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June 18, 2012

MEMORANDUM

TO: Legislative Education Study Committee

FR: Travis Dulany

RE: STAFF BRIEF: DECISION REGARDING THE PETITION TO CREATE THE KIRTLAND SCHOOL DISTRICT

According to a memorandum decision signed on June 7, 2012, Secretary-designate Hanna Skandera decided not to approve a proposed new school district in northwestern New Mexico (see Attachment 1). The new school district would have split the current Central Consolidated School District (CCSD), creating the Kirtland School District. In order to keep the committee informed about the issues surrounding the proposed school district, this staff brief contains information regarding:

- events leading up to the decision; and
- the decision.

Events Leading up to the Decision

- In December 2011, pursuant to provisions in current law (see Attachment 2), the San Juan County Clerk certified the receipt of signatures in a petition to create the Kirtland School District from a portion of the current CCSD in northwestern

New Mexico. Later that month, the County Clerk's certification was delivered to the Public Education Department (PED) by a representative of the petitioners¹.

- In January 2012, PED wrote to the petitioners with a request for a detailed prospectus or report for the proposed district, as well as a copy of the signed petition. The prospectus was received by the department in March.
- On May 16, 2012, Legislative Education Study Committee staff attended a PED hearing at San Juan College in Farmington. During the hearing, a representative for the petitioners and his attorney spoke on behalf of the petitioners. Several administrators and school board members spoke on behalf of CCSD, among them were the President of the CCSD School Board, the Superintendent for CCSD, and an attorney.
- During the hearing, among her comments Secretary-designate Skandera stated that:
 - the burden of proof for whether the new district should be created fell on the petitioners;
 - the standard for determining whether to create the new district would be based on a preponderance of evidence; and
 - no decision had been made prior to the hearing, and the decision would be based solely on the written information received prior to- and the testimony she heard at- the May 16 hearing.
- Also during the hearing, each party was given an allotted amount of time to speak, followed by public comment.
 - Among the petitioners' comments were:
 - ✓ the benefits of ideally sized school districts, noting that CCSD covers a large area and contains several thousand students; and
 - ✓ the creation of a new school district would result in higher test scores, more rigorous academics, and better local control and parent involvement.
 - Among CCSD's comments were:
 - ✓ the proposed school district split was racially motivated and was a 21st Century version of racial segregation; and
 - ✓ the petition for a new school district was related to recent actions by the CCSD School Board, which closed a business office located in Kirtland and consolidated business functions to the main district office in Shiprock.

¹ While the statute requires the Secretary-designate to conduct a public hearing within 90 days of the receipt of the petition to determine whether the proposed school district meets the criteria in law, the department requested and received agreement from both parties to extend the time for the hearing.

The Decision

According to provisions in current statute, Secretary-designate Skandera was required to determine whether:

1. the existing school district and new school district to be created [would] have a minimum membership level of 500;
2. a high school program [would be] taught in the existing school district and in the new school district to be created unless an exception is granted to this requirement by [PED]; and
3. creating the new school district would be in the best interest of public education in the existing school district and in the new school district to be created and in the best interest of public education in the state.

In her final decision, Secretary-designate Skandera stated (in quotes):

- “It is not in the best interest of public education to permit creation of a new school district whose boundaries were marked in the [original] proposal that reflected the petition of 60 percent of local voters certified by the San Juan County Clerk, because:
 - a) The nature of the existing district’s largest boundary which abuts the Navajo Indian Reservation, presents a real potential for a class action in federal court alleging violation of civil rights and deprivation of equal rights under the law.
 - b) The nature of the existing district’s largest boundary which abuts the Navajo Indian Reservation, presents a real potential for a lawsuit in federal court alleging violation of the *Voting Rights Act* in that it appears to dilute Navajo voting strength and the proposed boundary appears so bizarre on its face that it is unexplainable on grounds other than race.
 - c) The increase of graduation rates in a tiny community by *almost* 80 students per year is not sufficient justification to split a school district in the manner suggested by the Petitioners.
 - d) The State of New Mexico would be required to pay the new district some \$3.0 million as required by Section 22-8-23.3² in a new district adjustment that Petitioners neglected to detect but brushed off as small contributions from other districts to pay this.
 - e) It became increasingly apparent from the submissions of Petitioners prior to and after the hearing, as well as the negative rhetoric employed by both parties and some members of the public, that the driving reason for attempting to create the district was not to benefit students, but because petitioners disagreed with and opposed actions of a majority of Central Consolidated’s Board of Education including actions taken by its superintendent.
 - f) As to bonding capacity and capital outlay, Central Consolidated would lose half of their bonding capacity and their base would be 43.5 percent reduced by 56.47 percent; Central Consolidated would be left with the responsibility for the management and upkeep of 12 buildings while Petitioners got six buildings; Petitioners would be getting more than half of the net taxable value of Central

² The *Public School Finance Act*.

[Consolidated], but less students [sic], and as indicated, fewer buildings to manage; and the State of New Mexico would have to pay more money to [Central Consolidated] given the loss of its primary tax base and still have to provide capital outlay funding for *two* districts instead of the current single district.

- g) Despite Petitioner's elaborate and speculative argument to the contrary, smaller districts are more expensive to operate than larger districts.
- h) The PED would be conceding the Petitioners' arguments, discredited by state and federal Supreme Court decisions, that their community is paying the brunt of taxes to support the current school district for which they have no representation.
- i) Some students currently in the Kirtland attendance area who would be removed from this attendance area with the creation of a new school district and its attendance boundaries, would suddenly find themselves having to commute the 35 or so miles to Shiprock."



NEW MEXICO PUBLIC EDUCATION DEPARTMENT
BEFORE THE NEW MEXICO SECRETARY-DESIGNATE OF EDUCATION

In the Matter of a)
)
PETITION TO CREATE)
THE KIRTLAND SCHOOL DISTRICT)

MEMORANDUM DECISION

A. THE PARTIES

On May 16, 2012, the above matter came on for hearing before Hanna Skandera, Secretary-Designate of Education of the New Mexico Public Education Department (“PED” or “NMPED”). Proposed Kirtland School District (“Kirtland”) was represented by Byron Manning and Attorney Tyson Quail; the Central Consolidated School District #22 (“Central Consolidated” or “existing district”) was represented by Attorney Arthur D. Melendres and Matthew Tso, Board President for Central Consolidated’s Board of Education. Together they constitute “the Parties”.

B. DECISIONAL AUTHORITY

This Memorandum Decision of the Secretary-Designate of Education (“Secretary”) of the Public Education Department is issued pursuant to Sections 22-4-2 NMSA 1978 (1993) and 22-2-1 NMSA 1978 (2004) of the Public School Code; Sections 9-24-5, 9-24-8 and 9-24-10 NMSA 1978 (2004) of the Public Education Department Act; Article XII, Section 6 of the Constitution of New Mexico; and Attorney General Opinion 10-01 issued on January 7, 2010¹.

¹ In 2009, former Education Secretary Veronica Garcia asked for a formal Attorney General opinion to answer the following question, “Does the Secretary of Education have legal authority to order the creation of a new school

C. STATEMENT OF THE CASE

This case involves certain registered voters residing in San Juan County who submitted identical signatory petitions to the County Clerk for the purpose of obtaining certification that they had obtained 60% signatures. These voters sought to comply with Section 22-4-2(A)(2) of the Public School Code that permits the PED to create a new school district “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...” The San Juan County Clerk did issue written certification acknowledging that the petitioners had obtained the requisite 60% of signatures. Petitioners then presented the certification together with their petitions to the Public Education Department for consideration of their request to create a new school district, to be called Kirtland School District, whose boundaries would encompass a portion of the current geographical boundaries of Central Consolidated School District #22.

The Parties each filed opposing reports with attachments supporting their respective positions that had been requested by the PED. What follows is a brief chronology of important events that occurred prior to and in the days following the May 16, 2012 hearing on the merits of the case:

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?” The formal opinion answered the question in the affirmative. This question was pertinent to the voters having approved an amendment to the State Constitution in 2003, that eliminated the State Department of Education and State Board of Education in favor a cabinet-level Secretary of Education, even though the Legislature never changed the law that authorized the former State Board of Education to order the creation of a new school district.

