

## **Opinion 10-01**

**OPINION OF: GARY K. KING** Attorney General

January 7, 2010

**BY:** Lesley Lowe, Assistant Attorney General

**TO:** Dr. Veronica Garcia, Secretary of Education, 300 Don Gaspar, Santa Fe, NM 87501

### **QUESTIONS:**

1. Does the Secretary of Education have legal authority to order the creation of a new school district given that the procedure requiring the former State Superintendent of Public Instruction to recommend the creation of new districts to the former State Board of Education is no longer available in light of the adoption of the September 2003 amendment to Article XII, Section 6 of the New Mexico Constitution?
2. Pursuant to Section 22-4-2(A) and (B) and Section 22-4-10(A)(2), does the Secretary of Education have legal authority to order a school district to convey by deed all right, title and interest in school-owned realty located in the proposed boundary of a new school district to that district?
3. Assuming that the Secretary of Education does have legal authority to order a school district to convey certain school-owned realty to a new school district, which district is responsible for the liens, mortgages and encumbrances on that property?
4. Assuming the Secretary of Education does have legal authority to order the creation of a new school district, can she legally decline to make a recommendation and direct the requesters to obtain a petition signed by 60% of the requisite voters or to prevail upon the existing district to agree to the new district?

### **CONCLUSION:**

The analysis below will explain in detail that question 1, 2 and 4 can be answered in the affirmative. The Secretary does have legal authority to recommend that the department create a new district, this authority allows the Secretary to order the conveyance of school-owned real property and the Secretary may decline to recommend the creation of a new school district. Question 3 is not directly addressed in the statute, but it appears from our analysis that the indebtedness on transferred property remains with the school district that created the debt.

### **ANALYSIS:**

1. Authority to Create a New District

Article XII, Section 6 of the New Mexico Constitution gives the Secretary of Education authority as provided by law, including the authority to create a new school district.

Before 2003, Article XII, Section 6 stated in pertinent part as follows:

The state board of education shall determine public school policy... and shall have control, management and direction, including financial direction, distribution of school funds and financial accounting for all public schools, pursuant to authority and powers provided by law. The board shall appoint a qualified...superintendent of public instruction, who shall, subject to the policies established by the board, direct the operation of the state department of public education.

Under this former constitutional provision, the board of education had the conferred powers, with the superintendent directing the department of education, pursuant to the board's policies. This power structure was changed with the 2003 amendment.

As amended in 2003, Article XII, Section 6(D) now states:

The secretary of public education shall have administrative and regulatory powers and duties, including all functions relating to the distribution of school funds and financial accounting for the public schools to be performed as provided by law.

Following the amendment, the Secretary, as head of the public education department, now has the conferred powers once held by the board of education. Pursuant to NMSA 1978, Section 22-4-2(A)(3): "The state board [department] may order the creation of a new school district: upon recommendation of the state superintendent [secretary] and upon a determination by the state board [department] that creation of a new school district would meet the standards set forth in Subsection B of this section" (bracketed terms added by compilers of statute). \*It is our interpretation of this section that the Secretary now has the authority to recommend the creation of a new school district.

In these circumstances, there are rules of statutory construction that apply. First, statutes are interpreted "in order to facilitate their operation and achievement of their goals." Mutz v. Municipal Boundary Comm'n, 101 N.M. 694, 698, 688 P.2d. 12 (1984). Second, "when a power is conferred by statute everything necessary to carry out the power and make it effective and complete will be implied." Kennecott Copper Corp. v. Employment Security Comm'n, 78 N.M. 398, 402, 432 P.2d 109 (1967).

Based on the 2003 amendment to Article XII, Section 6, the powers of the former state board have now been conferred on the Secretary as head of the public education department. The statutory provision addressing creating new school districts, permitted the state board to order the creation of a new school district upon recommendation of the superintendent and a determination by the state board. Reading these two together following the amendment, the department, headed by the Secretary, may order the

creation of a new school district upon recommendation of the Secretary and a determination by her department.

While the Secretary of public education now has broad powers following the 2003 amendment, Article XII, Section 6(D) limits it to “powers and duties...as provided by law”. In N.M. Att’y Gen. Op. No. 77-6, this office concluded that while the authority granted was broad for the “control, management and direction of all public schools”, this authority can only be exercised “as provided by law”. In Amador v. New Mexico Board of Education, 80 N.M. 336, 337, 455 P.2d 840 (1969), the court held that Article XII, Section 6 is not self-executing and the regulatory power of the state board (department) “must be found in and limited by statute”. In this instance, Section 22-4-2 A(3) is clear in granting authority to the Secretary and her department to create new school districts.

## 2. Conveyance of Realty to New District

Pursuant to Section 22-4-10(A)(1) and (2), the Secretary’s order creating a new school district “shall contain...an accurate description of the geographical boundaries of all school districts affected by the order” and “the disposition of all property affected by the order.” Applying the statutory provision to the question raised, the Secretary has the authority to order a school district to convey realty located in the proposed boundary of the school district to the new school district. The applicable rule of statutory construction states that where the intention of the statute is clear and the language is plain, it must be given effect. See State v. Ortiz, 78 N.M. 507, 433 P.2d 92 (Ct. App. 1967). Applying this principle to Section 22-4-10(A)(1) and (2), the intent of the statute is to permit the Secretary in her order creating a new school district, to describe the geographical boundaries affected and the disposition of all property affected by the order. The statutory language is clear and should be given an interpretation which facilitates its operation in a manner consistent with the legislative intent.

