

CUDDY & McCARTHY, LLP

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WHAT'S NEW AT CUDDY & McCARTHY

In September, Matthew Campbell joined Cuddy & McCarthy as our newest associate. Here's his bio page from our website:

MATTHEW L. CAMPBELL
Albuquerque

Sandra Day O'Connor College of Law
Arizona State University
Juris Doctor
2008

Fort Lewis College
B.A., 2004



Mr. Campbell joined Cuddy & McCarthy, LLP in September 2009. His main areas of practice include Indian and education law. Mr. Campbell graduated from law school at Arizona State University with a certificate in Indian law and a Dean's award.

Mr. Campbell previously clerked for the Honorable Judge Irvine of the Arizona Court of Appeals, and served as a summer law clerk with Bledsoe, Downes & Rosier, P.C. working as general counsel to a federally-recognized Native American Tribe.

Mr. Campbell is a member of the State Bar of New Mexico. He is admitted to practice before the state courts of New Mexico and Colorado, and the United States District Court for New Mexico.

Mr. Campbell is enrolled with the Village of Gambell on Saint Lawrence Island in Alaska. He has been a tutor and teaching assistant for the Pre-Law Summer Institute for American Indians and Alaska Natives.

In October, Patricia Salazar Ives, Andrew Sanchez, and Buck Cuddy traveled to Seattle to attend the annual School Law Practice Seminar sponsored by the NSBA Council of School Attorneys ("COSA"). This annual seminar focuses on practical issues involved with the representation of school districts across the country and provides our attorneys with access not only to the latest information about developments in school law, but also important networking resources that benefit our clients.

Following in the footsteps of John Kennedy and Buck Cuddy, each of whom served two terms on the COSA Board of Directors, Andy Sanchez is now a member of the COSA Board. He attended the COSA Board meeting that occurred immediately prior to the School Law Practice seminar. Buck Cuddy represented the NMSBA at the meeting of State Association Counsel, which was held after the seminar adjourned. As you can see, our firm continues to take an active role in school law activities at the national level.

Closer to home, your school district may be one of many New Mexico districts faced with the prospect of budget cuts this year. If so, and especially if your district is considering hiring freezes, furloughs, or reductions in force, be sure to read Ramon Vigil's article in this *Education Law Quarterly* issue. Anyone involved with preparing school board agendas should read Buck Cuddy's article on the Open Meetings Act issues involved

with agenda preparation. If your school district is considering a policy requiring a moment of silence, especially for prayer or meditation, read Evelyn Peyton's article regarding such requirements in New Mexico schools. Finally, although New Mexico voters recently came very close to passing a state constitutional amendment allowing school elections to be held at the same time as non-partisan elections, this amendment failed. Read Patricia Salazar-Ives' article for more information on the timing of school elections in our state.

**SCHOOL BUDGET CUTS:
WHAT ARE THE RESPECTIVE LEGAL POWERS OF THE BOARD
AND SUPERINTENDENT?**

by Ramon Vigil, Jr.

Recently, the Legislature and Governor took action regarding 2009-2010 budget cutbacks for public school districts as part of the State's overall efforts to address the State's financial crisis. This action has prompted several questions from board members and school administrators regarding the duties and powers of local school boards and superintendents to implement budget conservation and reduction procedures. The types of actions most often questioned are hiring freezes, reductions in force, and reduction of salaries. Do local school boards have the authority to implement a hiring freeze? What are the requirements for a reduction in force ("RIF")? Can a school district simply decrease the salaries of employees during the school year?

First, local school boards have the authority to implement a hiring freeze. A local school board's powers and duties, which are listed in the New Mexico statutes at Section 22-5-4, include reviewing and approving the school district budget. NMSA 1978, § 22-5-4(C). Because a hiring freeze would be implemented as a measure to conserve the school district's budget, such a measure is a proper statutory function of the school board. The implementation of a hiring freeze by a local school board does not violate the statutory provisions related to the hiring powers and duties of the local superintendent. NMSA 1978, § 22-5-14(B)(3). Only if a local school board takes action directing the local superintendent *whom* to employ, terminate, or discharge is there a violation of that statute. Furthermore, since

the local school board has the budget authority to approve the full-time equivalent (“FTE”) positions in the school district’s budget, the local school board may also determine which vacant positions it will permit to be filled, so long as it does not dictate *who* should fill the approved vacant positions.

