special interest to: Superintendents, Administrators and Principals.

XVIII. LET'S GET IT RIGHT: IPRA and OMA

Salons F, G & H – Saturday, June 3, 2017, 8:30 a.m. – 9:30 a.m.

Presenters: Carol S. Helms - Cuddy & McCarthy, LLP

This session focuses on the efficient and legally-compliant implementation of New Mexico sunshine laws, and the costly consequences of failing to do so. School boards and school district officials are required to transparently conduct the business of the school and to keep the public informed regarding certain actions and records. This session focuses on what school districts are required to do, and prohibited from doing, with regard to keeping the public informed. Additionally, this session will examine practices and processes that may help minimize the districts' exposure to time-consuming and expensive violations of either/both the Open Meetings Act and/or Inspection of Public Records Act.

Presentation of special interest to: School Board Members, Superintendents and Administrators.

XIX. REGULAR AND SPECIAL EDUCATION STUDENT DISCIPLINE

Franciscan Room – Saturday, June 3, 2017, 8:30 a.m. – 9:30 a.m.

Presenters: Jacquelyn Archuleta-Staehlin and Laura M. Castille – Cuddy & McCarthy, LLP

This presentation will look at the options available to school districts when considering disciplinary action against both special education and general education students. The discussion will include a look at the procedural requirements and the steps that need to be taken and considered before any discipline is taken. It will also look at the use of in-school suspension, out-of-school suspension and the time limits for any suspensions.

Presentation of special interest to: Special Education Administrators, School Site Administrators and Student Services Administrators.

XX. BUDGET ISSUES AND REDUCTION-IN-FORCE

Salons A, B & C – Saturday, June 3, 2017, 9:45 a.m. – 10:45 a.m.

Presenters: John F. Kennedy and Carol S. Helms – Cuddy & McCarthy, LLP

To conduct a legally-defensible reduction-in-force (RIF), the school district must have a RIF policy; prepare a plan as called for in the policy; provide objective data to support the stated justification for the

RIF; and present all to the board for approval at a duly-convened meeting. This session will guide school boards and superintendents through recognizing and anticipating circumstances that may require a reduction in force (RIF); analyzing and articulating the budgetary justifications requiring a reduction in force (RIF); preparing and the plan and organizing the supporting proof. Finally, this session will review New Mexico case law that has determined additional requirements school districts must complete before moving forward with a RIF.

Presentation of special interest to: School Board Members and Superintendents.

XXI. SEARCH AND SEIZURE OF STUDENTS: Top 10 Laws N.M. School Leaders Must Know

Salon D - Saturday, June 3, 2017, 9:45 a.m. – 10:45 a.m.

Presenters: Laura M. Castille and Y. Jun Roh – Cuddy & McCarthy, LLP

This session will explore landmark cases related to the search and seizure of students, including 4th Amendment restrictions on the search of student cellphones and other electronic devices. Other topics discussed will be the recent challenges to the search of students in New Mexico by SROs and guidance on the proper use of SROs in New Mexico schools, drug-sniffing canines and more. If you need to keep your school campuses safe, while protecting the rights of students, this is the session for you.

Presentation of special interest to: Site Level Administrators, Superintendents, Directors, School Board Members and Campus Security.

XXII. EFFECTIVE WRITTEN DISCIPLINE AND EVALUATIONS

Salon E - Saturday, June 3, 2017, 9:45 a.m. – 10:45 a.m.

Presenters: Andrew M. Sanchez and Evelyn A. Peyton – Cuddy & McCarthy, LLP

This session will review all that is needed for the administrator to issue written discipline and begin the process of employee evaluations. It will cover the most common errors and provide a strategy for addressing them and for allowing the administrator to streamline the process to be time effective in addressing all aspects of employee conduct. A must have for the administrator.

Presentation of special interest to: Human Resources Directors, Superintendents and Administrators.

XXIII. TITLE IX AND THE NEW MEXICO ATHLETICS EQUITY ACT

Salon F, G & H - Saturday, June 3, 2017, 9:45 a.m. – 10:45 a.m.

Presenters: R. Daniel Castille and Laura Sanchez-Rivét – Cuddy & McCarthy, LLP

Title IX prohibits sex discrimination in all educational programs, but it is best known for, and most of its alleged violations relate to, its application to sports. This session will focus on how to get Title IX and the New Mexico Athletics Equity Act compliance right, and avoid costly investigations and liability.

Presentation of special interest to: Athletic and Activity Directors and Other Administrators.

XXIV. STUMP THE LAWYERS

Salons D & E – Saturday, June 3, 2017, 11:00 a.m. – 12:00 noon

Presenters: Cuddy & McCarthy, LLP Lawyers

BREAK-OUT PROGRAM GRID

FRIDAY – JUNE 2, 2017

Salon(s) Session & Time	Session I 1:30 – 2:30 p.m.	Session II 2:45 – 3:45 p.m.	Session III 4:00 – 5:00 p.m.
Salon A, B & C (Seats 180 People)	I. SOCIAL MEDIA: What Are The Limits On Employee Discipline	V. HIRING, MANAGING & FIRING THE SUPERINTENDENT	X. THE PROCESS OF COLLECTIVE BARGAINING – What Does It Mean?
Salon D (Seats 240 People)	II. CONFLICTS OF INTEREST, NEPOTISM, BOARD ETHICS AND THE GOVERNMENTAL CONDUCT ACT	VI. FROM POLICY TO PRACTICE: 10 Reasons To Put Your Policies Into Play	XI. WHEN THE GAVEL STRIKES: Conducting Effective and Legally Compliant School Board Meetings
Salon E (Seats 240 People)	III. INVESTIGATING STUDENT AND EMPLOYEE MISCONDUCT: 10 Steps To Getting It Right	VII. NAVIGATING THE LEAVE MAZE: FMLA, ADA, USERRA, and Worker's Compensation	XII. THE TOP 10 WAYS TO AVOID AN EEOC COMPLAINT
Salon F, G & H (Seats 180 People)	IV. TECHNOLOGY, BROADBAND & CYBERSECURITY: Keeping Your Virtual Campus Secure	VIII. ISSUES AND CHALLENGES IN CONTEMPORARY INDIAN EDUCATION	XIII. BULLYING BEHAVIOR: Where Are We In 2017?
Franciscan Ballroom (Seats 200 People)		IX. <i>DE MINIMIS:</i> What Does It Mean In Light of the New U.S. Supreme Court Decision?	XIV. RESTRAINT: Know When to Hold 'Em (Presented Twice)

BREAK-OUT PROGRAM GRID

SATURDAY – JUNE 3, 2017

Salon(s) Session & Time	Session I 8:30 - 9:30 a.m.	Session II 9:45 - 10:45 a.m.	Session III 11:00 - 12:00 noon
Salon A, B & C (Seats 180 People)	XV. MONEY CAN'T BUY HAPPINESS, BUT IT CAN BUY A NEW ROOF, AN ACTIVITY BUS, NEW COMPUTERS...	XX. BUDGET ISSUES AND REDUCTION-IN-FORCE	XXIV. STUMP THE LAWYERS
Salon D (Seats 240 People)	XVI. WHISTLEBLOWER PROTECTION ACT – The Weapon of Choice	XXI. SEARCH AND SEIZURE OF STUDENTS: Top 10 Laws N.M. School Leaders Must Know	
Salon E (Seats 240 People)	XVII. IMMIGRATION ISSUES - UNDOCUMENTED CHILDREN IN THE PUBLIC SCHOOLS	XXII. EFFECTIVE WRITTEN DISCIPLINE AND EVALUATIONS	
Salon F, G & H (Seats 180 People)	XVIII. LET'S GET IT RIGHT: IPRA and OMA	XXIII. TITLE IX AND THE NEW MEXICO ATHLETICS EQUITY ACT	
Franciscan Ballroom (Seats 200 People)	XIX. REGULAR AND SPECIAL EDUCATION STUDENT DISCIPLINE	XIV. RESTRAINT: Know When to Hold 'Em (Presented Twice)	

FIRST GENERAL SESSION

LEGISLATIVE AND JUDICIAL UPDATE

Presenters:

**John F. Kennedy
Patricia Salazar Ives**

Cuddy & McCarthy, LLP

[NO POWER POINT INCLUDED IN COMPENDIUM]

FIRST GENERAL SESSION

**BOARD EMPOWERMENT –
What School Boards Can Legally Do**

Presenters:

**Andrew M. Sanchez
Charlotte H. Hetherington**

Cuddy & McCarthy, LLP

[NO POWER POINT INCLUDED IN COMPENDIUM]

SECOND GENERAL SESSION

NATIONAL SCHOOL BOARDS ASSOCIATION UPDATE

Presenter:

**The Honorable Kevin Ciak, President
National School Boards Association**

[NO POWER POINT INCLUDED IN COMPENDIUM]

I.


**SOCIAL MEDIA:
What Are The Limits On Employee Discipline?**

Presenters:

Andrew M. Sanchez

Evelyn A. Peyton

Cuddy & McCarthy, LLP




Social Media

What are the Limits on Employee Discipline?

2017 School Law Conference
June 2-3, 2017

Andrew M. Sanchez
Evelyn A. Peyton



CUDDY & MCCARTHY, LLP
Attorneys at Law

What is social networking?


An online community of people who share interests and/or activities, or who are interested in exploring the interests and activities of others. Most social network services are web-based and provide a variety of ways for users to interact, such as e-mail and instant messaging services





What is social networking?

- Wikipedia lists 142 major active social networking websites. The most popular are:
 - Facebook
 - Twitter
 - LinkedIn
 - My Space
 - Flickr
 - BlogSpot
 - Tagged.com
 - You Tube



Modern Times

- According to a 2009 CareerBuilder survey of 2600 hiring managers-
 - 45% of employers regularly use social networking sites such as Facebook, LinkedIn, MySpace and Twitter as a factor in their hiring process
 - 11% plan to do so in the near future
 - 35% of employers claimed that they rejected applicants based on such information
 - 18% reported that they have found content on social networking sites that influenced them to hire the candidate

Modern Times

- 43% of U.S. office workers access social media at work
- 51% spend one or more hours per week on the sites
- 5% of workers maintain a personal blog
- 16% of employees who maintain personal blogs have posted information critical of their employers, supervisor, co-workers, customers or clients.
- Only 15% of employers have policies on work-related blogging or social networks.

When employees go wild on the web



Is this a problem?

- **2008 Washington Post Article entitled “When Young Teachers Go Wild on the Web”**
 - One Montgomery County SPED teacher displayed a poster on Facebook that depicts talking sperm and invokes a slang term for oral sex.
 - One William County kindergarten teacher posted a satiric shampoo commercial with a half-naked man having an orgasm in the shower.
 - D.C. educator offered this tip on her Facebook Page: “Teaching in DCPS—Lesson #1: Don’t smoke crack while pregnant.”

Is this a problem?

- Newspapers across the country have begun trolling social networking sites for embarrassing and titillating postings by local teachers.
- And there’s a treasure trove of material to be mined:



Is this a problem?

- The Charlotte Observer reported that an afterschool staffer from Charlotte was fired for his Facebook comment that he likes “chillin’ wit my niggas” and a “suggestive exchange” with a female friend.
- Two probationary teachers faced termination for their Facebook musings that “I’m feeling pissed because I hate my students,” and “I’m “teaching in the most ghetto school in Charlotte.”



Is this a problem?

- The Columbus (Ohio) Dispatch ran an expose entitled, “Teachers’ Saucy Web Profiles Risk Jobs.” One 25-year-old female bragged on her MySpace site about being “sexy” and “an aggressive freak in bed.” Another confessed that she recently got drunk, took drugs, went skinny-dipping, and got married.
- A SPED teacher wrote on her page to a student, “You’re a retard, but I love you,” and posted a photo of herself “sleeping” with a bottle of tequila.
- A San Antonio newspaper reported that college student “Mahka” posted pictures of herself in various stages of drunkenness with the catchy caption, “Can U say wasted?” She also wrote: “Drinking and partying is my life. I’m gonna be a high school English teacher one day.”

Question presented

- Do inappropriate or risqué pages matter if the teacher’s or employee’s performance is not hindered and if students, parents and school officials don’t see them?
- At what point are these employees judged by the standards for public officials?



School District Liability

- “Retard” posting as a basis for liability.
- *Schroeder v. San Diego Unified Sch. Dist.*, 2009 U.S. Dist. LEXIS 40422 (S.D. Cal. 2009)
 - Tutor in a SPED classroom had a MySpace page with derogatory comments about SPED students. School disciplined tutor for the comments but tutor remained in the classroom.
 - Tutor later sexually molested a student in the SPED classroom
 - Summary Judgment was denied to the school district, in part based on School’s knowledge of tutor’s attitude towards SPED students as shown on the MySpace Page.

Teachers and Photographs

- Tamara Hoover is an art teacher who was forced to resign from her position at Auston High School in Texas, for allegedly being the subject of explicit photos that had been posted on Flickr, a public photograph sharing website, by her girlfriend.
- The photos came to light in April, 2006. Students who had seen the pictures notified another teacher, who then notified school officials. The offending photographs have been removed from the site.
- Hoover was put on paid administrative leave on May 17, 2006. In August 2006, Hoover agreed to resign, with the school board paying her \$14,850.



Blurring the Boundaries

- What happens when the lines between teachers and students become blurred on social networking sites?
 - Studies show that 10% of female students “report being sexually harassed or abused by a school employee.”



Blurring the Boundaries

- There are two kinds of child molesters, the “grabbers” and the “groomers”
 - Social networking sites allow an unmonitored opportunity for the blurring of boundaries between teacher and students giving the “groomers” unfettered access to students outside of the school environment.
 - “The process of sexual grooming involves finding a suitable vulnerable student and engaging in increasingly invasive boundary invasions behaviors with that student. The boundary invasions reveal which students may be taken advantage of.

Blurring the Boundaries

- Sexual grooming is defined as a five step process:
 - Identify a vulnerable child
 - Engaging the child in peer-like involvement
 - Desensitizing the child to the conduct
 - Isolating the child
 - Making the child feel responsible.

Pamela Rogers

- Former gym teacher found guilty of having sex with a 13-year old boy and served 6-months in jail
- Arrested again after she sent sexy video and pictures to the boy as well as contacted him indirectly through her MySpace website.
- Sentenced to and addition two years and required to serve entire seven year original sentence.



U.S. Constitution Amendment I

- The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. Const. Amend. 1.



U.S. Constitution Amendment I

- “Speech is protected by insuring its full expression . . .” *Nichol v. Arin Intermediate Unit 28*, 268 F. Supp. 2d 536, 548 (W.D. Pa. 2003).
- “Speech” encompasses verbal and written expression, as well as “symbolic speech” expressed through symbols and conduct. See *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).



U.S. Constitution Amendment I

- “Symbolic speech” is protected under the First Amendment if (1) the “speaker” intends to convey a message, and (2) there is a “great likelihood” that observers will understand the message. See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974).
- The teacher’s display of him or herself or placing his or her thoughts on the Internet the Free Speech Clause of the First Amendment.



Cyber-Speech by Teachers: The Legal Foundation

- Up to 87 percent of teenagers (ages 12 to 17) have access to the Internet, and 55 percent of those individuals use social networking websites.
- The bottom line is that the use of social networking websites is widespread and is a phenomenon that school district administrators and school boards cannot ignore.
- Social media has benefits that can assist school districts in decision-making, but administrators must also be on guard to protect students, teachers, and the school district from negative aspects of social media use.

Cyber-Speech by Teachers: The Legal Foundation

“The problem . . . is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”



Pickering v. Board of Education, 391 U.S. 563, 568 (1968)

Cyber-Speech by Teachers: The Legal Foundation

Connick v. Myers, 461 U.S. 138 (1983)

Public employee’s First Amendment rights not violated when she was fired for circulating a questionnaire about internal office affairs.

Only one question touched on a matter of public concern. When speech does not touch on matter of public concern, retaliatory action by the public agency generally does not violate employee’s First Amendment rights.

When speech does touch on matter of public concern, the Pickering balancing test applies:

interest of the employee in commenting on matters of public concern weighed against the government’s interest in efficient operation of the workplace



Cyber-Speech by Teachers: The Legal Foundation

Garcetti v. Ceballos, 547 U.S. 410 (2006)

Public employee claimed violation of First Amendment rights when he was retaliated against for writing memo recommending dismissal of a case based on governmental misconduct.

Court held speech not protected.

“[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

547 U.S. at 421.

Cyber-Speech by Teachers: Caselaw

Spanierman v. Hughes, 576 F. Supp. 2d 292 (D. Conn. 2008)

- Teacher's contract not renewed after school district found he was using MySpace to interact with students.
- Garcetti* did not apply:**
 - Teacher's MySpace comments not made pursuant to his responsibilities as a teacher.



Cyber-Speech by Teachers: Caselaw

Spanierman v. Hughes (cont.)

- MySpace postings generally did not involve matters of public concern:
 - MySpace page consisted of "personal conversations"
 - Only exception was poem teacher wrote about the war in Iraq
- Court found no evidence that school district intended to retaliate against the teacher because of the views he expressed in the poem:
 - Teacher "failed to establish the necessary causal connection between his exercise of the right to free speech and the allegedly retaliatory action taken against him."



F. Supp. 2d. at 311. 576

Cyber-Speech by Teachers: Caselaw

Snyder v. Millersville University, 2008 WL 5093140 (E.D. Pa. 2008)

- Stacey Snyder, a student at Millersville University (MU), was assigned to complete her student teaching at an area high school.



Despite warnings, Snyder criticized her cooperating teacher on her MySpace page.

When high school refused to allow Snyder to continue her student teaching placement, MU did not award her teacher education degree.

Cyber-Speech by Teachers: Caselaw

Snyder v. Millersville University (cont.)

- Student treated as teacher for purposes of First Amendment analysis.
- Student's decision to sue MU instead of the high school did not affect the court's analysis.
- No matter of public concern involved, so speech not protected:
 - "[I]nsofar as Plaintiff's posting touched on any matter of public concern, it was protected by the First Amendment," but since the student "conceded at trial . . . that her posting raised only personal matters," MU's response did not violate the student's First Amendment rights.



Id. at 16.

Cyber-Speech by Teachers: Practical steps

Questions to ask when addressing a specific incident:


- Does the School District have a policy on the monitoring of social networks?**
 - Does the school district ban the contacting of students by teachers using a social network?
- Is the speech a matter of public concern?**
 - If no, speech not protected by First Amendment
 - If yes, court balances teacher's interest in speaking as a citizen with school district's interest in operating effectively and efficiently



Cyber-Speech by Teachers: Practical steps


- Was the teacher's speech made pursuant to his or her duties as a teacher?**
 - If yes, speech not protected by First Amendment
- Does the teacher's speech represent the airing of personal grievances against an employer?**
 - If yes, generally not matter of public concern






Cyber-Speech by Teachers: Practical steps


- **Was the teacher's speech touch on an issue of public concern?**
 - If yes, speech is protected by First Amendment
- **Does the teacher's speech represent the airing of grievances that any citizen or parent could make against the school district?**
 - If yes, generally it is a matter of public concern






Cyber-Speech by Teachers: Practical steps


- **Do we really need a policy?**
- The use of a board policy incorporating the PED Code of Ethical Responsibility and Standards of Conduct would most likely be challenged for vagueness under a First Amendment analysis.
- The void for vagueness doctrine also prevents arbitrary and discriminatory enforcement. *Smith v. Goguen*, 415 U.S. 566, 573 (1974).
- "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis . . ." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972).
- Here, the argument would be that the school district is acting as the "morality police."






Cyber-Speech by Teachers: Practical steps


- While we can all agree that certain photos or comments are inappropriate. The issue is what can a school district do when the photo was not taken or the comment was not made on school time or at school facilities.
- What standards apply with it does not appear that the employee submitted the photo or comment with the intent of being distributed or viewed by students, parents or school officials?
- What if the speech can be connected to a matter of public concern?






Cyber-Speech by Teachers: Practical steps


- Imposing moral standards is gelatinous at best when distilled within the legal process.
- Even the U.S. Supreme Court has had difficulty setting standards for what constitutes "obscenity" in the extreme case of free speech.
- "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that. - Justice Potter Stewart, concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184 (1964), regarding possible obscenity in the movie *The Lovers*."





Cyber-Speech by Teachers: Practical steps

- The Supreme Court in *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1983), set forth a balancing test to determine whether the government had a legitimate interest in regulating the speech of its employees that "differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* at 568.
- The *Pickering* balancing test considers "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). The test also takes into account the extent of authority entailed in the employee's position. *Id.* at 390.



Cyber-Speech by Teachers: Practical steps

- In evaluating First Amendment retaliation claims in light of the *Pickering* balancing test, a reviewing court will make the following inquiries:
 - (1) was the employee's speech on a matter of public concern, and if so, did his or her interest in the speech outweigh the governmental interest in providing efficient and effective service;
 - (2) was the speech a substantial or motivating factor in the alleged retaliatory action; and,
 - (3) would the employer have taken the adverse action had the employee not spoken out publicly. *Curinga v. City of Clairton*, 357 F.3d 305, 310 (3rd Cir. 2004).
- Facing discharge, we would suspect that the teacher will argue that his or her "speech" is of public concern.

Cyber-Speech by Teachers: Practical steps

- The School District's interest in addressing a teacher's photo or comment on the Internet will require a substantial showing of disruption.
- The School District will need to marshal evidence that establishes that the teacher's photograph or comments had the effect of materially and substantially disrupting the operations of the School District. See *Ravitch v. City of Philadelphia*, 2009 U.S. Dist. LEXIS 44352, at *30-32 (E.D. Pa. 2009).
- In *Tinker*, the Supreme Court pointed out at length how wearing black armbands in protest against the Vietnam War was passive and did not create "disorder or disturbance" and therefore did not interfere with the school's work or collide with other students' rights "to be secure and to be let alone." 393 U.S. at 508.

Cyber-Speech by Teachers: Practical steps

- "Of course, a mere desire to avoid 'discomfort and unpleasantness' was an insufficient basis to regulate the speech; there had to be disruption in the sense that the speech 'would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'" *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 572 (4th Cir. 2011), quoting *Tinker*, 393 U.S. at 509.
- Please note that "in cases such as this involving speech on matters of significant public concern, a showing of actual disruption is required." *Zamboni v. Stamler*, 847 F.2d 73, 79 (3rd Cir. 1988), see also *Am. Postal Workers Union v. U.S.P.S.*, 830 F.2d 294, 303, n.12, (D.C. Cir. 1987).

Model Policy

- **Use of Social Networking Websites.** Since a School District employee's interactions or dialogue with students on a Social Networking Website could be viewed as a representation of the School District by viewers and since communications on such websites are not subject to the same levels of supervision, structure or formality as the school or classroom environment, the School District strongly discourages its employees' use of Social Networking Websites as a means of conducting School District business or communicating with students, except as permitted by Paragraph ? below.

Model Policy

- **Interactions with Students.** State statutes and regulations and School Board-adopted ethical and professional policies and standards require that professional educators and School District employees establish strict, appropriate and professional boundaries in their conduct and communications with students. To that end, School District employees shall not use Social Networking Websites as a means of communication with any School District student for purposes unrelated to the school curriculum or school programs, and in the absence of approval as specified in Paragraph ? below.

Model Policy

- Employees of the _____ School District are hired for the purpose of taking a sincere professional interest in students. Professional ethics require that staff members avoid social situations through which they could exploit their positions of authority over students and specifically in this Policy through the use of social networking sites. Employees communicating on social networking sites on matters personal to them or personal to their individual employment on matters which are inappropriate and inconsistent with their ethical responsibilities and not of public concern or with intent to communicate personally with students outside of School District's approved instruction and supervision is prohibited. The intent of this Policy is to limit the communications between staff and students to that which is school-related and consistent with the ethics of education professionals and that employees utilize the extensive policies and procedures already existing to communicate with the School District's Administration on matters affecting their employment or the education of students whom they serve.

Cyber-Speech by Teachers: Applicants

- **There are new legal considerations when conducting e-due diligence**
 - Discrimination claims
 - Access to Information not in Application
 - Information on Disabilities
 - Constitutional claims
 - First Amendment
 - Fourth Amendment
 - Service and User Agreements
 - Must follow agreement on information
 - The *Kibbe* Case
 - Conduct outside the workplace that is not disruptive of the work environment



Wiretapping Laws

- **Fourth Amendment**
- Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510 *et. seq.*
 - Prohibits interception of e-mail or electronic communications in transit.
- Stored Communications Act, 18 U.S.C. §§ 2701 *et. seq.*
 - Prohibits searching of e-mails or electronic communication in storage
 - Does not apply to employer's own e-mail systems
 - Searching a "friends only" computer server without authority violates the Act.

Searches

- **Fourth Amendment**
 - Reasonable expectations of privacy
- Computers
 - Allowed exclusive use
 - Allowed private use
- Desks
 - Allowed exclusive use
 - Allowed private use
- Classrooms

Questions



Thank you

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II.

CONFLICTS OF INTEREST, NEPOTISM, BOARD ETHICS AND THE GOVERNMENTAL CONDUCT ACT

Presenters:

**R. Daniel Castille
Andrea Salazar**

Cuddy & McCarthy, LLP

Conflicts of Interest, Nepotism, Board Ethics, and the Governmental Conduct Act

2017 School Law Conference

R. Daniel Castille
Andrea Salazar
Cuddy & McCarthy, LLP

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1

Board Member Oath

- NMSA 1978, Section 22-5-9.1
 - 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.**

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2

Powers of the Board

- NMSA 1978, Section 22-5-4:
- 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;

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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 & maint. of property
 - I. subpoena witnesses for school hearings
 - J. contract for expenditure of funds, except for salaries

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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

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PED Regulations Powers of the Board (cont.)

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

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Statutory Powers of the Superintendent

- Section 22-4-14 NMSA 1978
- Supt. is chief executive officer
- Carry out ed. Policies and rules of PED and local board
- Administer and supervise the District
- Employ, fix salaries of, assign, terminate or discharge all employees of the District
- Prepare budget for approval by Board

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7

PED Regulations

Powers of the Superintendent

- NMAC 6.29.1.9(B)
 - Administer local board policies and state and federal regulations including the Public School Code
- NMAC 6.29.1.9(B)(1)
 - Attend all board meetings or, when necessary, designate a licensed administrator to attend
- NMAC 6.29.1.9(B)(4)
 - 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
- NMAC 6.29.1.9(B)(5)
 - Be accountable for student safety
- NMAC 6.29.1.9(B)(6)

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Governance v. Administration

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

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THE NEPOTISM PROHIBITION

- The Nepotism Law – Section 22-5-6
 - The Superintendent may not employ or approve the initial employment of the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of a local school board member or the Superintendent.
 - The Board may waive the prohibition as to relatives of the Superintendent.
 - The “Grandfather Clause” applies to continuing employment of relatives.

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10

Additional Board Member Conflict of Interest Requirements

- **Prohibited Employment – Section 22-5-5**
 - Board members shall serve without compensation.
 - A Board member may not be employed in any capacity by the School District governed by that Board during the term of office for which the Board member was elected or appointed.
- **Charter Schools – Section 22-8B-4B**
 - No Board member shall serve on the governing body of or be employed in any capacity by a locally-chartered charter school located in the School District during the Board member's term of office.

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Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Board Members' and Employee sales or contracts with the School District – Section 22-21-1**
 - Board members and employees may not sell or be a party to a transaction to sell instructional materials, furniture, equipment, insurance, school supplies or work directly or indirectly under contract with the School District:
 - Exception: Sales in regular course of business made in compliance with Procurement Code.
 - BEWARE: Unless an exception applies, violation carries FELONY sanctions!!

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12

Board Members as Volunteers: Incompatibility Doctrine

- Exists where there “is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.” *Haymaker v. State ex rel McCain* (N.M. 1917).
- Doctrine has not been applied to volunteers in New Mexico.

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13

Board Members as Volunteers: Incompatibility Doctrine

- 2001 Texas Attorney General opinion: School board member barred by the common-law doctrine of incompatibility from simultaneously serving as a volunteer part-time teacher in a regular academic class for a single semester
- Primary incompatibility related to *supervision*. In capacity on school board, member supervised Superintendent. In capacity as volunteer teacher, board member was supervised by the Superintendent.

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14

Board Members as Volunteers: Incompatibility Doctrine

- New Jersey ethics opinion: by serving as a “lead volunteer” of a club that meets in a school in the board’s school district, board member violates NJ’s code of ethics for board members.
- Board member responsibility is not to administer the schools but, with other members, to ensure that schools are well run. The frequency of the volunteer activity, the level of interaction, and control of the club evidenced direct involvement in the day-to-day administration of the school district in violation of the Code of Ethics.

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Board as Impartial Decisionmaker at Termination and Discharge Hearings

- The School Board determines whether there is just cause to discharge or terminate an employee who contests the Superintendent’s decision.
- Due Process requires that the Board be impartial, and base its decision only on the evidence presented at a hearing.
- If board members are too involved in personnel issues (failure to refrain from delegated administrative functions), employee may have argument that he or she didn’t get an impartial hearing.
- Don’t try to be the Director of Human Resources
- Don’t be the board member who all employees go to to voice their grievances with administration
- Do refer employees to the chain of command and grievance process; report to the Superintendent and ask Superintendent to report back on resolution.

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16

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Procurement Code Restrictions**
 - Unlawful employee participation – Section 13-1-190.
 - Local public body employee (includes Board members) may not participate in a procurement (i.e., authorize the procurement or approve the contract) when the employee or a member of the employee’s immediate family has a financial interest in the business seeking or obtaining the contract.
 - “Financial interest” means officer, director, trustee, partner or management position or 5% or more ownership interest. Section 13-1-57.

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17

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Procurement Code Restrictions**
 - Contemporaneous Employment – Section 13-1-193.
 - Local public body employee (including Board members) may not participate directly or indirectly in procurement, and may not be or become the employee of a person or business contracting with the governmental body.

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18

Additional Board Member and Employee Ethics and Conflict of Interest Requirements

- **Waiver of Unlawful Employee Participation and Contemporaneous Employment – Section 13-1-194**
 - The School Board may **waive** these Procurement Code restrictions by making a determination (usually by resolution adopted in public meeting) that the conflict has been disclosed publicly, that the Board member can perform the procurement function without bias or favoritism (usually by abstaining from involvement in the procurement process), and that the waiver is in the best interest of the School District.
 - We recommend that the resolution recite that in the absence of the waiver, the School Board could not procure the construction, goods or services at a competitive price.