1. **December 1, 2011**- The San Juan County Clerk certified that she had received the required 60% signatures in a petition to create a new school district.²

2. **December 27, 2011**- Mr. Byron Manning, the point person for the Petitioners, delivered the County Clerk's Certification to the PED.

3. **January 19, 2012**- A letter was issued by the PED to Mr. Manning, with a copy to the Board of Education for Central Consolidated Schools, stating that I needed to be provided with a complete copy of the petition with a copy delivered to Central Consolidated, as was required by statute. In making an informed decision, the letter indicated a need for the Petitioners to provide the PED with a detailed prospectus, or report that addressed some 18 separate issues.

4. **January 26, 2012**- The petition containing all of the signatures was delivered to the PED. It announced that registered voters who were also residents of the area affected by the petition, had signed it.

5. **March 1, 2012**- The PED received the Prospectus from Mr. Manning. He also delivered a copy to Central Consolidated. In his cover letter with the Prospectus, Mr. Manning stated "It is only fair to ask CCSD to provide data and information as to why not creating a new district would be in the best interest of public education in CCSD and in the Kirtland School District and in the best interest of public education in the state."³

² The PED detected some anomalies in the petitions we received. For example, the page numbering went from 1a to 496, although the PED only received 393 pages of petitions. We did note that some sequential numbers were missing. Numerous pages of the petitions contained strike-outs with no indication who made the strike-outs, when they were made, or why they were made. Several pages of the petitions indicated addresses of signatories who indicated their residence was in Farmington. Central Consolidated did not mention or object to any of the anomalies in the petitions.

³ During the hearing, Mr. Manning was asked about this position in the context of which party had the burden of proof.

6. March 20, 2012- The PED sent a letter to Central Consolidated Schools, with a copy to Mr. Manning, advising the existing district that they could respond to Petitioner's Prospectus and that any such response had to be delivered to the PED by April 4, 2012. The letter also stated that a hearing had to be held no later than Wednesday, April 25, 2012 to comply with the 90-day statutory requirement.

7. March 20, 2012- During this week, Mr. Willie Brown, the PED's General Counsel, contacted both parties to ask for their agreement in extending the time for the hearing. Mr. Brown reported that as he began to speak to the parties, he was told that a rumor had surfaced that Central Consolidated had asked for the delay so that the hearing would not be held until after the schools closed for the summer. As stated by the PED during the hearing, this was totally untrue. Instead, it was the PED that had asked the parties for an extension because key people who would otherwise be asked to assist in analyzing the parties' submissions were needed to prepare for and attend the annual Spring Budget Workshop. Both sides agreed to an extension until May 16, 2012, and Central Consolidated asked for an extension to submit their response to Petitioners' Prospectus to better coincide with their mid-April board meeting. This was deemed to be a reasonable request.

8. April 4, 2012- The PED issued a letter to both parties that notified them of the agreed-upon date of the hearing (May 16, 2012), the location of the hearing which was the campus of San Juan College, and that the hearing would take place from 1:30 p.m. to 4:30 p.m. This letter was posted on the PED's website on the same day the parties were notified.

9. April 11, 2011- The PED issued a letter to both parties that amended the hearing notice insofar as changing the time of the hearing to start at 3:00 p.m. and ending at 6:00 p.m. The times were changed after some concerns were raised by Petitioners and some members of

the public that this time was too early in the day. This amended notice was posted on the PED's webpage on the same day the letter was issued.

10. **April 18, 2012**- The PED received Central Consolidated's response. Unfortunately, Central Consolidated neglected to submit a copy of their response to Mr. Manning. However, when Mr. Manning apprised us of this oversight, Central Consolidated promptly corrected it.

11. **May 7, 2012**- The PED posted on its website the formal agenda for the hearing. This came after the PED conferred by email with both parties on how much time each side wanted for their presentations and how much time should be allotted to the parties. The proposal was that each party would get 45 minutes and those for and those against the proposal would each get 45 minutes. Neither side objected to this proposal although Mr. Manning requested to reserve some time to present a rebuttal. He was informed that he could reserve however much time he needed for his rebuttal. The only change to the agenda was to add 15 minutes for the PED's introductory remarks, which was used to describe the procedure to be used for the hearing and the burden of proof that would be applied, and to permit a 15 minute comfort break after the parties had completed their presentations. The agenda was posted on the PED's website on May 7, 2012 with no objection from either side.

12. **May 14, 2012**- The PED provided the parties with several documents and notified them that the PED had looked at these documents when evaluating their positions. The documents consisted of a spreadsheet listing the capacity of facilities; the PSFA⁴ ranking of all schools in the proposed new district; the PED's own strategic plan from 2011; a capital outlay analysis conducted by the PED; three pages of the PED's own strategic plan from 2011 that is posted on the PED's website; and three school budget 910B5 worksheets prepared by the PED to

⁴ "PSFA" is the Public School Facilities Authority and was created by Section 22-24-9 NMSA 1978 of the Public School Capital Outlay Act to assist the Public School Capital Outlay Council in carrying out its public school capital outlay functions and duties.

see what dollars would be generated. The documents were simultaneously posted on the PED's website directly under the hearing notice. Neither side objected to these documents.

13. May 16, 2012 - May 31, 2012- The PED received 11 mailed/mailed opinion-documents from the public *on or before* May 21, 2012; the PED received and 17 mailed/mailed opinion-documents from the public *after* May 21, 2012. At the conclusion of the hearing, the PED received 8 resolutions from Navajo chapter houses opposing the split for various reasons.

D. FINDINGS OF FACT

I make the following findings of fact:

1. I hereby incorporate by reference as findings of fact the chronology of important events set forth in Paragraph C 1 through 13 directly preceding.

2. The hearing commenced at approximately 3:00 p.m. on May 16, 2012 and ended at approximately 7:15 p.m., lasting just over 4 hours.

3. Both the Petitioners and Central Consolidated were given sufficient time to present their case through unsworn testimony, documentary evidence and the ability to submit post-hearing closing statements and/or requested findings of fact and rulings of law. Likewise, both sides were given sufficient time to respond to my questions and comments made in response to questions for clarification that I posed. Petitioners received a full 45 minutes to present their case as did Central Consolidated. Byron Manning, who led the Petitioners, asked for 10 minutes to present a rebuttal after Central Consolidated had completed their presentation and was granted the full 10 minutes. I asked questions of both sides and did not deduct from their allotted 45 minutes during the questioning.

4. Those favoring creation of the proposed new district and those who opposed creation of the proposed new district each received 45 minutes to present their position. Each person was given three minutes to present their position. Accommodation was afforded to two disabled members of the public to facilitate their being able to present without undue delay or disadvantage.

5. The PED supplied a certified translator in Navajo who translated for the benefit of attendees the presentation of a woman who spoke entirely in Navajo.

6. The room could not accommodate the large numbers of attendees so the partitioning doors of the room were opened permitting those gathering in the adjacent room (the college cafeteria which had closed and ceased serving food) to participate in the hearing. All those speaking on the record had the use of a microphone that amplified their comments which were transcribed by a court reporter.

7. The PED circulated three sign-in sheets simultaneously to record the names of people who attended and asked those in attendance to print their name on the sign-in sheets. A total of 361 attendees entered their name on the sign-in sheets.

8. Those wishing to provide public input were asked to hold their applause and other verbal expressions and that any delays caused by either would be counted in the total time of their allotted 45 minutes. Some members of the audience disregarded this caution which resulted in the clock for public input not being stopped as previously explained.

9. A total of 16 people provided public input on behalf of creation of the proposed school district, and a total of 12 people provided public input opposed to the creation of the proposed school district.

10. Byron Manning, the point person for Petitioners, spoke first and was assisted by

Attorney Tyson Quail.

11. Arthur D. Melendres, attorney for the Central Consolidated School District #22 presented second and, in order of appearance, was assisted by:

- a. Matthew Tso, President, Board of Education for Central Consolidated Schools;
- b. Don Levinski, Superintendent of Central Consolidated Schools;
- c. Pandora Mike, Director of Curriculum Instruction;
- d. Olivia Klein, Director of Academic Support;
- e. Rex Lee Jim, Vice President of the Navajo Nation; and
- f. Rick Nez, (he was introduced by Attorney Melendres as the President of Central Consolidated School District⁵) [TR 52, L 23-24]⁶

12. Petitioners were informed that they had the burden of proof which required them to establish the merits of their petition by a preponderance of the evidence.