Second, in order to address the budgetary cutbacks mandated by the Legislature and the Governor, several board members have opined that any cuts made to the budget should not affect direct instruction, and that any cuts in personnel should be made at the administration level. Any decision regarding changes to a school district’s approved budget must be made by the local school board. The approval process works as follows: pursuant to NMSA 1978, Section 22-5-14(B)(4), the local superintendent has the responsibility to prepare recommendations regarding the budget for review and approval by the local board. The local school board has the statutory power and duty to approve any budget changes. NMSA 1978, § 22-5-4(C). Thus, through board action, the local school board can determine the priorities and changes for the current budget to meet the required budget cutbacks enacted by the Legislature and Governor for public schools.

Local school boards and superintendents must be cautious about using cuts in personnel or reductions in salary as a means for budget reduction. Only at-will employees can be cut from the payroll without implementing a school district’s RIF provisions, and only the local superintendent is authorized by state law to take final action in any such reductions. A local school board cannot specifically identify individual employees for reduction, because that power is expressly granted to the local superintendent in state law. NMSA 1978, § 22-5-14(B)(3).

A school district may lay off employees who hold a term contract for the 2009-2010 school year *only* through application of the school district’s RIF policy or the RIF provisions in the school district’s negotiated collective bargaining agreement. Whether a school district uses its policy or the provisions of a collective bargaining agreement will depend on the class(es) of employees identified for reduction, and on whether those classes of employees are members of the collective bargaining unit. Any employee with a term contract for the 2009-2010 school year who is issued a termination notice or a notice of intent to discharge as a result of a RIF shall have a right to a termination or discharge hearing, as applicable, pursuant to the provisions of NMSA 1978, Section 22-10A-24 or Section 22-10A-27. In such a hearing, the Administration will have the burden of showing that, in

accordance with the applicable RIF procedures, the employee was appropriately identified for reduction.

In *Aguilera v. Bd. of Ed. of the Hatch Valley Schools*, 139 N.M. 330 (2006), the New Mexico Supreme Court held that when a school board is forced to reduce its staff by means of a RIF, the school district must prove that there is no other position for which the employee is *qualified* consistent with the academic necessities of the district. Furthermore, if the RIF is implemented during the school year rather than reducing the force for the subsequent school year, the school district must be able to show that it cannot “survive financially for the present year, which is already underway.” *Id.* at ¶ 32. The ruling in the *Aguilera* case states that “the Legislature has authorized a school district to reserve up to 5 percent of its cash balance for an emergency fund to help get through the year when it experiences ‘unforeseen expenditures incurred after the annual budget was approved.’ NMSA 1978, §22-8-41(B).” *Id.* Accordingly, a school district will be expected to show that it has expended all of its emergency funds before implementing a reduction in force.

Assuming that all the required provisions are met for a RIF, employees who are laid off through the RIF process have “call-back” rights for one year. Thus, if the school district decides that it can afford to fill the reduced position(s) during the subsequent year, the employees will be called back in the reverse order in which they were laid off.

Finally, a school district cannot reduce the salary of employees who hold term contracts. Such employees not only have an expectation of employment until the termination date of their contracts, but also have an expectation of payment in accordance with the terms and conditions of the contracts. The school district has a legal, contractual obligation to pay an employee according to the issued contract. Action by a local school board or local superintendent to reduce employee salaries unilaterally could result in breach-of-contract claims from such employees. Thus, a school district should use its RIF provisions rather than attempting to reduce salaries of employees who hold a term contract.

When considering budget conservation or reduction procedures, local school boards and local superintendents must understand their respective legal responsibilities, authority, and duties. The local board has authority over the budget, including the number of FTE positions to be funded. The

local superintendent has a duty to prepare recommendations regarding the budget for the local school board, and the local superintendent has the statutory authority to decide who should be hired, terminated, or discharged. By understanding their respective roles, local boards and superintendents can work together to address the financial needs of their school districts.