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19

Governmental Conduct Act Amendments

- SB 432 – Passed by 2011 NM Legislature and signed by Governor Martinez on April 7, 2011, effective **July 1, 2011**.
- Amends definitions of:
 - **“local governmental agency,”** to include local political subdivisions, within scope of Act. **See Section 10-16-2G. School Districts are political subdivisions, per Section 22-1-2R**

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20

Governmental Conduct Act Amendments

- Amends definitions of:
 - **“public employee”** to include employees of local governmental agencies. Local governmental agency employees include officers, elected or appointed officials and those eligible to receive per diem or mileage. See Section 10-16-2(I) . **Prior to 2011, only “prohibited bidding” section (Section 10-16-13) applied to local public schools.**

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21

Governmental Conduct Act

- General Principles:
 - Public employment or office is a public trust. Officers and employees must maintain integrity and high ethical standards. May not use their position to advance personal or private interests, and must disclose real or potential conflicts of interest. **Section 10-6-3 A, B and C.**
 - May not offer, request or receive any money or thing of value in exchange for performance of an official act, or take official act which primarily enhances personal financial interest. **Imposes 4th degree felony penalties! Sections 10-16-3D and 10-16-4A.**

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22

Governmental Conduct Act

- Additional Prohibitions - Public Officers and Employees **Shall Not**:
 - Coerce or attempt to coerce another public officer or employee to pay or contribute anything of value to any person or organization for political purposes. **Section 10-16-3.1A.**
 - Threaten or deny promotion or pay increase to an employee who does not vote for certain candidates, require contributions to a political fund or purchase of fundraising tickets for a political event, or advise employees to participate in political activity. **Section 10-16-3.1B.**

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Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees **Shall Not** :
 - Use or allow use of governmental property for unauthorized purposes. **Section 10-16-3.1C.**
 - Engage in an official act directly affecting personal financial interest (unless greater benefit accrues to the public), or acquire financial interest which will be affected by the officer's or employee's official action. **Section 10-16-4B and C.**

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24

Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - Receive payment or honoraria exceeding \$100, exclusive of per diem, mileage and lodging, for speeches or services related to performance of official duties. **Section 10-16-4.1.**
 - Disclose confidential information acquired in an official position for his or another's private gain. **Section 10-16-6.**

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Governmental Conduct Act

- Additional Prohibitions (Continued) - Public Officers and Employees Shall Not :
 - If the employee or official has authority over public money or issuance of bonds, accept a contribution or anything of value (not including food or refreshments less than \$100 consumed in one day) from a business that contracts with the governmental entity for financial services involving investment of public funds or issuance of bonds. **Section 10-16-13.3B.**

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26

Governmental Conduct Act

- Specific Requirements as to **Contracts** with the Public Agency:
 - Current Officers or Employees:
 - Officer or employee, family members, or businesses in which officer or employee has a **substantial interest** may not enter into contract with Agency, unless public disclosure of interest is made, and competitive process is used to award the contract. **Sections 10-16-13.2B and 10-16-7 (similar to current restrictions imposed by Sections 22-21-1 and 13-1-190.)**

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27

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not sell or be party to contract to sell goods, services tangible personal property or construction directly or indirectly through family or business to an employee supervised by the officer or employee. **Section 10-16-3.2A.**

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28

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Agency may not accept a bid or proposal from a person who directly participated in preparing the specifications, evaluation criteria or qualifications for the bid or RFP. **Section 10-16-13.**

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29

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Current Officers or Employees (Continued):
 - Officer or employee may not accept an offer of a contract or receive a commission or profit from sale or transaction to sell goods, services, tangible personal property or construction from person over whom officer or employee has regulatory authority. **Section 10-16-3.2C and D.**

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30

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees:
 - Agency may not enter into contract with person or business which:
 - Is assisted in the transaction by a former employee whose action while a public employee resulted in the Agency making or acting on the contract,

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31

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees (Continued):
 - Agency may not enter into contract with person or business which:
 - Is represented by person who was public officer or employee within the preceding year, if the contract amount exceeds \$1,000, and results from the official act of the officer or employee.

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32

Governmental Conduct Act

- Specific Requirements as to Contracts with the Public Agency:
 - Former Officers or Employees may not represent any person in dealings with the public employer:
 - On a matter as to which the former officer or employee participated directly or substantially, while employed, or
 - For one year period after leaving employment, receive compensation or pay for representation before the Public Employer.

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33

Governmental Conduct Act

- Disclosure of Outside Employment:
 - **All public officers or employees must disclose in writing to the employer all employment engaged in by the officer or employee, other than the employment with or service to the School District. Section 10-16-4.2**

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34

Governmental Conduct Act

- Penalties for Violation:
 - Other than those prohibitions which carry felony sanctions, as specified above, violation of the Act constitutes a misdemeanor (maximum penalties \$1,000, or imprisonment of up to 1 year, or both.)
 - Attorney General may enforce civil penalties.
 - Alleged violations could be basis for initiating recall effort of local school board members.

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35

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;

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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;

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37

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.

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38

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- 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

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39

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

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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

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41

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

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42

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 processes

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43

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

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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

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45

QUESTIONS?

Thank You!

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46

III.

INVESTIGATING STUDENT AND EMPLOYEE MISCONDUCT: Ten Steps To Getting It Right

Presenters:

**Laura M. Castille
Cuddy & McCarthy, LLP**

**Dr. Kerry Parker, Assistant Superintendent of Human Resources
Clovis Municipal School District**

INVESTIGATING STUDENT AND EMPLOYEE MISCONDUCT: TEN STEPS TO GETTING IT RIGHT

NMSBA School Law Conference
June 2, 2017

Presented by:

Dr. Kerry Parker, Asst. Superintendent of HR, Clovis
Municipal Schools

Laura Castille – Attorney, Cuddy & McCarthy, LLP



SESSION CHECKLIST: 10 STEPS

1. What/Whom/When and Why Investigate?
2. Who Conducts the Investigation?
3. Utilize Investigator Checklist
4. Prepare the Investigator to Investigate
5. Evaluate Risk of Further Harm - Act
6. Interview Witnesses/Rights of an Accused employee
7. To Report or Not to Report and Other Evidentiary Considerations
8. Analyze the Evidence
9. Create a Report
10. Take Action

STEP #1: WHAT SHOULD BE INVESTIGATED?

Do Not Ignore Complaints of:

- Alleged criminal violations
- Alleged violations of Board policy, discipline codes, personnel and student conduct regulations
- Sexual harassment
- Alleged discrimination
- Miscellaneous (alleged offenses that may result in termination/discharge of employees or suspension or expulsion of students)
- Alleged bullying
- Alleged fraudulent conduct

STEP #1: WHEN DO WE INVESTIGATE?

- ⊙ Immediately upon receiving a complaint or when you have reason to believe that there may be a problem.
- ⊙ Every complaint does not require a complete investigation, but when in doubt, conduct an investigation.
 - *Failure to investigate allegations can set the School District up for exposure to lawsuits, OCR complaints, EEOC charges, Due Process complaints and tort claims.*
 - *Failure to investigate can lead students and employees to believe that no one cares and create a hostile environment for learning and working.*

DON'T WAIT FOR THE POLICE TO INVESTIGATE

- ⊙ Different Timelines: Don't hold off on employee or student discipline until police investigation complete; may exceed time limits for hearings.
- ⊙ Different Standards of Proof
 - *Reasonable suspicion v. probable cause*
- ⊙ Conflicts with:
 - *Self-incrimination/double jeopardy*
- ⊙ Police Evidence v. School Evidence
 - *You can gather when the police cannot*

WHO MIGHT SCHOOLS INVESTIGATE?

- ⊙ Anyone Within Our Purview:
 - Students
 - Employees
 - Coaches
 - Bus drivers
 - Members of the Board
 - Volunteers
 - Contractors

You do not have to be Sherlock Holmes, but you have a duty to investigate complaints thoroughly and efficiently.

WHY IS AN EFFECTIVE INVESTIGATION IMPORTANT?

- ◉ Due Process
 - *Basic fairness and integrity of fact-finding*
 - *Notice of charges*
 - *Explanation of evidence*
 - *Opportunity to respond*
- ◉ Deliberate Indifference
 - *Avoiding future liability*
- ◉ Required by State Statutes and Regulations

STATE LAW 22-10A-5

- ◉ Superintendent must investigate all allegations of ethical misconduct about any licensed school employee who resigns, is being discharged or terminated, or otherwise leaves employment after an allegation is made.
- ◉ If investigation results in finding of wrongdoing, superintendent must report employee's identity and circumstances of the misconduct to PED within 30 days following separation from employment.
- ◉ District cannot enter into any agreement with employee that interferes with this duty to investigate and report.
- ◉ PED may suspend, revoke, or refuse to renew license of superintendent who fails to make report as required.

STEP #2: DECIDE WHO WILL CONDUCT THE INVESTIGATION

- ◉ Employee Misconduct:
 - *Immediate Supervisor*
 - *Personnel Administrator*
 - *Superintendent*
 - *Board Member (never!)*
 - *Outside Investigator (sometimes)*
- ◉ *It really depends on the allegations and circumstances. The investigation should be objective, neutral and stand up to any later action that may be required.*

STEP #2 CONTINUED

- ◉ Student Misconduct:
 - *Teacher*
 - *Principal*
 - *Other administrator*
 - *Coach*
 - *Superintendent*
 - *Outside Investigator (?)*

FACTORS TO CONSIDER WHEN SELECTING AN INVESTIGATOR

- ◉ What do your policies say?
- ◉ Is there a conflict of interest?
- ◉ Can the investigator:
 - *Keep accurate records?*
 - *Conduct a thorough witness interview?*
 - *Maintain confidentiality?*
 - *Complete an accurate and thorough report?*

STEP #3: INVESTIGATOR CHECKLIST FOR BEGINNING STAGES

- ◉ Open a file for the investigation and maintain file at one location.
- ◉ Consider whether early indications give rise to reasonable suspicion that a crime has occurred, or child abuse or neglect, that warrant report to police or CYFD - may need to revisit this later.
- ◉ Remember: Legal obligation to maintain evidence- good or bad- when litigation may reasonably result. Do not destroy.
- ◉ Make a Plan: who must be interviewed, what documents do you need and who will get them for you, etc.

STEP #3 CONTINUED

- ◉ Review your applicable policies related to investigations.
- ◉ Specific investigatory steps may be required by policy in certain cases, i.e., bullying or harassment complaints.
- ◉ Do you have a collective bargaining agreement with specific investigation requirements?
- ◉ If likely to result in claim against the District or employees, notify insurance carrier of allegation and ongoing investigation (may not know until later).

STEP #4: PREPARING THE INVESTIGATOR TO INVESTIGATE

- ◉ Adopt a calm, impartial, fair, and deliberate mindset; do not prejudice the allegations or create that perception.
 - *If you cannot be neutral or are perceived as one-sided - someone else should conduct investigation.*
- ◉ Be the calm one in the storm; no witch-hunts, reputations/livelihoods are at stake.
- ◉ Exercise common sense and good judgment.
- ◉ Know whom you can trust.
- ◉ Remember that your actions will be reviewed, and challenged; the materials you develop and your communications may be subject to later disclosure - keep it neutral.

STEP #4: CONTINUE

- ◉ Determine Investigation Goals:
 - *Did undesirable conduct take place?*
 - *What occurred, and how? Lay out timeline.*
 - *Identify the person(s) responsible for the undesirable conduct.*
 - *Change that person(s) conduct.*
 - *Gather evidence to support the imposition of consequences (discipline), when appropriate, for undesirable conduct.*
 - *Solve this problem and make changes to policy/procedure to prevent it from happening again.*

STEP #5: EVALUATE THE RISK OF HARM AND TAKE NECESSARY STEPS

- ◉ Should you separate alleged victim from alleged violator?
- ◉ Should the alleged perpetrator be immediately removed from school setting?
- ◉ **Employee:** Suspension with pay (administrative leave)?
 - *Check you CBA for procedures*
- ◉ **Student:** Short-term suspension followed by disciplinary hearing (comply with Special Education rules where applicable)

STEP #6: INTERVIEW THE WITNESSES

- ◉ Interview the complaining party first.
- ◉ Interview witnesses (ideally, separately).
- ◉ Interview the accused party last.
- ◉ *Do not wing it! Follow a prepared script.*

STEP #6 CONTINUED

- ◉ Interview promptly while events still fresh.
- ◉ Be discrete about where and how interviews will be conducted to avoid rumors, speculation, embarrassment.
- ◉ Interview with two individuals present if possible. Most important when interviewing the accused.
- ◉ Interview witnesses separately if possible (with union rep. if applicable).
- ◉ Keep interviews confidential and tell witness to do the same.

STEP #6 CONTINUED

- ◉ Explain to the witness what you are investigating, and that you will be taking notes.
- ◉ Ask open-ended questions first, then narrower follow up questions.
- ◉ Date and time of incident, location, who present, detailed description, reaction to incident, to whom has the witness spoken.
- ◉ Take good notes (include date and time of interview).
- ◉ Take your time.

STEP #6 CONTINUED

- ◉ Get written statements.
- ◉ Take good quality color photos where appropriate (e.g., bruises).
- ◉ Record the interview, if necessary or helpful.
- ◉ Keep a timeline of events that took place before, during, and the after incident(s) in question.

STEP #6 CONTINUED **EMPLOYEES**

- ◉ Request for union representation.
- ◉ Request for legal representation- no right to have a lawyer present during interview.
- ◉ Garrity Warning: accused has a right not to incriminate him/herself that applies in criminal setting. *No such right in employment setting.* Accused may be disciplined/fired for not answering employer's questions.

STEP #6 CONTINUED **EMPLOYEE GARRITY WARNING**

◉ Model Garrity Warning:

As a condition of your employment, you are being ordered to answer our questions as part of an official investigation. The questions will be specifically directed and narrowly related to the performance of your official duties.

The information or evidence you provide cannot be used against you in any criminal proceeding. However, your statement may be used against you if a subsequent administrative action is commenced.

If you refuse to answer our questions, you will be subject to disciplinary action which could include job termination. Do you understand?

STEP #7: **REPORTING AND COLLECTING** **EVIDENCE**

- ◉ Seize physical evidence
 - *Fourth Amendment issues (right to be free from unreasonable searches and seizures).*
 - *Search is legally permissible when:*
 - 1) *justified at its inception.*
 - ◉ *Individualized Reasonable Suspicion that a school rule or law has been violated and that search will produce evidence.*
 - 2) *reasonable in scope.*
 - ◉ *Search tailored to find evidence of wrongdoing.*

STEP #7 CONTINUED

- ◉ Report alleged crimes to law enforcement.
- ◉ Report ethical violations to PED.
- ◉ Report child abuse to CYFD.
- ◉ Report bullying and harassment to parents.
- ◉ Report to staff when appropriate.

N.M. ADMIN. CODE 6.68.2

- ⦿ B. Reporting requirements: Every school superintendent or the person designated by the governing authorities of state agencies, private schools or charter schools shall provide written notification to the director of EEB or PLB (director) of **purported facts reasonably believed by a superintendent to constitute grounds under this rule for denial of an educator license or continuing licensure. At a minimum, the written notification shall include the name and address of the individual, the personnel action taken by the school district, if any, and a statement of reasons for the action.** The following are not justifications for failing to report this information to the director: whether or not the personnel action is final; whether or not the personnel action was taken by a different school district; whether or not the licensed person resigned from a different school district pending investigation for misconduct; whether or not a person has been licensed for three (3) or more years; whether or not any adverse personnel action is/was reversed. Written notification shall be made to the director within 30 calendar days of the sooner of any adverse personnel action or discovering purported facts reasonably believed to constitute grounds for licensure denial. Failure of a superintendent to provide such written notification to assist the PED's licensure process shall not bar the PED from denying an application or serving notice on an applicant.

STEP #8:

ANALYZE THE EVIDENCE

- ⦿ Is there a pattern of past conduct to support allegation?
- ⦿ Follow up with witnesses if necessary.
- ⦿ Gather more documents if necessary.
- ⦿ Make considered judgments about witness credibility.
 - *Talk through evidence with trusted individual.*
- ⦿ Depending on circumstances, review the evidence with your attorney.

STEP #8: CONTINUED

- ⦿ View evidence from independent observer's perspective:
 - *How will an arbitrator, judge, board member or jury view it?*
 - *Use the "reasonable person" standard.*
 - *Use direct evidence v. "hearsay" evidence.*
 - *Do you have enough evidence (documents and witnesses to testify) to prove a case where you bear the burden of proof - i.e. termination hearing?*
 - *Remember that employee or student will have an opportunity to present evidence to refute charges, present witnesses, cross-examine witnesses, and review all evidence against him/her.*
 - ⦿ *Consider all possible explanations - do not lock yourself into one way of thinking about the evidence.*

STEP #9:

CREATE A REPORT

- ⦿ Description of allegations.
- ⦿ Response of accused.
- ⦿ Names of witnesses, facts found, summary of witness statements.
- ⦿ Investigator's findings and conclusions.
- ⦿ Recommendations for this action and possible policy/procedural changes.

STEP #9 CONTINUED

- ⦿ Confidentiality Concerns:
 - *Do not disclose investigation report to Board as they may need to sit in a future discharge, termination or student discipline hearing.*
 - *Do not disclose information about individual students under FERPA, student privacy.*
 - ⦿ *Use numbers, etc. to ID students if necessary to keep privacy.*
 - *Exercise caution in small communities*
 - ⦿ *Initials will not protect identity.*

STEP #10:

TAKE ACTION

- ⦿ Based on a preponderance of the evidence, evaluating credibility of witnesses.
- ⦿ Employee discipline options.
- ⦿ Student discipline options.
- ⦿ Meet with complainant and accused (separately) to notify of completion and whether allegations substantiated.
 - *Include parents of students when appropriate.*

BIGGEST MISTAKES THAT YOU CAN MAKE IN CONDUCTING AN INVESTIGATION

- ◉ Ignoring complaints.
- ◉ Not investigating.
- ◉ Delaying an investigation.
- ◉ Losing objectivity.
- ◉ Being distracted (like you have nothing else to do, right?)
- ◉ Being overly aggressive.
- ◉ Not being thorough - overturn each stone, but understand the boundaries of your investigation.
- ◉ Not reaching a conclusion and taking action.
- ◉ Failing to create a written report that is comprehensive - your report needs to be understood even if you are not there to explain it.
- ◉ Failing to communicate with the complainant and the alleged perpetrator.

GOT QUESTIONS?

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IV.

**TECHNOLOGY, BROADBAND & CYBERSECURITY:
Keeping Your Virtual Campus Secure**

Presenters:

**Laura Sanchez-Rivét
Y. Jun Roh**

Cuddy & McCarthy, LLP



Technology, Broadband & Cybersecurity: Keeping Your Virtual Campus Secure

New Mexico School Board
Association
Thirty Eighth Annual School Law
Conference
Albuquerque, NM – June 2, 2017
Laura E. Sanchez-Rivét and Jun Roh

1

Presentation Roadmap

- Threat Landscape
- Examples of School Hacks
- Cloud Computing
- Privacy Concerns
- Protecting Student Data

2

The Threat Landscape

- Remember calling in a bomb threat to get out of tests?
- Now students have ordered cyberattacks to get out of testing
 - Kansas, Idaho, California
- Students have launched cyberattacks from school
 - New Mexico

3

How Easy Is it to Be Hacked?

Buying a DDoS* attack is easy *and* cheap.

“It used to take a tech-savvy hacker to compromise the system, now it’s a credit card.”

-Douglas G. Pearce, Director, Technical Support Services, Broward County Public Schools, Florida

*distributed denial-of-service attack

4

Kansas, March 27, 2014

THE KANSAS CITY STAR

APRIL 2, 2014 10:00 AM

Kansas adds defensive barrier after cyberattack shuts down student testing

INSIDE: The attack, known as a "distributed denial of service," began March 27, with some overseas sites bombarding the computer server with intense volumes of data. A new assault Tuesday from both domestic and international locations crashed the system.

BY JENNIFER BROWN

A sophisticated cyberattack on Kansas' online student testing system has forced the state to shut down its exams until Thursday.

The state on Wednesday put an extra barrier around the testing system's server that seems to have curbed the assault, said Malcolm Price, co-director of the Center for Educational Testing and Evaluation at the University of Kansas.



5

Idaho, May 2015

SC MAGAZINE

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SC Magazine US News • Two Idaho students face charges after DDoS attacks against school district

By Robert Abel, Content Coordinator/Reporter

May 18, 2015

Two Idaho students face charges after DDoS attacks against school district

A 17-year-old Idaho high-schooler and a middle school student could face felony charges for a series of distributed denial of service (DDoS) attacks against the West Ada School District in Meridian last week.

GET THE INSIDER TRACK on the latest developments with SC Magazine.

1. EMV chips with that Chipotle POS breach?

MOST READ ON SC

6

California, May 2015



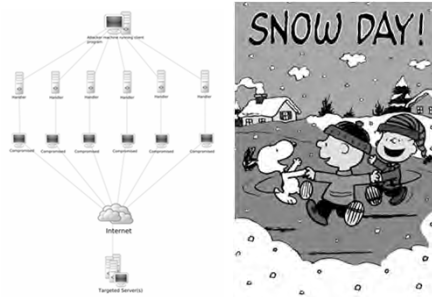
7

New Mexico, May 20, 2015



8

Are you ready for a network snow day?



9

What is a DDoS Attack?

- A distributed **denial-of-service (DDoS) attack** occurs when multiple systems flood the bandwidth or resources of a targeted system, usually one or more web servers. Such an **attack** is often the result of multiple compromised systems (for example, a botnet) flooding the targeted system with traffic.

10

What is a botnet?

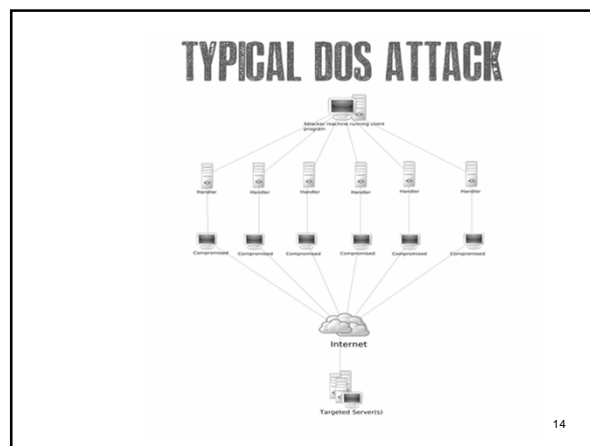
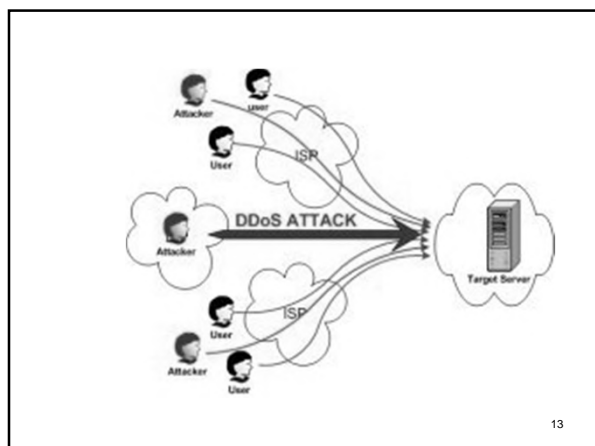
- A network of private computers infected with malicious software and controlled as a group without the owners' knowledge, e.g., to send spam messages.

11

More on a botnet

- A **botnet** is a number of Internet-connected devices used by a botnet owner to perform various tasks. Botnets can be used to perform Distributed Denial of Service, steal data, send spam, and allow the attacker access to the device and its connection. The owner can control the botnet using command and control (C&C) software. The word botnet is a combination of the words robot and network. The term is usually used with a negative or malicious connotation.

12



What can you do?

- Internal IT
- External IT
- Firewall
- Contracts
- Policies

15

Cloud Computing

- What is cloud computing?
 - The practice of using a network of remote servers hosted on the Internet to store, manage, and process data, rather than a local server or a personal computer
 - Convenience, access data across multiple devices, from anywhere
 - But disadvantages include downtime, security and privacy, vulnerability to attack, costs

16

Cloud Computing

- **Best practices for minimizing security and privacy risks:**
 - Know who is supposed to have access to each resource and service
 - Limit data access based on user context
 - Take a risk-based approach to securing assets used in the cloud
 - Extend security to the device
 - Add intelligence to network protection
 - Build in the ability to see through the cloud

Source: <http://cloudacademy.com/blog/disadvantages-of-cloud-computing/>

17

Cloud Computing

Best practices to help you reduce cloud attacks:

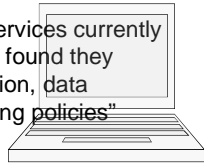
- Identify threats by correlating real-time alerts with global security intelligence
- Proactively protect information
- Automate security through IT compliance controls
- Prevent data exfiltration (unauthorized copying, transfer or retrieval of data from a server)
- Integrate prevention and response strategies into security operations
- Discover rogue projects with audits
- Authenticate identities

Source: <http://cloudacademy.com/blog/disadvantages-of-cloud-computing/>

18

Data Collection by Tech Companies

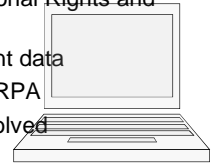
- New Report from the Electronic Frontier Foundation (EFF) (April 13, 2017)
- Laptops, tablets, wearable devices all collect info including DOBs & what they look at online
- Investigated 152 tech services currently used in classrooms and found they "were lacking in encryption, data retention and data sharing policies"



19

Data Collection by Tech Companies

- Parents are not always aware of what apps their kids are using and what info they collect
- There are Federal Privacy Laws, like FERPA (Family Educational Rights and Privacy Act)
- FERPA regulates student data
- But some critics say FERPA and other laws haven't evolved with technology



20

FERPA

- Applies to districts and schools that receive federal funding
- Forbids schools from disclosing student information without parental consent
- Protects students' "education records" – including personally identifiable information (PII)
- Also protects info about student online activity when they are using school-issued devices, when that info is tied to PII

21

FERPA

- Exception to sharing information for "school officials"
- Sometimes schools get around written parental consent by classifying Ed Tech Companies as "school officials"
- School can only share if contractor is serving legitimate educational interests
- Contractor must be under direct control of school district
- Contractor cannot use for a different purpose
- Contractor must perform institutional function for which school would otherwise use employees

22

FERPA

- These requirements mean your contracts with Ed Tech Companies should be very specific in their terms.
- Always have your school lawyers review these contracts.
- Particularly when signing the Ed Tech Company's contract.
- U.S. Dept. of Ed. enforces FERPA, which can cut off funding to schools who are noncompliant.

23

Collection of Student Data

- Critics say FERPA doesn't go far enough
- Some states have enacted their own laws about student data
- California, Colorado, Connecticut
- Prohibit companies from using student data for targeted advertising

24

Congress' Overturning of Privacy Rules for ISPs

- In March 2017, U.S. Congress passed a law to overturn new privacy rules for internet service providers (ISPs)
- The rules had been passed by the FCC in October – requiring explicit consent from consumers if financial, health or browsing history was shared or sold
- Rules did not go into effect

25

Congress' Overturning of Privacy Rules for ISPs

- Law was signed by Trump on April 3, 2017
- Permits Internet Service Providers to sell people's browser history
- Seen as a major blow to online privacy regulation
- Over a dozen Obama-era Regulations have been overturned this year in the name of curbing "government overreach"



26

Thank you!

Questions?

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27

V.

HIRING, MANAGING & FIRING THE SUPERINTENDENT

Presenters:

**John F. Kennedy
Carol S. Helms**

Cuddy & McCarthy, LLP



HIRING, MANAGING AND FIRING THE SUPERINTENDENT

Prepared and presented by
Carol S. Helms and John F. Kennedy



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Attorneys at Law

1

AGENDA

- Hiring *the* Superintendent
- Managing the Superintendent
- Firing the Superintendent

2

HIRING THE SUPERINTENDENT *PLANNING FOR A NEW SUPERINTENDENT*

Finding the right person for the job requires time, planning and commitment to the process.

The work starts before the position is posted!

- Board discussion (open meeting)
- Town hall discussions – 2 or 3
- Surveys
 - Administration and staff
 - Parents / community
 - Students

3

HIRING CONTINUED:

HOW DO WE KNOW WHAT TO DISCUSS?

- If you have a strategic plan, it should drive the conversation. A well-considered, well-developed strategic plan will define the goals and priorities of the District, and help inform the type of leadership needed to carry out that plan.
- If you do not have a strategic plan for the District, consider if experience in developing and/or implementing a strategic plan should be a required or preferred qualification for applicants.

4

HIRING CONTINUED: *ANYTHING ELSE WE SHOULD DISCUSS?*

- History: what worked and didn't work in the past? Both provide equally valuable information.
- What are the Board's firm requirements, non-negotiables, as opposed to preferences?
- Consider and discuss relevant experience:
 - Big city or small town
 - Experienced administrator or rookie
- You may find what appears to be a perfect candidate, but is s/he perfect for your District and community?

5

HIRING CONTINUED:

WHY IS ALL THIS DONE BEFORE THE POSITION IS POSTED?

How will you know you have a good candidate
if you do not know what you are looking for?!

- ✓ Set your District up for success
- ✓ Set your new hire up for success
- ✓ Set your strategic plan up for success
- ✓ Set you community up for success

6

HIRING CONTINUED:
ADVERTISING THE POSITION

What do you need to know before you advertise?

- Check local policy; consider local practice.
- Do you have to advertise or can you hire from within?
- If you have to advertise before hiring within, or if the Board chooses to advertise before looking or hiring within, where will you advertise?

7

HIRING CONTINUED:
ADVERTISING THE POSITION

What will go in your posting (advertisement)?

- Qualifications
 - Requirements (non-negotiables)
 - Preferences
- References
- Deadline for receiving applications
- To whom should application be delivered?
- Preferred format for application submission

8

HIRING CONTINUED:
THE SCREENING PROCESS

Board or committee?

- Consider composition of committee:
 - Representatives (two) from Board
 - Representatives from administrators
 - Representative from teachers
 - Representatives from parents/community

9

HIRING CONTINUED:
THE SCREENING PROCESS CONT.