13. Petitioners' Prospectus exhorted the PED to approve the creation of a new school district on the basis of proposed boundaries and voter signatures submitted to the San Juan County Clerk for certification of 60% registered voter signatures. However, without any prompting from the PED, Petitioners' Prospectus also exhorted the PED to approve the creation of a new school on the basis of proposed boundaries not previously submitted for certification to the County Clerk. Specifically, Petitioners stated the following on page 3 of their Prospectus, "The community is also asking that you consider the creation of a new district for the current KCHS attendance areas under your authority provided by NMSA 22-4-2(A)(3)." Additionally, Petitioners stated the following on page 4 of their Prospectus:

⁵This is no doubt an incomplete or erroneous description of his title since Matthew Tso is the Board President of Central Consolidated.

⁶ In this decision the initials "TR" will indicate references to the certified transcript and "L" will indicate references to the corresponding numbered lines in the certified transcript.

There are two boundaries which we are recommending for you to consider as the defined boundaries for the proposed school district. The boundaries under Option A are aligned to the petition boundaries while the boundaries under Option B are aligned to the KCHS attendance boundaries which have been in effect for approximately fifty years.

14. The PED letter issued to Petitioners dated of January 19, 2012, asking for their prospectus, never solicited information related to the creation of a new school district with proposed boundaries other than those boundaries described on Petitioners' petition that was presented to and certified by the County Clerk as containing the requisite percent of voters' signatures.

15. Neither the letter of January 19, 2012 nor any other PED document made any recommendation for the creation of a new district within the existing geographical boundaries of Central Consolidated.

16. It became apparent from Petitioners' Prospectus and from listening to Petitioners' presentation during the hearing, that they favored Option B:

- a. Option B contained one more school than Option A, namely, an elementary school;
- b. Only Option B is mentioned in Petitioners' Conclusion on pages 39-41 of their Prospectus;
- c. Tab W of Petitioners' Prospectus appeared to have abandoned Option A by producing program cost calculations of Central Consolidated with or without the proposed new (Kirtland) district, and another program cost calculation of

the proposed new (Kirtland) district, with calculations given only as to Option B;⁷

- d. I asked Mr. Manning directly if Option A was off the table or had been abandoned, and even though the transcript did not seem to detect all of his response, he expressed a preference for Option B. [TR 55, L 10-15]⁸

17. In their Prospectus, Petitioners attached as Exhibit C a page from the US Census Bureau which listed so-called “Quick Facts” for the “Kirtland CDP” (census-designated place). While the Quick Facts inform that Kirtland CDP is comprised of 38.6% white persons and 52.1% American Indians, with a total population for 2010 reported as 7,875, we are not informed by Petitioners what communities comprise Kirtland CDP. It would have been helpful if Petitioners had pointed out the similarity or difference with the Kirtland CDP/Exhibit C to the population of proposed Kirtland School District in which petitioners informed us consists of 4,923 voters. (Petitioners’ Prospectus, page 1) Moreover, without explanation Petitioners provide a lower figure of 34.2% representing the white population of Kirtland CDP than the 38.6% figure contained in their own exhibit.

18. For a variety of reasons addressed by both parties during the hearing as well as by members of the public and members of the government of the Navajo Nation, the ethnic identification of the student population comprising Central Consolidated is critically important to

⁷ This glaring omission prompted PED staff to prepare its own program cost calculations related to Option A on PED’s 910B5 forms which were forwarded to the parties and which were placed on the PED’s website for public review. In reviewing the figures Petitioners had used in their Tab W, PED staff learned that Petitioners had used the incorrect Training & Experience Index. Instead of the T & E index for a new school district which is 1.12 [22-8-24(E) NMSA 178], Petitioners used the T & E index for Central Consolidated which is 1.34.

⁸ In their rebuttal brief of May 16, 2012, Petitioners stated on page 1, “We made it very clear in our initial response that Option B is the better and preferred option, which the district admits would be the best option if the creation of a new district is granted...” Citing to the use of the word “may” in 22-4-2(A) NMSA 1978, the Attorney General in referenced AG Opinion 10-01 stated at page 6, “The Secretary is not obligated to recommend the creation of a new school district.”

disposition of this case. As examples: Olivia Kien, Director of Academic Support for Central Consolidated stated, “our students that attend our districts are 90% or more Native American and primarily Navajo.” [TR 66, L 11-16] Board President Matthew Tso who spoke for Central Consolidated stated, “and with the Navajo Nation having 90% of its students being Navajo...” [TR 87, L 20] And see, PED *School Fact Sheets*, “Enrollment by Ethnicity” for the 2009-2010 school year, which demonstrates that of 6,236 students counted in Central Consolidated on the 40th day, 5,523 were identified as Native Americans—which would yield an approximate percentage of 89%. [See, <http://ped.state.nm.us/IT/schoolFactSheets.html>, site last visited on May 27, 2012] It would not be an exaggeration to conclude that the vast majority of students currently attending Central Consolidated are Native Americans. The PED received 8 resolutions from Navajo chapter houses opposing the split.

19. During the hearing I pointed out to Petitioners that Petitioners had not made computations under Section 22-8-23.3 of the Public School Finance Act, which makes a newly created district eligible for a new district adjustment that would require the state to pay out almost \$3 million for the first year of operation to pay the increase in the program cost for the proposed Kirtland and existing Central Districts. I asked if this was in the best interests of the state. Petitioners responded that this would come from other districts’ state equalization guarantee amounts, which meant each district would receive less from the state; Petitioners also responded by indicating that parents were already voting with their feet by moving to Farmington and that the shift of students was already occurring.⁹ [TR 48, L 4; TR 48, L 24-25]

⁹ During the public input, one pro-Kirtland commentator demanded that I release dollar figures that demonstrated the cost to the state of new charter schools I had allowed to open. That analogy is totally without merit because the PED does not authorize the opening of any new charter schools. Instead, only local school districts by vote of their boards, or the Public Education Commission (PEC), can authorize the creation of new charter schools. See 22-8B-6 and 22-8B-16 NMSA 1978. N.M. Constitution, Article XII, Section 6. (The PEC members are elected officials.)

20. All post-hearing pleadings, including any public input, had to be received at the PED by May 21, 2012. On May 21, 2012, the PED received an emailed letter from Leonard Gorman, Executive Director of the Navajo Nation Human Rights Commission. Attached to the letter was a 4-page certified Resolution¹⁰ from the Commission, together with 3 exhibits. The Resolution raised a number of important legal and factual issues:

- a. The Resolution unequivocally “opposes the splitting of the Central Consolidated School District...”
- b. The Resolution, relying on “the principle of right of self-determination and sovereignty,” concludes that the PED “must seek the consent of the Navajo Nation to develop a new school district, separate from the current CCSD;”
- c. The Resolution concludes that the Option A “proposal to split CCSD is not in the best interest of Navajo citizens and children, and it will dilute Navajo voting strength and undermines input in the school administration under the proposed school district”;
- d. The Resolution asserts as though fact that “Navajos are against the split and non-Native Americans are for the split;”¹¹
- e. The Resolution states that on December 21, 2011, the Chair of the Navajo Nation Health, Education and Human Services Committee requested the Navajo Nation Human Rights Commission to investigate “the alleged race discrimination

¹⁰ While he did not speak during the public input portion of the hearing, Mr. Gorman attended the hearing and in my presence handed the PED General Counsel his business card. The certification at the end of the Resolution announced that a quorum attended the meeting of the Commission and that the Resolution was passed by a vote of 4 in favor and 0 opposed.