OPEN MEETINGS ISSUES AND SCHOOL BOARD MEETING AGENDAS

by C. Emery Cuddy, Jr.

I recently attended a meeting of the attorneys for state school boards associations, where we discussed both the kind of training given to new school board members and what issues come up most frequently from board members. I was surprised to learn that open-meetings law issues are as frequent and dominant in most states as they are here in New Mexico. This discussion reinforced my judgment that we are not spending too much time in school board member training sessions on this issue.

One of the frequent Open Meetings Act violations our law firm sees is the failure of school boards to construct and follow their agendas properly. Although school boards have discretion in deciding who will be involved in preparing meeting agendas, this task usually is a joint responsibility of the board president and the superintendent. Regardless of who performs the task, however, the agenda **must** be finalized at least 24 hours prior to the meeting and must be available to the public at that time. Although school boards may approve the agenda formally at the beginning of a board meeting, this approval is limited to rearranging the agenda items or deciding to delete or defer items; the board may not add any items, including any “items of business to be discussed,” to the agenda. The board must not allow the discussion of items that did not appear on the final agenda. If a matter that needs to be discussed comes up for the first time during the meeting, the board should simply direct the superintendent to place that matter on a future meeting’s agenda for discussion at that meeting.

Perhaps the most serious agenda development mistake is the failure to describe the items of discussion or business with reasonable specificity. Agenda items must not be described in vague or broad terms. When in doubt, describe the agenda item in greater detail, so that no member of the public can challenge the board’s discussion or actions on the grounds that

they did not have sufficient notice of what the board was going to discuss or what action it intended to take. However, do not disclose details regarding what will take place, or has taken place, in a closed session. Such disclosures could expose the school district to potential legal problems, particularly if they reveal information about a confidential transaction or the identity of a person against whom the board is considering disciplinary action. If a board meeting will include a discussion in closed session under one of the exceptions to the Open Meetings Act, the person preparing the meeting's agenda should consult with the school district's legal counsel for guidance.

School boards should alert the public specifically as to those items upon which the board may take action at the meeting. Many boards use some kind of code (such as an asterisk next to each action item) to indicate that the board reserves the right to take action on the matter. If your board uses such a system, be aware that a failure to mark the item on the agenda as an "action item" may result in an Open Meetings Act challenge. However, so long as an item is on the agenda with sufficient specificity and the board has reserved the right in its meeting procedures to do so, the board may treat any item on the agenda as an action item. This procedure can help the board avoid the problem of an inadvertent failure to mark an item as an action item.

Let us know if the above-discussed issues raise any questions about the way you have done things in your district.

MANDATORY MOMENTS OF SILENCE IN SCHOOLS: CONSTITUTIONAL ISSUES

by Evelyn A. Peyton

An old joke says that as long as public school students have to take math tests, there will be prayer in public schools. The legal trouble comes when students are required or pressured to pray in public schools. The First Amendment of the United States Constitution states in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." These two clauses of the First Amendment – the Establishment Clause and the Free Exercise Clause – limit governmental power to make rules affecting religious freedom.

Because public schools are governmental entities, they cannot make rules that violate the Establishment Clause or the Free Exercise Clause. In the landmark case of *Engle v. Vitale*, 370 U.S. 421 (1962), the United States Supreme Court held that it is unconstitutional for state officials to compose an official school prayer and require its recitation in public schools. Although the official school prayer at issue in *Engle* was non-denominational, and student participation in the prayer was voluntary, the Supreme Court ruled that government-directed prayer in public schools was an unconstitutional violation of the Establishment Clause. As the Supreme Court explained in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), one of the key criteria for determining whether a statute violates the Establishment Clause is that the statute must have a secular purpose. A statute that is entirely motivated by a purpose to advance religion is invalid.