Scope of committee review and narrowing field of candidates:

- Paper screening and/or applicant screening
 - Paper (application) screening to narrow the field; then committee interview with narrowed field of applicants?
 - Paper (application) screening to narrow the field; then recommend narrowed field to Board to review and consider applications and interviews?

10

HIRING CONTINUED:
BOARD INTERVIEWS WITH FINALISTS

Public or private?

Example 42 in the OMA Compliance Guide states “A school board meets to consider applicants for the position of superintendent. Discussion of the applicant’s qualifications is conducted in closed session but the final decision or vote of the board with respect to hiring one of the applicants as superintendent must be taken in open session.”

11

MANAGING THE SUPERINTENDENT
MAINTAINING THE BOARD-SUPERINTENDENT RELATIONSHIP

Communication, Communication, Communication!

- Communicating the Board’s expectations and priorities begins in the hiring process.
- The hiring process should inform the successful applicant about the Board’s expectations and priorities for the District and its leadership, including the CEO.
- A superintendent will likely not be successful if s/he is unaware of Board’s expectations and priorities; discuss these frequently and consistently, and most certainly prior to the superintendent’s first evaluation.

12

MANAGING THE SUPERINTENDENT

MAINTAINING THE BOARD-SUPERINTENDENT RELATIONSHIP

- Put your expectations and priorities in writing, e.g., Memorandum of Board's Expectations and Priorities for the Superintendent.
- This is an informative writing; not an "or else" writing.
- Address issues early and respectfully, then let them go. Smoldering, silent resentments on your part dig a hole that is hard for the smolder-ee to crawl out of.
- Peel off the band aid and heal the wound.

13

MANAGING THE SUPERINTENDENT

MAINTAINING THE BOARD-SUPERINTENDENT RELATIONSHIP

Understand and stick to statutory leadership roles:

- NMSA 1978, §22-5-4 (2003) = Board duties, responsibilities
- NMSA 1978, §22-5-14 (2003) = Superintendent duties, responsibilities
- 6.29.1 NMAC - Standards for Excellence – specifically delineates more detailed roles of the Board and Superintendent in 9 A and 9 B, respectively (attached)

14

MANAGING THE SUPERINTENDENT

EVALUATING YOUR SUPERINTENDENT

Evaluations:

- ✓ provide a basis for evaluating weak areas;
- ✓ provide a basis for rewarding satisfactory job performance;
- ✓ offer protection from lawsuits and criticism from both terminated superintendents and constituents angered over the superintendent's performance and salary; and
- ✓ at its best, evaluation is a communication process.

15

MANAGING THE SUPERINTENDENT

EVALUATING YOUR SUPERINTENDENT

- ✓ Before and after evaluation, the Board should provide regular and constructive feedback and guidance.
- ✓ Offer encouraging praise, instructive criticism, and suggestions for overcoming shortcomings and problems.
- ✓ Measured and considered feedback offers protection from lawsuits and criticism from both terminated superintendents and constituents angered over the superintendent's performance and salary

16

MANAGING THE SUPERINTENDENT

EVALUATING YOUR SUPERINTENDENT

The Board must agree upon:

- ✓ HOW it will determine what to evaluate;
- ✓ WHAT instrument/form or method it will use; and
- ✓ WHEN.

Just as your strategic plan, and your expectations and priorities for the Superintendent guided the hiring process, they will also prove to be valuable markers in the evaluation process.

17

MANAGING THE SUPERINTENDENT

EVALUATING YOUR SUPERINTENDENT

Other markers:

- ✓ NM Admin. Competencies
- ✓ Job Description/Additional Superintendent Competencies imposed by the Board, e.g."
 - ✓ Superintendent/Board relationship
 - ✓ Morale of District employees
 - ✓ Safety of students
 - ✓ Parental satisfaction
 - ✓ Relationships with community leaders

18

MANAGING THE SUPERINTENDENT
EVALUATING YOUR SUPERINTENDENT

Board evaluates the results in:

- Reaching agreed-upon goals
- Solving agreed-upon problems
- Making agreed-upon improvements

Big picture results; not the routine duties, unless such duties have been deficient in the bigger picture.

19

MANAGING THE SUPERINTENDENT
EVALUATING YOUR SUPERINTENDENT

To the extent possible, use specific, measurable goals/objectives:

- Narrowly focused
- Objective
- Quantify, when possible

20

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

- Tie each deficiency to a competency or District goal
- Be Specific
- Use examples

Develop goals / objectives to address deficiencies.

21

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

- **What** task(s) need to be done?
- **How** does each task need to be done (written reports, oral reports, etc.)?
- **When** does each task need to be done?
- **For whom** does each task need to be done?
- Comments on these tasks – **Why** do they need to be done?

22

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

Suggested timeline:

- **Prior to or Early in School Year**
 - Identify strengths, weaknesses, what will be evaluated, instrument or forms to be used, set evaluation schedule for the rest of the year.
- **Nov. / Dec.** - (Formative Evaluation)
 - Assess the progress being made
- **Feb. / Early Spring Semester** –
- (Summative Evaluation)
 - Determine if goals / objectives met
 - Make employment decision
 - Begin new cycle for next year

23

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

- **Unsatisfactory Work Performance** – 6.69.2.7D NMAC
- **Uncorrected Unsatisfactory Work Performance** – 6.69.2.7C NMAC
- **Uncorrected Unsatisfactory Work Performance** is “just cause” for discharge – 6.69.2.8A NMAC

24

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

- 2 or more conferences with immediate supervisor (The Board)
- Sufficient time allowed to correct
- Written record of all conferences, specifying area(s) of uncorrected unsatisfactory work performance, suggestions for improvement, signed by parties at conference. 6.69.2.8B NMAC

25

MANAGING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

The evaluation and remediation process are used to substantiate “*Just Cause*” for discharge.

“Just Cause” is a reason that is rationally related to an employee’s competence or turpitude or the proper performance of his duties and that is not in violation of the employee’s civil or constitutional rights.

26

FIRING THE SUPERINTENDENT
ADDRESSING DEFICIENCIES OR UNSATISFACTORY WORK

Unfortunately, occasionally it becomes necessary to part ways with the Superintendent and, as ripped from the headlines, that can be a very public, very expensive, very disruptive occurrence unless the Board has diligently done its job:

- Placed the Superintendent on notice of its concerns
- Provided clear expectations and reasonable time for improvement
- Provided supports and encouragement
- Documented its efforts to help the Superintendent be successful

27

THANK YOU!

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28

VI.

**FROM POLICY TO PRACTICE:
10 Reasons To Put Your Policies Into Play**

Presenters:

**Laura M. Castille
Cuddy & McCarthy, LLP**

**Kelt Cooper, Superintendent
Las Vegas City School District**

From Policy to Practice: **10 Reasons to Put Your** **Policies Into Play**

Kell Cooper, Superintendent Las Vegas City Schools

Laura Castille, Cuddy & McCarthy, LLP

New Mexico School Boards Association
38th Annual School Law Conference

June 2-3, 2017



IT IS YOUR DUTY

- 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;**
- N.M. Stat. Ann. § 22-5-4 (West)

School Board Policy Process

- Changes in needs, conditions, purposes, and objectives may require revisions, deletions, and additions to the policies. The District will welcome suggestions for ongoing policy review and revision.
- Policy B-2450

The policy development required by the Board is identified in statute:

- Student Discipline
- A. Local school boards **shall establish student discipline policies** and shall file them with the department. The local school board shall involve parents, school personnel and students in the development of these policies, and public hearings shall be held during the formulation of these policies in the high school attendance areas within each school district or on a district-wide basis for those school districts that have no high school.

N.M. Stat. Ann. § 22-5-4.3 (West)

Bullying

- A. The department shall establish guidelines for bullying prevention policies to be promulgated by local school boards. Every local school board and governing body of a charter school shall promulgate a bullying prevention policy by August 2011. Every public school shall implement a bullying prevention program by August 2012.

N.M. Stat. Ann. § 22-2-21 (West)

Medication

- A. Each local school board or governing body that provides to schools within its jurisdiction a stock supply of albuterol aerosol canisters and spacers **shall develop policies**, based on department of health rules and recommendations, for a school nurse to administer albuterol to a student who is perceived to be in respiratory distress, regardless of whether the student has been identified or documented as having asthma, has a prescription for albuterol or has supplied the school with albuterol. Such policies shall include procedures to:

N.M. Stat. Ann. § 22-33-4 (West)

Leave Donation

- A. State agencies, political subdivisions and school districts **shall implement policies** that provide for employees who earn annual or sick leave the opportunity to donate annual or sick leave to another employee for a medical emergency. The policy shall provide:

N.M. Stat. Ann. § 10-7-22 (West)

New - Restraint

- Schools shall establish policies and procedures for the use of restraint or seclusion techniques in a school safety plan; provided that:
- (1) the school safety plan shall not be specific to any individual student; and (2) any school safety plan shall be drafted by a planning team that includes at least one special education expert.
- House Bill 75

Weapons Free Schools

- A. In addition to other student discipline policies, each school district shall **adopt a policy** providing for the expulsion from school, for a period of not less than one year, of any student who is determined to have knowingly brought a weapon to a school under the jurisdiction of the local board. The local school board or the superintendent of the school district may modify the expulsion requirement on a case-by-case basis.

N.M. Stat. Ann. § 22-5-4.7 (West)

Policies are only as good as the practice

- Most school districts have the required policies, but have either inadequate procedures for implementation or
- The procedures are implemented inconsistently across the schools within the district.
- Consistent application of policy will lead to safer, better schools.

But...what happens when policy and practice clash?

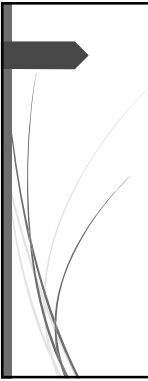
When your policies are not followed or the practices at the school sites are directly in conflict with Board policy – your district is **exposed**.

- Legal problems are sure to follow.

What to do?

Start by Knowing your School District's policies

- It is the first step in creating a defensible School District practice.
- Ongoing policy review is critical to knowing your policies.
- Generally, we only become familiar with the district's policy when something goes wrong.
- When you call your lawyer, their first question is going to be, "What is your policy?"
- The second questions will be, "What actually happened?"
- Your employees will use your policies against you.



DO NOT LET THE DISCONNECT IN YOUR POLICY AND YOUR PRACTICE CATCH YOUR SCHOOL BOARD BY SURPRISE?



**WHEN A COMPLAINT OR ISSUE REACHES THEM AND THEY
LEARN ADMINISTRATION HAS NOT FOLLOWED SCHOOL
BOARD POLICY.**



ONGOING POLICY REVIEW IS CRITICAL TO A HEALTHY SCHOOL DISTRICT

- Add policy sections to each meeting of the Board.
- Review the sections in advance.
- Have the Superintendent invited district administrators and other stakeholders to the meeting who can describe the implementation of the policy under review and make suggestions for adjustments or tweaks.
- Understand how that policy is being interpreted by the Superintendent and your school district administrators.
 - Does their interpretation match the intent/interpretation of the Board?



Example for discussion:



FORMS OF POLICY REVIEW THAT THE BOARD SHOULD UNDERTAKE ANNUALLY

- A. Updating to meet state and federal requirements
- B. Local nuances
- C. How policy is operationalized



UPDATING TO MEET STATE AND FEDERAL REQUIREMENTS

- Your legal council should inform you of new laws requiring your attention in policy.
- After each legislative session, the Board agenda should contain draft policies related to new legislation passed and required for Board review.
- The Board should have public comment on the policy and get a policy approved prior to the next school year beginning.
- The Board should direct the Superintendent to ensure that staff are trained in the new policy when they report back to work and the new policy is included in all pertinent areas, including:
 - Staff handbooks
 - Parent handbooks
 - Student handbooks
 - District websites

Example for discussion:

LOCAL NUANCES

- Local Boards should customize their policies to meet the needs of their individual districts.
- Customization may need to be considered based on:
 - Size of the district
 - Teacher Unions and CBA
 - Rural or urban location
 - Student demographics

HOW POLICY IS OPERATIONALIZED

- The board needs to have ongoing discussions with the Superintendent and site level administrators to determine how the policies approved by the Board will be put into operation.
- How does the administration interpret the policy?
- What processes must be created to ensure that the policy becomes a standard part of school district operation?
- How will the School District monitor implementation of the policy?

Example: New Restraint Policy

RECOMMENDATIONS

- **DEVELOP A SCHOOL BOARD POLICY SUBCOMMITTEE**
 - Decide who should be on the subcommittee and how/when they will report to the Board.
 - This can be a standing agenda item.

RECOMMENDATIONS CONTINUED

- **ESTABLISH A SYSTEM OF PERIODIC REVIEW FOR UPDATES AND SECTIONS**
 - Policy subcommittee can develop the system with approval from the Board.
 - Establish most crucial policies requiring review.
 - System should cover 3-5 years – not just this year

Recommendations Continued

- **ESTABLISH A SYSTEM OF PERIODIC PRESENTATIONS FROM ADMINISTRATION DEMONSTRATING HOW POLICY IS BEING IMPLEMENTED**
 - Don't wait until something happens to ask administrators their practice –
 - Should involve ongoing dialogue.
 - Do not wait until the media comes knocking to know how administrators are handling situations at the school sites.

Recommendations Continued

- Conduct policy audits
- **POLICY AUDITS SHOULD BE INFORMATIVE AND DEVELOPMENTAL NOT PUNITIVE**
- The goal is to improve practice
- Look forward, not backwards
- How will we do it from now on?
- When will we review this practice again?

Questions?

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VII.

**NAVIGATING THE LEAVE MAZE:
FMLA, ADA, USERRA, and Worker's Compensation**

Presenters:


**R. Daniel Castille
Evelyn A. Peyton**

Cuddy & McCarthy, LLP



Navigating the Leave Maze: FMLA, ADA, USERRA, and Workers' Compensation

NMSBA School Law Conference
June 1-3, 2017



CUDDY & MCCARTHY, LLP
Attorneys at Law

R. Daniel Castille
Evelyn A. Peyton

Laws governing four types of leave commonly taken in New Mexico public schools

- Family Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Uniformed Services Employment and Reemployment Rights Act (USERRA)
- New Mexico Workers' Compensation Act

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What is the FMLA's purpose, and who is eligible for FMLA leave?

- Purpose: helps balance workplace demands with family needs
- Eligibility requirements:
 - Employed for 12 months
 - Worked minimum 1,250 hours in those 12 months
 - Covered employers include:
 - All public agencies, and public elementary and secondary schools regardless of the number of employees
 - Private sector employers with at least 50 employees within 75 miles of the work site on every working day for at least 20 work weeks in the current or preceding calendar year

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How are the 1,250 hours counted?

- Hours must be compensable hours under the federal Fair Labor Standards Act (FLSA)
- Full-time teachers employed by an educational institution are presumed to meet the 1,250-hour test
- School district can overcome that presumption by demonstrating that the employee did not work 1,250 hours in the previous 12 months, but for salaried employees, the school district must count all hours worked, whether at the work site or at home

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What are the general reasons for FMLA leave?

- Parenting leave for mothers and fathers
 - 12 weeks per year for birth of employee's child, or for placement of a child for adoption or foster care
 - If both parents work for the same employer, FMLA leave is limited to 12 weeks for both parents rather than 12 weeks for each parent
- Serious health condition
 - 12 weeks for the employee's own condition or to care for the employee's spouse, child, or parent with a serious health condition

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What are the military reasons for FMLA leave?

- Qualifying Exigency Leave
 - Up to 12 weeks for an immediate family member's covered active duty – immediate family members include the employee's spouse, son, daughter, or parent
 - Obligations that may arise relating to the covered person's active duty
- Military Servicemember Family Leave
 - Eligible employee who is the nearest blood relative of a covered servicemember is entitled to up to 26 work weeks of leave during a 12-month period to care for that covered servicemember

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How does the FMLA define “serious health condition”?

- Any illness, injury, impairment, or physical or mental condition that involves:
 - Inpatient care – any period of incapacity or subsequent treatment in connection with inpatient care
 - Continuing treatment (incapacity or treatment):
 - More than 3 consecutive days
 - Related to pregnancy or prenatal care
 - Continued over an extended period of time
 - May be permanent or long-term due to condition for which treatment may not be effective
 - Any absences to receive multiple treatments for restorative surgery or a condition that will likely result in longer incapacity

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What methods can an employer use for determining the amount of FMLA leave an employee has used within a 12-month period?

- Employers may choose any one of the following methods for determining their 12-month period:
 - The calendar year
 - Any fixed 12-month “leave year” (such as a fiscal year, a year required by state law, or a year starting on the employee’s “anniversary” date)
 - The 12-month period measured forward from the date the employee’s first FMLA leave begins
 - A “rolling” 12-month period measured backward from the date the employee uses any FMLA leave

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What are the FMLA notification requirements for employees?

- Employees must comply with the employer’s usual and customary requirements for FMLA leave requests
 - When the FMLA leave is foreseeable, the employee must submit a leave request at least 30 days in advance
 - When the need for FMLA leave is not foreseeable (or not foreseeable 30 days in advance), the employee must provide notice as soon as possible under the circumstances, submitting a leave request
- Employees may take FMLA leave on an intermittent or reduced-schedule basis
- Employer may waive notice requirements, but if the notice requirements are not waived, the employer may take action against an employee who fails to comply with those requirements

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What are the FMLA notification and response requirements for employers?

- Notification requirements:
 - Post a notice explaining employee FMLA rights
 - Adopt an FMLA policy and include FMLA information in employee handbooks
- Response requirements after an employee requests FMLA leave:
 - Within 5 business days, provide a notice regarding the employee’s eligibility for FMLA leave and the employee’s corresponding rights and responsibilities
 - Notify the employee whether the leave is designated as FMLA leave, as well as the corresponding amount of leave that will be deducted from the employee’s paycheck
 - If leave should have been designated as FMLA and was not, retroactive designation could constitute interference with the employee’s FMLA rights
 - Maintain records for no less than 3 years

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What medical records may an employer request under the FMLA?

- May request proof of the employee’s need for FMLA leave
 - May require subsequent medical opinions, at the employer’s expense
 - May request certification at a later date if the appropriateness of continuing leave is questioned
- Leave policy may require the employee to provide periodic updates on the employee’s plan to return to work
 - Policy cannot be discriminatory and must account for the facts of each employee’s individual leave situation

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11

How should an employer determine the amount of FMLA used? (slide 1 of 2)

- “Week” of FMLA leave is based on the employee’s actual work week
- Leave may be taken in whole weeks, single days, hours, or less than an hour
- FMLA leave must be allowed to be used in the smallest increments used for any other type of leave
- No work may be performed during any period of time counted as FMLA leave

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12

How should an employer determine the amount of FMLA leave used? (slide 2 of 2)

- Only the amount of leave actually taken may be counted against an employee's FMLA leave entitlement
- Holidays and school breaks are excluded
- Required overtime hours are included, but voluntary overtime hours are excluded
- Light-duty assignments are excluded – employers are not required to offer a light-duty assignment, but if such an assignment is offered and accepted, the time spent in that assignment cannot be counted against the employee's FMLA leave entitlement

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What happens to insurance benefits during an employee's FMLA leave?

- Employer must maintain the employee's coverage under any group health plan
- Employer must pay its share of the group health plan premium, and the employee must pay his/her share
- If the employee's premium payment is more than 30 days late, the employer's obligation to pay for coverage ends

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May the employer require the employee to use paid leave for the FMLA period?

- Employees may want to substitute paid leave (such as vacation or paid sick leave) for unpaid FMLA leave
- Employer may require employees to substitute paid leave, if that requirement does not conflict with an applicable bargaining agreement or bargaining law

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Under what conditions must an employer return an employee to work following FMLA leave?

- Employer must return employees to either:
 - Original position,
 - Equivalent position, or
 - Position with equivalent benefits
- Employer may require fitness-for-duty certification **only** if notice of this requirement was given to the employee at the outset of the FMLA leave
 - ADA applies here – after the employee returns from FMLA leave, any medical examination must be job-related and consistent with business necessity
- Employer may fire an employee who is unable to return to work after FMLA leave period

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16

What special FMLA rules apply to school employees?

- Some rules apply only to "instructional" employees
- Summer vacation breaks don't count as FMLA leave time unless the employee is normally required to work during that time
- Intermittent leave rules for instructional employees apply in the same manner as for all other covered employees, except under certain circumstances linked to the end of a school term (such as a semester)

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17

To whom does the ADA apply?

- ADA applies to employees who either:
 - Have an actual disability,
 - Have a record of disability,
 - Are regarded as disabled, or
 - Are associated with a person who is disabled

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18

What are the components of an “actual disability” under the ADA?

- Physical or mental impairment that
- Substantially limits
- One or more major life activities

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What should employers keep in mind regarding ADA mental impairment issues?

- Employers should be aware of and be able to identify signs of mental impairment
- Where mental impairment is obvious, employers should not wait for the employee to request accommodation
- Employers should avoid making undue assumptions or diagnosing an employee; may want to consult with mental health professionals (consult school district’s legal counsel for guidance)

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What should an employer discuss with the employee during the ADA’s interactive process?

- The nature and severity of the employee’s mental or physical impairment
- The essential functions of the job performed by the employee
- Whether there are available accommodations that will allow the employee to perform the essential job functions
- Whether the possible accommodations are reasonable

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What types of accommodations might be considered reasonable under the ADA?

- Accommodations are reasonable unless they would constitute an undue hardship
- Reasonable accommodations include modifications or adjustments to:
 - Job application process to enable a qualified applicant with a disability to be considered for a position
 - Work environment or manner or circumstances under which the job duties are performed to enable the individual to perform the essential functions of the position
 - Allow the employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities

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What should an employer consider regarding ADA leaves of absence?

- Must provide same access to leave for disabled and nondisabled employees
- Must consider unpaid leave as a reasonable accommodation
- Know the length of the leave requested
- Communicate with employees during leave and prior to return to work (check with school district’s legal counsel for guidance first)
- Additional accommodation upon returning to work – **policies requiring employees to return to work without restrictions violate the ADA**
- Indefinite leave does not need to be accommodated – undue hardship
- Right to return to original position, unless keeping position open creates an undue hardship
- If employee cannot return to original position even with reasonable accommodation, consider reassignment to a vacant position for which employee is qualified

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How do the ADA and the FMLA interact? (slide 1 of 2)

- An employer that asks for information specified in the FMLA certification form does not violate the ADA because the inquiry is deemed to be job-related and consistent with business necessity
- The FMLA limit of 12 weeks of leave does not affect an employee’s right to seek additional unpaid leave under the ADA
- Under the ADA, employees may be entitled to take intermittent leave, but the employer may deny such leave if the leave would create undue hardship. Under the FMLA, employees are entitled to take intermittent leave when they otherwise meet the requirements of the regulations and there is no undue hardship exception available to employers

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24

How do the ADA and the FMLA interact? (slide 2 of 2)

- When employees request time off for reasons related to a disability, employers should treat those requests as both requests for accommodation under the ADA and for leave under the FMLA
- When both the ADA and the FMLA apply to a leave of absence, the employer must follow the statutory provision that gives the employee the greater benefit
- Employers may offer employees an alternative to a leave of absence, but, if the employee is eligible for FMLA leave, the employee cannot be compelled to accept that alternative

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Which employees are covered by USERRA?

- Employees who have been absent from a position of employment because of “service in the uniformed services,” which includes:
 - Active duty
 - Inactive duty
 - Full-time National Guard duty
 - Physical fitness tests to determine the person’s fitness for any of the above types of duty
 - Funeral honors duty
 - National Disaster Medical System active duty for a public health emergency
 - Service members who leave civilian jobs voluntarily or involuntarily for a military obligation

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26

What are the basic provisions of USERRA?

- Covered service members are treated as if they are on a leave of absence
- Entitled to participate in any rights and benefits
- Entitled to any new benefits that became effective during their service
- Must be permitted, but not required, to use vacation time
- Health benefits must be continuous – if the plan’s coverage would terminate because of the absence, the service member may elect to continue the plan coverage for up to 18 months after the absence begins

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27

What are the employee’s requirements under USERRA?

- Must give the employer advance notice of service obligations as soon as reasonable to do so
- Subject to certain exceptions, length of absence from work protected by USERRA is limited to 5 years (check with school district’s legal counsel before refusing reemployment based on the 5-year rule)
- Employee may forfeit certain rights (leave-of-absence and benefits rights) if, before leaving for service, the employee provides a clear written notice of intent not to return to work after military service
- Reemployment rights **cannot be waived**

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28

What are the USERRA exemptions and disqualifications?

- Exemptions:
 - Pre-service position is for brief, non-recurrent period
 - Change in circumstance or reduction in force for the employer
- Disqualifications:
 - Dishonorable or bad conduct discharge
 - Separation from service under other than honorable conditions
 - Court martial or dismissal by order of the President during war time
 - AWOL for more than 3 months or incarceration

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29

What are the USERRA timeframes for returning to work?

- For service up to 30 days – first regularly scheduled work period following completion of service
- For service of 31 to 180 days – within 14 days of completion of service
- For service of more than 181 days or more – within 90 days of completion of service

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What are the USERRA reinstatement rules?

- Basic rule = “escalator principle,” which requires that the returning service member step back onto the seniority “escalator” at the point the person would have occupied if the person had remained on the job
- For service of 90 days – normally reinstated to previous position
- For service of 91 days or more – reinstated to previous position or position of like seniority, status, and pay

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31

What are the USERRA rules regarding disabilities during service?

- Employer must make reasonable efforts to accommodate the employee's disability so that the employee can perform the position he or she would have held if he or she had remained continuously employed
- If, despite reasonable accommodation efforts, the employee is not qualified for the position due to disability, the employee must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer (training may be a reasonable accommodation)
- If the employee cannot become qualified for these positions, the employee must be employed in a position that, consistent with the circumstances of the employee's case, most nearly approximates the position in terms of seniority, status, and pay

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32

How do workers' compensation issues interact with the ADA? (slide 1 of 6)

- Not every employee who suffers a work-related injury is considered to be disabled under the ADA
- Not every employee who suffers a work-related injury is considered to have a “record of disability” under the ADA
- Employers may not insist that an employee who suffers a work-related injury only return to work when the employee can return to “full duty”

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33

How do workers' compensation issues interact with the ADA? (slide 2 of 6)

- Employers may not refuse to return an employee who suffers a work-related injury to work simply because the employer assumes that the employee poses some increased risk of re-injury
- Employers may not refuse to return to work an employee who suffers a work-related injury simply because the employee has been determined, under the workers' compensation statute, to have a “permanent disability” or to be “totally disabled”

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34

How do workers' compensation issues interact with the ADA? (slide 3 of 6)

- Under the ADA, it is the employer, and not a rehabilitation counselor, physician, or other specialist, who decides whether an employee who suffers a work-related injury is ready to return to work
- The ADA does not require an employer to provide a reasonable accommodation to an employee who suffers a work-related injury but who is not disabled
- An employer may not discharge an employee who suffers a work-related injury but who is temporarily unable to return to work

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35

How do workers' compensation issues interact with the ADA? (slide 4 of 6)

- The duty of reasonable accommodation requires employers to reallocate marginal job duties as an accommodation for an employee who suffers a work-related injury but who is unable to perform those duties
- The duty of reasonable accommodation requires employers to reassign employees who suffer a work-related injury and who are unable to perform the duties of their former position provided there is a vacancy in a position for which the employee is qualified

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36

How do workers' compensation issues interact with the ADA? (slide 5 of 6)

- Employers are not required to create a position for employees who suffer a work-related injury and who are unable to perform the duties of their former position
- If an employee who suffers a work-related injury requests a leave of absence, the employer may instead provide an accommodation that requires the employee to remain on the job

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37

How do workers' compensation issues interact with the ADA? (slide 6 of 6)

- Under the ADA, employers are permitted, but not required, to create a light-duty position for an employee who suffers a work-related injury but who is temporarily unable to perform his or her normal duties. But, if an employer creates light-duty positions for employees who suffer a work-related injury, the employer may not refuse to place disabled employees who have not suffered a work-related injury in those positions
- If an employer only has temporary light-duty positions, it is not obligated to place an employee who suffers a work-related injury in such a position on a permanent basis

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38

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39

VIII.

ISSUES AND CHALLENGES IN CONTEMPORARY INDIAN EDUCATION A Panel Discussion

Panelists:

**Patricia Salazar Ives
Cuddy & McCarthy, LLP**

**Derrick J. Lente, New Mexico State Representative
District 65, New Mexico House of Representatives
Sandia Pueblo**

**Regis Pecos, Co-Director of Leadership Institute &
Senior Policy Advisor for the Office of the Majority, N. M. House of Representatives**

**Latifah Phillips, Assistant Secretary of Indian Education
New Mexico Public Education Department**

**David Atencio, Superintendent
Laguna Department of Education**

**Roy Herrera, Superintendent
Santa Fe Indian School**

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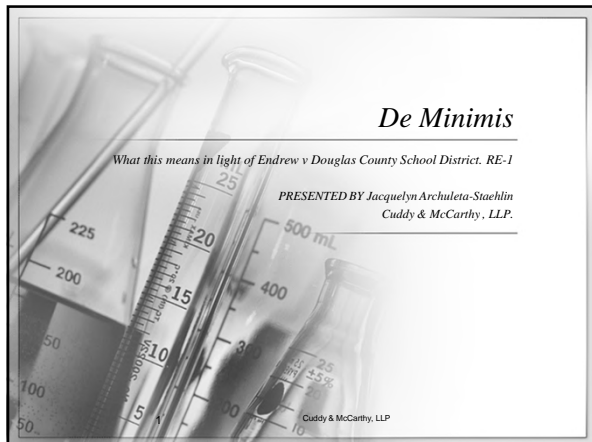
IX.

DE MINIMIS:
**What Does It Mean In Light Of The New
U.S. Supreme Court Decision?**

Presenter:

Jacquelyn Archuleta-Staehlin

Cuddy & McCarthy, LLP



De Minimis

What this means in light of *Endrew v. Douglas County School District, RE-1*

PRESENTED BY Jacquelyn Archuleta-Staehlin
Cuddy & McCarthy, LLP.

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De Minimis

An abbreviated form of the Latin Maxim de minimis non curat lex, "the law cares not for small things." A legal doctrine by which a court refuses to consider trifling matters.

Rowley established that if a state educational agency complies with the procedures of the Act, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the Act.