¹¹ This is factually erroneous as became apparent during the hearing when a number of Navajos living in the Kirtland area spoke in favor of creating the new district. Also, a Native American proponent of the proposed new district produced a petition signed by 51 Native Americans attesting to their support of the new school district.

perpetrated by a 'Children First' local organization in the Central Consolidated School District of San Juan County, New Mexico;"¹²

- f. The Resolution states that the Navajo Nation advocated for the rights of indigenous peoples before the United Nations which on September 13, 2007 adopted a Declaration of the Rights of Indigenous Peoples which included the right to self-determination;¹³
- g. The Resolution alleges that removing Kirtland Community from the Central consolidated School District "is segregating the non-Native American voters and parents from the predominately Navajo school district;"¹⁴
- h. The Resolution states that the Commission, determined that by holding the hearing "at San Juan College, away from the main population areas of the Navajo people," the PED discouraged attendance by Navajo citizens;¹⁵
- i. The Resolution provides convincing statistics derived from the 2010 United States Census, that if the Option A proposal were permitted, the Navajo people's voting

¹² This appears to be an allegation or assumption without any conclusion since the Resolution does not indicate that any such investigation was conducted, or if one was, that there was a conclusion based upon findings of facts.

¹³ The Resolution points out that the United States did not sign the Declaration but that on December [sic] 10, 2010 the United States announced its support. However, this does not equate to signing the Declaration. Moreover, according to the United Nations, a Declaration of the General Assembly is not a legally binding document. [Source: http://www.un.org/esa/socdev/unpfii/documents/dec_faq.pdf] Although I am not ordering that in this case, the PED does in fact possess statutory authority to create new school districts in New Mexico by reason of Section 22-4-2 NMSA 1978 of the Public School Code.

¹⁴ This is factually incorrect. As was pointed out during the hearing and in submission by the parties and the public, some of the voters in the Kirtland Community are Native American.

¹⁵ This is, unfortunately, an incorrect and divisive assertion. The public hearing was held at San Juan College—outside of the geographical boundary of Central Consolidated as well as outside of the proposed Kirtland School District—so that neither party could claim favoritism. Moreover, it was held in what the PED perceived to be neutral territory. Also, the location of the hearing resulted in the documented attendance of at least 361 people. Equal time was allotted for those in the audience who wanted to speak for and those who wanted to speak against the proposed creation of the new district. The PED did not poll the audience to determine the number who were for or were against the creation of the new district. It was never the intent of the PED to render a decision on this important of an issue on the basis of which group could shout the loudest. The allegation that the PED was trying to discourage attendance by Navajo citizens is overtly inflammatory and flatly wrong.

strength for school board elections would be diluted; whereas if the Option B proposal were permitted, the Navajo people's voting strength for school board elections would be about the same as it currently is.

21. Testimony during the hearing detected some of the animosity between the communities represented by the parties that were, more often than not, divided by ethnicity, race and religion. It was pointed out by census data and testimony, that between 80% and 90% of the students enrolled in Central Consolidated Schools are Navajo; moreover, all of the land bordering the boundary of the proposed new school district to the west and south is tribal land.

22. Petitioners' key advantages for creating a new district focused on increased parental involvement, greater local control, less travel time to school for some students, the ability of new board members and their superintendent to be able to easily visit all schools in the new district, and assertions that it would be cheaper in the long run to fund two smaller districts than one larger district. During the hearing, Petitioners asserted that small districts yielded greater proficiency in students and better use of funds than larger districts and cited some examples.¹⁶ Central Consolidated disputed those arguments and argued, by giving examples, that Petitioner's own literature supported smaller *districts* and a move away from consolidation of districts—not smaller schools. Petitioners correctly pointed out that New Mexico has both large and small districts. Regardless of the size of an individual school, classroom size is governed by Section 22-10A-20 NMSA 1978 (2003) of the Public School Code.

23. While no doubt any arguments advanced by Petitioners would appear to be in the best interest of *parents* who support creation of the new school district and reside within its

¹⁶ Petitioners provided 7 treatments of the benefit of small schools and 3 treatments on the advantages and disadvantages of "deconsolidation" versus "consolidation" of school districts that span from 1999 to 2011. Any such treatments, however, empirical as they may appear to be, are subject to various interpretations. For example as presented by Petitioners in their Prospectus, at issue is not the creation of *small schools*, but the creation of a *new district* whose student population would consist of approximately 48% of the existing school population.

proposed boundaries, it is neither clear nor persuasive from their Prospectus how it would be in the best interest of *public education* in the existing district, in the proposed new district and in the state. Consider the following:

- a. The discussion by Petitioners about board members in the proposed new district being better able to get around and travel to all of the schools in “their” district is more a factor of a current board that either is or is perceived to be not-represented by all who currently reside in the current boundaries of the school district;¹⁷
- b. The discussion by Petitioners about the superintendent in the proposed new district being better able to travel to and thus visit all of the schools in “their” district is more a factor of a belief that an effective superintendent must engage in such activity than what is succinctly stated in Section 22-5-14 NMSA 1978, which treats the superintendent as the Chief Executive Officer of the district with more broad-based managerial duties to administer the district;
- c. The assertion by Petitioners that there would be greater parental involvement in the proposed new district is unpersuasive given that voting statistics taken from the San Juan County Clerk’s website¹⁸ regarding school board elections showed only 1,903 people voted in 2005; 1,199 people voted in 2007; 1,713 of 17,288 registered voters voted in 2009; and 894 people voted in 2011;

¹⁷ Given that school board members are elected officials that can be voted in or out of office, this reason for approving a new district has no validity. 22-5-1 NMSA 1978 (School boards are qualified electors residing within the state.) Contrast 22-7-1 to 22-7-16 NMSA 1978.

¹⁸ The full statistics were emailed to the parties and also placed on the PED’s website underneath the public hearing notice prior to the hearing. When asked about this discrepancy during the hearing, Mr. Manning stated that their community members were more energized.

- d. The assertion by Petitioners that under relevant caselaw no issue exists regarding the federal Voting Rights Act [42 US Code Sections 1973-1973aa-6] [TR 18 - 22], offers no comfort given that the Navajo Nation Human Rights Commission has demonstrated that if I approved the Option A plan, “it will dilute Navajo voting strength and undermines input in the school administration under the proposed school district;”¹⁹
- e. The assertion by Petitioners in their prospectus that their intent is to operate the new district *as if it were a charter district* “with high goals, expectations, and performances which will encourage further progress and development of all programs throughout the county[,]”²⁰ omits any concrete or actual description of how a charter district model would be in the best interest of public education—i.e., how it would be in the best interest of students.
- f. The Nenahnezad Chapter stated in their resolution that, “The proposed split along the border of the Navajo Nation would put the students of the Nenahnezad, Upper Fruitland, and San Juan Chapters communities at a huge disadvantage of having to travel thirty-five (35) miles to attend schools in the Shiprock area instead of directly across the river in the Kirtland area, a mere five (5) miles.”

¹⁹ Attorney Tyson Quail, who spoke on this issue for Petitioners, only focused on so much of the Voting Rights Act that related to the dilution of votes. However, Section 5 of the Act was also interpreted by the US Supreme Court in the case of *Miller v. Johnson*, 515 U.S. 900 (1995) (Striking down Georgia's congressional redistricting plan as violating the Equal Protection Clause because, although neutral on its face, it was unexplainable on grounds other than race, and because the redistricting legislation was so bizarre on its face that it was unexplainable on grounds other than race and therefore demanded the same strict scrutiny given to other state laws that classify citizens by race.); accord *Bush v. Vera*, 517 U.S. 952 (1996) (Another case involving the Voting Rights Act in which the Supreme Court again referred to a bizarre shaped redistricting plan as unexplainable on grounds other than race.)

²⁰ Operating an actual charter school district requires application to and approval by the PED, the holding of at least two public hearings on the issue, and not less than 65% of the employees of the school district must sign a petition in support of the school district becoming a charter school district. 22-8E-3 NMSA 1978.

24. During the hearing Superintendent Lewinski mentioned that Central Consolidated had recently signed several 50-year leases with the Navajo Nation. The leases were attached as Exhibit B to their post-hearing filed Closing Argument. They are relevant and I receive them as evidence.

