

TONY F. ORTIZ, PARTNER

tony@ortiz-zamora.com

GENO ZAMORA, PARTNER

geno@ortiz-zamora.com

GABRIELA M. STEWART, OF COUNSEL

gabriela@ortiz-zamora.com

MAILING ADDRESS:

2011 BOTULPH RD., SUITE 200
SANTA FE, NEW MEXICO 87505

TELEPHONE: (505) 986-2900

(505) 986-2901

FACSIMILE: (505) 986-2911

WEBSITE: ortiz-zamora.com

March 30, 2017

Hanna Skandera
Secretary of Education
Public Education Department
300 Don Gaspar
Santa Fe, NM 87501

***RE: Response to NMPED Letter of March 23, 2017
and Request for Public Records under the NM Inspection of Public Records Act***

Dear Secretary Skandera:

This law firm represents the Santa Fe Public Schools Board of Education (“SFPS” or “the District”). We are submitting this response to your letter dated March 23, 2017, on behalf of the District and Superintendent Dr. Veronica C. Garcia. Unfortunately, the NMPED letter contains incorrect legal analysis and incorrect assumptions. The Board is particularly concerned with NMPED’s attempt to curtail Dr. Garcia’s engagement in permissible civic activities as superintendent and for taking actions that the Board believes are well within the purview of the District. Nevertheless, the District will respond to each of the allegations in the March 23rd letter in the hopes that NMPED and the District can conclude this matter promptly and amicably.

SFPS engaged in public discourse regarding educational issues, not partisan politics

While the March 23rd letter characterizes it otherwise, the stated purpose of closing schools for a half day was to permit students and staff to express their views on pending and important educational issues by legally and peacefully gathering at the New Mexico Legislature. No position was taken or urged by SFPS --- only that SFPS parents, staff and students use the opportunity to express their opinions, whatever they may be. Furthermore, encouraging and engaging students and families in the civic process is non-partisan and fits squarely within the District’s educational mission, and contrary to NMPED’s assertions, it does not qualify as “lobbying”. See NMSA 1978, § 2-11-2(E)(1) and (2). Thus, the District did not take a political or partisan position, or otherwise step outside of its educational mission. It is important to note that the District’s actions were clearly within the protections

Hanna Skandera
Secretary of Education
March 30, 2017
Page 2

afforded to all citizens under the U.S. Constitution and the New Mexico Constitution. Furthermore, the District's actions were undertaken with the intent of serving a public and civic purpose.

Furthermore, even using NMPED's incorrect characterization of the District's activity as "lobbying", the fact remains that NMPED routinely engages in the same practices. For example, NMPED regularly uses public time and money to request that superintendents lobby on behalf of the Governor's education positions, including a meeting held recently by the Secretary for select superintendents including Dr. Garcia on January 11, 2017, at 8:00 AM at the NMPED. Additionally, Deputy Secretary of Education Christopher Ruzkowski requested a meeting with Dr. Garcia during school hours to discuss the Governor's early literacy legislative initiatives. (See [Attachment 1](#), email from Deputy Secretary of Education Christopher Ruzzkowki to Dr. Garcia dated February 9, 2017, requesting a meeting regarding early literacy legislation.)

In addition, Secretary Skandera and Governor Martinez have held multiple press conferences with school children participating at SFPS school sites during the school day. (See [Attachment 2](#), "Governor proposes 10% pay hike for new teachers" at Sweeney Elementary with students at the podium; see also [Attachment 3](#), "Governor Martinez unveils her budget plan Monday at Acequia Madre Elementary School.") These are examples of NMPED using school time, students, and personnel for lobbying purposes. It is the quintessential example of "Do as I say, not as I do."

We also have attached additional articles involving charter schools' use of school time, students, and personnel for lobbying purposes. (See [Attachment 4](#), "Charter School Supporters Tout 'Options' at Roundhouse Rally"; see also [Attachment 5](#), "Local Schools Fight for Funding.") Please note, Secretary Skandera participated in one of the charter school rallies covered in the articles. As a result of all of these examples, NMPED lacks consistency if it allows some school districts and charter schools to participate in civic engagement, but penalizes or prohibits SFPS from doing so. It is our hope that NMPED is not engaging in content-based restrictions on civic engagement.