No particular standard of education is mandated by the Act (*Rowley*) nor is a school district required to guarantee the success of the program

2

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Project Overview

In deciding if a student has received or a district has offered a free appropriate public education, it is first necessary to determine if the district has met standards for the provision of FAPE. The U.S. Supreme Court has held that an appropriate education for a student with a disability is one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."

Endrew F. v. Douglas County Sch. Dist. RE-1, 69 IDELR 174 (U.S. 2017)

3

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Reasonableness and appropriate

- A "reasonableness" standard governs the provision of special education to eligible students with disabilities, but a student's educational program must be "appropriately ambitious in light of his circumstances." *Endrew F. v. Douglas*
- The High Court said the IDEA does not guarantee a particular level of education because "the IDEA cannot and does not promise 'any particular [educational] outcome.'" *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (2017) (citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)).
- The *Endrew* Court emphasized that what is appropriate **depends on the child's circumstances and explained that the instruction offered must be specially designed to meet a child's unique needs, through an individualized education program.** *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017) (citing 20 USC 1401(29) and 20 USC 1401(14)).

4

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Judged at time written

- An IEP must be judged as to its appropriateness at the time that it is written, not with respect to subsequently obtained information about the student. *Roland M. v. Concord Sch. Comm.*, 16 IDELR 1129 (1st Cir. 1990), *reh'g en banc denied*, 110 LRP 65965 (1st Cir. 09/14/90), *cert. denied*, 499 U.S. 912, 110 LRP 66026 (1991) ("An IEP is a snapshot, not a retrospective" and "must take into account what was objectively reasonable at the time the IEP was drafted").
- The "reasonably calculated" standard of *Endrew* shows that **crafting an appropriate program of education requires a prospective judgment by school officials, informed by their own expertise and the views of a child's parents or guardians.** The Court explained that any review of an IEP must determine whether the IEP is reasonable, not whether it is ideal. *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

5

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How do we prepare?

Present levels of performance will become even more critical to the development of an IEP when looking at the issue or appropriate and reasonable. Without a clear cut view of the student's current status it will be difficult if not impossible to design a program that will meet the needs of the student for the next 12 months.

Present levels of performance which tie directly into the goal and objectives of a student will allow for measurement of progress as well as implementation.

6

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PURPOSE

- Purpose of Present Levels of Educational Performance
- Helps describe the problems that interfere with student's education to assist in developing annual goals.
- The Present Levels should include
 - Academic achievement
 - Test scores with an evaluation of the results
 - Students current physical condition
 - Description of social/emotional maturity
 - Strengths and weaknesses including learning style

7

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STUDENT PERFORMANCE MEASURED

- IEP teams should ask a series of questions to develop a child's present levels of performance.
 - These questions include:
 - What can the student do?
 - What is the student expected to do?
 - What will be the focus this year in order to narrow the gap between the two?

8

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CONSIDERATIONS

- What is the impact of disability on academic and functional performance?
 - What strategies and accommodations support the student?
 - What motivates the student?

9

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Other Matters to Consider

- 1) Be careful to ensure that IEP goals and objectives are individualized to student.
- 2) If a goal is carried over from year to year make it clear in the PWN what the educational rationale is for carrying it over.
- 3) If you include objectives in the IEP make sure they are the building blocks for the goals.

10

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IEP requirements

- For a child fully integrated in the regular classroom, an IEP typically should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."
- In determining what it means to "meet the unique needs" of a child with a disability, the *Endrew* Court looked to portions of the IDEA governing the IEP development process and explained that these provisions reflected what the Court said in *Rowley* by focusing on a "progress in the general education curriculum." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

11

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FAPE

- With respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level, the child's educational program must be "**appropriately ambitious**" and give the child a "**chance to meet challenging objectives**." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

12

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Under Endrew

- Appropriately Ambitious
- When drafting goals for the student it will be important to ensure that the goal is not only individualized but is drafted with the general curriculum and grade level expectations in mind. This does not mean that they should indicate the student will work only on grade level matters but what is reasonable to expect this particular child to gain in the way of skills that will draw him closer to being able to access the general curriculum at his grade level.

13

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Challenging

- Chance to Meeting challenging Objectives
- For children with disabilities, receiving instruction that aims so low would be tantamount to 'sitting idly ... awaiting the time when they were old enough to 'drop out.
- Be on the lookout for unique opportunities and even if the student does not achieve the particular task does not mean it should be abandoned if it is challenging to the student and the student continues to make a good effort to meet the challenge.

14

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- Simple example:
- 15 year old student is currently reading at 2nd grade level and is very interested in being a lawyer. It would be very challenging for him to read *To Kill a Mockingbird*. You decide to find a way for him to get through the material with books on CD, word lists, and having him read several pages and tell you what happened. You measure his progress on the word lists, his comprehension and his fluency to show how this will hopefully increase his reading skills and literacy. He may be unable to full appreciate the task but it will be challenging, but not impossible.

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- The IDEA does not guarantee any particular level of education and "cannot and does not" promise any particular educational outcome.

16

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Additional considerations

- Court did reject a line of cases from Circuit courts that had held that the IDEA FAPE standard was merely more than *de minimis* educational progress.
- A FAPE standard not focused on student progress would "do little to remedy the pervasive and tragic academic stagnation that prompted Congress" to enact the IDEA.
- If a student with a behavioral impairment makes adequate gains in school but no progress at home, he is still considered to be receiving an educational benefit.
- The parents of an elementary school student with autism could not point to their son's social and behavioral difficulties outside of school to demonstrate his continued need for special education services.

17

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- Still no bright line defining term "educational benefit" but will require documentation of efforts to provide individual child educational programming focused on his/her individual needs and circumstances at the time of the IEP.

18

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THANK YOU!

HAVE A GOOD SUMMER

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19

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X.

**THE PROCESS OF COLLECTIVE BARGAINING –
What Does It Mean?**

Presenters:

**Andrew M. Sanchez
Cuddy & McCarthy, LLP**

**Dina E. Holcomb
Holcomb Law Office**



CUDDY & MCCARTHY, LLP
Attorneys at Law



The Process of Collective Bargaining

What does it mean?

2017 School Law Conference
June 2-3, 2016

The Process of Collective Bargaining

Andrew M. Sanchez

Dina E. Holcomb



CUDDY & MCCARTHY, LLP
Attorneys at Law

Dina E. Holcomb, Esq.
HOLCOMB LAW OFFICE

Laboring Through the Process of Collective Bargaining

I. The Union Organizing Process

- A. Card Check v. Election
- B. Organizing During Duty Time /Restricting Activities of Non-Employee Organizers
- C. Access to Mailboxes / Networks

Laboring Through the Process of Collective Bargaining

II. The Negotiation Process

- A. Appointing the Negotiating Team
- B. Identifying Management Proposals
- C. Confidentiality
 - N.M. Stat. Ann. § 10-15-1H(f) (1978) (Open Meetings Act)
 - N.M. Stat. Ann. § 10-7E-17G (1978) (PEBA-Closed Meetings)
- D. Negotiating Ground Rules

Laboring Through the Process of Collective Bargaining

III. The Scope of Bargaining

- A. Management Rights
 - N.M. Stat. Ann. § 10-7E-6 (Direct work of, hire, promote, assign, transfer, demote, suspend, discharge or terminate public employees; determine qualifications for employment ...)
 - The only restriction on the employer's unfettered right to manage the enterprise is when there is express language in the CBA allowing for it, otherwise management retains the right to manage. (the "traditional management view is that management has reserved the right to manage unless it has limited its right by some **specific** provision of the labor agreement.")
 - One of the reserved management rights is to hire, fire and manage its employees.

Laboring Through the Process of Collective Bargaining

- B. Past Practices
 - "Zipper" Clauses
- C. Dues Deduction
- D. Reductions in Force
- E. "Bargaining: the impact of professional and instructional decisions made by the [Public School] Employer." N.M. Stat. Ann. § 10-7E-17D (1978).
- F. See *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958) (terms and conditions of employment are limited to include only issues that settle an aspect of the employment relationship between employer and employees contained in the CBA or that will be in a negotiated CBA)

Laboring Through the Process of Collective Bargaining

IV. Dispute Resolution

A. Grievance Procedures

- Binding Arbitration – N.M. Stat. Ann. § 10-7E-17(F) (1978)
- *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009),
- U.S. Supreme Court-5-4 Decision
 - provision in CBA that clearly and unmistakably required union members to arbitrate ADEA claims was enforceable

Laboring Through the Process of Collective Bargaining

- Courts must place CBAs on equal footing with all other contracts. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006). As such, the Arbitrator's decision must "draw its essence" from the labor contract itself. *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-99 (1960). In addition, the arbitration decision may not violate explicit public policy as set forth by the applicable statutes, regulations and common sense. See *Paperworks v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (the court may vacate an arbitration award if it creates "any explicit conflict with other 'laws and legal precedents' rather than [assessing] 'general considerations of supposed public interests.'" (quoting *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 766 (1983)).
- See *Trustees of Sw. Multi-Craft Health & Welfare Trust Fund v. IAP World Servs. Inc.*, 2008 WL 5573072, at *5 (D.N.M. Aug. 28, 2008) ("Generally, the intention of the parties to an unambiguous collective bargaining agreement must be gleaned from its four corners.") (citing *Manning v. Wiscombe*, 498 F.2d 1311, 1313 (10th Cir. 1974))

Laboring Through the Process of Collective Bargaining

- Board as final level of grievance process
 - CCSD v. CCEA, New Mexico Court of Appeals
 - June 21, 2016
 - Statutory Authority vs. CBA bargaining
 - Does the Board have authority to hear termination and discharge hearings

Laboring Through the Process of Collective Bargaining

- Prohibited Practices Complaints
 - Broad use to address individual employment issues;
 - Used in political process to influence local school board;
 - Complaints against local superintendent
- Election of Remedies
 - What does your CBA say?
 - HRB/EEOC
 - PELRB

Questions



- Thank you

11

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XI.

WHEN THE GAVEL STRIKES: Conducting Effective and Legally Compliant School Board Meetings

Presenters:

**Patricia Salazar Ives
Carol S. Helms**

Cuddy & McCarthy, LLP



**WHEN THE GAVEL STRIKES:
CONDUCTING EFFECTIVE AND LEGALLY-COMPLIANT
SCHOOL BOARD MEETINGS**

Prepared and presented by
Carol S. Helms and Patricia S. Ives



CUDDY & MCCARTHY, LLP
Attorneys at Law

1

**NEW MEXICO OPEN MEETING ACT (OMA)
NMSA 10-15-1 THROUGH 10-15-4**

AGENDA

- I. Brief introductory remarks relevant to all meetings of the Board
- II. Before the meeting requirements
- III. During the meeting requirements
- IV. After the meeting requirements
- V. Invalid Actions; standing
- VI. Criminal penalties

2

I. INTRODUCTORY REMARKS

KEY WORDS: OPEN AND PUBLIC

- “[I]t is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.”
- “The formation of public policy or the conduct of business by vote shall not be conducted in closed meetings.”
- “[A]ll persons desiring shall be permitted to attend and listen to the deliberations and proceedings.”

NMSA 10-15-1 A

3

REGULAR, SPECIAL AND EMERGENCY MEETINGS

Any meeting where a quorum of the Board “held for the purpose of formulating public policy, ... discussing public business or for the purpose of taking action within the authority of or the delegated authority of any [public body] are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.” NMSA 10-15-1 B.

Accordingly, this provision applies to three recognized types of Board meetings: regularly-scheduled and convened Board meetings, special Board meetings and emergency Board meetings.

4

EMERGENCY MEETING

“Emergency” refers to unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body.

Forgetting or oversight, in and of itself, is not an emergency.

“Within ten (10) days of taking action on an emergency matter, the public body shall report to the attorney general’s office the action taken and the circumstances creating the emergency.”

The reporting requirement is waived upon the declaration of a state or national emergency.

5

BOARD PRESIDENT

- Recognize speakers
- No private conversations
- Permit both sides to be heard
- Restate motions
- Announce vote or decision

Maintain order

6

SUCCESSFUL BOARD MEETING

- ✓ Proper notice
- ✓ Organized agenda
- ✓ Orderly progress through agenda
- ✓ Thoughtful discussions
- ✓ Airing of both sides
- ✓ Legal compliance
- ✓ Prompt drafting of minutes

7

A SUCCESSFUL MEETING

- Recognize speakers
- No private conversations
- Permit both sides to be heard
- Restate motions
- Announce vote or decision

Maintain order

8

II. BEFORE THE MEETING

- Familiarize yourself with the OMA
- Familiarize yourself with the District's OMA Board Resolution
- Familiarize yourself with the Board's adopted rules of order for conducting a meeting
- Commit to being a stickler for following the OMA to the letter
- Consider a half-day annual in-District OMA training with legal counsel

9

OVERVIEW OF CHAPTER 10, ART. 15, SEC. 1

- A. Public
- B. Quorum for purpose of formulating public policy
- C. Telephone participation
- D. Notice requirements (Board Resolution)
- E. Recess & reconvene
- F. Agenda - Notice requirements; Special & Emergency Mtgs. (emergency defined)
- G. Minutes
- H. Exceptions – closed sessions limited
- I. Closing/convening a closed meeting

10

NOTICE REQUIREMENTS

ANNUAL DETERMINATION – BOARD RESOLUTION

- Any meeting
 - for discussion or adoption
 - proposed resolution, rule, regulation or formal action
 - majority or quorum
 - and any closed meeting, only after
- Reasonable notice for your Board
 - FCC-licensed broadcast stations *and*
 - Newspapers of general circulation *that have provided a written request for such notice.*

11

TELEPHONE CONFERENCES

Permissible if authorized in annual OMA Board Resolution, and

- Participant can be identified and
- All are able to hear phone participant.

**Telephonic participation should be used if necessary; not as a matter of course.*

12

NOTICE & AGENDA

- Notice posted per OMA Board Resolution, consistent with OMA requirements
 - Regular Board Meeting
 - Special Board Meeting (72 hours notice requirement)
 - Emergency Board Meetings (see next slide)
- Notice shall include a list of specific items of business to be discussed or transacted or information on how public may obtain a copy of Agenda
- Action limited to items appearing on the posted Agenda

13

CONSENT AGENDA

- Specific list of topics
- Routine matters only
- No discussion of items
- One vote
- Any item may be pulled for individual consideration

14

III. DURING THE MEETING

Slide 10 does not directly address what happens during the meeting, but suffice it to say, all parts of the OMA listed there are related to the business of the Board. Most Boards have an Agenda that includes in some form or another, a basic outline of the start of the meeting, the business of the meeting (discussion items and action items), perhaps an Executive Session, and ultimately, adjournment. This session focuses more on the nitty-gritty details of the ever-so-important and ever-so-scrutinized details of the continuum of a meeting from before through after, including the nitty-gritty of Executive Session.

15

EXECUTIVE (CLOSED) SESSION

“Subsection H prescribes the circumstances under which certain meetings or portions of meetings are not subject to the open meetings and minute-taking requirements of the Open Meetings Act. Because the basic policy established by the Act favors open meetings, the Act must be strictly followed when meetings are to be closed. As a general rule, meetings may only be closed when the matter to be considered falls within one of the enumerated exceptions defined in the Act[.]”

~ *A Compliance Guide for New Mexico Public Officials and Citizens*, Hector Balderas, Attorney General, Eighth Edition, 2015, Commentary, p. 19.

16

TWO PROCEDURES FOR CLOSED MEETING

1. Closing an open meeting
 - Majority vote of quorum after
 - Motion stating authority for closure and subject to be discussed stated with **“reasonable specificity”** in the motion
 - Roll call vote
2. Holding a closed meeting separate from an open meeting
 - Public notice appropriate under the circumstances
 - Stating law authorizing closed session (exemption)
 - Subject to be discussed stated with “reasonable specificity”

17

THE REQUIREMENTS FOR GOING INTO EXECUTIVE SESSION

NMSA 10-15-1 I (1) states “[the] authority for the closure and subject to be discussed shall be stated with reasonable specificity in the motion calling for the vote on a closed meeting; the vote shall be taken in an open meeting; and the vote of each individual member shall be recorded in the minutes.”

- ✓ Authority for closure
- ✓ Reasonable specificity without compromising personal confidentiality
- ✓ Roll call vote recorded in minutes

18

THE REQUIREMENTS FOR GOING INTO EXECUTIVE SESSION (CONT.)

The Commentary in the Attorney General's guidance document states: "The subject announced will comply with the 'reasonable specificity' requirement if it provides sufficient information to give the public a general idea about what will be discussed without compromising the confidentiality conferred by the exception."

~ *A Compliance Guide for New Mexico Public Officials and Citizens*, Hector Balderas, Attorney General, Eighth Edition, 2015, Commentary, p. 31.

Example 1: "I move that the [board] convene in closed session as authorized by the limited personnel matters exception to discuss possible disciplinary action against an employee."

Example 2: "I move that the board discuss the case of X vs. the [Board] with the board's attorney in executive session as authorized by Section 10-15-1(H)(7) of the OMA."

19

"REASONABLE SPECIFICITY" SCENARIO 1

Board Member A states "I move that the Board adjourn to executive session to discuss whether Jake Jones should be long-term suspended, expelled, or worse."

- Is this a matter to which an exception applies?
Yes; to discuss personally identifiable information about an individual student.
- Is there a violation of the OMA?
Yes; no exemption is identified, *too much* specificity in the notice.

Compare to "Pursuant to NMSA 10-15-1 H(4), the Board will adjourn to executive session to discuss a student discipline issue."

- Violation? No. Authority for closure and reasonable specificity.

20

"REASONABLE SPECIFICITY" SCENARIO 2

Board Member C states "I move we adjourn to closed session for two limited personnel matters because OMA says we can."

- Is this a matter to which an exception applies?
Yes; to discuss limited personnel matters.
- Is there a violation of the OMA?
Yes; insufficient specificity.

Board members talk about the 2 different issues involving 2 employees, and then generally chat about their collective discontent with 2 other employees.

Violation? Yes, several!

21

COMPARE:

"Limited personnel matter" to

"The Board will convene in closed session pursuant to NMSA 10-15-1 H 2 to discuss two limited personnel matters; specifically: (1) the circumstances surrounding the extended administrative leave with pay for a certified instructor; and (2) the qualifications of the applicants for the position of superintendent."

Then the Board must discuss only the 2 personnel issues specifically delineated in the motion to go into executive session.

22

EXEMPTIONS OMA § H (1) – (10)*

Section A, B and G of the OMA do not apply to:

- (2) *Discussion* about limited personnel matters re: hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any public employee
- (3) *Deliberations* in connection with an adjudicatory proceeding

***Note: Subsections (1), (9) and (10) do not apply to school boards.**

23

EXEMPTIONS CONT.

- (4) *Discussion* re: personally identifiable information re: individual students
- (5) *Discussion* of listed collective bargaining issues
- (6) *Discussion* of limited listed procurement issues
- (7) Meeting *with the board's attorney* re: threatened or pending litigation in which the board is or may become a participant
- (8) *Discussion* of the purchase, acquisition or disposal of real property or water rights

24

STATEMENT REGARDING CLOSED DISCUSSIONS

“Following completion of any closed meeting, the minutes of the open meeting that was closed, or the minutes of the next open meeting if the closed meeting was separately scheduled, shall state that the matters discussed in the closed meeting were limited only to those specified in the motion for closure or in the notice of the separate meeting. This statement shall be approved by the [Board] under Subsection G of this section as part of the minutes.”

~ NMSA 10-15-1 J.

25

RECESS & RECONVENE

- Prior to recessing determine date, time and place of continuation
- Immediately after recessing, post notice of date, time and place for the reconvened meeting
- On or near door of place of original meeting
- Limited to matters on the agenda of the original meeting

26

STILL DURING THE MEETING, BUT CONTINUING AFTER - MINUTES

At a minimum the Minutes shall include:

- Date, time and place of meeting
- Names of members in attendance and those absent
- Substance of proposals considered
- Record of any decision
- Votes taken that show how each member voted
- Verbatim not required; description may be concise, but accurate

27

IV. AFTER THE MEETING – MINUTES CONT.

- Draft prepared within 10 working days of meeting
- Draft must be available for public inspection, clearly marked “not the official minutes”
- Board must approve, amend or disapprove minutes at the next meeting of a quorum
- Minutes not official until approved

28

V. INVALID ACTIONS; STANDING

Anyone, but . . . Complaints more frequently filed by:

- Media/Foundation for Open Government (“FOG”)/or other “sunshine watch” entity
- Parents/school employees/minority Board members displeased with controversial decisions made
- Any citizen; however,
 - individuals (or entities) may seek judicial enforcement of a perceived OMA violation **only** if the individual/entity **first** provides notice of the claimed violation to the public body and the public body has denied or not acted on the claim within 15 days.

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29

WHAT ACTIONS MAY BE TAKEN TO ENFORCE THE OMA? (SLIDE 1 OF 3)

- **Mandamus petition** to compel compliance with a mandatory nondiscretionary legal duty
- **Petition for injunctive relief** to prevent or enjoin a prospective violation of law
- **Petition for recall of Board members** to remove one or more Board members for misfeasance or malfeasance

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30

WHAT ACTIONS MAY BE TAKEN TO ENFORCE THE OMA? (SLIDE 2 OF 3)

- *Courts have authority to invalidate actions taken in violation of the OMA based upon Section 10-15-3(A), which reads:* “No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of [the Open Meetings Act].”
- *In addition, Section 10-15-3(D) states:* “No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings.”

WHAT ACTIONS MAY BE TAKEN TO ENFORCE THE OMA? (SLIDE 3 OF 3)

- **Section 10-15-4 states:** “A person violating any of the provisions of Section 10-15-1 or 10-15-2 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense.”
- Thus, the Attorney General or District Attorney can file criminal charges for OMA violations. **Such prosecutions have occurred!**

WHAT RELIEF CAN BE AWARDED IF ENFORCEMENT ACTION IS TAKEN? (SLIDE 1 OF 2)

- District court can issue a writ of mandamus, an injunction, or a declaratory judgment, if a violation is found.
- “The Court **shall** award costs and reasonable attorneys’ fees to any person who is successful in bringing a court action to enforce the provisions of the [OMA].” NMSA 1978, § 10-15-3(C)

WHAT RELIEF CAN BE AWARDED IF ENFORCEMENT ACTION IS TAKEN? (SLIDE 2 OF 2)

- If the public body prevails, it **shall be** awarded court costs, and **shall be** awarded reasonable attorneys’ fees from the plaintiff if the plaintiff brought the action **“without sufficient information and belief that good grounds supported it.”** NMSA 1978, § 10-15-3(C)
- Awards of attorneys’ fees to public bodies are rare.

WHAT TYPICALLY RESULTS FROM A COMPLAINT FILED WITH THE ATTORNEY GENERAL ALLEGING AN OMA VIOLATION?

- AG sends a letter to the public body notifying it of the complaint and requesting a response, usually within 20 or 30 days.
- The School Board then has the opportunity to submit its response and to take corrective action, if necessary.

WHAT SHOULD THE SCHOOL BOARD DO IF IT REALIZES THAT IT HAS VIOLATED THE OMA? (SLIDE 1 OF 5)

The appropriate response depends upon whether the Board first learns of the violation through a complaint from the Attorney General’s office, or whether the violation comes to the Board’s attention as a result of a complaint by a citizen.

WHAT SHOULD THE SCHOOL BOARD DO IF IT
REALIZES THAT IT HAS VIOLATED THE OMA?
(SLIDE 2 OF 5)

- If the Board realizes that an inadvertent violation has occurred, even before a formal complaint from the AG's office is received, the Board should cure the violation by resolution immediately.
- Doing so probably will require a special meeting (agenda item should read: "Discussion and Board action on resolution to correct possible violation of the Open Meetings Act.").

WHAT SHOULD THE SCHOOL BOARD DO IF
IT REALIZES THAT IT HAS VIOLATED THE
OMA? (SLIDE 3 OF 5)

- The Board President should read the entire corrective resolution in public before the Board votes on it.
- If the Board takes this action right away, the Board is then prepared to respond to a letter received later from the Attorney General by submitting the resolution already adopted. The AG's action is then likely to be in the nature of "okay, but don't do it again."

WHAT SHOULD THE SCHOOL BOARD DO IF IT
REALIZES THAT IT HAS VIOLATED THE OMA?
(SLIDE 4 OF 5)

- Under Section 10-15-3(B), if the error is brought to the Board's attention by a citizen or the media, the Board must take action to correct the violation within 15 days of the notification received from the citizen/media, in order to forestall district court enforcement.

WHAT SHOULD THE SCHOOL BOARD DO IF IT
REALIZES THAT IT HAS VIOLATED THE OMA?
(SLIDE 5 OF 5)

In addition, if a corrective resolution is adopted, note that Section 10-15-3(B) also states:

"A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred."

So if a citizen, a reporter, or a School Board member spoke up at the meeting at which the violation happened, the Board must acknowledge those comments in its action to correct it.

VI. CRIMINAL PENALTIES

"Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense."

FURTHER INFORMATION ABOUT THE OMA

Open Meetings Act Compliance Guide, published by the New Mexico Attorney General's Office – available online at:

<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf>

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43

XII.

THE TOP 10 WAYS TO AVOID AN EEOC COMPLAINT

Presenters:

**R. Daniel Castille
Evelyn A. Peyton**

Cuddy & McCarthy, LLP

The Top 10 Ways to Avoid an EEOC Complaint

NMSBA School Law Conference
June 1-3, 2017
R. Daniel Castille
Evelyn A. Peyton
Cuddy & McCarthy, LLP

Cuddy & McCarthy, LLP

[1]

State and Federal Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act (ADA)
- Age Discrimination in Employment Act (ADEA)
- Enforced by the EEOC
- Protect against discrimination on bases of:
- New Mexico Human Rights Act – Enforced by the Human Rights Bureau of the Dept. of Workforce Solutions.
- Protects against discrimination on bases of:

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[2]

- FEDERAL LAW
 - Race
 - Color
 - National origin
 - Religion
 - Sex
 - Age (over 40)
 - Genetic information
 - Pregnancy
 - Disability
 - Harassment
 - RETALIATION
- STATE LAW
 - Race
 - Color
 - National origin
 - Religion
 - Ancestry
 - Sex
 - Age (over 40)
 - Physical and mental handicap
 - Serious medical condition
 - Spousal affiliation
 - Sexual orientation
 - Gender identity
 - Harassment
 - RETALIATION

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[3]

Discrimination Illegal in Broad Aspects of the Employment Process

- Job Advertisements
- Recruitment
- Applications and Hiring Procedures
- Job Assignments and Promotions
- Pay and Benefits
- Discipline and Discharge
- Terms and Conditions of Employment
 - Granting breaks
 - Approving leave
 - Assigning work stations
 - Disciplinary Interventions
 - Other terms or conditions of employment

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[4]

Basic Theories of Discrimination

- Disparate Treatment
- Disparate Impact
- Harassment
- Failure to Accommodate an Individual's Disability

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[5]

Why Avoid Discrimination Complaints?

- Employee morale suffers if employees feel they are not treated with respect and dignity.
- Expensive, time-consuming, stressful, disruptive of school operations.
- Employer liability/exposure to large punitive damages awards.
- Increased work load and lost productivity = More work for you!
- Your reputation in the organization may be impaired if you are the target of an EEOC charge or named in a lawsuit.
- Direct or indirect legal costs may affect your budget.

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[6]

Why Avoid Discrimination Complaints? (cont'd.)

- Remedies which employee may seek:
 - Re-Hiring or reinstatement
 - Back-pay
 - Front pay (when reinstatement is not possible or delayed)
 - Reasonable accommodation
 - Attorneys' fees
 - Expert witness fees
 - Court costs
- If intentional discrimination found, damages can include:
 - **Compensatory**- actual losses, future losses, mental anguish
 - **Punitive** - if act with malice or deliberate indifference
- Non-monetary Sanctions: Notice of Noncompliance or violation
- Discontinue actions, or corrective or preventative actions, continued monitoring by EEOC
- **SOME DISCRIMINATION COMPLAINTS CANNOT BE AVOIDED.**

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[7]

Big Picture Ways to Avoid Discrimination Complaints vs. How to deal with what is happening right now

- Create a Culture that Values Diversity
- Respond Appropriately to Current Situations (i.e., don't overreact to a crisis)

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[8]

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#1. Adopt, Implement and Enforce Anti-Discrimination and Harassment Policies and Procedures (and know them well!)

- General statement of commitment to equal employment opportunity for all employees and applicants in Personnel Handbook
- Expressly prohibit discrimination, harassment or retaliation
- Designate an official to receive complaints (and effective avenues of complaint)
- Clear investigation procedures and prompt timelines
- Complainants and witnesses protected from retaliation or reprisal/keep information confidential to the extent possible
- Provide examples of prohibited harassment (not just sexual harassment)
- State that complaining employee will be informed of results of investigation and remedial actions implemented
- Follow the Policy and Procedures
- Make sure the Policy is embraced at the highest levels of District, including by the School Board

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[9]

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#2. Train Supervisors and all Employees (the Policy is not just a piece of paper)

- Train HR managers, supervisors and site administrators. Periodically inform all employees of requirements and expectations of EEO laws and District policy
 - Educate employees on responsibility to comply with EEO laws
 - Advise how to recognize and report discriminatory behavior, and to promote a respectful workplace
 - May be a defense to District liability
- Review on acceptable pre-employment inquiries
- Discuss examples of harassment vs. responses to poor performing employee
- Do not limit harassment training to solely sexual harassment
- Educate on retaliation issues
- Sensitize to issues dealing with disability claims

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[10]

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#3. Establish Neutral and Necessary Job Qualifications

- Analyze the duties, functions and competencies relevant to particular jobs
- Establish neutral and objective job-related qualifications to avoid subjective employment decisions, based on personal stereotypes or hidden biases
- Describe the actual requirements of the job/Divide functions into major and minor functions
- Don't exaggerate physical requirements, but assure that job descriptions include an accurate listing of essential job functions
- Assess whether job requirements, even if neutral or evenly applied, adversely impact employees based on protected characteristics
- Ensure **selection criteria** do not disproportionately exclude certain racial groups unless the criteria are valid predictors of successful job performance and meet the employer's business needs.
- Make sure **promotion criteria** are made **known**, and that **job openings** are **communicated** to all eligible employees.