25. During the hearing, both Ms. Kien and Board President Tso discussed the benefits of the Memorandum of Agreement (MOA) recently signed between Central Consolidated and the Navajo Nation. [TR 67 – 68] Mr. Tso stated in part, "...it's a positive example of how we involve parties in the education of our children." [TR 87, L 18] The MOA was attached as Exhibit C to Central Consolidator's Closing Argument. The MOA is relevant and I receive it as evidence. The MOA incorporates the Navajo Sovereignty in Education Act of 2005 (NSEA), 10 Navajo Nation Code into its terms. [See NSEA, <http://www.navajocourts.org/Resolutions/CJY-37-05.pdf>, site last visited on 5/26/12.] The MOA requires of Central Consolidated that "*Every parent shall be afforded the opportunity to fully participate in upgrading the quality of the local education plan.*"²¹

26. Petitioners presented the PED with not only documentation to support what it referred to as "Option A" in their Prospectus consisting of a proposed district that tracked the geographic boundaries of its petition certified by the County Clerk of San Juan County, but also presented the PED with an "Option B" that was wholly unsolicited and cannot be legally

²¹ After listening to the testimony mostly from the audience, it became apparent that at least part of the acrimony between the communities involved in this dispute is that some members of the Kirtland Community are not permitted inclusion in certain school programs because they are not Navajos—even though in some cases they are married to Navajos and/or have lived in and contributed to the community for decades if not for generations. While the PED must defer to how the Navajo Nation seeks to preserve its language and culture in the public schools of New Mexico, policies that have the effect of excluding an important segment of the school community will do just that—to the detriment of all students in the district. The PED acknowledges the stated purpose of the Indian Education Act [22-23A-2 NMSA 1978] and the 2003 law establishing the Native American language and culture certificate. [22-10A-13 NMSA 1978] Also see, Public Law 101-477 Native American Languages Act ("The Congress finds that the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages;"). In order to restore harmony, Central must do more to include the Kirtland Community, not engage in any acts that would isolate or ignore it.

considered. Central Consolidated argues in its Closing Argument that for me to consider Option B would violate their due process since there has never been a PED recommendation to create a new school district out of the existing Central Consolidated School District. Petitioners, who obviously favored Option B, submitted a budgeting document that only supported that option. However, after this failure was brought to their attention during the hearing, Petitioners belatedly issued budgeting documentation that supported Option A.

27. In their Prospectus, Petitioners did very little to put forth a persuasive case that approval of their new district would benefit public education—that is students—in their opportunities for achievement. Consider:

- a. Petitioners did not mention a vision, a mission statement or any strategic goals that would convince me that the purpose of creating a new district was to benefit students.²²
- b. Petitioners spent considerable time in their Prospectus attempting to convince me that all students in the Kirtland Community, except for those in the high school, demonstrated a greater proficiency in mathematics and reading than students in the rest of Central. This observation alone would permit a conclusion that a split of the district is not warranted.
- c. Petitioners provided me with AYP rating data and school grading ratings under the new letter-grading law.
- d. Petitioners said very little in their Prospectus or during the hearing on how they will increase opportunities for student achievement beyond students simply

²² Petitioners only resorted to explaining their commitment to state strategic goals after the PED sent the parties and posted on the PED website excerpts from the PED strategic goals (already on that website) just before the hearing.

attending schools more closely located in their neighborhood or being in smaller schools visited by their superintendent.

- e. Petitioners have said little to nothing on the topic or importance of curriculum development, Common Core standards, the use of career technical education, the use of virtual learning, the use of dual credits, the use of advanced placement, the use of grant proposals or professional development in increasing student achievement.

28. Petitioners alleged on page 1 of their post-hearing “Final Response” that I had stated that they could send additional information for clarification purposes or to answer questions posed to rebut charges. No such offer appears in the record. [TR 14, L 23 to TR 15, L 1-6] Instead, the parties were given the opportunity to submit a closing argument or requested findings of fact and ruling of law, and/or documents to support their position. However, it was not intended to be an opportunity to compile a “do-over,” for parties to re-engineer their basic submissions and include new factual arguments or data that were never presented during the hearing and attendant documents. Instead, it was intended to be an opportunity to present persuasive arguments based upon what had already been submitted.²³ Accordingly:

- a. Exhibits A, B, C and D attached to Petitioners’ Final Response will be stricken and not considered because they are self-serving, hearsay and constitute extrinsic matters well outside of the hearing;

²³ In a transmittal email sent on May 21, 2012 by Byron Manning to the PED General Counsel, Mr. Manning stated, “Please find attached the community’s post hearing [sic] rebutal and answers to additional questions posed by Secretary Skandera at the May 16, 2012 hearing.” While the post-hearing submissions could fairly be used to “rebut” Central’s opposition or answer questions I posed during the hearing, they could not consist of documents created or relied on *after* the hearing that were not previously discussed or introduced during the hearing, nor could the post-hearing submissions consist of statements allegedly made by people days, months or even years prior to the hearing.

- b. Central Consolidated's Exhibit D attached to its Closing Argument will also be stricken and not considered because it is self-serving and constitutes factual testimony that was created after the hearing;
- c. Exhibit E attached to Petitioners' Final Response will be stricken and not considered because it is self-serving, hearsay and constitutes a poll that I asked about during the hearing to which Mr. Byron Manning stated that one could not be conducted for fear of retaliation; whatever the circumstances of this poll's creation, it cannot be questioned or challenged due to its sudden post-hearing emergence; it will also be stricken and not be considered because it constitutes totally new information not previously presented prior to or during the hearing which constitutes unfair surprise to Central Consolidated who is unable to oppose it or to submit contrary evidence as to its reliability;
- d. Exhibit H attached to Petitioners' Final Response will be afforded minimal weight because, even though it is a letter signed and issued by me, it does not as Petitioners argue stand for the proposition that I advised the Kirtland Community to attempt to split the district or that I supported such an option; in fact, the letter states, "Dividing the Central Consolidated School District *would be the wrong thing to do for our students.*" (Emphasis added.)
- e. In the case of Exhibit K which is the 910B5 form for the Option A district which Petitioners never submitted to me even though it was the Option A proposed district for which Petitioners had succeeded in obtaining a written certification from the San Juan County Clerk acknowledging that they had obtained the requisite 60% of the registered voters residing within the

geographic area desiring creation of a new school district, this exhibit will not be considered since its submission after the hearing constitutes unfair surprise to Central Consolidated and Petitioners, for all intents and purposes during the hearing, abandoned Option A as the district they sought to establish with PED approval;

- f. Petitioners' Exhibits J, K, L, M, N, O, and P attached to their Final Response also will be stricken and not considered because they are self-serving and constitute data that could have been submitted at or prior to the hearing but appear to have been created after the hearing;
- g. Exhibit I attached to Petitioners' Final Response will be afforded minimal weight because, even though Petitioners inform me that it is taken from the Navajo Nation website, it was not introduced during the hearing, there is no foundation for or relevance about its introduction, and no one from the Navajo Nation explained its significance or use;
- h. Much of what appears in Petitioners' Final Response will either not be considered or will be afforded minimal weight because it contains opinions by people that cannot be verified as authentic because never presented during the hearing, it contains conjecture and statements amounting to a person's belief, it contains board meetings held months or sometimes years ago, it contains assertions of violations of the Open Meetings Act which have never been definitively proven, it contains quotes by people whose statements are not attributed to a speaker, and it contains scandalous allegations of false statement directed toward an elected official of the Navajo Nation;

- i. While not stricken from consideration, Petitioners' 51 page rebuttal with approximately 44 pages of exhibits will be received but afforded nominal weight in that the manner of its submission on the date of the hearing constituted "trial by ambush" and "unfair surprise" to Central Consolidated.²⁴
- j. The documents sent FedEx by Petitioners (actually by Chris Manning, the son of Byron Manning), while arriving before the May 21, 2012 submission deadline, will not be considered because copies were not provided to Central Consolidated.²⁵
- k. Petitioners' resourceful yet disingenuous attempt in their presentation during the hearing and in their Final Response to align concepts in their proposal with the PED's Strategic Plan, must be afforded only nominal weight because nowhere in their initial Prospectus did Petitioners ever mention a strategic plan or a vision for creating a new district.²⁶

²⁴ Both parties were admonished by the PED General Counsel on procedural issues prior to the hearing that any documents submitted to me for consideration had to be shared. [April 10, 2012 email to Mr. Melendres: "I would recommend a formal letter and that you cc Byron Manning. The letter can be emailed to accelerate its delivery." (April 23, 2012 email to both parties: "All, please make sure for future reference that anything you send to me and/or Secretary Skandera on the proposed new district is copied to one another.") As Central Consolidated commented in their closing argument, "at the public hearing on May 16, the Petitioners submitted over 100 pages of additional arguments, that document was seen by CCS D for the first time at the hearing." Throughout the process the PED attempted to provide due process equally to both sides with an assurance of no prejudgment of the outcome.

