

## **Opinion 07-07**

December 18, 2007

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

**BY:** Melanie Carver Assistant, Attorney General

**TO:** The Honorable Linda Lopez, New Mexico State Senator, 9132 Suncrest SW, Albuquerque, NM 87121

#### **QUESTION:**

Does the Board of Education of the Albuquerque Public Schools (“APS Board”) have authority to create and fund an independent police department without specific legislative authorization?

#### **CONCLUSION:**

Based on our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that the APS Board does not have the authority to create and fund an independent police department without specific legislative authority.

#### **ANALYSIS:**

The applicable constitutional and statutory provisions give the legislature sole authority to create police departments. Article IV, Section 1 of the New Mexico Constitution vests the legislature with the authority to enact laws necessary for the effective exercise of the powers reserved to it, including the authority to enact “general appropriation laws, laws for the preservation of the public peace, health and safety ... and for the maintenance of the public schools or state institutions, and local or special laws.” In an exercise of its police power, the New Mexico legislature generally limited the power to create police or other law enforcement departments in NMSA 1978, Chapter 29. The legislature restricted the power to appoint peace officers in NMSA 1978, Section 29-1-9, which states in relevant part:

No person shall assume or exercise the functions, powers, duties and privileges incident and belonging to the office of special deputy sheriff, marshal, policeman or other peace officer without first having received an appointment in writing from a person authorized by law [to do so].

The plain language of the phrase “a person authorized by law” indicates that specific authorization from the legislature is necessary in order to appoint peace officers. According to the rules of statutory construction:

When an act is to be done according to law, or a thing is to be established by law, we all understand that the law intended is a law passed by the legislature, and not by some inferior body acting under powers conferred by the legislature, unless, from the nature of the case, the act of the inferior body is obviously intended.

Stout v. City of Clovis, 37 N.M. 30, 32, 16 P.2d 936 (1932), quoting Healey v Dudley, 5 Lans. (N.Y.) 115. The New Mexico Supreme Court further stated that such statutes must be “strictly construed against any greater delegation of power than clearly appears in the language used.” Stout, 37 N.M. at 34. Nothing in NMSA 1978, Chapter 29 refers to local school boards or specifically or implicitly confers authority on local school boards to create police departments.

We next examine the laws creating local school boards to determine any specific authorization to create and fund a police department.

As recognized by the New Mexico Supreme Court:

A school district has only such power and authority as is granted by the legislature and its power to contract, including contracts for employment, is only such as is conferred either expressly or by necessary implication.

Swinney v. Deming Board of Education, 117 N.M. 492, 494, 873 P.2d 238 (1994) (quoting Gragg v. Unified Sch. Dist. No. 287, 627 P.2d 335, 338 (Kan.App. 1981)). Article XII, Section 1 of the New Mexico Constitution provides: “A uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state shall be established and maintained.” The Public School Code authorizes the creation of local school boards and lists their powers and duties. NMSA 1978, §§ 22-5-1, 22-5-4. Those powers and duties of local school boards include development of educational policies, employment of a superintendent, approval of budgets and property matters including eminent domain, the power to issue bonds and repair and maintain school property and a variety of administrative powers.

The Public School Code does not explicitly state that a local school board may create its own independent police force or take any direct action to enforce any criminal law. The Public School Code’s only explicit reference to a duty connected to law enforcement is in NMSA 1978, Section 22-5-4 (M), which empowers school boards, including the APS Board “to offer and ... pay rewards for information leading to arrest and conviction ... of offenders who have stolen, destroyed or defaced school property.” The section further provides that “such rewards shall be paid from school district funds.” The plain meaning of 22-5-4 (M) is limited to the power to pay for information. There is no language inferring that the APS Board has the power to actually arrest vandals or thieves or to enforce the criminal law generally. If the legislature contemplated any further or direct powers or duties in the area of law enforcement and peace keeping, these would have been logically placed with this singular description of powers connected to law enforcement. Further, the legislature anticipated the funding needs for paying rewards

authorized under Section 22-5-4 (M) and provided for specific source funding. We believe that the absence of a parallel provision regarding funding of a police force indicates a lack of legislative intent to authorize such action.[1]

The absence of legislative authority to create an independent police department is supported by comparing a school board's authority with that of other public bodies. We "interpret statutes as a whole and look to other statutes *in pari materia* in order to determine legislative intent." See State v. Martinez, 126 N.M. 39, 41, 966 P.2d 747 (1998). "[S]tatutes which relate to the same class of things are considered to be *in pari materia*, and, if possible by reasonable construction, both are to be so construed that effect is to be given to every provision of each." See State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth., 76 N.M. 1, 18, 411 P.2d 984, (1966).

Here it is particularly instructive to compare the legislative authorization to local school boards with legislative authorization to the governing boards of other educational institutions. The statutes governing law enforcement expressly authorize state institutions of higher education and other post-secondary educational institutions to employ and commission peace officers. See NMSA 1978, § 29-5-2 (authorizing state educational institutions to employ and assign duties to University police officers); § 29-5-3 (authorizing post-secondary educational institutions to employ and assign duties to campus police officers). Likewise, where the legislature has authorized other public entities to appoint peace officers or others with the powers of law enforcement, it has done so explicitly in statutes related to the public body and with detail regarding the parameters of such powers. See NMSA 1978, § 66-2-12 (Taxation and Revenue Department's Motor Vehicle Division authority to enforce traffic code) and NMSA 1978, § 63-2-18 (governor's authority to appoint peace officers upon application of a railroad company).

When read in conjunction with the legislative schemes for other public bodies with authority to appoint law enforcement officers or create police departments, the Public School Code cannot be said to implicitly authorize local school boards to create and fund an independent police department. Had the legislature intended to give local school boards that authority it would have done so expressly.

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[1] As the New Mexico Supreme Court noted in Swinney, quoted above in the text, a local school board's authority is limited to that conferred expressly by the legislature or "by necessary implication." 117 N.M. at 494. New Mexico courts have narrowly construed a public body's use of implied powers, holding that implied powers are limited to the powers necessary to effectuate express powers. Kennecott Copper Co. v. Environmental Improvement Bd., 84 N.M. 193, 195, 500 P.2d 1316 (1972). The creation

of an independent police force or appointment of peace officers is not necessary to effectuate the express statutory powers of local school boards, based on our review of those powers.