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[11]

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#4. Don't Make Inappropriate or Illegal Pre-Employment Inquiries

- Limit hiring inquiries to those essential to determine qualification for the job. Employers should not request information that discloses or tends to disclose an applicant's race, sex, national origin, age, religion, disability, etc...
- **YOU ARE EXPRESSLY PROHIBITED FROM MAKING PRE-OFFER INQUIRIES ABOUT DISABILITY**
- Questions not directly about job qualification may be used as evidence of intent to discriminate:
 - Avoid questions about an applicant's religious affiliation, such as place of worship, days of worship, and religious holidays. You should not ask for references from religious leaders, e.g., minister, rabbi, priest, imam, or pastor.
 - **DO NOT ASK** whether applicant is pregnant or is planning a family in the next few years; Marital status of applicant or whether applicant plans to marry; Number and age of children or future child bearing plans; Child care arrangements; Employment status of spouse.
 - Are you a U.S. Citizen? What is your native language?
 - How old are you? How much longer do you plan to work before retirement?
 - What is your gender?
 - Do you have any disabilities? Have you had any recent or past illnesses or operations?
 - Have you ever filed an EEOC charge against a past employer?

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[12]

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#4. Pre-employment inquiries about disability (cont'd.)

- Employers are permitted prior to a job offer to ask limited questions about reasonable accommodation if they reasonably believe that the applicant may need accommodation because of an obvious or voluntarily disclosed disability, or where the applicant has disclosed a need for accommodation.
- The employer may not ask any questions about the nature or severity of the disability prior to a hiring offer. However, after making a conditional job offer, an employer may ask questions about the prospective employee's ability to perform the work described or its essential job functions. The employee may also require a medical examination, as long as all individuals selected for the same job are asked the same questions or take the same examination.

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(13)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#5. Take Complaints Seriously and Investigate Thoroughly

- Don't prejudge merits or jump to conclusions (however tempting) in either direction
- Investigate promptly, but not hastily or dismissively
- Interview complainant, possible witnesses. Talk to the alleged discriminator/harasser last
- Ask questions in a way that is neutral, not accusatory or impartial
- Ask open-ended questions
- Advise alleged discriminator that no retaliatory action may be taken against the complainant or anyone who assisted in the investigation
- Advise complainant to report perceived retaliation
- Have there been prior allegations/findings against the accused harasser?
- What action does complainant want employer to take?

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(14)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#5. Investigations (cont'd.)

- Determine whether immediate, temporary action should be taken to separate parties during investigation – administrative leave, temporary transfer or new supervisor.
- Document your actions: always add a memo to the file, keep detailed notes of meetings, give written warnings and terminations
- Consider whether to have a witness present during interviews
- Maintain confidentiality to extent possible
- If discrimination/harassment found, impose appropriate sanctions and notify complainant of action taken.
- If no discrimination/harassment found, advise the parties, and remind of the non-discrimination/non-retaliation obligations.

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(15)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#6. Avoid Retaliation

- Unlawful retaliation occurs when:
 - Employee is subjected to adverse action for opposing or complaining about prohibited discrimination, participating in an employment discrimination proceeding, requesting a reasonable accommodation based on disability or religion
- Adverse Actions Include:
 - Termination, refusal to hire, denial of promotion, transfer to less favorable position
 - Threats, shunning, unjustified negative evaluations or references, increased supervision
 - Any action likely to deter reasonable people from making a good faith discrimination claim
 - New Mexico adopted Whistleblower Protection Act in 2008

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(16)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#6. Retaliation (cont'd.)

- Protects people closely associated with complainant (such as a spouse, key witnesses)
- Protects people who refuse to obey an order reasonably believed to be discriminatory
- Complaining employee still has to perform job and follow legitimate workplace rules

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(17)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#6. Retaliation (cont'd.)

- 38% of all EEOC claims alleged retaliation in 2012– Most common type of discrimination alleged
- Retaliation claims more likely to be successful
- “Anti-retaliation laws require almost super-human restraint.”
- Human nature makes it difficult for supervisor to treat subordinate as if no complaint made, but that is what law requires.

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(18)

THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#6. Retaliation (cont'd.)

- Engage with the complainant proactively
- Explain retaliation and offer to assist if problems arise
- Document discussions
- Follow up to ensure no retaliatory incidents
- Consider protective measures
 - Should supervisor/evaluator/job location/work schedule be changed
- Be careful that changes don't appear retaliatory. Ask for buy-in from employee and document employee's agreement to change

(19)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#6. Retaliation (cont'd.)

- Monitor later employment actions to ensure retaliation plays no role.
 - Is proposed action consistent with past practice for similar performance or misconduct issues?
 - Is there sufficient documentation?
 - Is discipline imposed for conduct that was previously acceptable?
 - Would you treat your "best" employee this way?
 - How would this look to an unbiased observer?

(20)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#7. Engage in the ADA Interactive Process

- A **Reasonable Accommodation** requires that steps be taken to enable a qualified individual with a disability to perform the essential functions of a job.
- This includes an employer making reasonable efforts to assist the employee and communicate with employee in good faith.
- This is the "interactive process" by which employers and employees work together informally to assess whether the disability can be reasonably accommodated.
- It's a dialogue. Engage in the dialogue in good faith to determine how best to enable the individual to do the job.
- Employer required to provide a reasonable accommodation, unless doing so would pose an undue hardship or direct threat.

(21)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#7. What triggers the interactive process? (cont'd.)

- Employee requests an accommodation
 - Request doesn't have to be in writing or use "magic words," like "reasonable accommodation" or "disability."
 - At a minimum, employee must request a change and link the request to a disability (unless disability is obvious, or disability prevents employee from requesting an accommodation).
- Employee also has a duty to engage in the interactive process. Do so promptly.

(22)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#7. Interactive Process (cont'd.)

- Generally requires employers to:
 - Analyze job functions to establish the essential and nonessential tasks.
 - Identify obstacles to job performance by discussing with employee the actual disability related limitations
 - Explore various types of accommodations and alternatives if the requested accommodation is burdensome.
- Not required if no accommodation would enable employee to perform essential functions of the job or if the only accommodation is that another employee must perform a substantial portion of the disabled employee's work.

(23)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#7. Interactive Process (cont'd.)

- Document receipt of request for an accommodation
- Talk to person about extent of impairment
- If disability is not obvious, may request more detailed information or report from the treating physician and may request medical testing relevant to a particular accommodation.
- May ask medical providers to confirm whether individual has a disability and whether and what accommodations would enable the person to perform the essential functions.
- You may seek an Independent Medical Evaluation (IME) (at the School District's cost) if the treating physician's report is not helpful to the process.

(24)

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#7. Interactive Process (cont'd.)

- Discuss the individual's accommodation preference and alternatives
- Document discussion and decision about the accommodation request
- The obligation to provide a reasonable accommodation is ongoing and doesn't end after making one reasonable accommodation.

[25]

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#8. Nip Problems in the Bud/Insist on Professional Conduct/Address Harassment

- Don't let collegial banter devolve into, or give license to, lewd, disgusting, racially, sexually inappropriate comments.
- Hostile Work Environment
- "A smattering of incidents" or "stray remarks"
- *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, 143 N.M. 506, 511, 177 P.3d 1080, 1085
- Harassment "is actionable ... when the offensive conduct becomes so severe and pervasive that it alters the conditions of employment in such a manner that the workplace is transformed into a hostile and abusive environment for the employee."
- Must look at the totality of the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The work environment must be both objectively and subjectively offensive—one that a reasonable person would find hostile or abusive and one that the employee did perceive as being hostile or abusive.

[26]

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#9. Create a Culture that Values Diversity

- Implement a strong EEO policy that is EMBRACED at the top levels. Does the School Board support it? Let the workforce know that this is always a priority.
- Promote an **inclusive culture** in the workplace by fostering an environment of professionalism and respect for personal differences.
- Recruit, hire, and promote with EEO principles in mind, by implementing practices designed to widen and **diversify the pool of candidates** considered for employment openings, including openings in upper level management.
- Monitor for EEO compliance by **conducting self-analyses** to determine whether current employment practices disadvantage protected classes, treat them differently, or leave uncorrected the effects of historical discrimination in the District.
- Ensure **selection criteria** do not disproportionately exclude certain racial groups unless the criteria are valid predictors and meet the employer's business needs.

[27]

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#9. A Culture of Diversity (cont'd.)

- Monitor compensation practices and performance evaluation systems for patterns of potential discrimination. Ensure consistency regardless of the evaluator
- Develop the potential of all employees with EEO principles in mind. Provide training and mentoring that provides people of all backgrounds the opportunity, skill, experience and information necessary to perform well and to rise to upper level jobs
- Have good, well-documented reasons for terminating even at-will employees

[28]

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THE TOP TEN WAYS TO PREVENT AN EEOC CHARGE

#10. Document! Document! Document!

Keep careful and detailed records, notes, memos of interactions with employees making a complaint (or who may be likely to make a complaint). But don't wait to construct the perfect memo!

And finally, when you perceive that a claim is coming, call your lawyer for guidance at an early stage!

[29]

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QUESTIONS?

[30]

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[31]

XIII.

**BULLYING BEHAVIOR:
Where Are We In 2017?**

Presenters:

**Charlotte H. Hetherington
Laura Sanchez- Rivét**

Cuddy & McCarthy, LLP

Bullying Behavior: Where are We in 2017?

NMSBA School Law Conference
Albuquerque, New Mexico
June 2, 2017
Charlotte H. Hetherington and
Laura E. Sanchez-Rivét



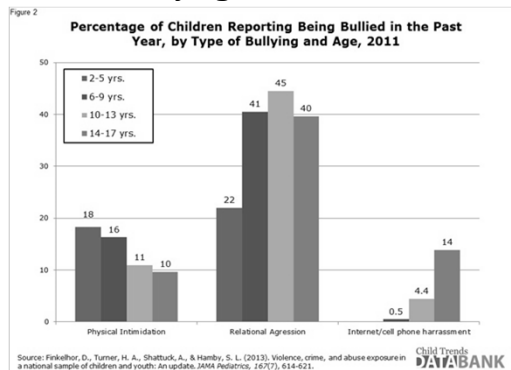
[1]

Presentation Agenda

- Overview of Statistics
- Bullying Between Students
- Off-Campus Bullying
- Workplace Bullying
- When Bullying Becomes Discrimination
- Prevention Tips

[2]

Student Bullying



[3]

Risk Factors for Bullying

- Prior history of violence
- Delinquency
- Drug, alcohol use
- Gang involvement
- Poor family functioning
- Poor grades in school
- Poverty
- Mental Illness



[4]

Bullying Statistics

- 2007 National Crime Victimization Survey School Crime Supplement (biennial report).
- Students 12-18 years of age.
- Bullying victimization, bullying victims and bullying victims' schools.

[5]

Bullying Statistics: Victimization

- Bullying" statistics showed:
 - Physical Threat = 53%
 - Destruction of Property = 51%
 - Physical Touching = 46%

[6]

Bullying Statistics: Characteristics of Bullying Victims

- Grade level
 - higher percentage in lower grades
- Household income
 - higher income, the lower the frequency
- Females more than males
- Non-Hispanic (African-American) highest racial group

[7]

Bullying Statistics: Bullying Victims' Schools

- Public schools report bullying more than private;
- Schools with staff monitoring hallways had same percentage bullying reported;
- Schools without student code of conduct were 7% higher.



[8]

State Regulations

- NMAC 6.12.7.8
 - Cyberbullying and Bullying policies and programs in effect by 2013-14.
 - Anti-bullying policy must include:
 - Procedures for reporting incidents of cyber/bullying
 - Consequences for knowingly making false reports
 - A requirement that staff report incidents
 - A requirement that anti-bullying be included as part of the health education curriculum
 - Must investigate
 - Must train staff to recognize cyber/bullying

[9]

The OCR is going to ask these questions.

- What happens when an incident of bullying or cyberbullying is reported to administration?
- What procedure is in place for investigating and documenting the investigation of these reports?
- Does the school culture encourage students to recognize and report acts of bullying?
- Are teachers and administrators trained on the difference between bullying and teasing?
- How often does training occur?
- Is there a protocol for handling reports? Who is responsible?

[10]

Bullying Behavior Off-Campus

- Can the school show:
 - The speech "materially and substantially interfered" with the educational process; or
 - The speech is reasonably forecasted to materially and substantially interfere with the educational process.
 - Courts differ on standards for "substantial disruption"
 - OCR will ding you for doing nothing.
 - Have a social media policy.

You can and should impose discipline for behavior occurring off-campus that interferes with the educational process.

[11]

What is Workplace Bullying?

- There is no "Legal" definition but "you know it when you see it".
- Workplace bullying has been described as: Repeated mistreatment of individuals or groups using persistent aggressive or unreasonable behavior, through tactics like verbal, nonverbal, psychological, physical abuse, and humiliation

[12]

Allegation of harassment based on disability

- *P.R. v. Metropolitan School District of Washington Township* (S.D. Ind. Nov. 1, 2010)
- May 2007: instant message outside of school calling her names;
- Fall 2007: plaintiff's cousin comments about disability;
- Fall 2008: Coach asks about student's disability.



[13]

Harassment Based on Disability

P.R. v. Metropolitan School District of Washington Township (S.D. Ind. Nov. 1, 2010)

- 5 part test
- 1) Student has a disability
- 2) Student harassed because of disability
- 3) Question of Fact: Severe or pervasive harassment
- 4) School knew about harassment
- 5) School was NOT deliberately indifferent

[14]

What is Workplace Bullying, continued

- Workplace bullying is the repeated less favorable treatment of a person by another or others in the workplace. Bullying is persistent unwelcome behavior, mostly using unwarranted or invalid criticism, fault finding, exclusion or isolation

[15]

How and when does bullying occur?

- Workplace bullying often manifests as abusive and offensive conduct or behavior that is humiliating, intimidating, or threatening.
- Bullying can occur at all levels of an organization.
- Either men or women can be perpetrators; however, most bullying occurs amongst Verbal bullying often leads to physical fights or alternations
- same-sex employees

[16]

Impact of Workplace Bullying

- In a survey conducted by the Workplace Bullying
- Institute in 2010, 35% of workers in the United States reported being bullied at work. Some estimates show that as many as 14 million adults are bullies in the workplace each year.
- Workplace bullies have an extremely negative impact on productivity and retention, and can destroy the work environment.
- Workplace bullying can lead to workplace violence and ultimately expose employers to legal liability.

[17]

Workplace Bullying Behaviors

Bullying behaviors may include:

- Personal threats
- Verbal abuse (*i.e.* derogatory comments, yelling, profanity)
- Spreading malicious rumors, gossiping, or innuendo that is false
- Workplace humiliation
- Undermining or deliberately impeding someone else's work
- Removing areas of responsibility without cause
- Constantly changing work guidelines

[18]

Workplace Bullying Behaviors, continued

- Unwarranted or underserved punishment
- Intimidation tactics such as hovering or startling
- Withholding necessary information
- Purposeful exclusion of others from meetings, discussions, or training
- Excessive demands, Impossible deadlines, or unreasonable requests
- Persistent criticism not called for by performance
- Pestering, spying, stalking, or inappropriate surveillance

[19]

Consequences of Bullying

- lower workplace productivity and efficiency
- high staff turnover with resultant increase in recruitment and induction costs, as well as down time as replacement workers are trained in their new jobs
- increased absenteeism and sick leave



[20]

Consequences of Bullying, continued

- stress related costs via the Workers' Compensation system with resultant increases in insurance premiums and/or rehabilitation costs, poor morale
- the direct cost of dealing with complaints of bullying such as the cost of counseling effected workers, costs associated with legal action, etc.

[21]

Types of Bullying that may be Prohibited by Federal EEO Law

(Equal employment opportunity law)

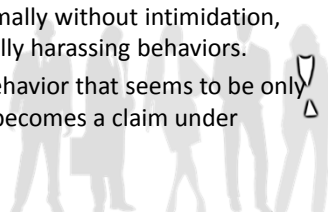
Some bullying can amount to discrimination that is illegal pursuant to federal law:

- **Title VI of the Civil Rights Act of 1964** (Title VI), which prohibits discrimination on the basis of race, color, or national origin;
- **Title IX of the Education Amendments of 1972** (Title IX), which prohibits discrimination on the basis of sex; and,
- **Section 504 of the Rehabilitation Act of 1973** (Section 504); and **Title II of the Americans with Disabilities Act of 1990** (Title II), prohibit discrimination on the basis of disability.

[22]

Federal Claims/Bullying

- Hostile Environment Sexual Harassment
- A work or learning environment which interferes with a person's ability to function normally without intimidation, fear, or sexually harassing behaviors.
- Be alert to behavior that seems to be only bullying but becomes a claim under federal law.



[23]

Federal Consequences

- When peer-to-peer bullying amounts to harassment based on race, color, national origin, sex, or disability, which is sufficiently serious that it creates a hostile environment, and such harassment is encouraged, tolerated, not adequately addressed, or ignored by school employees, federal law is triggered.
- A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.

[24]

Examples where Workplace Bullying is NOT Discrimination

- Discrimination cannot be found where bullying or harassment was based on a personality conflict and not race. See *Palesch v. Missouri Com'n on Human Rights*, 233 F.3d 560, 567-68 (8th Cir. 2000)
- Discrimination is not present where "none of the ridicule was overtly racial." See *Bolden v. PRC, Inc.*, 43 F.3d 545, 551 (10th Cir. 1994)

[25]

State Law on Workplace Bullying

- New Mexico Human Rights Act prohibits not only all discrimination prohibited by Title VII but also:
- if the employer has 50+ employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or,
- if the employer has 15+ employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity.

[26]

State Law on Workplace Bullying, continued

- While New Mexico has not yet passed a "Healthy Workplace Bill," designed to regulate workplace bullying, workplace bullies can still create liability for themselves or their employers under various state law tort claims, including:
- Intentional Infliction of Emotional Distress (IIED);
- Negligent Hiring or Retention;
- Assault, Battery, Harassment, False Imprisonment; and,
- Vicarious liability theories of tort.

[27]

Difficult Situations

- Not all rude or discourteous behavior amounts to "bullying" or actionable harassment.
- Example:
- A supervisor could be a "hard-charger" that shows results for the company, but who can be brash toward employees. An employee that has a history of sub-par performance complains that the supervisor is bullying him and it is affecting performance.
- What should the investigator do?



[28]

Difficult Situations, continued

- In this example, the investigator should consider all of the facts, including:
- How the supervisor treats all of his other employees.
- Whether the alleged bullying is the true cause of the poor performance, or whether the poor performance led to appropriate (but perhaps harsh) criticism.
- Whether the criticism was warranted.



[29]

Prevention Tips: Education & Training

- Small isolated acts of bullying or workplace misbehavior can become bullying if they are not stopped.
- The school's goal should be to educate, intervene, and correct behavior to reduce instances of bullying and provide effective remedies.
- Schools should adopt a policy prohibiting workplace bullying, listing specific prohibited behaviors.

[30]

Prevention Tips: Education & Training, continued

- Employees should be trained to immediately report all incidents of workplace bullying to the right person: Principal, 504 Coordinator, Title IX Coordinator, or School Site Committee.
- Administrators who receive reports about workplace bullying should not disregard anonymous tips, as employees that feel bullied can often be fearful of coming forward.
- Employees should be trained that they will not be retaliated against for reporting workplace bullying.

[31]

Prevention Tips: Prompt and Fair Investigation

- Administrators should investigate complaints by interviewing witnesses, gathering facts, and attempting to observe the bully in action, if possible.
- Investigators should be neutral when investigating, and refrain from labeling the incident as "bullying", or the individuals involved as bullies or victims. This helps encourages everyone to share information openly..

[32]

Prevention Tips: Prompt and Fair Investigation, continued

- If bullying is confirmed by the administrative investigation, meet with the bully and identify the unacceptable behaviors, and the school's policies regarding those behaviors. Be as specific as possible, and document the meeting and the steps for improvement
- The investigator should monitor the bully's behavior to ensure than he or she corrects the situation and does not take any retaliatory action.

[33]

Prevention Tips: Prompt and Fair Investigation, continued

- The investigator should communicate with the victim of bullying, determine whether the bullying still continues, and provide a supportive environment
- The investigator should take reasonable steps to protect the employee who reported bullying from retaliation for reporting the incident.
- The investigator should take reasonable steps to protect the employee who reported bullying from retaliation for reporting the incident

[34]

Prevention Tips: Consequences for Workplace Bullying

- Corrective efforts such as sensitivity training or other similar coaching, should be implemented, if necessary.
- If corrective efforts fail, the administration should take appropriate disciplinary action against the bully, up to and including termination.



[35]

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[36]

XIV.

**RESTRAINT:
Know When to Hold ‘Em**

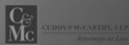
Presenters:

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Know When to Hold ‘em **Restraint and Seclusion** **House Bill 75**

Jacque Archuleta-Staehlin
Charlotte H. Hetherington
Laura Castille
Andrea Salazar
Cuddy & McCarthy LLP



House Bill 75

- Signed into law on January 28, 2017, by Governor Martinez.
- Follows general language of a bill submitted in the 2016 legislative session, which was tabled.
- Adds a new section to the public school code with specific requirements for the use of restraint and seclusion techniques.

Ripped from the headlines:



OCR Report, March 2014

- Restraint and seclusion, by disability status and race: Students with disabilities (served by IDEA) represent 12% of the student population, but 58% of those placed in seclusion or involuntary confinement, and 75% of those physically restrained at school to immobilize them or reduce their ability to move freely.

OCR Report continued

- Black students represent 19% of students with disabilities served by IDEA, but 36% of these students who are restrained at school through the use of a mechanical device or equipment designed to restrict their freedom of movement.
- <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>

- HB 75 does not just apply to students in special education.
- Administrators and security staff must know the procedures for both special and general education students.

Restraint Allowed Only if:

- › The student's behavior presents an imminent danger of serious physical harm to the student OR others;
- › AND
- › Less restrictive interventions appear insufficient to prevent the serious physical harm from occurring

If Restraint or Seclusion is used:

- › School employees shall maintain continuous visual observation and monitoring of the student during the restraint or seclusion;
- › The technique must end when the student's behavior no longer present an imminent danger of serious physical harm to the student or others

Restraint Requirements cont.

- › Shall only be used by employees who are **trained in safe and effective use of restraint** and seclusion techniques unless an emergency situation does not allow
- › The restraint **shall not** impede student's ability to breathe or speak
- › AND
- › **Shall not be out of proportion** to the student's age or physical condition

Policies and Procedures required:

- › Must be included in school safety plan;
- › However:
 - Plan may not be specific to any student – no names
 - AND
 - School safety plan team must include at least one special education expert

Reporting and Documentation:

- › After a technique has been used on a student, procedures must be followed by school personnel to include:
 - School employee must give notice to parent on the same day that the technique was used – notice may be oral or written (do both).
 - If notice cannot be provided that day – must be provided within 24 hours.

Reporting cont.

- › Within a "reasonable time" (recommend not more than 48 hours) after the incident, a school employee shall provide the parent with written documentation to include the following:
 - Information about any person, location or activity that may have triggered the behavior leading to the technique;
 - AND
 - Specifics about the behavior and precursors to it
 - AND

Reporting continued..

- ▶ The type of technique used
- ▶ AND
- ▶ The duration of the technique

Must review strategies for addressing behaviors if:

- ▶ A technique has been used two or more times during any thirty day calendar period.
- ▶ Review must include:
 - A review of the incidents where a technique was used
 - AND
 - Analysis of how future incidents may be avoided
 - Should include discussion of the need for an FBA
 - And/or BIP

Review continued

- ▶ Must hold a meeting of a student's IEP team (if special education student), BIP team or SAT within two weeks of each use of restraint or seclusion triggering the 30-day provision
- ▶ AND
- ▶ Provide recommendations for avoiding future incidents.

Law Enforcement

- ▶ If a school involves law enforcement instead of using a technique, all reporting requirements must still be followed.
- ▶ However this law does cover law enforcement, first responders or schools located within juvenile detention centers of state run juvenile facilities.

Policy

- ▶ Must include school district support and strategies for school employees to successfully reintegrate the student back into the classroom environment.

Restraint defined

- ▶ The law uses the term "restraint" to mean both mechanical and physical restraint.
 - Restraint does not include physical escort.
- ▶ Seclusion means involuntary confinement of a student in a room from which egress is prevented.
 - Seclusion does not include "time out" or other strategies where a student is separated from the larger group for the purpose of calming.

Recommendations for Compliance:

- › Develop a form for special education students. (see example)
- › Develop/revise a form for general education students. (should be included on the discipline referral form)

More Recommendations

- › After any incident of restraint or seclusion – debrief, fill out the appropriate form and contact the parent.
- › Call the nurse immediately to examine both the student and staff members involved in using a technique.
 - Nurse should document in log.
 - Take pictures of injuries if necessary.
- › Document parent contact.
- › Make adjustments immediately – do not wait for another incident to occur in a 30-day period.

Recommendations cont.

- › Maintain forms in centralized locations.
- › Track use of techniques for both special and general education students.
- › Ensure that staff are trained in techniques annually – do not allow training to lapse.
- › Ensure that adequate staff are trained in techniques to respond to both special general education incidents.
- › Train administrators and security personnel.

Recommendations:

- › Have the Board adopt a policy regarding restraint and seclusion.
 - We can send you a model policy.
- › Have written administrative procedures on handling incidents of restraint and seclusion that mirror the statute.
- › Review the PEDs guidance on restraint and seclusion

OCR Resources:

- › OCR Dear Colleague Letter on Restraint and Seclusion
- › <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>
- › OCR Fact sheet on Restraint and Seclusion
- › <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201612-504-restraint-seclusion-ps.pdf>

PED Resources

- › Guidance letter 2006
- › <http://ped.state.nm.us/ped/SEBdocuments/law/Restraint.Policy.pdf>
- › Guidance letter 2003
- › <http://ped.state.nm.us/seo/guide/dl09/TimeOutMemo2-EG.pdf>

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XV.

**MONEY CAN'T BUY HAPPINESS, BUT IT CAN BUY
A NEW ROOF, AN ACTIVITY BUS, NEW COMPUTERS ...**

Presenters:

**Patricia Salazar Ives
Charlotte H. Hetherington**

Cuddy & McCarthy, LLP

Money Can't Buy Happiness, But It Can Buy a New Roof, an Activity Bus, New Computers,

By Patricia Salazar Ives and
Charlotte Hetherington
Cuddy & McCarthy, LLP

Alternative Sources of Funding

- Mill Levies
 - Capital Improvements Taxes (SB9)
 - School Buildings Act (HB33)
- General Obligation Bonds
- Education Technology Lease-Purchase Arrangements
- Energy Savings Performance Contracts
- Lease Purchase Act Financings

Lessons From the 2017 Regular School Election

- HB 174 Failed
 - School Elections Remain Non-Partisan
 - Regular and Special Elections Continue
- Board Member Elections
 - Must reside in District
 - At-large or Districted
 - Position

Lessons From the 2017 Regular School Election

- Problems/Issues
 - Timing of Board Documents
 - Filing of Board Documents
 - Publications
 - Open Meeting Resolutions
 - Advertising/Electioneering

Lessons From the 2017 Regular School Election

- Consequences
 - Impact on Board Members
 - Impact on Tax
 - Impact on Bonds

Financings Requiring Elections

- SB 9 Tax
 - Duration
 - SB9 taxes CAN be used for:
 - Erecting, remodeling, making additions to, providing equipment for or furnishing public school buildings
 - Purchasing or improving public school grounds

SB9 Taxes Can Be Used For

- Purchasing computer software and hardware for student use in classrooms
- Purchasing activity vehicles for transporting students to extracurricular school activities
- Maintenance of public school buildings or public school grounds, including:
 - Purchasing or repairing of maintenance equipment
 - Participating in the facility information management system as required by the Public School Capital Outlay Act

SB9 Taxes Can be Used For

- Payments under contracts with regional education cooperatives for maintenance support services
- Expenditures for technical training and certification for maintenance and facilities management personnel
- But excluding salary expenses of District employees

SB9 Taxes Can be Used For

- Purchasing activity vehicles for transporting students to extracurricular school activities;
- Purchasing computer software and hardware for student use in public school classrooms; **AND**
- Purchasing and installing education technology improvements, excluding salary expenses of school district employees, but including tools used in the educational process that constitute learning and administrative resources, and which may also include:

SB 9 Taxes Can Be Used For

- satellite, copper and fiber-optic transmission, computer and network connection devices; digital communication equipment, including voice, video and data equipment; servers; switches; portable media devices, such as discs and drives to contain data for electronic storage and playback; and the purchase or lease of software licenses or other technologies and services, maintenance, equipment and computer infrastructure information, techniques and tools used to implement technology in schools and related facilities; and

SB 9 Taxes Can be Used For

- Improvements, alterations and modifications to, or expansions of, existing buildings or tangible personal property necessary or advisable to house or otherwise accommodate any of the tools listed in this paragraph

SB9 Taxes Can NOT be Used for

- Ongoing janitorial expenses (supplies)
- Building administration
- Constructing teacherages
- Salaries

HB 33 Tax Uses

- HB33 Taxes
 - Duration
 - HB33 taxes can be used for
 - A) Erecting, remodeling, making additions to, providing equipment for or furnishing public school buildings
 - B) Payments made pursuant to a financing agreement entered into by the District for the leasing of a building or other real property with an option to purchase for a price that is reduced according to payments made

HB 33 Taxes Can be Used for

- C) Purchasing or improving public school grounds
- D) Purchasing activity vehicles for transporting students to and from extracurricular activities (but not school districts with MEM > 60,000)

HB 9 Taxes Can Be Used For

- Administering the projects undertaken pursuant to A) and C) including expenditures for facility maintenance software, project oversight, and District personnel specifically related to administration of projects funded by the Public School Buildings Act provided that expenditures shall not exceed 5% of the total project costs, **AND**

HB 9 Taxes Can Be Used For

- satellite, copper and fiber-optic transmission, computer and network connection devices; digital communication equipment, including voice, video and data equipment; servers; switches; portable media devices, such as discs and drives to contain data for electronic storage and playback; and the purchase or lease of software licenses or other technologies and services, maintenance, equipment and computer infrastructure information, techniques and tools used to implement technology in schools and

HB 9 Taxes Can Be Used For

- Improvements, alterations and modifications to, or expansions of, existing buildings or tangible personal property necessary or advisable to house or otherwise accommodate any of the tools listed above.