²⁵ As indicated previously, both sides had been cautioned about copying the other about any submissions. At the end of the hearing when I asked if copies of the studies of school/district sizes advanced by Petitioners were available, Mr. Byron Manning submitted some 10 studies. Mr. Melendres then examined the tendered submissions to copy down their titles. Because Central Consolidated were not copied on the studies sent by Chris Manning, in all fairness they cannot be received or considered for any reason as that would constitute unfair surprise. Due process should never result in one side to a dispute able to claim strategic advantages advanced by stealth not available to the other side.

²⁶ To permit the creation of a new district for any reason is a monumental, unsettling undertaking unless, of course, all involved in both communities agree, which here is not the case. But to state as a reason that I should approve the request because 80 more students per year would graduate school from the Kirtland area is wholly unpersuasive. (Source, p. 25, Petitioners' Final Response.) It would irresponsible for me to permit creation of a new district primarily because two communities in a school district do not get along.

- l. The 17 or so documents submitted as public input after May 21, 2012 are untimely and will not be considered for any reason.²⁷

29. That certain members of the opposing parties do not get along as reflective of feelings harbored by some members of the respective communities was revealed in testimony during the hearing. While the testimony and respective briefs were generally tempered and civil in tone, some resorted to unfortunate displays of name calling and acrimony. Consider:

- a. The issue of “race” was brought up 13 times. [TR 75, L 24; TR 91, L 16; TR 106, L 23; TR 107, L 8-10; 107, L 22-25; TR 108, L 1-21; 110, L 23; TR 111, L 6; TR 114, L 13; TR 115, L 4; TR 116, L 17; TR 117, L 1-5; TR 121, L 8]
- b. The issue of a person’s religion or faith was brought up twice. [TR 134, L 23-25; 136, L 12]
- c. Some speakers chose to disparage the leadership of the school board of Central Consolidated. [TR 138, L 1-25; TR 100, L 1-25; TR 102, L 17-18; TR 103, L 1-6; TR 112, L 22-25; TR 118, L 1-25; TR 120, L 20-25; TR 122, L 5-11; TR 128, L 6-17; TR 138, L 9-25]
- d. One speaker directed his comments at Children First and Mr. Byron Manning in the context of their treating public education as a commodity using public funds with their ultimate solution being the establishment of a proposed district adjacent the Indian reservation. [TR 144-145]

²⁷ The hearing ended on May 16, 2013 even though I permitted submission of public input and closing arguments/requested findings until May 21, 2012—five days after the hearing. A draft of this decision based on timely submissions was completed by May 29, 2012 but required substantial edits.

- e. At page 36 of their Prospectus, Petitioners point out the volatile and polarizing comments leveled by the Board President²⁸ against the Kirtland Community that appeared in a newspaper article attached as Exhibit Y.
- f. On page 37 of the Prospectus—the very next page of Petitioner’s finger-pointing—Petitioners describe their view of the current school district as *a cancer* observing, “The benefits of removing *this cancer* eating away at our communities far outweigh any potential monetary costs associated with the creation of a Kirtland School District.”
- g. The May 21, 2012 “Final Response” from Petitioners, unprofessionally characterized the testimony of Navajo Nation Vice President Rex Lee Jim as lies because Petitioners allege he indicated he was speaking on behalf of the Navajo Nation when, in fact, according further to Petitioners, there was no formal resolution from the Navajo Nation and that Messrs. Tso and Jim are close friends, who apparently would lie for one another.²⁹

²⁸ Mr. Tso’s proclivity for using the media to express his views again surfaced when he directed Central Consolidated’s Public Information Officer (PIO) to send me an email with a link to a Navajo Times article about the May 16th hearing in which Mr. Tso voiced his views. The PED’s General Counsel admonished the PIO about sending this email 4 days *after* the deadline for submitting post-hearing comments. Moreover, the specter of a Board President directing a district employee to engage in an official act to serve the purposes of that board member in pending litigation is a wholly inappropriate use of authority. See, Sections 22-5-4 and 22-5-14, NMSA 1978, which implemented salient portions of the massive 2003 Education Reforms that, *inter alia*, limited the authority of the board and made *the superintendent* the administrator who manages the district.

²⁹ Petitioners provide no basis for their assertions other than unverifiable statements using the phrases, “*We believe...*” or “*we have learned...*” Aside from Petitioners’ pleading that inaccurately referred to the Vice President as “Mr. Lee,” that Mr. Jim and Mr. Tso “are very close, personal friends,” is not a “fact” known to the PED nor was it asserted during the hearing. Moreover, the PED did receive a letter on May 21, 2012 signed by Navajo Nation President Ben Shelly indicating the Nation’s opposition to creation of a new school district in the Kirtland area. Vice President Jim was cc-ed in that letter. Additionally, the PED received a resolution from the Navajo Nation Human Rights Commission that also opposed the proposed new district. Petitioners have made scandalous and outrageous assertions that have no business in this hearing and will be stricken and not considered. Vice President Jim’s testimony would be accepted as representative of the Navajo Nation’s disapproval of creating the proposed new district. The PED also received no fewer than 8 resolutions from Navajo chapter houses opposing the split.

30. On page 39 of Petitioners' Prospectus, they conclude that "Each community will now be able to control their own taxes and establish short-term and long-term capital plans that are best for the needs of the students within those communities." This conclusion came after Petitioners discussed their views that the Kirtland Community was solely paying for bonds voted on by registered voters of the entire district and that their community was carrying an uneven load with regard to all construction throughout the district. Moreover, they alleged on page 23 of their Prospectus that they are being taxed without representation since "the majority of voters in CCSD live on the Navajo Reservation..." This argument is rejected for the following reasons:

- a. As established by Central in their Response, the majority of the taxable revenue available to the districts does not come from the Kirtland Community's property taxes but from the power plants and other businesses operating in the area.
- b. In 1975 in the case of *Prince v. Board of Education*, 88 N.M (1975)³⁰, the New Mexico Supreme Court struck down as unconstitutional Article 9, Section 11 of the State Constitution, in that it attempted to limit voting in bond elections to real estate owners or those who had paid a property tax on property in a school district for the preceding year.
- c. Central Consolidated also pointed out in their April 17, 2012 Response that as far back as 1970, the New Mexico Supreme Court expressly ruled that property ownership could *not* be made the basis for eligibility to vote. They referred to the case of *Board of Education v. Maloney*, 82 N.M. 167 (1970).

³⁰ The *Prince* case came out of litigation originating from residents of San Juan County who sought to dispute a county election regarding Central Consolidated School District No. 22 on the basis that "illegal votes" had been cast.

31. To my question during the hearing whether Petitioners had actually asked Kirtland area employees if they agreed to be employees of the proposed district if it was approved [TR 38-39], the following occurred:

- a. Mr. Byron Manning responded that teachers who wished to speak or sign petitions were afraid to do so because they felt the threat of retribution.
- b. Mr. Manning's Response will be interpreted as a "No" although he did not directly use that word.
- c. David Fierke from the Southern Consolidated Education Association (SCEA) union provided public input during the hearing to the effect that 50 percent of the Kirtland area employees were members of the SCEA.
- d. In their May 21, 2012 post-hearing brief, Petitioners attempted to "cross-examine" Mr. Fierke by brief, presenting arguments not discussed prior to or during the hearing. Moreover, Petitioners provided for the first time, in contradiction of what Mr. Manning stated during the hearing, that 171 teachers had been surveyed as to whether they supported the creation of a Kirtland School District. A voting grid by numbers was included in the brief and an Exhibit E with additional data was attached. None of that will be considered as it is extrinsic to the hearing, was obtained *after* the hearing, and constitutes unfair surprise to Central Consolidated. Petitioners cannot have it both ways: telling me during the hearing that teachers were not questioned for fear of retaliation, then producing questionnaire "results" barely 5 days after the hearing ended.