Thus, we believe that the Secretary has legal authority to order a school district to convey by deed all right, title and interest in school-owned realty located in the proposed boundary of the new school district to that district.

## 3. Responsibility for Liens, Mortgages and Encumbrances

As explained in more detail below, where one school district is ordered to convey realty to another school district, the school district that incurred the indebtedness would remain responsible for the debt on the transferred property.

Article IX, Section 11 of the New Mexico Constitution provides:

...no school district shall borrow money except for [defined] purposes, and in such cases only when the proposition to create the debt has been submitted to a vote of such qualified electors of a district as are owners of real estate within the school district and a majority of those voting on the question have voted in favor of creating such debt.

Article IX, Section 11 requires a majority vote of the school district's voters to approve indebtedness. In the present case, if the Secretary orders a school district to transfer real property with encumbrances to a new school district, pursuant to this constitutional provision, the indebted district retains its identity for the purpose of paying the debt.

The statutory provision to consider in the analysis is NMSA 1978, Section 22-4-15(B) which provides:

Any outstanding school district bonds **or other indebtedness** of a school district shall not be affected by consolidation. Whenever a school district included within a consolidation has outstanding school district bonds or certificates of indebtedness, the school district shall retain its identity for the purpose of paying any debt service until the bonds or certificates are paid in full. No school district included within a consolidation shall become responsible for the debt service of any other school district included within the consolidation.

(Emphasis added.)

If the general definition of other indebtedness includes encumbrances on real property as a "claim, lien, charge or liability attached to and binding real property; e.g. a mortgage, judgment lien, ...", then the new school district receiving the transferred realty cannot become responsible for the debt of the school district that was ordered to transfer the property. See Black's Law Dictionary 527 (6th ed. 1990) defining encumbrance.

The Office of the Attorney General addressed the issue of responsibility for general indebtedness on school realty in 1992 when Representative Pauline Eisenstadt raised the issue with regard to the creation of the new Rio Rancho Independent School District. See AGO legal advisory letter written on September 23, 1992 to Representative Pauline Eisenstadt. In that advisory letter, we stated that with respect to general obligation indebtedness, the property transferred to the new district remained subject to tax levies to pay the outstanding bonded indebtedness. The legal advisory letter applies to the issue we are addressing here because both deal with the creation of new school districts. Where school districts are consolidated pursuant to Section 22-4-15 quoted above, the legislature specifically requires that the indebted district retain its identity for the purpose of paying the debt service. Although consolidation is not involved here or in the earlier advisory letter, the legislature has expressed its policy in Section 22-4-15(B) that general obligation bonds are not to be affected when school districts change. Where school districts are consolidated or change in other ways, the indebted district retains its identity for the purpose of paying the debt service.

If the Secretary by formal order transfers encumbered real property from one school district to a newly created school district, the legislature has expressed its policy in Section 22-4-15(B) that general obligation bonds are not to be affected when school districts change, and therefore, the indebted district retains the debt.

#### 4. Secretary's Authority to Decline to Recommend

The Secretary is not obligated to recommend the creation of a new school district. Section 22-4-2(A) provides that the department may order the creation of a new school district under three scenarios:

(1) upon receipt of and according to a resolution requesting the creation of the new school district by the local school board of the existing school district;

(2) after review by the local school board and upon receipt of a petition bearing signatures verified by the county clerk of the affected area of sixty percent of the registered voters residing within the geographic area desiring creation of a new school district; **or**

(3) upon recommendation of the state superintendent [secretary] and upon a determination by the state board [department] that creation of a new district would meet the standards set forth in Subsection B of this section.

(Emphasis added.) Subsection B of Section 22-4-2 requires the department to hold a public hearing within 90 days after receiving the resolution, petition or recommendation specified in Subsection A. The purpose of the hearing is to enable the department to make certain determinations, including whether the creation of a new district is in the best interest of public education in the state. NMSA 1978, § 22-4-2(B).

The word "or" is "given its normal disjunctive meaning unless the context of a statute demands otherwise." Hale v. Basin Motor Co., 110 N.M. 314, 318, 795 P.2d 1006 (1990). As used in Section 22-4-2(A), the word "or" indicates the legislature's intent to establish three alternative methods of proposing a new school district to the department. The Secretary may, but is not required to, recommend the creation of a new school district. Her decision not to recommend the creation of a new school district does not affect the availability of the other two alternative methods. Regardless of the source of the proposal, the department must hold a public hearing and determine whether the creation of a new district meets the standards set forth in Section 22-4-2(B) before the department may order that the new district be created.

In conclusion, the Secretary can recommend the creation of a new school district and order the transfer of real property. If the transferred property is encumbered, the school district that incurred the indebtedness remains liable on the debt. Lastly, there is nothing in the statute that requires the Secretary to recommend to the department to create a new school district. If the Secretary does not make a recommendation, the requesters have two other avenues to pursue in an attempt to have a new school district created.

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