General Obligation Bonds

- GO Bond proceeds can be used for
 - Erecting, remodeling, making additions to and furnishing school buildings
 - Purchasing or improving school grounds
 - Purchasing computer software and hardware for student use in public schools
 - Providing matching funds for capital outlay projects funded pursuant to the Public School Capital Outlay Act or
 - Any combination of these purposes.

General Obligation Bonds

- GO Bond proceeds can NOT be used for
 - Salaries or benefits
 - Activity buses
 - Administrative computer equipment/network or
 - Building which are not places where instruction occurs

General Obligation Bonds

- Issuing GO Bonds
 - Requires the Attorney General's approval before closing
 - Purchasers are usually financial institutions
 - Must be sold within 4 years
 - Must mature/be paid off within 20 years
 - Interest paid annually or semiannually (1st payment not more than 1 year from date of bonds)

Using Bond Proceeds

- Bonds
 - Issuing the Bonds
 - Using the Proceeds
 - Post Issuance Reporting (material events, arbitrage issues as required to protect purchasers and tax exempt status)

Using Mill Levy Proceeds

- SB9 Tax
 - Uses
 - Charter School Participation
- HB33 Tax
 - Uses
 - Charter School Participation

Education Technology LPAs

- Education Technology Equipment
 - Defined by statute
 - SB 63 amendments in 2017 legislature
- Do NOT require an election
- A financial instrument used to provide revenue for education technology equipment for school districts

Education Technology

- What Proceeds Can Be Used For
- Education Technology Equipment, which includes
 - Closed-circuit television systems
 - Educational television and radio broadcasting
 - Cable television
 - Satellite, copper and fiber-optic transmission

Education Technology

- Computer, video and audio laser and CD ROM discs
- Video and audio tapes or other technologies
- Computer, video and audio laser and CD ROM discs
- Video and audio tapes or other technologies

Education Technology

- What Proceeds Cannot Be Used For
 - Stand alone desks or other pieces of furniture
 - Telephone systems
 - Security systems
- Must be a nexus (reasonable relationship) between the property and technology tasks
- What They Are Not
- Indefinite

Energy and Conservation Performance Savings Contracts

- Public Facility Energy Efficiency and Water Conservation Act; Sections 6-23-1, et seq., NMSA 1978
- School Districts authorized to enter into performance Contracts with “qualified providers” of buildings, systems and equipment designed to reduce energy, water or conservation-related operating costs

Energy and Conservation Performance Contracts

- PED approves contract; EID approves “provider”
- Voter approval not required and is not “Debt” for purposes of Constitution limit of 6% of assessed value of taxable property in the District

Energy and Conservation Performance Contracts

- Criteria for contract:
 - The cost of conservation measures is not likely to exceed the amount of cost savings over 25 years or life of conservation measures
 - Qualified provider guarantees the cost savings will meet or exceed conservation measures (and pays difference if the savings aren’t sufficient)
 - May include an installment contract or lease purchase agreement

Energy and Conservation Performance Contracts

- Payment mechanism
 - Money from the Permanent Fund and common schools fund is paid to the “public school utility conservation fund” based on SEG calculation, then appropriated to PED solely for disbursement of money to districts for payments pursuant to any guaranteed utility savings contract or lease purchase agreement.

Energy and Conservation Performance Contracts

- PED reports to LFC annually on the list of payments to be made and the amount of cost savings

Other Lease-Purchase Arrangements

- Lease Purchase Act
 - Long term financing arrangement for purchase of land, buildings, or both
 - Available to school districts and chartering authority
 - Notify PED of intent
 - PSFA approves project
 - PED approves final agreement

Lease Purchase Act

- Must be subject to termination annually by District
- May extend for 30 years
- If public funds used for improvements, the District acquires a right to a lien on property for value of improvements and to foreclose it

Lease Purchase Act

- Payments for the lease purchase arrangements can come from multiple funding sources, including mill levies, but not from bond proceeds, lease reimbursement payments if a charter school
- A special voter approved mill levy of up to 10 mills may be imposed for up to 30 years by a District

Questions?

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XVI.

**WHISTLEBLOWER PROTECTION ACT –
The Weapon of Choice**

Presenters:

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**Elizabeth L. German
Jason M. Burnette
German-Burnett & Associates**

Whistleblower Protection Act – The Weapon of Choice



2017 School Law Conference
June 2-3, 2017



CUDDY & MCCARTHY, LLP
Attorneys at Law

German + Burnette & Associates, LLC

1

The Whistleblower Protection Act



- ❑ Enacted in 2010.
- ❑ Applies to “Any political subdivision of the state ... that receives or expends public money from whatever source derived.”
- ❑ Protects public employees, defined as “A person who works for or contracts with a public employer.”
- ❑ Simply put, under New Mexico’s Whistleblower Protection Act, a public employer may not take any “retaliatory action” against its employees for whistleblowing. *See* N.M. Stat. Ann. § 10-16C-3 (2013).

2

The Whistleblower Protection Act, Continued



❧ PROHIBITS RETALIATORY ACTION AGAINST EMPLOYEE BECAUSE EMPLOYEE:

- ❧ Communicates to employer or third party information about an action or failure to act that the employee believes in good faith constitutes an unlawful or improper act.
- ❧ Provides information to or testifies before a public body as part of an investigation, hearing or inquiry into an unlawful or improper act.
- ❧ Objects to or refuses to participate in an activity, policy or practice that constitutes an unlawful or improper act.

3

The Whistleblower Protection Act, Continued



- ❧ Retaliatory action means discriminatory or adverse employment action against the employee in terms and conditions of employment.
- ❧ Unlawful or improper act is a practice, procedure, action or failure to act by the employer that:
 - ❧ violates federal or state law, regulations or administrative rules or law, or rule of a political subdivision;
 - ❧ constitutes malfeasance in public office;
 - ❧ constitutes gross mismanagement, waste of public funds, abuse of authority, or substantial and specific danger to the public.

4

The Whistleblower Protection Act, Continued



❧ Remedies for violation of Act:

- ❧ Actual damages;
- ❧ Reinstatement with restoration of seniority;
- ❧ Two times back pay, plus interest;
- ❧ Compensation for any special damage sustained;
- ❧ Litigation costs and reasonable attorneys’ fees;
- ❧ Action may be commenced in any court of competent jurisdiction.

5

The Whistleblower Protection Act, Continued



- ❧ Defenses – Public employer may raise as affirmative defenses:
 - ❧ Action was taken due to employee’s misconduct;
 - ❧ Action was taken due to employee’s poor job performance;
 - ❧ Reduction in force;
 - ❧ Unrelated legitimate business purposes and retaliation was not a motivating factor.

6

The Whistleblower Protection Act, Continued



- œ Remedies not exclusive – i.e., actions under other laws may be taken:
 - œ Civil or criminal sanctions, including libel and slander, may apply to false claims.
- œ Posting – Notice of provisions of the Act must be posted in a conspicuous place on the employer's premises. (Sample notice on CD.)
- œ Two year statute of limitation applies from date of retaliatory action.

7

Whistleblower Act and the First Amendment



- œ U.S. Supreme Court Cases (Connick v Myers and Garcetti v Ceballos) limit First Amendment (free speech) protections when public employee complains and speaks out about a dispute as to his or her particular job circumstances or “official duties.”

8

Whistleblower Act and the First Amendment, Continued



- œ After Garcetti, a reviewing court must evaluate:
 - œ Whether the employee engaged in constitutionally protected speech:
 - œ Which touched on an issue of public concern
 - œ Whether the interests of the employee outweighed the interests of the employer in the efficiency of public services
 - œ Whether the employee's “speech” was as a private citizen or part of his official duties.

9

Whistleblower Act and the First Amendment, Continued



- œ In Posey v Lake Pend Oreille Sch Dist No. 84, the Ninth Circuit Court of Appeals held:
 - œ District Court must decide as a matter of law: whether the speech touches upon matters of public concern, and whether treating the employee differently from other members of the public is justified.
 - œ If answer to these questions is yes, did the employee act as a private citizen or public employee? If there are factual disputes about this question, the jury will decide.
- 546 F.3d 1121 (9th Cir 2008).

10

Whistleblower Act and the First Amendment, Continued



- œ Lessons from interplay of First Amendment and Whistleblower Protection Act.
 - œ Legislature has expanded the scope of issues of public concern as a matter of state policy and extended protections available to public employees and contractors.
 - œ While the “official duties” limitation may provide a defense under the First Amendment, the Whistleblower Protection Act exposes the public employer to significant sanctions if adverse action is taken against the employee.

11

Whistleblower Protection Act



- œ Steps you can take to better defend against Whistleblower Protection Act claims:
 - œ Adopt policies prohibiting discrimination, harassment and retaliation.
 - œ Adopt clear reporting policies
 - œ Be sure employees sign for receipt of policies and maintain signed receipt in personnel files

12

Whistleblower Protection Act



- ☞ Steps you can take to better defend against Whistleblower Protection Act claims (cont.):
 - ☞ Advise employees of the internal process for submitting a complaint.
 - ☞ Encourage employees to report health and safety concerns.
 - ☞ Assure no retaliation for reporting or coming forward.

13

Whistleblower Protection Act



- ☞ Steps you can take to better defend against Whistleblower Protection Act claims, continued:
 - ☞ Post the required notice and publicize policies regularly.
 - ☞ Spell out in the employee handbook and training materials an employee's obligation to report "gross mismanagement, a waste of funds, an abuse of authority or a substantial and specific danger to the public," violations of federal law, federal regulation, state and local laws and administrative rules, and malfeasance in public office. Remind employees of this obligation through periodic meetings.

14

Whistleblower Protection Act



- ☞ Training efforts to better defend against Whistleblower Protection Act claims:
 - ☞ Train supervisors to recognize conduct that could constitute retaliation and to appreciate that adverse action far less than termination or demotion can be considered retaliatory. [For example, the Supreme Court has said that changing an employee's schedule or excluding her from an important business activity could constitute retaliation depending on the circumstances.]

15

Whistleblower Protection Act



- ☞ Training efforts to better defend against Whistleblower Protection Act claims:
 - ☞ Administer discipline and reporting policies in a fair and consistent manner. Any employee policy, when enforced in a discriminatory or arbitrary manner, or when the policy becomes a "pretext" or sham excuse for retaliation against an employee, exposes the employer to a challenge. Failing to discipline employee for misconduct sends the wrong signal to potential whistleblowers.

16

Whistleblower Protection Act



- ☞ Training efforts to better defend against Whistleblower Protection Act claims:
 - ☞ Train employees to recognize the privacy rights of other employees. Many whistleblowers feel that when they do not see tangible results to their complaints, they have not been addressed. The opposite may in fact be true, but the employer may not share the confidential personnel information.

17

Whistleblower Protection Act



- ☞ Training efforts to better defend against Whistleblower Protection Act claims:
 - ☞ Supervisors must be alert to situations in which employees are in fact discouraged or prohibited from reporting workplace misconduct, unlawful or improper acts, or violations of law and or school policy.
 - ☞ An employee who makes a complaint should not be ignored or ostracized. The employee should be reminded to seek assistance if he or she perceives or experiences problems as a result of his or her complaint.
 - ☞ Administrators should know how to investigate and properly document complaints.

18

Whistleblower Protection Act



œ Documentation Needed to better defend against Whistleblower Protection Act claims:

- œ Don't avoid problems in employee evaluations. Document employee performance issues so that subsequent discipline or job actions are justified and does not form the basis for retaliation claims.
- œ Document date of receipt of employee complaints. Have the employee prepare and acknowledge (initial or sign and date) a written statement summarizing the complaint. (We have found that complaints change over time. Thus, it is good to have each complaint clearly identified).
- œ As with all discrimination or retaliation complaints, make sure that you have a full understanding of the conduct complained of and that you perform a thorough investigation that includes interviews of the whistleblower and the person(s) identified in the complaint.

19

Whistleblower Protection Act



œ Documentation Needed to better defend against Whistleblower Protection Act claims:

- œ Remember timing is everything – be sure all documents, including notes, are dated with month, day, and year.
- œ Be sure all witness interviews or statements and documentation regarding investigation of complaints are dated.

20

Whistleblower Protection Act



œ Documentation Needed to better defend against Whistleblower Protection Act claims:

- œ If the complaint relates to a person responsible for the employee's evaluation process.
- œ If you have a Collective Bargaining Agreement, include a provision for filing grievances, and reporting retaliation pursuant to the Collective Bargaining Agreement, and requiring that any such retaliation claim be processed through the Collective Bargaining Agreement mediation / arbitration process.

21

CONTACT INFORMATION

Thank You!!

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22

XVII.

**IMMIGRATION ISSUES - UNDOCUMENTED CHILDREN
IN THE PUBLIC SCHOOLS**

Presenters:

**John F. Kennedy
Y. Jun Roh**

Cuddy & McCarthy, LLP

IMMIGRATION ISSUES - UNDOCUMENTED CHILDREN IN THE PUBLIC SCHOOLS



New Mexico School Boards Association
Thirty Eighth Annual School Law Conference
Cuddy & McCarthy, LLP
John F. Kennedy
Y. Jun Roh
June 3, 2017

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1

Today's Discussions

- The Law As to Undocumented Students
- Current Status of Law
- ICE agents at School
 - What to do?
- “Sanctuary Jurisdictions”

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2

Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- In *Plyler*, the U.S. Supreme Court held that under the Equal Protection Clause, Mexican school-aged children who had filed a class action suit, who could not establish that they were in this country legally, were entitled to the same free public education that was made available to other residents of the same school district, irrespective of their immigration status.

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Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- “Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.”
- **This decision mirrored the practice in New Mexico – Certain school districts along the border have enrolled and educated students living in Mexican border communities for decades.**

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Landmark decision: *Plyler v. Doe*, 457 U.S. 202 (1982)

- Under *Plyler*, schools should not take actions that would discourage enrollment and success of students based on immigration status:
 - Do not ask about immigration status
 - Do not request or maintain records related to immigration status (i.e.: birth certificates being used as proof of citizenship, as opposed to proof of age, Social Security Numbers, etc.)

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Current State of the Law

• ICE “Sensitive Location Enforcement” Policy

In October 2011, ICE issued its “Sensitive Enforcement Location” policy that “is meant to ensure that ICE officers and agents exercise sound judgment when enforcing federal law at or focused on sensitive locations and make substantial efforts to avoid unnecessarily alarming local communities.

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6

Current State of the Law

• ICE “Sensitive Location Enforcement” Policy

The policy is not intended to categorically prohibit lawful enforcement operations when there is an

- immediate need for enforcement action”
- Memorandum from John Morton, U.S. Immigration and Customs Enforcement Director, to Field Office Directors et al., Policy No. 10029.2 (Oct. 24, 2011), available at <https://www.ice.gov/doclib/ero-outreach/pdf/10029.2-policy.pdf>

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7

Current State of the Law

• ICE “Sensitive Location Enforcement” Policy

- It is important to note that the “Sensitive Location” policy only applies to arrests, interviews, searches, and surveillance. “Actions not covered by this policy include actions such as obtaining records, documents and similar materials from officials or employees, providing notice to officials or employees, serving subpoenas....”

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8

Current State of the Law

• ICE “Sensitive Location Enforcement” Policy

- “Schools” are defined in the policy as: “schools (including pre-schools, primary schools, secondary schools, post-secondary schools up to and including colleges and universities, and other institutions of learning such as vocational or trade schools);”
- Under this policy, “any planned enforcement action at or focused on a sensitive location ... must have prior approval” from senior DHS officials. However, the memorandum states that this “policy is not intended to categorically prohibit lawful enforcement operations when there is an immediate need for enforcement action”

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9

Current State of the Law

• ICE “Sensitive Location Enforcement” Policy

- Exigent circumstances permitting enforcement action without such approval include:
 - national security or terrorism matter;
 - imminent risk of death, violence, or physical harm to any person or property;
 - immediate arrest or pursuit of a dangerous felon, terrorist suspect, or any other individual(s) that present an imminent danger to public safety; or
 - imminent risk of destruction of evidence material to an ongoing criminal case.

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Executive Order: “Protecting the Homeland”

- In January 2017, President Trump issued an Executive Order that impacts immigration law enforcement: “*Enhancing Public Safety in the Interior of the United States*.”*
- Federal government will increase enforcement efforts against “removable aliens”
- Federal government “shall ensure that [sanctuary] jurisdictions ... are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes...”

*Executive Order 13768 of January 25, 2017, *Enhancing Public Safety in the Interior of the United States*, 82 Fed. Reg. 8,799 (Jan. 30, 2017). A federal court in Hawaii has issued a nationwide injunction precluding implementation of this order.

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Executive Order: “Protecting the Homeland”

- Under this Administration’s Executive Order, “*Enhancing Public Safety in the Interior of the United States*,” jurisdictions deemed by the Attorney General or the DHS Secretary to have willfully refused to comply with 8 U.S.C. 1373 will not be eligible for federal grants.

Section 1373 relates to the sharing of information between governmental entities and the INS regarding an individual’s citizenship or immigration status.

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Department of Homeland Security Implementation Orders

- On February 21, 2017, DHS issued comprehensive policy guidance implementing the Executive Orders, signaling more intensive law enforcement:
- Elimination of most of the previously exempt categories for enforcement
- “Sparing” use of parole in lieu of detention and only in the case of “demonstrated urgent humanitarian reasons or significant public benefit”
- Higher level of proof for asylum claims
- Elimination of privacy rights for immigration proceedings
- Goal of rapid resolution of immigration matters
- Significant new resources for enforcement agents and detention centers

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13

Department of Homeland Security Implementation Orders

- Check your state for statutes, regulations, and state education guidance.
- Inform students and families about how to report.
- Take concerns seriously and investigate promptly.
- If harassment is found, take effective remedial action.
- When First Amendment issues come into play, be ready to navigate carefully and seek legal guidance.
- If concerns arise, be prepared for media attention and potential legal action.

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What to Do When ICE Comes to School

- **Release of Education Records**
- FERPA generally prohibits release of student education records without prior parental consent
- No exception that clearly applies to ICE enforcement activities, nor does it fall into a health and safety emergency under 34 C.F.R. § 99.36; see NMSA 1978 Sections 32A-4-3E and 29-1-8, but you should be aware of the state law mandates of these two statutes.
- Designated directory information may be released without parental consent (34 C.F.R. § 99.31(a)) (FERPA **does not require** disclosure)
- Current district practice regarding release of directory information may only apply to local law enforcement
- Decide what practice your district will follow for federal agents, and clearly communicate to your site administrators

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Release of Education Records - Subpoenas

- Schools must produce education records in response to a subpoena, but FERPA requires a “reasonable effort” to notify parents in advance of the school’s compliance, so that the parent (or eligible student) “may seek protective action”. 34 C.F.R. § 99.31(a)(9)(ii).
- It is strongly suggested that school staff have a process in place that directs all subpoenas to central office for processing to ensure consistent response in accordance with local school board policies and state law.

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Student Interviews by ICE Agents

- Review policies and practices regarding making students available to law enforcement during the school day. Does your district have a current policy on “cooperation with law enforcement?”
- Update training of front office and teaching staff in interview policies.
- Formal or informal agreements with local law enforcement may not apply to federal agents.
- Significant risk in not providing prior notice to parents of law enforcement interviews, except in cases of child abuse, imminent harm, or warrant.

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Student Interviews by ICE Agents

- If an ICE agent comes to school seeking to interview a student, best practice is for school staff to take agent’s contact information and tell him/her that someone will be in touch promptly.
- Schools should not release student information or make students available for interview on the spot.
- School should not confirm that student is in attendance.

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Implications for Agreements with Security Resource Officers (SROs)

Given the relationships between police departments and school districts regarding SROs, it may be wise to review agreements between your district and local SROs, so there is understanding about the respective roles and responsibilities.

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ICE Agent Compliance Checks in SEVIS program

- For schools that are in the SEVIS program*, front office staff should be trained to know that ICE agents can come on to campus **without** a warrant or subpoena and get information specific to those students in the SEVIS program.
- This is part of the school's compliance with the SEVIS program.

* Memorandum from U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, to All SEVIS Users, No. 1703-05 (Mar. 14, 2017), available at <https://www.ice.gov/doclib/sevis/pdf/bcm1703-05.pdf>.

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DACA

- DACA, Deferred Action for Childhood Arrivals, is an immigration policy established during the Obama Administration in June 2012.
- Children who were brought to the U.S. as minors by their parents can apply for DACA status, and, as such, are granted protection from deportation so long as they meet certain requirements.

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21

DACA

- The new Administration has indicated an intent to review the DACA program, but has not yet issued any orders or guidance affecting it. Also, the 2017 DHS Orders "do not affect DACA recipients."
- Note, however, that recently, the first DREAMer under the DACA program has been deported to Mexico, and is challenging his deportation in court.*

* Alan Gomez and David Agren, "First protected DREAMer is deported under Trump," USA TODAY (Apr. 18, 2017), available at <https://www.usatoday.com/story/news/world/2017/04/18/firstprotected-dreamer-deported-under-trump/100583274/>

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22

What is a "Sanctuary" School District?

- Under the Executive Order, "Enhancing Public Safety in the Interior of the United States," the current Administration specifically identifies "sanctuary jurisdictions" as those that may lose eligibility for federal grants.
- However, there is no common definition of a "sanctuary" jurisdiction. It depends on the jurisdiction and context.
- This is a political term in the vernacular, but not a legal term of art, and means different things to different people.

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23

What is a "Sanctuary" School District?

- For school districts, the term is commonly applied when the district has proactively stated it will take some or all of the following actions:
- not provide student or family information to ICE agents except as required by law
- establish procedural safeguards for ICE agents engaging at school or with students
- take other actions to support immigrant students

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24

“Sanctuary” School District Designations

- Self-Designated “Sanctuary” School Districts
- School Board Adoption of Resolution (Re)Affirming Protecting All Students
- School Districts Making a Public Statement
- School Districts That Choose to Make No Such Designation

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25

“Sanctuary” School District Designations

- A major concern with such a designation is that the term “sanctuary” may convey more power to protect students and families than schools actually have.
- That said, the DHS Orders do not address sanctuary jurisdictions.
- From a public relations perspective, what does your school district gain by labeling itself as a “sanctuary” district? Think about this designation, politically versus constitutionally.

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26

Do “Sanctuary” Schools Risk Loss of Federal Funds?

- At first glance of the Executive Order, only federal grants related to law enforcement seem to be implicated.
- If the Executive Order is read broadly, this is a very complex question under Tenth Amendment.
- It is generally understood that the federal government cannot require states to assist with federal law enforcement.
- Most federal funds for schools come through congressional appropriation.
- Substantive changes would require congressional approval.

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27

Challenges to “Sanctuary Sanctions”

- *City and County of San Francisco v. Trump*, Case No. 3:17-cv-00485-WHO (N.D. Cal.).
- *County of Santa Clara v. Trump*, Case No. 5-17-cv-00574 (N.D. Cal.); 2017 WL 1459081, County of Santa Clara v. Trump, 2017 WL 1459081 (N.D. Cal. Apr. 25, 2017)
- On April 25, 2017, a federal judge issued a nationwide injunction against the President’s January 25th Executive Order, prohibiting the withholding of federal funds from jurisdictions that refuse to cooperate with immigration authorities.

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28

What To Do

- Communicate and Be Prepared!!
- Consider Plyler – broad constitutional mandate
- Locate and determine district policy
- Communicate to students and families AND YOUR SCHOOL LAWYERS!
- Respond to concerns and keep documentation
- Prepare in advance for media coverage

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29

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30

XVIII.

**LET'S GET IT RIGHT:
IPRA and OMA**

Presenter:

Carol S. Helms

Cuddy & McCarthy, LLP



LET'S GET IT RIGHT: IPRA AND OMA

NMSBA 2017 School Law Conference
Prepared and presented by Carol S. Helms



CUDDY & MCCARTHY, LLP
Attorneys at Law

THE PURPOSE OF "SUNSHINE LAWS"

- To give members of the public the right to inspect and copy public records and to know what happens in meetings of public bodies so that the public can keep an eye on the government.
- "Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman." Louis D. Brandeis, 1913.

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[2]

WHAT NEW MEXICO "SUNSHINE LAWS" APPLY TO SCHOOL BOARD MEMBERS AND SCHOOL DISTRICT ADMINISTRATORS?

- Inspection of Public Records Act ("IPRA"), NMSA 1978, §§ 14-2-1 through -12
- Open Meetings Act ("OMA"), NMSA 1978, §§ 10-15-1 through -4

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[3]

Why should School Board members and School District administrators follow these sunshine laws?

IPRA and the OMA contain enforcement provisions, and violations can result in:

- expensive litigation
- criminal prosecution of individuals
- monetary damages against the School District
- potential recall of School Board members

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[4]

The Inspection of Public Records Act ("IPRA")

- ❖ "Every person has a right to inspect any public records of this state except . . ." NMSA 1978, § 14-2-1(A).
- ❖ When the School District's records custodian receives an IPRA request, the School District *must* disclose all responsive documents that do not fall within any of the IPRA's exceptions.

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[5]

What is a public record?

- All documents, papers, letters, books, maps, tapes, photographs, recordings, and other materials, *regardless of physical form or characteristics*, that are:
 - used, created, received, maintained, or held by or on behalf of any public body, and
 - relate to public business.

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[6]

School Board communications are subject to the IPRA

- Such communications include e-mail – not only School District e-mail, but also personal e-mail, if e-mail is forwarded or used for school business.
- Text messages made or received on School District telephones are also subject to the IPRA.
- Keep Board business in an open meeting. Do not risk having embarrassing communications (or communications you thought were private) disclosed in response to an IPRA request.

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[7]

Exceptions to the IPRA (slide 1 of 3)

- Records pertaining to physical or mental examinations and medical treatment of persons confined to any institution;
- Letters of reference concerning employment, licensing, or permits;
- Letters or memos that are *matters of opinion* in personnel files or students' cumulative files; [verified factual information is subject to disclosure]
- Law enforcement records that reveal confidential sources, methods, information, or individuals not charged with a crime. Such records include evidence in any form received or compiled in connection with any criminal investigation or prosecution, including inactive matters or closed investigations;

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[8]

Exceptions to the IPRA (slide 2 of 3)

- As provided by the Confidential Materials Act;
- Trade secrets, attorney-client privileged information, and long-range or strategic business plans of public hospitals discussed in a properly closed session;
- Tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments, or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and

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[9]

Exceptions to the IPRA (slide 3 of 3)

- As otherwise provided by law. This exception includes, but is not limited to:
 - Federal laws, such as FERPA and HIPAA;
 - State laws, including those prohibiting disclosures of certain records, or keeping other records confidential until a certain amount of time has elapsed; and
 - Rules adopted by the New Mexico Supreme Court.

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[10]

IPRA and FERPA

Example of stated justification for redacting or withholding certain student records:

Names of parents and students have been redacted pursuant NMSA 1978, § 14-2-1 A(12), as otherwise provided by law; specifically, the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, which prohibits the release of personally identifiable student information (other than directory information) without consent. FERPA has been broadly interpreted to prohibit the disclosure of information by which a particular student may be readily identified, for example, by parent's name or profession, or under circumstances where the student's identity could readily be ascertained by the disclosure that a student is singularly situated by a stated fact unique only to that student.

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[11]

Protected personal identifier information *exempt* from IPRA disclosure (slide 1 of 2)

- ❖ All but the last four digits of:
 - ❖ a taxpayer identification number;
 - ❖ financial account number; or
 - ❖ driver's license number;
- ❖ all but the year of a person's date of birth; and
- ❖ a social security number.

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[12]

Protected personal identifier information exempt from IPRA disclosure (slide 2 of 2)

- ❖ Protected personal identifier information on a record **does not exempt the record** from inspection.
- ❖ Protected personal identifier information contained in a public record may be redacted by a public body before inspection or copying of the record.
- ❖ Unredacted records containing protected personal identifier information shall not be made available on publicly accessible websites operated or managed on behalf of a public body.

[13]

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Starting the procedure for requesting records

- Request may be written or oral
- E-mail is sufficient as written request
- No requirement to state reason for request

[14]

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What if a requested record does not exist?

- The record must exist at the time of the request.
- Nothing in the IPRA requires a public body to create a public record.
- There is no requirement to compile existing information into a new record.

[15]

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What if you get a request for records?

- If you are not the district's records custodian, give the request to the records custodian **immediately!**
- Do not disclose records for inspection or via copies unless/until the records have been carefully reviewed for redactions and/or withholding of certain records in their entirety.
- If you are the records custodian, and not certain if a record or portion of record should be disclosed or withheld, consult with the School District's lawyer(s) for guidance for questions about the content of the response and/or the deadlines for responding to the request.

[16]

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Further information about the IPRA

Inspection of Public Records Act Compliance Guide, published by the New Mexico Attorney General's Office – available online at:

<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Inspection%20of%20Public%20Records%20Compliance%20Guide%202015.pdf>

[17]

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The **consequences** for violation of the IPRA

- ✓ Money damages
- ✓ Costs and reasonable attorneys' fees to any person whose written request has been denied and is successful in a court action to enforce the IPRA

[18]

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The Open Meetings Act ("OMA") 10 – 15 – 1 NMAC

- The OMA *presumes* that public bodies take proper actions:
 - before the meeting
 - during the meeting
 - after the meeting, but
- If that presumption is successfully challenged, the district may be ordered to pay costs and reasonable attorneys' fees, and subject the person violating the law to criminal penalties (misdemeanor and no more than \$500), likewise,
- The district may recover reasonable attorney fees if the action was brought without sufficient information and belief that good grounds supported it. But, it still costs a lot of money to prove you got it right. So... let's get it right!

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(19)

Notice and Agenda (slide 1 of 4)

- Notices must include an agenda or information on how to obtain an agenda
- Must be available to the public at least seventy-two (72) hours before the meeting
- Must be posted on the school's website
- Notice must include requesting licensed broadcast stations and newspapers

**The Board must adopt
Open Meetings Resolution annually.**

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(20)

Notice and Agenda (slide 2 of 4)

- The Board can take action only on action items listed on the posted agenda.
- The agenda must contain specific items of business to be discussed or transacted.
- Exceptions to the 72 Hour Requirement:
 - meetings held to address an emergency, and
 - public bodies that meet more than once per week.