32. On the issue of capital outlay funding, Petitioners state on page 29 of their Prospectus, "Both districts would have a better chance of meeting their matching requirements

with the excess bonding capacity that exists at this time.” This conclusory observation by Petitioners is unpersuasive and does not tell the whole story. Consider:

- a. As pointed out by Central Consolidated on page 16 of their April 27, 2012 Response to Petitioners’ prospectus in which Petitioners clarified their views as to which community was paying property taxes, “[T]he Kirtland group is planning to take the largest single taxpayer in San Juan County—the San Juan mine—into the new District. That would allow the new District to benefit from taxing someone else’s property, while taking from Central Consolidated a major source of bonding revenue.”
- b. Central Consolidated also persuasively pointed to PED’s 2010 statistical spreadsheet attached as Exhibit 2 to its April 27, 2012 Response, for the proposition that the majority of the assessed valuation for taxes came, not from residential taxes, but from non-residential sources, namely, the power plants;³¹
- c. The PED’s own spreadsheet sent to the parties and placed on the PED’s “Public Notices” portion of their website prior to the hearing under the heading “Capital Outlay Analysis,” demonstrates that:
 - i. If I approved a new district, Central Consolidated would lose half of their bonding capacity and their tax base would be 43.5% of its original amount reduced by 56.47%;
 - ii. Central Consolidated would be left with responsibility for 12 buildings to manage and be responsible for their upkeep while Petitioners got 6 buildings;

³¹ Specifically, Central Consolidated pointed out that the aggregate of taxable assets were non-residential and were valued at \$780.4 million, while the aggregate of residential taxable assets totaled \$73.4 million.

- iii. Petitioners would be getting *more than half of the net taxable value* of Central but less students, and as indicated, fewer buildings to manage;
- iv. The gross area in square feet of the buildings left in Central for them to manage and keep up would be greater for Central than for Petitioners, with Central left with less ability to generate local capital outlay money;
- v. The State of New Mexico would be responsible to pay more money to Central given the loss of its primary tax base and still have to provide capital outlay funding for *two* districts instead of the current single district.³²

33. Petitioners attempted to convince me that, notwithstanding the economies of scale that come into play when operating small school districts, it was less expensive and more efficient to operate the *proposed* district than the current district. This argument is unpersuasive for the following reasons:

- a. Petitioners guided me to Exhibit K of their Prospectus to convince me that the administrative costs for both districts would be lower on average than the average for similar districts;
- b. Petitioners stated on page 10 in the Prospectus that “We know that in the end Kirtland is a conservative community and that these costs would be made up in salaries and positions at the administrative level.”
- c. Petitioners stated on page 39 in their Prospectus that “We have demonstrated that there are no real issues related with costs in the creation of two districts.”

³² Central pointed out that if creation of the new district is permitted, this would result in a reduction in the match required to be paid by Central while Kirtland would have to pay a higher amount. Such a change in payment of the match would result in less dollars available for capital outlay projects in other districts.

- d. Petitioners argued on page 11 in the Prospectus that the lesser cost of administrators visiting the schools in the proposed district would save the new district money, then added, “We believe the benefits for our children far outweigh the potential dollar costs.”
- e. However, Central Consolidated have persuasively identified that Petitioners’ arguments, that it is less expensive to operate the proposed district than the current district, is speculative and based upon a number of assumptions, including the student membership and size of the administration, and the wishes and direction of the new board, a board as of yet created is neither known nor elected.
- f. Attributing the source of the data from the PED’s online Stat Book, Central Consolidated demonstrated for the 2010-2011 school year, the relative higher costs of smaller districts over larger districts in New Mexico in a chart attached as Exhibit A to their Closing Argument.
- g. Any year reported in the PED’s online Stat Books demonstrates that smaller districts are more expensive to operate than larger districts. Consider School Year 2009-2010 which shows the per pupil operational expenditures was \$15, 698 for Lake Arthur Municipal Schools with a membership of 147.50, compared to Albuquerque Public Schools with a membership exceeding 87,000 and whose per pupil operational expenditure for the same year was \$6,809.³³ [Source: PED Stat Book, “Operational Expenditures per Pupil, by School Size”; <http://ped.state.nm.us/div/fin/school.budget/nm.stat.10/index.html>, site last visited May 28, 2012.]

³³ Central Consolidated’s per pupil operational expenditure for that year was \$7,802.

- h. The need for emergency supplemental funds from the PED is provided for by Section 22-8-30 NMSA 1978 of the Public School Finance Act and is requested primarily by smaller districts that do not generate sufficient program cost within which to operate their programs.³⁴

E. RULINGS OF LAW

As a matter of law, I make the following rulings:

1. As the Secretary of Education of the PED, I have authority to issue the instant Decision and Order pursuant to: Sections 22-4-2 NMSA 1978 (1993) and 22-2-1 NMSA 1978 (2004) of the Public School Code; Sections 9-24-5, 9-24-8 and 9-24-10 NMSA 1978 (2004) of the Public Education Department Act; Article XII, Section 6 of the Constitution of New Mexico; and Attorney General Opinion 10-01 issued on January 7, 2010.
2. According to Section 22-4-2(B) NMSA 1978 of the Public Schools Code, the public hearing on the creation of a new school district requires the PED to determine whether:
 - a. the existing school district and the new school district to be created will each have a minimum membership of five hundred;
 - b. a high school program is to be taught in the existing school district and in the new school district to be created unless an exception is granted to this requirement by the state board [department]; *and*

³⁴See, PED Complete Stat Book, "2009-2010 Actual-2010-2011 Estimated", <http://ped.state.nm.us/div/fin/school.budget/nm.stat.10/Complete%20Stat%20Book.pdf>, site last visited on 5/28/12.

c. creating the new school district is in the best interest of public education in the existing school district and in the new school district to be created and in the best interest of public education in the state.

3. Based upon the documents submitted by the parties, the requirements of 2a and 2b have been met.

4. The PED does not have a rule to implement the law permitting the creation of a new school district. Nor does the applicable statute provide any further requirements on conducting a public hearing or on what burden of proof is required.

5. The PED applied the time-honored “preponderance of evidence” standard that is commonly used in administrative hearings and is applied in the School Personnel Act in relation to arbitration hearings involving terminations and discharges of licensed staff [22-10A-25(K) and 22-10A-28(D) NMSA 1978], accord *Aguilera v. Bd. of Educ.*, 2005-NMCA-069, 137 N.M. 642, 114 P.3d 322, cert. granted, 2005-NM Cert-006, 137 N.M. 767, 115 P.3d 230.; it is applied under PED rules adopted pursuant to the School Personnel/Uniform Licensing Acts in Relation to licensure suspension/revocation hearings involving licensed employees [22-10A-31 NMSA 1978; §§6.68.3.11(A) NMAC & 6.68.13(A) NMAC (2005)]; it is applied in the Unemployment Compensation Law in relation to claims for benefits [51-1-42(F)(5) NMSA 1978 (2007)]; it is applied in the Workers Compensation Act in relation to overcoming presumptions of diseases being related to employment that are contracted by firefighters. [52-3-32.1(C) and (E) NMSA 1978 (2009)]; and it is applied under rules adopted by the Human Rights Division pursuant to the Human Rights Act related to hearings on the issue of alleged employer discrimination. [§9.1.1.12(C)(6) NMAC (2001); 28-1-1 to 28-1-15 NMSA 1978]. Proof by a preponderance of the evidence means simply proof by the greater weight of the evidence, that is, when the

evidence tips the scales in favor of the party who has the burden even if it barely tips them. See Uniform Jury Instruction (civil cases) #13-305; accord *Campbell v. Campbell*, 62 N.M. 330, 341, 310 P.2d 266, 272 (1957); *Lumpkins v. McPhee*, 59 N.M. 442, 453, 286 P.2d 299, 306 (1955).

6. Because Petitioners are the ones who submitted the voter-signed petition for PED consideration in creating a new school district, they bear the burden of proof, which is by a preponderance of the evidence.