NMPED requires civic and political engagement in its regulations

It is also worth noting that licensed school personnel are not only permitted to participate in lobbying, but also expected by NMPED to do so. NMPED requires each school district to "include the following competencies and indicators as part of the evaluation criteria [...] ... demonstrates an understanding of the politics of school governance and operations ... and exhibits skills in lobbying, ... policy development and policy maintenance" NMAC

Hanna Skandera
Secretary of Education
March 30, 2017
Page 3

6.69.3.8(C)(6)(b) and (e). For a Pre-K to 12 Administrator’s license, NMPED requires a competency for demonstrating “Political leadership” as follows:

G. The political leader has the knowledge and ability to promote the success of all students including students with disabilities and students who are culturally and linguistically diverse through their understanding of the political, economic, legal, and social climate that exists in school settings. The Administrator:

...

(3) demonstrates an understanding of the policies, laws and regulations enacted by local, state and federal authorities affecting a specific district;

...

(7) espouses positions in response to proposed policy changes that would benefit or harm districts and explain how proposed policies and laws might improve educational and social opportunities for specific communities;

(8) demonstrates the ability to engage students, parents, members of the school board, and other community members in advocating for adoption of improved policies and laws;

See NMAC 6.62.2.10(G) (emphasis added). NMPED also requires a competency for demonstrating leadership in community relations that an administrator “demonstrates an ability to develop and implement a plan for nurturing relationships with community leaders” and “demonstrates an understanding of ways to use public resources and funds appropriately and effectively to encourage communities to provide new resources to address emerging student problems”. See NMAC (F)(4) and (15). Also, the statutes outlining board and superintendent authority require that superintendents provide for the financial stability of the District. See, generally, § 22.5-4 and -14. As a practical matter, licensed personnel from across the state are paid through their salaries every year to travel to Santa Fe to meet with the legislature, NMPED staff and the governor on matters involving proposed legislation. Even assuming for purposes of argument that Dr. Garcia’s actions were “lobbying” (and SFPS does not believe they were), the March 23rd letter targets her unfairly for activities that regularly are permitted, condoned and facilitated by NMPED.

Documentation of specific complaints is requested – IPRA request

Hanna Skandera
Secretary of Education
March 30, 2017
Page 4

In addition, NMPED's letter references "numerous complaints" and alleged improper actions at the SFPS school sites. However, absent from the letter is even a single specific example or complaint form. While the District is, of course, willing to review such matters, NMPED's failure to substantiate its allegations makes such inquiry difficult. NMPED has provided Dr. Garcia thirty days to respond to the March 23rd letter, but it has failed to provide the factual information supporting the claims that she has been asked to address in her response.

To that end, please consider this **a request under New Mexico's Inspection of Public Records Act** for all complaints referenced in the NMPED letter of March 23rd, in any format and in all forms such as emails, messages taken, audio files including voicemail messages, phone logs, letters, written reports, notes of oral communications, and memoranda. Furthermore, under IPRA please provide any materials in any format regarding the actions that NMPED alleges were inappropriate at the school sites or SFPS central office, including any and all identifying information. The requested information relating to complaints received by NMPED is public record under *Cox v. NM Dept. of Safety*, 148 N.M. 934. Also, no FERPA restrictions apply. See 20 USC § 1232g.

Because the documentation of complaints was readily available when you prepared and sent your March 23rd letter, those documents should still be readily available for providing to the District. Accordingly, to permit a full and fair investigation by the District into the allegations raised in the March 23rd letter, and to comply with the statute, we will expect your response immediately or within the three day time period required by the New Mexico Inspection of Public Records Act. See § 14-2-8(D)

NMPED incorrectly assumes that public funds were used improperly

Setting aside for the moment the easily identifiable public purpose behind the District's actions, NMPED's statutory and regulatory analysis is also faulty. **To be clear, there was no improper or illegal use of public funds.**