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(21)

Notice and Agenda (slide 3 of 4)

- What constitutes an emergency:
 - issues that could not have been anticipated, and
 - which if not addressed immediately, will threaten the health, safety or property of its citizens, or likely result in substantial financial loss to the public body.
- Notice must be provided as far in advance as reasonably possible under the circumstances.

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(22)

Notice and Agenda (slide 4 of 4)

Emergency meeting (cont.):

- The Board must report to the AG the action taken and the circumstances creating the emergency within ten (10) days of taking action on an emergency matter.
- The 10-day AG report is not required for a declaration of a state or national emergency.

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(23)

Closed/executive sessions

- Closing meetings creates curiosity and suspicion from:
 - Community members
 - District employees
 - The media
- Use closed/executive sessions sparingly and
 - only as allowed by law under the OMA, and
 - pursuant to a motion that:
 - identifies the exemption
 - is stated with "reasonably specificity"
 - determined via roll call vote.

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(24)

Quorum

- If the School Board is meeting to discuss School District business and a majority of the Board members are present, you have a quorum.
- If:
 - a majority of Board members are in attendance at a basketball game, you are considered to have a quorum, so **do not formulate policy, discuss school business or take action!**
 - A quorum is announced, but a member or member(s) leave, absolving the quorum, it will be best to adjourn the meeting since you will not have much to talk about if you are not **formulating policy, discussing school business or taking action.**

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(25)

Exceptions to OMA pertinent to school boards (slide 1 of 6)

- **Limited personnel matters – subsection H(2)**
 - Discussions around the hiring, promotion, demotion, dismissal, assignment, or resignation of, or
 - Investigation or consideration of complaints or charges against any individual public employee.
- The **discussion** is confidential and can take place in a closed executive session; however, any **final action** is public information and must take place in an open meeting.

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(26)

Exceptions to OMA pertinent to school boards (slide 2 of 6)

- **Deliberations in administrative adjudicatory proceedings – subsection H(3)**
 - Proceeding brought by or against a person before the public body in which individual legal rights, duties, or privileges are required by law to be determined by the public body after an opportunity for a trial-type hearing.
- The **proceeding** is confidential and can take place in a closed executive session; however,
- Any **final action** is public information and must take place in an open meeting.

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(27)

Exceptions to OMA pertinent to school boards (slide 3 of 6)

- **Personally identifiable information about any student – subsection H (4)**
 - This information is confidential unless the student, parent, or guardian requests otherwise.
 - This confidential information includes long-term suspension or expulsion hearings; as well as individual student test scores, grades, health or medical information, etc.
 - Aggregate data may be disclosed, so long as it is not personally identifiable.
- The **information** is protected by FERPA and cannot be discussed outside of a closed executive session.

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(28)

Exceptions to OMA pertinent to school boards (slide 4 of 6)

- **Bargaining strategy preliminary to collective bargaining negotiations – subsection H (5)**
 - DOES NOT include discussion of hiring a collective bargaining consultant, adopting a policy as to the collective bargaining process, or responding to union organizing efforts

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(29)

Exceptions to OMA pertinent to school boards (slide 5 of 6)

- **Discussion concerning purchases exceeding \$2,500 from one source – subsection H (6)**
 - Sole-source purchases for \$2,500 or less
 - Competitive sealed proposals discussed for contract negotiation process

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(30)

Exceptions to OMA pertinent to school boards (slide 6 of 6)

- **Attorney-client privilege pertaining to pending or threatened litigation – subsection H (7)**
 - Situations where public body is or may become a participant in litigation (including as a plaintiff)
 - Attorney General takes very restrictive view of this exception – requires attorney to be present or on the phone, or has sent letter or memorandum about litigation
 - NEVER share such information!

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[31]

Who can complain if School Board violates the OMA?

Anyone, but ... Complaints more frequently filed by:

- Media/Foundation for Open Government ("FOG")/or other "sunshine watch" entity
- Parents/school employees/minority Board members displeased with controversial decisions made
- Any citizen; however,
 - individuals (or entities) may seek judicial enforcement of a perceived OMA violation **only** if the individual/entity **first** provides notice of the claimed violation to the public body and the public body has denied or not acted on the claim within 15 days.

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[32]

What actions may be taken to enforce the OMA? (slide 1 of 3)

- **Mandamus petition** to compel compliance with a mandatory nondiscretionary legal duty
- **Petition for injunctive relief** to prevent or enjoin a prospective violation of law
- **Petition for recall of Board members** to remove one or more Board members for misfeasance or malfeasance

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[33]

What actions may be taken to enforce the OMA? (slide 2 of 3)

- **Courts have authority to invalidate actions taken in violation of the OMA based upon Section 10-15-3(A), which reads:** "No resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of [the Open Meetings Act]."
- **In addition, Section 10-15-3(D) states:** "No section of the Open Meetings Act shall be construed to preclude other remedies or rights not relating to the question of open meetings."

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[34]

What actions may be taken to enforce the OMA? (slide 3 of 3)

- **Section 10-15-4 states:** "A person violating any of the provisions of Section 10-15-1 or 10-15-2 NMSA 1978 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense."
- Thus, the Attorney General or District Attorney can file criminal charges for OMA violations. **Such prosecutions have occurred!**

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[35]

What relief can be awarded if enforcement action is taken? (slide 1 of 2)

- District court can issue a writ of mandamus, an injunction, or a declaratory judgment, if a violation is found.
- "The Court **shall** award costs and reasonable attorneys' fees to any person who is successful in bringing a court action to enforce the provisions of the [OMA]." NMSA 1978, § 10-15-3(C)

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[36]

What relief can be awarded if enforcement action is taken? (slide 2 of 2)

- If the public body prevails, it **shall be** awarded court costs, and **shall be** awarded reasonable attorneys' fees from the plaintiff if the plaintiff brought the action "**without sufficient information and belief that good grounds supported it.**" NMSA 1978, § 10-15-3(C)
- Awards of attorneys' fees to public bodies are rare.

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[37]

What typically results from a complaint filed with the Attorney General alleging an OMA violation?

- AG sends a letter to the public body notifying it of the complaint and requesting a response, usually within 20 or 30 days.
- The School Board then has the opportunity to submit its response and to take corrective action, if necessary.

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[38]

What should the School Board do if it realizes that it has violated the OMA? (slide 1 of 5)

The appropriate response depends upon whether the Board first learns of the violation through a complaint from the Attorney General's office, or whether the violation comes to the Board's attention as a result of a complaint by a citizen.

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[39]

What should the School Board do if it realizes that it has violated the OMA? (slide 2 of 5)

- If the Board realizes that an inadvertent violation has occurred, even before a formal complaint from the AG's office is received, the Board should cure the violation by resolution immediately.
- Doing so probably will require a special meeting (agenda item should read: "Discussion and Board action on resolution to correct possible violation of the Open Meetings Act").

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[40]

What should the School Board do if it realizes that it has violated the OMA? (slide 3 of 5)

- The Board President should read the entire corrective resolution in public before the Board votes on it.
- If the Board takes this action right away, the Board is then prepared to respond to a letter received later from the Attorney General by submitting the resolution already adopted. The AG's action is then likely to be in the nature of "okay, but don't do it again."

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[41]

What should the School Board do if it realizes that it has violated the OMA? (slide 4 of 5)

- Under Section 10-15-3(B), if the error is brought to the Board's attention by a citizen or the media, the Board must take action to correct the violation within 15 days of the notification received from the citizen/media, in order to forestall district court enforcement.

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[42]

What should the School Board do if it realizes that it has violated the OMA? (slide 5 of 5)

- In addition, if a corrective resolution is adopted, note that Section 10-15-3(B) also states:

"A public meeting held to address a claimed violation of the Open Meetings Act shall include a summary of comments made at the meeting at which the claimed violation occurred."

So if a citizen, a reporter, or a School Board member spoke up at the meeting at which the violation happened, the Board must acknowledge those comments in its action to correct it.

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[43]

Criminal Penalties

"Any person violating any of the provisions of NMSA 1978, Section 10-15-1 or 10-15-2 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than five hundred dollars (\$500) for each offense."

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Further information about the OMA

Open Meetings Act Compliance Guide, published by the New Mexico Attorney General's Office – available online at:

<http://www.nmag.gov/uploads/files/Publications/ComplianceGuides/Open%20Meetings%20Act%20Compliance%20Guide%202015.pdf>

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[45]

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[46]

XIX.

REGULAR AND SPECIAL EDUCATION STUDENT DISCIPLINE

Presenters:

**Jacquelyn Archuleta-Staehlin
Laura M. Castille**

Cuddy & McCarthy, LLP

Student Discipline

Presented by:
Jacque Archuleta-Staehlin
Laura M. Castille

CUDDY & MCCARTHY, LLP

Cuddy & McCarthy, LLP

1

U.S. Departments of Justice and Education Dear Colleague Letter

Explains nondiscrimination requirements under Titles IV and VI of the Civil Rights Act of 1964 and reminds schools of their legal obligations to administer student discipline without discriminating on the basis of race, color or national origin

Explains what OCR will do when it receives a complaint or begins a compliance review related to discrimination in the administration of student discipline, and outlines the legal framework and approach OCR will follow in its investigation

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2

DEAR COLLEAGUE

Urges school districts to evaluate their discipline policies, practices and procedures to ensure they are fair and applied equally to all students

Provides recommendations to assist schools in the fair and equitable administration of student discipline

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3

RATIONALE FOR CHANGE

- Improve Data Accuracy and Reliability
- Improve Transparency in Data Reporting
- Address Concerns about the Disproportionate Use of Discipline Actions
- Improve Ambiguous Categorical Definitions and the Correlation Between Discipline Incidents and Discipline Actions

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6.11.2.10 ENFORCING RULES OF CONDUCT:

A. Enforcing attendance requirements. Formal enforcement action under the Compulsory School Attendance Law, supra, and the Family Services Act, Section 32A-3A-1 et seq. NMSA 1978 shall be initiated whenever a student's absences indicate that the law is being violated.

B. Search and seizure: School property assigned to a student and a student's person or property while under the authority of the public schools are subject to search, and items found are subject to seizure, in accordance with the requirements set forth in the statute.

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Basis for disciplinary action:

A student may appropriately be disciplined by administrative authorities in the following circumstances:

- (1) for committing any act which endangers the health or safety of students, school personnel or others for whose safety the public school is responsible;
- (2) for violating valid rules of student conduct established by the local school board or by an administrative authority to whom the board has delegated rulemaking authority or
- (3) by committing acts prohibited by this rule, when the student knew or should have known that the conduct was prohibited.

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Discipline

- Within legal limits as defined in Subsection L. of 6.11.2.7 NMAC above, local school boards have discretion to determine
- the appropriate sanction(s)
- to be imposed for violations
- of rules of student conduct, or to authorize appropriate administrative authorities to make such determinations.

Corporal punishment shall not be utilized as a means of enforcing rules of conduct in public schools.

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Detention . . .

- Detention, suspension and expulsion: Where detention, suspension or expulsion is determined to be the appropriate penalty, it may be imposed only in accordance with procedures that provide at least the minimum safeguards prescribed in Section 6.11.2.12 NMAC. Suspensions or expulsions of students with disabilities shall be subject to the further requirements of Subsection G of Section 6.11.2.10 NMAC and Section 6.11.2.11 NMAC.

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Transmittal of records.

- (i) An administrative authority reporting a crime committed by a student with a disability must ensure that copies of the special education and disciplinary records of the student are transmitted, for consideration by the appropriate authorities, to whom the administrative authority reports the crime.
- (ii) An administrative authority reporting a crime under this section may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

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Who is a child with a disability?

- IDEA Definition
- Section 504 definition

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IDEA Eligibility Determinations

A child with a disability is a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disability **who by reason thereof needs special education or related services.**

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504 Qualified handicapped person

- (1) with respect to public school, a handicapped person
 - (i) of an age during which non-handicapped persons are provided such services,
 - (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or
 - (iii) to whom a state is required to provide a free appropriate public education under Sec. 612 of the Education of the Handicapped Act;

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Discipline

- Discipline

Allows administration to consider unique situation

- *Not absolutely bound by mandatory long-term removal*
- *Response to zero tolerance policies that dictate specific outcome, e.g., alternative placement*
- *More discretion for school personnel*

If more than 10 days cumulative then consider requirements under the IDEA.

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Discipline Considerations

- The process for determining if a student's misconduct is related to his disability is referred to as a manifestation determination. This determination is a key step in the discipline process under both Section 504 and IDEA because it impacts the type of discipline the district can impose on the student.
- Key difference-if not manifestation then same discipline and no services required

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DOES IN-SCHOOL SUSPENSION COUNT?

- A commentary to the regulations provides that an in-school suspension would not be considered as part of the days of suspension . . . So long as the child is afforded the opportunity to appropriately progress in the general curriculum, continue to receive the services specified on his IEP and continue to participate with nondisabled children to the extent he would have in the current placement.

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ANSWER

- It depends on whether you have met the various provisions discussed in the comments to the regulations – Be extremely cautious and use sparingly

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What About Partial Days of Suspension?

- Again not made clear in the regulations
- Discussed in the commentary
 - *Portions of a school day that a child has been suspended may be considered as a removal in regard to determining whether there is a pattern of removals.*
 - *A bus suspension would count as a suspension if it is part of student's IEP – unless provided in some other manner.*

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Exceptions include weapons or drug violation of school policy.

If you take disciplinary action that exceeds 10 days it is always a change of placement

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WHAT HAPPENS AFTER 10 DAYS?

If considering long term suspension (more than 10 school days) then requirements under the IDEA must be implemented.

IDEA requires “*manifestation determination*” before imposition of long term suspension.

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FBA & BIP are they place and up to date?

- The identification of important, controllable, causal functional relationships applicable to a specific set of target behaviors for an individual client
- Multimodal: each behavior typically has multiple cause contributing differentially to the expression of the behavior

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BIP

- Describe the expected outcomes and goals for the plan
- Specify the interventions used to achieve the goals
- Specify person who is responsible for specific interventions
- Specify a review date

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Good news

Parents must not show a Closer link between behavior and disability

- Intent: schools determine if behavior has direct relationship to disability, and not an attenuated association such as low self-esteem to student's disability

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Special circumstances

- There currently are three provisions in the Act which allow schools to change a student's placement without *first* conducting a manifestation determination. These are:
 - A. *Includes possession and distribution*
 - B. *Violation of weapons policy*
 - ✓ C. *Includes provision for inflicting “serious bodily injury”*

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Definition of Serious Bodily Injury “maiming”

- A. Substantial risk of death
- B. Extreme physical pain
- C. Protracted and obvious disfigurement, or
- D. Protracted loss or impairment of the function of a bodily member, organ or mental faculty

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Protections for students not yet eligible for special education

- Child may assert protections if:

“Staff of teachers must have expressed concern directly to special education directors or other supervisors” about a pattern of behavior demonstrated by the student

Then LEA had knowledge that child was a child with a disability

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Additional Provision for School Seeking Removal of Student

- School district's may invoke hearing process if it believes that maintaining current placement of the student is substantially likely to result in injury to the child or to others. A hearing officer can order a change in placement to an appropriate alternative educational setting for not more than 45 school days

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THANK YOU!

- Have a great summer
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27

XX.

BUDGET ISSUES AND REDUCTION-IN-FORCE

Presenters:

**John F. Kennedy
Carol S. Helms**

Cuddy & McCarthy, LLP



Budget Issues and Reduction-in-Force

Prepared and presented by
Carol S. Helms and John F. Kennedy



CUDDY & MCCARTHY, LLP
Attorneys at Law

1

Broad Agenda

- School District Fiscal Responsibilities, Roles, Stewardship and Oversight – an overview of public school finance
- What Happens When the District's Best Fiscal Efforts and Oversight Are Not Enough – an overview of a legally-defensible reduction-in-force (RIF)

2

District Leadership Oversight is Critical

- Every 5-10 years there is a case of school finance embezzlement, and those are the cases that we know about.
- Local Board has final authority and responsibility for the District's budget and finances.
- Communities expect the local board to be good stewards of the public purse.
- It is the most important part of your job as a board member.
- Money is tight, we have to make sure we are spending it in the right places.

3

The Board's Legal Responsibilities

NMSA 1978, §22-5-4 (2003), Subsections

- (C) - review and approve the annual school budget;
- (D) - acquire, lease and dispose of property;
- ****
- (J) - except for expenditures for salaries, contract for the expenditure of money according to the provisions of the **Procurement Code**;

4

The Board's Legal Responsibilities

6.29.1.9 NMAC, Subsections:

- (9) ensure that district or charter school funds are appropriately managed and disbursed in accordance with laws, regulations and terms of grants;
- (10) approve the annual district or charter school budget;
- (11) be responsible for oversight of revenue and expenditures within the district or charter school budget;

5

The Superintendent's Legal Responsibilities

NMSA 1978, §22-5-14 (2003), Subsection B(4) – Prepare the school district budget based on the public schools' recommendations for review and approval by the local school board and the Public Education Department;

6.29.1.9 B, subsections:

- (1) administer local board's (or governing body of a charter school's) policies, state and federal requirements and applicable laws, including the Public School Code; *[includes all financial components therein]*
- (2) be accountable for student achievement; budget management; expenditure of funds; dissemination of information; district or charter school communications; development, implementation and evaluation of the EPSS and all other district or charter school business;

6

Understanding School Finances

- Board members don't need to be CPAs or MBAs to understand and provide input on the budget.
- Superintendents and Business Managers have a responsibility to make finances/budget understandable by lay persons.
- Get the budget explained to you in a format that you can understand.
 - Summaries, Outlines, Charts, etc.
- Ask that it be presented differently if it does not make sense to you.
- Take ownership of the tough decisions that you have to make.
 - RIFs, program cuts, etc.

7

Understanding School Finances cont.

- Devote sufficient time to reviewing the documents provided by the administration.
- Ask questions for clarification.
- You are not expected to become a finance and budget expert overnight.
- Acquire an understanding of the BIG PICTURE first, then gradually learn about the details and specifics.
- Do not simply delegate the finances completely to the administration because it is complicated.

8

Process Makes Perfect

- Reports should be provided in advance of meetings in order to give Board members adequate time to review the information and formulate questions or get clarification.
- Develop a process for receiving information that works for all members of the Board.
- **Remember:** Inundating the Superintendent with requests for reports and information is disruptive. Ask for regular and ongoing reports.

9

Board Finance and Audit Committees

❖ Mandated by Legislature

❖ § 22-8-12.3 NMSA 1978 Requires:

- ❖ Finance Subcommittee and
- ❖ Audit Committee

10

Board Finance Subcommittee

- NMSA 1978, § 22-8-12.3
- Finance Subcommittee – At least two Board members shall be appointed:
- Duties:
 - Make recommendations to the Board on financial planning, including reviews of revenue and expenditure projections

Please take minutes of these meetings.

11

Board Finance Subcommittee cont.

Finance Subcommittee Duties:

Make recommendations to the Board on

- (1) financial planning, including reviews of revenue and expenditure projections;
- (2) review financial statements and periodic monitoring of revenues and expenses;
- (3) annual budget preparation and oversight;
- (4) procurement; and
- (5) Serve as external monitoring committee on budget and other financial matters.

12

Audit Committee

Audit Committee – composed of:

- at least two Board members shall be appointed
- one volunteer member who is a parent of a student attending that school district
- one volunteer member who has experience in accounting or financial matters
- The superintendent and the school district business manager shall serve as **ex-officio (non-voting)** members of the committee.

13

Audit Committee cont.

Audit Committee Duties:

- 1) Evaluate RFPs for annual financial audit services
- 2) Recommend selection of auditor
- 3) Attend entrance and exit conferences for annual and special audits
- 4) Meet with external auditors at least monthly after field work begins until audit is completed

14

Audit Committee cont.

Audit Committee Duties cont:

- 5) Be accessible to external auditors to facilitate communication with Board and Superintendent
- 6) Track and report progress on status of most recent audit findings; advise Board on policy changes needed to address audit findings
- 7) Provide advice and assistance as requested by the Board
- 8) Comply with confidentiality requirements as to audit information imposed on Board by State Audit Act and Rules of State Auditor

15

The Importance of Committees

- ✓ They will operate in conjunction with Section 22-8-13.1
- ✓ Imposes sanctions for late audits
 - ✓ State Auditor reports audit not submitted within 90 days of due date, triggering monthly reporting to PED
 - ✓ Audit late between 90-180 days – 5% State Equalization Guarantee (SEG) penalty possible
 - ✓ Audit late between 180-270 days – 7% SEG penalty possible
 - ✓ Audit late more than 270 days – 7% SEG penalty plus suspension of board of finance status

16

Complying with Committee Requirements

Issues to consider in complying with these requirements:

- Is your financial software sufficient to provide data which the Board committees need?
- Are security protections adequate?
- Are there sufficient “checks-and-balances” built into the system to avoid fraud and embezzlement?

17

More Compliance Issues to Consider

What additional training should be scheduled to increase the “financial literacy” of all Board members and the members of the financial and audit committees?

Should the Board increase the limits on surety bonds available from NMPSIA, covering those responsible for your financial system? (Current amount for all school officials – \$250,000.)

18

Relevant Board Policies/Procedures

- ❖ The District's Educational Plan for Student Success shall serve as the basis for developing the budget.
- ❖ The Superintendent will present the tentative District budget to the Board for final review prior to the submission deadline of the State Public Education Department (PED).
- ❖ The Board will conduct **at least one (1)** preliminary review of the Superintendent's budget recommendations prior to the final review. Public comment and input **will be** taken at all such preliminary meetings.

19

Deadlines

- Why tax day?
- Prior to April 15 of each year, each local school board shall submit to the department an operating budget for the school district for the ensuing fiscal year.

~ N. M. S. A. 1978, § 22-8-6

20

Budget Requirements: Charter Schools

NMSA § 22-8-6 C. The operating budget required by this section shall include a proposed breakdown for charter schools in the school district,

- by individual charter school, of the membership projected for each charter school,
- the total program units generated at that charter school and
- approximate anticipated disbursements and expenditures at each charter school.

21

Budget Requirements

NMSA § 22-8-6(D). 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.

22

Balancing of the Budget

The Superintendent will be responsible for the monthly reconciliation of the budget.

NMSA 22-8-13.2 Each local superintendent or person in charge of the fiscal management of a charter school shall provide quarterly reports on the financial position of the school district

23

Personnel and Budget

Except for personnel required to meet staffing requirements mandated by the State Department of Education due to increases in enrollment, the District shall not hire any personnel whose positions are not included in the budget, as adjusted, for the fiscal year in which they are hired without concurrently securing Board approval for any adjustments to the budget necessitated by the new positions.

24

II. REDUCTION-IN-FORCE

What is a RIF?

The elimination of one or more job positions as a result of:

- Financial exigency
- Decreased enrollment
- Program changes

Job positions are eliminated, and the employees currently holding those positions lose their jobs, or by qualifications, “bump” someone less qualified, even though neither has done something wrong.

25

PERMISSIBLE REASONS FOR A RIF

- ✓ Decrease in enrollment
- ✓ Decrease or revision of educational programs
- ✓ Insufficient legislative appropriations or authorizations
- ✓ Consolidated or de-consolidation
- ✓ Other reasons

26

REDUCTION-IN-FORCE

Rising costs, enrollment shifts and changes in funding ... just a few things that may require staff reductions and the potential for costly legal complications.

Proper planning and management of the process from the outset is critical to reducing litigation risks.

If possible, preparation for a RIF should begin early. As noted in the preceding slides, the budget process is open and ongoing. There should, without legitimate unforeseen circumstances, never be a surprise RIF.

27

PRE-RIF MEASURES

- Consider other personnel cost-cutting means
- Review RIF policy and requirements therein
- Review negotiated agreement/CBA
- Review sites, programs, departments, activities
- Be straight-forward with staff and community about the problem and steps district is taking to avoid a RIF
- Avoid unnecessary spending
- Consult legal counsel early in the process

28

AUTHORITY TO DECLARE AND IMPLEMENT A RIF

THE BOARD:

- Responsible for developing and adopting policy including a RIF policy
- Authority/oversight of District budgets

The SUPERINTENDENT:

- Carry out the educational policies of the Board and administer and supervise the District
- Exercise his/her discretion in determining when a RIF is justified
- Report to Board circumstances that may require RIF
- Develop RIF Plan

BOTH: Compliance with policy and procedures

29

TIMING OF A RIF

A RIF may occur at any time during the calendar year. If possible, a RIF affecting tenured employees should be accomplished through terminations (severance of the employment at end of school year) and non-renewals rather than through discharges (severance of the employment during the course of the school year) because the legal standard that the district must meet is less stringent for terminations.

30

TIMING OF A RIF CONT.

In *Aguilera v. Board of Education of the Hatch Valley Schools*, 139 N.M. 330, the New Mexico Supreme Court held that if the RIF is implemented during the school year and results in discharges, the district has to show not just projected financial burdens in the future, but also that the district cannot survive financially in the present year.

31

WHEN DOES THE SUPERINTENDENT TALK TO STAFF ABOUT A POTENTIAL RIF?

EARLY AND FREQUENTLY!

Keeping the problem confidential until the last minute can trigger suspicion about the process.

Involving existing employees by effective communication will help the district to get their buy-in that this is a fair and equitable process.

32

STEPS FOR A RIF

- Board declares the need for a RIF by identifying:
 - a decrease in enrollment,
 - A decrease or revision of educational programs, and/or
 - Insufficient legislative funding.
- Declaration is generally based on Superintendent's recommendation.

33

SUPERINTENDENT'S RECOMMENDATION BECOMES BLUEPRINT FOR THE RIF PLAN

Both the recommendation and the RIF Plan should include clear documentation of:

- causes for the RIF;
- detailed description of efforts taken to correct problem;
- alternative measures and adjustments tried or considered and why same were rejected;
- options considered to preserve academic programs;

34

SUPERINTENDENT'S RECOMMENDATION BECOMES BLUEPRINT FOR THE RIF PLAN CONT.

- designation of extra-curricular/non-core programs to be retained and justification for same;
- identification of site, area, department, activities and/or program to be affected and number of positions in each to be eliminated;
- timing of the RIF; and
- how the proposed RIF will solve the problem.

35

Facts, Data, Columns, Rows

The Superintendent's recommendation and the Board's final decision must be based on a determination made in good faith and authenticated educational factors.

A RIF must not be used to discharge or terminate licensed school personnel without just cause or for legally impermissible reasons.

36

Facts, Data, Columns, Rows cont.

Remember: If the RIF is to be implemented during the course of the school year and will result in discharge(s), the plan must show that the district cannot survive financially for the present school year.

Consider having legal counsel review your RIF Plan and supporting documentation before the Board takes final action.

37

NOTIFY THE LOCAL UNION

Negotiated/collective bargaining agreements may set forth procedures for written notice to the union when the district anticipates a RIF that will impact member employees. Many agreements include the procedure and process for a RIF implementation and/or the selection criteria and a ranking process.

The administration should review the bargaining agreement to ensure compliance with all RIF procedures.

The administration should meet with appropriate bargaining personnel to discuss reasons for RIF, affected programs, positions, plan and process.

38

BOARD ACTION ON PROPOSED RIF PLAN MUST COMPLY WITH OMA

The Board may defer final action on the RIF Plan to allow additional review, consultation, comment by employees and public discussion.

The Board must consider final action on the RIF Plan at a duly convened meeting with public notice announcing that a RIF will be considered. The discussion and action on the RIF Plan must be in open session, but the Board can hold portions of those discussions in closed session, if such discussion would be proper under the New Mexico OMA.

39

Publish the RIF Plan

After Board approval of the RIF Plan, make it readily available to employees, e.g.:

- copy at central office
- copy at each main office at each site
- online copy

40

CRITERIA FOR SELECTION

- ✓ implement plan and determine positions to be eliminated
- ✓ selection criteria are reasonable and related to skills and competencies necessary for success in the affected positions
- ✓ the more subjective the criteria, the more vulnerable they are to criticism and legal challenge

41

CRITERIA FOR SELECTION CONT.

- ✓ local RIF policy typically specifies the criteria in order of importance, e.g.:
 - ✓ licensure/certification/endorsement
 - ✓ assignments and experience
 - ✓ academic training and education
 - ✓ past contributions and service to the district's educational programs
 - ✓ Performance, which will usually be based upon the comparison of the evaluation criteria

42

CRITERIA FOR SELECTION CONT.

- ✓ if policy allows, the administration may prepare a rating system designed to each employee on a point scale
- ✓ to help eliminate favoritism, employees should be compared on with other employees currently assigned to the same position or category of positions
- ✓ review negotiated agreement for criteria for selections

43

SUPERINTENDENT IDENTIFIES INDIVIDUAL EMPLOYEES FOR THE RIF

- ✓ If policy permits, the Superintendent may consider recommendation of mid-level supervisors.
- ✓ Policy/procedures must be followed and criteria applied fairly and consistently.
- ✓ Termination or discharge must comply with provisions of the School Personnel Act.
- ✓ If the selection process involves evaluating employee performance, the criteria should be based on actual job descriptions; the process should subject performance-based evaluations to several layers of review to help ensure accuracy and non-discriminatory motives.

44

DATA- DRIVEN DECISIONS

The Superintendent should not use a RIF to manage performance problems that are not supported by documentation.

Minimize claims of pretext by engaging in the appropriate due diligence before finalizing the list of selected employees.

45

AGUILERA V. HATCH

- The Superintendent must endeavor to find another eligible position for which the certified RIF employee is qualified.
- This is the *Swisher* rule based on the 1955 case *Swisher v. Darden*.
- The District must be able to prove that there is no other position for which a certified RIF employee is qualified consistent with the academic necessities of the District.
- The District is not required to jeopardize the quality of education or conduct a realignment that is proven to have harmful effect on the overall academic program.

46

CONDUCT AN AUDIT OF THE SELECTION DECISIONS

- Assess affected individuals in protected class for potential liabilities.
- Look at the group of employees to determine whether statistically they appear to be different from the overall workforce.

47

BEGIN THE RIF PROCESS

Determine employees to be listed for RIF termination or discharge. At that point the termination and discharge procedures of the School Personnel Act apply.

48

RECALL AND “BUMPING”

Rights: School Personnel Act

Recall:

- no statutory right to recall
- policy/negotiated agreement may provide for recall
- Recall may be limited to a certain period of time
- Offer the RIF employee any positions which become available and for which s/he is qualified if s/he complied with requirements in policy/CBA

49

TENURE AND “BUMPING” RIGHTS

A tenured teacher subject to termination under a RIF is entitled to bump a non-tenured teacher holding a position for which both are certified, or take priority over a non-tenured teacher in obtaining the necessary certification for a vacant position for which neither is presently certified. However, a tenured teacher retained as an alternative to a staff realignment which would seriously affect the educational program. See New Mexico State Board of Education v. Abeyta, 107 N.M.1 (1988).