At least 35 states, including New Mexico, have laws regarding moments of silence in public schools, and such laws are often challenged as violating the Establishment Clause. Mandatory moments of silence that are imposed by school personnel rather than initiated by students are problematic. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), for example, the Supreme Court ruled that an Alabama state law authorizing teachers to set aside one minute at the beginning of each school day for a moment of “silent meditation or voluntary prayer” was invalid, because the statute’s purpose was to advance religion. The Court held that the state’s endorsement of prayer activities at the beginning of each school day was not consistent with the established principle that the government must pursue a course of complete neutrality toward religion. Similarly, in January 2009, the United States District Court for the Northern District of Illinois held that the Illinois Silent Reflection and Student Prayer Act, which requires schools to start each day with a brief period of prayer or reflective silence, is unconstitutional. The district court judge reached this conclusion in part because the law allows only two options during these moments of silence in school: prayer or reflection upon the upcoming day’s activities. He reasoned that even silent thoughts by a student about a professional sporting event or family vacation appear to violate the stated intent of the statute. Consequently, teachers would have to instruct their students, especially in the lower grades, about prayer and its meaning, as well as about the limitations on permissible student reflection.

A former New Mexico law stated that “[e]ach local school board may authorize a period of silence not to exceed one minute at the beginning of

the school day. This period may be used for contemplation, meditation or prayer, provided that silence is maintained and no activities are undertaken.” NMSA 1978, § 22-5-4.1 (repealed). In *Duffy v. Las Cruces Public Schools*, 557 F. Supp. 1013 (D.N.M. 1983), a parent sued the school district because the local school board had adopted a policy requiring the period of silence described in Section 22-5-4.1. The federal district court ruled that the primary purpose of the statute and of the school board policy was to establish a devotional exercise in public school classrooms in New Mexico, and that the effect of the statute and the school board policy was to advance religion. The federal court declared the statute unconstitutional, and the statute has since been repealed.

New Mexico currently has a Meditation in Public Schools Act, the purpose of which is “to foster respect for the educational process and environment and to provide for the right of every public school student to exercise his freedom of conscience on public school grounds without pressure from the state, any public school, teacher, school personnel or other student.” NMSA 1978, § 22-27-2(B). Under this Meditation in Public Schools Act, “[s]tudents in the public schools may *voluntarily* engage in *student-initiated* moments of silent meditation.” NMSA 1978, § 22-27-3 (emphasis added). Mandatory moments of silence that are not student-initiated are not covered by this statute and could expose a school district to legal liability, as in the *Duffy* case. If your school district currently has, or is considering implementing, policies requiring moments of silence in school, please consult with your school district’s counsel for legal advice.

NEW MEXICO CONSTITUTION REMAINS UNCHANGED REGARDING TIMING OF SCHOOL ELECTIONS

by Patricia Salazar Ives

The November 2009 General Election ballot included Constitutional Amendment No. 4, a proposal to amend Article 7, Section 1 of the New Mexico State Constitution to allow school elections to be held at the same time as non-partisan elections. Non-partisan elections include municipal elections, bond elections, hospital elections, conservancy district elections, and other special district elections. Proponents of the amendment argued that voter participation in school board, bond, and tax elections would

increase by allowing those elections to be held in conjunction with other non-partisan elections. They also argued that school district election costs would decrease if school elections could be combined with other non-partisan elections.

Opponents of the amendment claimed it was important to keep school elections separate from other elections to give voters more direct access to school board candidates and issues. They feared that adding school election matters to other non-partisan election matters would result in long ballots that were confusing to voters.

The results of the general election were canvassed and showed that a majority of those voting on the question, more than a half a million people, voted in favor of the amendment. These results were reported throughout the state, and many people assumed that the amendment had passed. After several months went by, however, the Secretary of State made clear that, in fact, the amendment had not passed. The amendment did not pass because the section of the New Mexico Constitution pertaining to elections cannot be amended unless three-fourths (75%) of the voters voting on the amendment vote in favor of it. In the case of Constitutional Amendment No. 4, only 74.48% of the voters approved it, which was .52% less than the 75% required by law.

Many people still do not know that the amendment did not pass. The Secretary of State's Office indicates that it has received numerous calls assuming that the 2010 special school elections must be held in conjunction with the November 2010 general election. The Secretary of State's Office informs callers that the amendment did not pass, and therefore school elections must continue to be held separately from other elections. Moreover, Constitutional Amendment No. 4 never included a proposal to hold school elections at the same time as general elections; it would have allowed school elections to be held with other non-partisan elections only. Having failed, Article 7, Section 1 remains unchanged – "All school elections shall be held at different times from other elections."

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.