7. Because I can take administrative notice of the laws and rules of the State of New Mexico, I incorporate by reference thereto all of the instances in the factual findings above, including those within footnotes, where I referenced laws or rules. *Holquin v. Elephant Butte Irrigation District*, 91 N.M. 398, 402, 575 P.2d 88, 92 (1977); *Eastern Navajo Ind., Inc. v. Bureau of Revenue*, 89 N.M. 369, 552 P.2d 805 (1976), cert. denied 90 N.M. 7, 558 P.2d 619 (1976), cert. denied, 430 U.S. 959, 97 S. Ct. 1610, 51 L. Ed. 2d 810 (1977); and see 11-201 NMRA and 1-044 NMRA.

8. While due process in administrative proceedings is flexible in nature, *Morrissey v. Brewer*, 408 U.S. 471 (1972), the PED must provide a proper public hearing that is basically fair and impartial and cannot refuse arbitrarily to receive and consider material evidence on issues being tried. *State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct. App. 1989). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (observing that some form of hearing is required before an individual is deprived of a property interest). Quoted in, *Cerrillos Gravel Products, Inc. v. S.F. Bd. Of Co. Commissioners*, 2005-NMSC-023, ¶28, 138 N.M. 126, 117 P.3d 932.

9. It is not in the best interest of public education to permit creation of a new school district whose boundaries were marked in the Option A proposal that reflected the petition of 60% of local voters certified by the San Juan county Clerk, because:

- a. The nature of the existing district's largest boundary which abuts the Navajo Indian Reservation, presents a real potential for a class action in federal court alleging violation of civil rights and deprivation of equal rights under the law.
- b. The nature of the existing district's largest boundary which abuts the Navajo Indian Reservation, presents a real potential for a lawsuit in federal court alleging violation of the Voting Rights Act in that it appears to dilute Navajo voting strength and the proposed boundary appears so bizarre on its face that it is unexplainable on grounds other than race.
- c. The increase of graduation rates in a tiny community by *almost* 80 students per year is not sufficient justification to split a school district in the manner suggested by Petitioners.
- d. The State of New Mexico would be required to pay the new district some \$3 million as required by Section 22-8-23.3 in a new district adjustment that Petitioners neglected to detect but brushed off as small contributions from other districts to pay this.
- e. It became increasingly apparent from the submissions of Petitioners prior to and after the hearing, as well the negative rhetoric employed by both parties and some members of the public, that the driving reason for attempting to create the district was not to benefit students, but because Petitioners disagreed with and opposed

actions of a majority of Central Consolidated's Board of Education including actions taken by its Superintendent.³⁵

- f. As to bonding capacity and capital outlay, Central Consolidated would lose half of their bonding capacity and their base would be 43.5% reduced by 56.47%; Central Consolidated would be left with the responsibility for the management and upkeep of 12 buildings while Petitioners got 6 buildings; Petitioners would be getting more than half of the net taxable value of Central but less students, and as indicated, fewer buildings to manage; and the State of New Mexico would have to pay more money to Central given the loss of its primary tax base and still have to provide capital outlay funding for *two* districts instead of the current single district.
- g. Despite Petitioner's elaborate and speculative argument to the contrary, smaller districts are more expensive to operate than larger districts.
- h. The PED would be conceding the Petitioners' arguments, discredited by state and federal Supreme Court decisions, that their community is paying the brunt of taxes to support the current school district for which they have no representation.³⁶
- i. Some students currently in the Kirtland attendance area who would be removed from this attendance area with the creation of the new district and its attendant boundaries, would suddenly find themselves having to commute the 35 or so miles to Shiprock.

³⁵ The established recourse for disagreement with a school board and the choice and conduct of their superintendent is through the method of school board election. The PED should not be expected to concur *pro forma* with the splitting of a longtime school district every time a segment of the district's populace disagrees with the direction of the local school board.

³⁶ Ironically, this same issue was litigated in 1975 in the case of *Prince v. Board of Education*, *id.*, in which our Supreme Court ruled that it violated the State Constitution to attempt to limit voting in bond elections to real estate owners or to those who had paid a property tax on property in a school district for the preceding year. In *Prince*, San Juan County residents had brought a suit against Central Consolidated Schools alleging the casting of illegal votes.

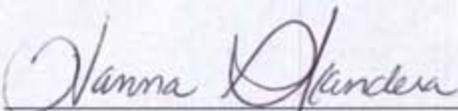
10. For reasons of due process, proper notice and compliance with Section 22-4-2(A)(2) NMSA 1978, the Option B proposal was not properly before the PED for consideration and must be rejected. Nor could I in the conduct of this case consider *sua sponte* the creation of a new district reflective of the Option B proposal.

11. There is substantial evidence in the record that consists of the hearing on May 16, 2012 and the pre and post submissions of the parties and the public, that the Petitioners have failed to establish by a preponderance of the evidence that the creation of proposed Kirtland School District would be in the best interest of public education in the existing school district and in the new school district to be created and in the best interest of public education in the state.

F. CONCLUSION

In addition to the detailed reasons set forth above in the "Findings of Fact" and "Rulings of Law," I find that Petitioners have not established by a preponderance of evidence that creating the new school district is in the best interest of public education in the existing school district and in the new school district to be created and in the best interest of public education in the state.

Accordingly, I hereby **DECIDE** that Petitioners' request reflected in their petition for the creation of a new school district, namely, the Kirtland School District, **IS HEREBY DENIED**.

By: 
HANNA SKANDERA
Secretary-Designate of Education

Dated: 6.7.12

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum Decision was served upon the following individuals by first class mail at the following addresses and also served as indicated in italics, this 8th day of June 2012, as indicated below:

by email and by mail to:
Byron Manning
PO Box 125
Kirtland, NM 87417

by email and by mail to:
Arthur D. Melendres, Esq.
Modrall Sperling Lawyers
P.O. Box 2168
Albuquerque, New Mexico 87103-2168


Mary Deets, Administrative Assistant
Public Education Department

22-4-2. New school districts; creation.

A. The state board [department] may order the creation of a new school district:

(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.

B. Within ninety days of receipt of the local school board resolution, receipt of the voters' petition or receipt of a recommendation by the state superintendent [secretary], the state board [department] shall conduct a public hearing to determine whether:

(1) the existing school district and the new school district to be created will each have a minimum membership of five hundred;

(2) a high school program is to be taught in the existing school district and in the new school district to be created unless an exception is granted to this requirement by the state board [department]; and

(3) creating the new school district is in the best interest of public education in the existing school district and in the new school district to be created and in the best interest of public education in the state.

History: 1953 Comp., § 77-3-2, enacted by Laws 1967, ch. 16, § 15; 1981, ch. 26, § 1; 1993, ch. 235, § 1.

Bracketed material. — The bracketed material was inserted by the compiler and is not part of the law.

Cross references. — For current powers and duties of the former state board of education, see 9-24-9 NMSA 1978.

For references to the former state board, see 9-24-15 NMSA 1978.

For contents and publication of order creating new school district, see 22-4-10 and 22-4-11 NMSA 1978.

For interim school board of newly created district, see 22-4-12 NMSA 1978.

For election of local school board for newly created district, see 22-4-13 and 22-4-14 NMSA 1978.

The 1993 amendment, effective June 18, 1993, added the subsection designation "A" at the beginning of the section; deleted "within an existing school district" at the end of the introductory

paragraph of Subsection A; inserted the paragraph designations (1) and (2) and added Paragraph (3) in Subsection A; deleted "after a hearing to be held within ninety (90) days after filing of petition by the state board to determine that" at the end of Paragraph (2) of Subsection A; added the introductory paragraph of current Subsection B; redesignated former Subsections A to C as Paragraphs (1) to (3) of Subsection B; and made minor stylistic changes in Subsection A.

ANNOTATIONS

Secretary of education may create a new school district. — Under N.M. Const. art. XII, § 6, as amended in 2003, the secretary of education has legal authority to order the creation of a new school district and 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 the new school district. If the transferred property is encumbered, the school district that incurred the indebtedness remains liable on the debt. 2010 Op. Att'y Gen. No. 10-01.