50

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51

XXI.

**SEARCH AND SEIZURE OF STUDENTS:
Top 10 Laws N.M. School Leaders Must Know**

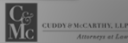
Presenters:

**Laura M. Castille
Y. Jun Roh**

Cuddy & McCarthy, LLP

**Search and Seizure of
Students: Top 10 Laws
N.M. School Leaders
Must Know**

New Mexico School Board Association
Thirty Eight Annual School Law Conference
Y. Jun Roh
Laura Castille
Cuddy & McCarthy, LLP
June 3, 2017



#1: The Fourth Amendment

- o Fourth Amendment of US Constitution
 - o Prohibits unreasonable searches and seizures
 - o *"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause . . ."*
 - o Government may not conduct a search without a warrant issued by an independent magistrate based on probable cause.
 - o **Public Schools are considered the Government.**

#2: New Jersey v. T.L.O.

- o **New Jersey v. T.L.O.**, 469 U.S. 325 (1985)
 - o Adopted the **"Reasonable Suspicion"** standard
 - o Must be:
 - o Justified at inception – Reasonable grounds for suspecting search will reveal evidence of violation of law or school rules
 - o Not excessively intrusive in light of age and sex of the student and the nature of the infraction
 - o A mere "hunch" is not a proper basis for a search

**Remember: These are all
"searches" under the 4th
Amendment**

- o Pocket Searches
- o Strip Searches
- o Locker Searches
- o Vehicle Searches
- o Drug Sniff Dog Searches
- o Student Drug Testing

#3: State v. Tywayne H.

- o **New Mexico (1997 -NMCA- 015)**
 - o **Police Officers and Reasonable Suspicion**
 - o – "reasonable suspicion" does not apply to student search conducted completely at the discretion of police officer.
 - o Similarly:
 - o In Re Josue T., 1999 -NMCA- 115 – Law enforcement officer may search student at the behest of an official school administrator.

#4: Kennedy v. Dexter

- o 2000 -NMSC- 025
- o Strip search for lost diamond ring found to be a violation of 4th Amendment
- o No individualized reasonable suspicion
- o excessively intrusive in light of age & sex of student and the nature of the infraction
- o **Just say "No" to strip searches**

More Strip Search no-nos

- **U.S. Supreme Court** - *Safford Unified School District v. Redding* (2009) School officials violated the constitutional rights of 13-year student when strip searched based on classmate's uncorroborated accusation she possessed ibuprofen
- School officials were not held personally liable because lower courts were disparate enough to warrant doubt about the scope of a student's 4th Amendment right.

#5: Herrera v. SFPS

- 41 F. Supp. 3d 1027 (D.N.M. 2014)
- **Every** student entering the prom was patted down and bags searched. in
- Female students sued the school district alleging that the search was unreasonable.
- Court held:
- Pat down searches at prom or graduation must be based on **individualized reasonable suspicion**
 - Can search bags at prom or graduation without reasonable suspicion, but cannot search everyone entering prom
 - Must be random - every fourth student, etc.

Three Part test for Search

- **NM Court of Appeals** - *State of New Mexico v. Jonathan D.* (2009) - Court affirmed district court's denial of motion to suppress evidence obtained as a result of a school search.
- School search met the qualifications of a valid search because the search was:

Test continued...

- 1. based on reasonable individualized suspicion, AND
- 2. reasonable in scope AND
- 3. not excessively intrusive in light of the age and sex of the student and nature of the infraction.

Make sure that
your student
search will hold
up to a challenge
in court.

#6: PED Regulations on Search and Seizure

- NMAC 6.11.2.10 (B)
- **Search and seizure:** School property assigned to a student and a student's person or property while under the authority of the public schools are subject to search, and items found are subject to seizure, in accordance with the requirements below.
- **Notice of search policy.** Students shall be given reasonable notice, through **distribution of written policies** or otherwise, of each school's policy on searches at the beginning of each school year or upon admission for students entering during the school year.

PED Regulations cont.

- *Who may search.*
- Certified school personnel, school security personnel and school bus drivers are "authorized persons" to conduct searches when a search is permissible as set forth below. An authorized person who is conducting a search may request the assistance of some other person(s), who upon consent become(s) an authorized person for the purpose of that search only.

PED Regulations Cont.

- *When search is permissible.*
- Unless local school board policy provides otherwise, an authorized person may conduct a search when (s)he has a reasonable suspicion that a crime or other breach of disciplinary rules is occurring or has occurred.
- An administrative authority may direct or conduct a search under the same conditions and also when (s)he has reasonable cause to believe that a search is necessary to help maintain school discipline.

◦ To Do:

- Train your administrators and SROs. Search are to be conducted by school administrators or under the direction of school administrators. SROs may not conduct searches without an administrator present.

PED Regulations Cont.

- *Conduct of searches; witnesses.* The following requirements govern the conduct of permissible searches by authorized persons:
- (a) School property, including lockers and school buses, may be searched with or without students present unless a local school board or administrative authority provides otherwise. When students are not present for locker searches, another authorized person shall serve as a witness whenever possible. Locks furnished by students should not be destroyed unless a student refuses to open one or circumstances otherwise render such action necessary in the judgment of the administrative authority.

To Do:

- Print notice in student handbook
- Lockers and vehicles may be searched if determined necessary for student safety. School will not be responsible for damages related to search.

PED Regulations Cont.

- (b) Student vehicles when on campus or otherwise under school control and students' personal effects which are not within their immediate physical possession may be searched in accordance with the requirements for locker searches

To Do:

Ensure that students show proof of driver's license and insurance before parking on campus. Issue parking passes to all students. Monitor parking lots. No parking on campus without a valid, visible pass. Print on all passes the search policy.

PED regulations cont.

- o Seizure of items:
- o Illegal items, legal items which threaten the safety or security of others and items which are used to disrupt or interfere with the educational process may be seized by authorized persons. Seized items shall be released to appropriate authorities or a student's parent or returned to the student when and if the administrative authority deems appropriate.

What about cell phones?

- o Cell phones may be seized when used to break school rules or used in violation of school rules.
- o Cannot be kept indefinitely.
- o Board policy determines whether illegal items are turned over to law enforcement. *i.e.* drugs

PED Regulations cont.

- o (c) Physical searches
- o of a student's person may be conducted only by an authorized person who is of the same sex as the student, and except when circumstances render it impossible may be conducted only in the presence of another authorized person of the same sex. The extent of the search must be reasonably related to the infraction, and the search **must not be excessively intrusive in light of the student's age and sex, and the nature of the infraction.**

To Do:

- o Train all administrators and SROs on proper search of students and their belongings. Post notice in the student handbook of right to search based on individualized reasonable suspicion.

#7: Doe v. Little Rock Sch. Dist.

- o **Student Drug Tests**
- o Gen. population: Courts have found drug/alcohol testing for all students infringed upon the student's legitimate expectations of privacy. Must have reasonable suspicion.
- o 380 F.3d 349 (8th Cir. 2004) – random, suspicionless searches of students and belongings violated the 4th Amendment.

#8: Tannahill v. Lockney Ind. Sch. Dist.

- o 133 F.Supp. 2d 919 (N.D. Tex. 2001)
- o Struck down both mandatory and random drug test policy **for all students** in grades 6 through 12.
- o Expectation to privacy higher than for just athletes

Expectation of privacy lower for students participating in extra-curricular activities

Athletics:

Vernonia v. Acton, 515 U.S. 646 (1995)
For students who voluntarily choose to participate in non-mandatory school activities.

Activities:

Bd. of Ed. of Pottawattomie County v. Earls, 536 U.S. 822 (2002)
For student who voluntarily participate in competitive extra curricular activities.

More sniffing cases...

- o 462 U.S. 696 (1983)
- o U.S. Supreme Court held use of sniffer dogs with respect to unattended luggage was not a search.
- o Dog alert creates the "reasonable suspicion" needed to conduct a search

#9: U.S. v. Morales-Zamora

- o 914 F.2d 200 (10th Cir. 1990)
- o Vehicle search
- o "society does not recognize a reasonable privacy interest in the public airspace containing the incriminating odor" when that air space is sniffed around a vehicle.

Sniffing Cases cont.

- o *Dow v. Renfrow*, 631 F.2d 91 (7th Cir. 1980)
 - o Canine sniff did not constitute search
- o *Horton v. Goose Creek Ind. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982)
 - o Sniff was a search – dog placed nose on student
- o *B.C. v. Plumas Unif'd Sch. Dist.*, 192 F.2d 1260 (9th Cir. 1999)
 - o Sniff of student belongings in classroom (after students removed) was a 4th Amend. search

#10: State v. Antonio T.

- o New Mexico Supreme Court, October 23, 2014 (2015-NMSC- 019)
- o 17-year old student appeared drunk at school and was sent to office.
- o Admitted to the school principal, in front of SRO – a Sheriff's deputy, that he had brought and consumed alcohol at school.
- o Student was given breathalyzer at principal's request and tested positive.
- o Student was mirandized afterwards and did not answer any further questions about alcohol possession.
- o Charged with delinquent act of possession of alcohol.

Antonio T. cont.

- o Student moved to suppress his admission to drinking alcohol because he did not knowingly waive his rights.
- o District court denied motion.
- o Court of Appeals affirmed.
- o NMSC granted cert:
 - o Under 13, a child's statements are never admissible in court.
 - o 13-14 years old – inadmissible if made to a person in authority.
 - o 15+ admissible if made spontaneously
 - o If elicited, State must prove done so having willingly waived rights.

Antonio T. cont.

- o Schools may continue to use student statements for school disciplinary proceedings because the Delinquency Act does not apply to non-criminal proceedings.
- o If schools want the student arrested/charged, they need to ensure that SRO's follow the correct procedure:
 - o no investigatory detention without Miranda, i.e. the SRO was standing at the door of the Principal's office listening while the Principal questioned the student.
 - o Searches conducted at the request and under the supervision of administrators.
 - o No searches without **reasonable individualized suspicion**.

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XXII.


EFFECTIVE WRITTEN DISCIPLINE AND EVALUATIONS

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Effective Written Discipline
and Evaluations

2017 School Law Conference
June 2-3, 2017
Andrew M. Sanchez
Evelyn A. Peyton



CUDDY & MCCARTHY, LLP
Attorneys at Law

IMPORTANT NOTE #1:

Federal laws, New Mexico state laws, New Mexico Public Education Department regulations and School District policies can change frequently.

*When writing disciplinary documents, always check the **CURRENT VERSIONS** of laws, regulations and applicable policies and procedures to make sure your disciplinary documents comply.*

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IMPORTANT NOTE #2:

*If an employee's conduct endangers (or could endanger) a child or another staff member, report that conduct to the Superintendent **IMMEDIATELY!***

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IMPORTANT NOTE #3:

If the employee is authorized to do it, but you don't like the way they do it—It is work performance as part of the evaluation process.

If the employee is not authorized to do it—It is misconduct and must be addressed in writing.

An employee who has been disciplined showed have a competency effected by the misconduct on the evaluation. Do Not Revisit the misconduct in an evaluation (growth plan—don't steal computers).

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Why have written discipline?

- Let employees know if their conduct violates District policies, regulations, and directives; New Mexico Public Education Department ("PED") regulations; or state or federal laws applicable to school personnel
- Let employees know how and why their conduct is unacceptable and have them stop the behavior
- Help employees understand what specific things they need to do – or to stop doing – in order to correct their misconduct

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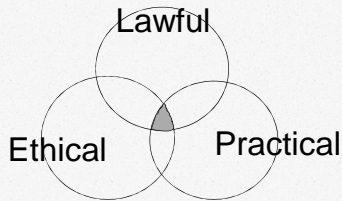
Why have written discipline?

- Let employees know the consequences of future misconduct
- Create and maintain a record of the employee's conduct and the supervisors' instructions to the employee that can be viewed by the employee, administrators, and third parties later
- Provide evidence to support positive or negative employment actions and to defend against discrimination or retaliation claims

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CONSIDERATIONS

- Lawful
- Ethical
- Practical



“Just cause”

- Many collective bargaining agreements state that “no unit employee shall be disciplined without just cause.”
- “Just cause” is not defined in the PED regulations, but the PED’s contract form for licensed employees states that the contract “may be cancelled by the board for cause, including unsatisfactory work performance, incompetence, insubordination, physical or mental inability to perform the required duties or for any other good and just cause.”

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8

The Supervisor’s Mantras

- o If someone is not doing their job they need to read about it.
- o It’s my building, room, program, etc.
- o No good deed goes unpunished.
- o If you write someone’s evaluation you have no friends
- o There is no law that employees must be made happy
- o It’s not about individuals—it’s about process
- o Something beats nothing every time—document, document, document
- o Form letters for letters of reprimand, etc. “Knock-it-off”
- o “Failure to follow these directives will be considered insubordination and result in further discipline, including the termination or discharge of your employment with the Cobre Consolidated Schools.”
- o Be consistent.

“Due process”

- Notice
- A right to be heard

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What is progressive discipline?

- Those principles include:
 - the “severity and frequency of an employee’s conduct infraction or job performance will determine the level of progressive discipline”
 - supervisors and administrators give verbal counseling in a due process meeting before giving any written notice of possible disciplinary action to an employee

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11

What is “insubordination”?

- Insubordination does not mean rudeness or a “bad attitude.”
- PED regulations define “insubordination” as “actual or implied willful refusal to follow written policies, regulations, rules, or procedures established by” the PED, “the local school board, or administrative authorities, or the lawful written or oral orders, requests, or instructions of administrative authorities.”

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12

What is “insubordination”?

- Insubordination is just cause for disciplinary action, including termination or discharge.

Directive

Ideal to have magic language or what will happen if not followed

Failure to follow directive

No lawful reason

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13

What resources can I use to create effective written discipline?

- Directions from supervisors, whether those directions are spoken or written
- School District rules, policies, and regulations, including but not limited to policies dealing with staff ethics, staff conduct, and staff conduct with students

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14

What resources can I use to create effective written discipline?

- PED regulations, including but not limited to:
 - 6.69.2 NMAC, “Unsatisfactory Work Performance of Certified (Licensed) School Personnel” – definition of “insubordination” in Section 6.69.2.7(B)
 - 6.60.9 NMAC, “Licensure Requirements, Code of Ethical Responsibility of the Education Profession” – Code of Ethics in Section 6.60.9.8; Standards of Professional Conduct in Section 6.60.9.9
- New Mexico and/or federal laws

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What steps should I take before writing the written discipline?

- Determine the nature and seriousness of the misconduct.
 - Does the misconduct create a risk of physical harm to any person?
 - Does the misconduct create a risk of damage to School District equipment or property?
 - Does the misconduct create a risk of mental or emotional harm to any person?
 - Has the misconduct been reported to the Superintendent?

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16

What steps should I take before writing the written discipline?

- Have the allegations of misconduct been investigated? If so, what did the witnesses say about the allegations?
- Has a due process meeting been held with the employee? If so, what does the employee say about the allegations?
- Review the employee’s disciplinary history to see whether the misconduct is a first offense by the employee, or whether the employee has a history of this type of misconduct.

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17

What steps should I take before writing the written discipline?

- Review any directives or instructions from supervisors received by this employee relating to this type of misconduct; any School District rules, policies, and regulations applicable to this misconduct; and any PED regulations applicable to this misconduct. (The Superintendent can check with the School District’s lawyers regarding any New Mexico and/or federal laws applicable to this misconduct.)
- Identify every portion of each of these directives, instructions, rules, policies, regulations, and laws that the employee’s conduct violates.

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18

What steps should I take before writing the written discipline?

- Did the prior discipline give the employee clear direction about what the employee should do, or refrain from doing, in the future?

Has the employee violated any such directive?
Did the prior discipline tell the employee that failing or refusing to comply with those directives may result in further disciplinary action?

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19

What type of written discipline would be appropriate?

- Serious misconduct, especially if the employee has engaged in such conduct before, probably requires a strong reprimand rather than lesser such letters such as a Letter of Concern or an Administrative Directive.
- If the misconduct is less serious, especially if the misconduct is a first offense by this employee, a Letter of Concern or an Administrative Directive may be more appropriate.

They are all knock-it-off letters

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What type of written discipline would be appropriate?

- If the employee denies the misconduct and if evidence of the misconduct is inconclusive, a Letter of Caution or an Administrative Directive may be appropriate.

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21

Performance Evaluations

o Performance Evaluations-District Standards

- o § 6.69.4.12 NMAC - NM Teacher Competencies & Indicators for Levels I, II and III
- o Performance Evaluation forms (including PDPs and PGPs) must be based on Performance Competencies
- o § 6.69.4 NMAC - Performance Evaluation System for Teachers
- o § 6.69.3 NMAC - Performance Evaluation System for Administrators

22

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Documenting Unsatisfactory Work Performance

o § 6.69.2.8(A) NMAC

- o Uncorrected unsatisfactory work performance is just cause for discharging licensed school personnel, so long as the following procedures are followed:

23

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Documenting Unsatisfactory Work Performance

o § 6.69.2.8(B) NMAC

- o Two or more conferences held showing unsatisfactory work performance
- o Conference held with employee's immediate supervisor
- o Sufficient time shall have elapsed between conferences to correct the unsatisfactory work
- o Written record of all conferences, specifying areas of uncorrected unsatisfactory work and all improvements made. Signed by parties. Copy given to employee.

24

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Steps for Documentation of Unsatisfactory Work Performance

- o Evaluation showing unsatisfactory work performance +
- o Development/Implementation of a Professional Growth Plan (PGP) +
- o Evaluation showing unsatisfactory work performance =
- o Sufficient Documentation for Discharge or Termination

25

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Professional Growth Plan (PGP)

- o Do Not confuse with Professional Development Plan – “PDP”
- o PGP addresses identified deficiencies and unsatisfactory work performance **according to district standards**
- o District PGP Guidelines should be developed in addition to PDP Guidelines
- o Evaluation can take place any time unsatisfactory performance is identified or suspected
- o Unsatisfactory work = Does not meet **district standards**

26

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Performance Evaluation Process

- o Used to Substantiate “Just Cause” for Discharge or Termination

27

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Performance Evaluation

- o Identifying Deficiencies and Unsatisfactory Work
 - o Be specific
 - o Use examples from performance observations

28

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Do Not Use Unsupported Statements That Are

- o Broad
- o General
- o Summative

29

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Performance Evaluation

Support conclusions with specifics and/or examples:

Support:
“Teacher has trouble with classroom management”

With:
–Students in personal conversations with each other
–Students passing notes

30

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Look at Indicators for Each Competency

For example, § 6.69.12(A)(6) NMAC lists eight indicators for competency in managing “the educational setting in a manner that promotes positive student behavior, and a safe and healthy environment,” including:

- Serves as a model for constructive behavior patterns
- Establishes and states expectations for student behavior
- Minimizes distractions and interruptions

31

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UNCORRECTED UNSATISFACTORY WORK PERFORMANCE

- **Unsatisfactory Work Performance** – § 6.69.2.7D NMAC
- **Uncorrected Unsatisfactory Work Performance** – § 6.69.2.7C NMAC
- Uncorrected Unsatisfactory Work Performance is “**just cause**” for discharge – § 6.69.2.8A NMAC

32

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Questions



◦ Thank you

33

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XXIII.

TITLE IX AND THE NEW MEXICO ATHLETICS EQUITY ACT

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2017 SCHOOL LAW CONFERENCE
**TITLE IX AND THE
NEW MEXICO ATHLETICS EQUITY ACT**
R. Daniel Castille
Laura Sanchez-Rivet
Cuddy & McCarthy, LLP

What is Title IX?

- Title IX is the portion of the Education Amendments of 1972 that provides:
 - No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

Gender Equity

- "Gender equity is an atmosphere and a reality where fair distribution of overall athletic opportunity and resources are proportionate to women and men and where no student-athlete, coach or athletic administrator is discriminated against in any way in the athletic program on the basis of gender."
- "That is to say, an athletic program is gender equitable when the men's sports program would be *pleased to accept for its own* the overall participation, opportunities and resources currently allocated to the women's program and vice versa."**

Statutory and Regulatory Framework

- 20 U.S.C. § 1681 prohibits gender discrimination in education programs that receive federal funds, either directly or indirectly
- Enforcement power is vested in U. S. Department of Education's Office of Civil Rights ("OCR")
- Title IX does not reference athletic programs. Regulations promulgated by OCR at 34 C.F.R. Part 106 address athletics.

How is Title IX applied to athletics programs?

- Title IX applies:
 - to the overall athletic *program* of a school—not to specific sports or teams.
 - intramural sports, physical education courses and all other school sponsored athletic programs.

Title IX: EQUIVALENCE

- The basic test of compliance is – *equivalence*.
- The benefits, opportunities and treatment of each gender must be equal or equal in effect.
- There must be no disparity between boys' and girls' programs.

Title IX: EQUIVALENCE

- Disparity—a difference on the basis of gender, in benefits or services, that has a negative impact on athletics of one gender when compared to the benefits or services available to athletes of the other gender.

7

Federal Requirements for Accommodation of Interests and Abilities

- OCR issues a three test examination in 1996
- Participation/Opportunities Tests
 - 1. participation is substantially proportionate to enrollment; or
 - 2. demonstrates history and continuing practice of program expansion responsive to developing interests and abilities of under-represented sex; or
 - 3. fully and effectively accommodate interests and abilities of under-represented sex

8

Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
- First test
 - Participation of female student athletes in the school's athletics program is *substantially proportional* to the percentage of females enrolled in the school
 - No requirement for strict proportionality
 - No clear rule setting a definitive percentage

9

Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
- Second Test
 - demonstrate history and continuing practice of expanding its sports offerings for females
 - Adding sports
 - Responding to requests for adding sports
 - Monitoring interests and abilities of student athletes

10

Federal Requirements for Accommodation of Interests and Abilities

- Participation/Opportunities Tests
- Third Test
 - Fully and effectively accommodating the athletic interests and abilities of females in the student body.
 - Surveys
 - Reviews
 - Assessments

11

Federal Requirements for Accommodation of Interests and Abilities

Major OCR compliance emphasis is on the participation opportunities tests. Failure to comply with at least **one** of the three part tests will likely result in a finding of a violation by OCR.

12

ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

- Travel and per diem allowance
- Tutors
- Coaches
 - Pay and assignment
 - Office/facilities

13

ATHLETIC PROGRAM AREAS EXAMINED TO DETERMINE COMPLIANCE

- Facilities: Locker rooms, practice etc.
- Publicity and Support services
- Recruitment

14

COMPLIANCE ISSUES

Athletics

- Compliance is an examination of the overall benefits provided to girls' athletics compared to boys' athletics.
 - Compliance = overall benefits
 - NOT boys' soccer = girls' soccer

15

COMPLIANCE ISSUES

Athletics

- compliance may mean that equivalent benefits can only be established by providing equivalent benefits to more girls' teams than boys' teams

16

COMPLIANCE ISSUES

Athletics

- Example: New Uniforms
 - 2 of 8 boys' teams
 - 50% of boys' participation
- **Equivalence**
 - New uniforms for 50% of girls' participation
 - 4 of 9 girls' teams or 5 of 9 girls' teams

17

COMPLIANCE ISSUES

Athletics

- teams may be provided different benefits as long as balance of benefits in women's programs is equal to balance in men's programs
- Boys' football team requires more equipment and storage space than girls' tennis. Are benefits given to the other girls' teams, when aggregated, equal to benefits given to the football team?

18

COMPLIANCE ISSUES

Athletics

- Proportionality of benefits--
- NOT \$ girls = \$ boys
- able to demonstrate amount, quality and suitability of equipment is equivalent

19

COMPLIANCE ISSUES

Booster clubs, donations and fundraiser impact

- Differences in donations may not be used to justify imbalance in benefits or services provided
- Disproportionate benefits from team booster clubs may require reallocation of budgeted funds from teams receiving donations to teams which are not.
- Donations policy—direct donations to school's athletics program not to specific team or program.

20

TITLE IX COMPLIANCE OFFICER

- At least one employee MUST be designated as a Title IX coordinator for the school district to oversee compliance.
- All students and employees must be notified of the name, office address and telephone number of the designated Title IX coordinator.
- Coordinator oversees compliance by departments, programs and employees and investigates complaints of violations of Title IX

21

TITLE IX BOARD POLICIES

- Generic EEOC nondiscrimination policy statement will not satisfy OCR
- OCR will require the implementation of a Title IX Nondiscrimination Policy
- "Notification" of compliance officer and policy includes
 - publication in local newspapers
 - publication in school newspapers
 - mailing/distributing to students and their parents
 - Publishing in student and employee handbooks
 - any other written communication actually distributed to employees, parents and students

22

TITLE IX BOARD POLICIES

- Policy requirements include Title IX Grievance Procedures
- Superintendent Directives
 - Coordinator: authority to intake and investigate
 - Separate from informal dispute resolution regulations
 - Appeal rights to Title IX Grievance Committee
 - Appeal rights for final review by Board of Education
 - Hearing includes Evidence and witnesses

23

TITLE IX BOARD POLICIES

- Sexual Harassment Policy
 - Actual Notice is key to liability
 - *Bostic v. Smyrna School District* (Third Circuit)
 - Principal and assistant principal are not appropriate persons based on position alone
 - Deliberate indifferent to known acts of teacher-student discrimination
 - Student-on-Student Policy
 - Employee-on-Student
 - Employee-on-Employee
 - Title VII
 - Separate Policy

24

TITLE IX BOARD POLICIES

- Training
 - All Employees
 - Yearly
 - Coaches/Athletes
 - Prior to each season of sports
 - Provide means for athletes to report with athletic dept.
- Take appropriate action
 - Investigate
 - Stop conduct
 - Discipline/law enforcement

25

School Athletics Equity Act

- The School Athletics Equity Act ("SAEA") applies to each public school that has an athletics program for grades seven through twelve.
- Each public school shall operate its program in a manner that does not discriminate against students or staff on the basis of gender.

26

School Athletics Equity Act

- PED shall collect annual data from public schools on their athletics programs.
- Each public school shall collect and submit the prior-year data required in SAEA in a format required by PED.

27

School Athletics Equity Act

- The data submitted shall include:
 - by August 31, 2011, the following information pertaining to enrollment:
 - (1) the total enrollment in each public school as an average of enrollment at the eightieth and one hundred twentieth days of the school year;
 - (2) student enrollment by gender;
 - (3) total number of students participating in athletics;
 - (4) athletics participation by gender; and;
 - (5) the number of boys' teams and girls' teams by sport and by competition level;

28

School Athletics Equity Act

- The data submitted shall include:
 - by August 31, 2011, the following information pertaining to athletic directors, coaches and other school personnel:
 - (1) the name and gender of each public school's athletic director;
 - (2) the name of each team's coaches and other team personnel, with their gender, job title and employment status, such as full-time, part-time, contract or seasonal, specified;
 - (3) the coach-to-athlete and staff-to-athlete ratio for each team; and;
 - (4) the stipend or other compensation for coaching paid to coaches of boys' teams and to coaches of girls' teams for each public school;

29

School Athletics Equity Act

- The data submitted shall include:
 - by August 31, 2012, an accounting of the funding sources that are used to support the school's athletics programs and to which teams those funds are allocated; funding sources include state funding, federal funding, fundraising or booster clubs, game and concession receipts, gate receipts, cash or in-kind donations, grants and any other source;

30

School Athletics Equity Act

- The data submitted shall include:
 - by August 31, 2012, the following information regarding expenses, including:
 - (1) any capital outlay expenditures for each public school's athletics programs;
 - (2) the expenditures for each public school's athletics programs; and;
 - (3) the expenditures for individual teams, including travel expenses such as transportation, meal allowances and overnight accommodations; equipment; uniforms; facilities; facilities improvements; publicity expenses; awards; banquets; insurance; and any other expenses incurred by each team; and

31

School Athletics Equity Act

- The data submitted shall include:
 - by August 31, 2012, a statement of benefits and services to each team, including:
 - (1) replacement schedules for equipment, uniforms and supplies;
 - (2) practice and game schedules;
 - (3) access to locker rooms, weight rooms and practice, competitive and training facilities; and;
 - (4) assistance in obtaining scholarships.

32

School Athletics Equity Act

- Each public school shall make its data available to the public, including all materials relied upon to compile the data.
- Each public school shall inform all students at the public school of their right to review the data.
- PED shall publish the following information:
 - (1) each public school's data; and;
 - (2) a list of public schools that did not submit fully completed data.

33

School Athletics Equity Act

- Each public school shall maintain its data and all materials relied upon to complete the data for at least three years.
 - Statute of Limitations for Title IX cases.
- Each public school shall publish its data in a newspaper of general circulation in the state or make the data available on a publicly accessible web site.

34

School Athletics Equity Act

- Each public school shall submit an assurance of compliance with Title IX to its local school board or governing body and provide a copy to PED no later than August 31 of each year.
- The assurance shall be signed by the superintendent or the head administrator of the charter school.
- PED shall publish, in a newspaper of general circulation in the state or on a publicly accessible web site, a list of public schools that fail to submit the assurance of compliance with Title IX.

35

School Athletics Equity Act

- REPORT TO GOVERNOR AND LEGISLATURE.
 - Beginning December 1, 2011, PED shall submit annually a report on the School Athletics Equity Act to the Governor and the Legislature, including a summary of the data received from the public schools.
 - The report shall include recommendations on how to increase gender equity in athletics in public schools.
 - PED shall post the report on its web site.

36

Suggestions

- Conduct a Title IX Audit
 - Work with the NMAA
 - Review your numbers as to enrollment and participation in athletics
 - Surveys of interest
 - Finances in athletics
 - Benefits to each team
 - Review of booster clubs

37

Suggestions

- Begin the culture change now
 - Administrators
 - Athletic Directors
 - Coaches
 - Parents
 - Students

38

Suggestions

- Make necessary changes
 - Be open with parents, coaches and public
 - Address threats of litigation and complaints to OCR
 - Work with booster clubs or have plan to address booster clubs
 - Donations policy
 - Control of name and logo
 - Control of athletes.

39

Questions



- Thank you

40

Contact Information



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41

XXIV.

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