- Services provided: Students received all services, scheduled meals, and transportation for the school day. Furthermore, the District has met all of its instructional hour requirements for that day and for the year-to-date, and therefore, any *de minimis* loss of afternoon time has already been addressed and accounted for in the year's totals. In this regard, NMPED's attempt to characterize this as a loss of instructional time is incorrect.
- Staff: By working through noon or 1 PM (depending on school-site start time), staff worked a full contract day and met the service requirements of a full day. Furthermore, staff

Hanna Skandera
Secretary of Education
March 30, 2017
Page 5

not covered by a bargaining agreement was required to use annual leave if they wished to participate. Further, the Superintendent required all non-school site personnel on 11 and 12 month contracts to take leave or flex time to attend the rally. All school district offices remained open and operational during the rally. (See [Attachment 6](#), Memo from Dr. Garcia to all SFPS staff.) In that regard, NMPED's claim that staff was improperly compensated is incorrect.

- After the school day: Any functions occurring at the legislature were after the end of the school day and were optional. Thus, nothing in this activity was during the school day.
- Any school bus use to transport staff or students was paid by private funds. (See [Attachment 7](#), Invoice for transportation services.)
- Governmental Conduct Act: Section 10-16-3.1 states that there is a duty not to use property belonging to a state agency for other than an authorized purpose. As outlined above, the half-day, along with any statements encouraging students and staff to participate, was and is authorized by the District, and was legitimately associated with a public and educational purpose. In this regard, use of websites, robo-calls, and intercoms were not only permissible, but also were reasonable tools to alert families of the change in schedule and educational components of this action. Thus, NMPED's allegations under this statute are incorrect.
- Governmental Conduct Act, Coercion to participate in political activity: The NMPED letter alleges that a principal announced that attendance at the rally was mandatory. While NMPED again did not provide any information to assist in identifying where and when this occurred, SFPS will be waiting for the IPRA response so that it may fully review the matter. In any event, if such an action occurred, it was inconsistent with the District's position. (See [Attachment 6](#), Memo from Dr. Garcia.) At the same time, and again without specific identifying information, the NMPED letter complains that students were given a template letter to write complaints. Again, such a position would be inconsistent with the instructions given to staff in this matter, but SFPS will be waiting for the response to its IPRA request so that it can review and respond to this allegation.
- Anti-donation: Under Article IX, §14 of the New Mexico Constitution, a state entity is generally barred from conveying public benefit to a private entity without compensation. As outlined above, the staff was paid in compliance with their contract for the time worked, and any transportation using school buses was paid by a private entity. Had District funds been utilized, they would have been utilized for the permissible public purpose of informing community leaders of the fiscal needs of school districts. Nonetheless, there was no public value improperly conveyed, and NMPED's expressed concerns are similarly unwarranted.

Hanna Skandera
Secretary of Education
March 30, 2017
Page 6

Conclusion

SFPS is confident (1) that none of these matters rise to the level of any legal violation, (2) that the actions are in fact within the bounds of legally protected civic activities, and (3) that such civic involvement actually is required for compliance with NMPED regulation. Nonetheless, in the interest of full transparency, SFPS will provide a copy of this response to the State Auditor, Attorney General, and Secretary of State and so that they may review and determine if they require any further information from SFPS to conclude that the District acted properly. In the meantime, and to assist SFPS in its further review, please provide your complete response to the IPRA request immediately.

Please know that SFPS hopes for prompt conclusion of the listed concerns. After fully researching this matter as well as the historic action of other districts, charter schools, and NMPED, SFPS questions whether the March 23rd letter is a form of impermissible or retaliatory overreach by NMPED that serves as an attempt to curtail the activities of certain school districts and superintendents, while jeopardizing the constitutionally protected rights of the SFPS, its staff, and its students.

Having herein provided its response to the March 23rd letter, SFPS considers the legal questions posed in the letter closed, pending any supplement that we will provide after SFPS receives your IPRA response.

The Board has unanimously authorized this letter in a public meeting held on March 30, 2017.

Sincerely,

Tony F. Ortiz
SFPS Board Counsel

cc: New Mexico Attorney General
New Mexico State Auditor
Office of the New Mexico Secretary of State