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| <b>LFC Requester:</b> | <b>Liu</b> |
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**AGENCY BILL ANALYSIS  
2021 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

[LFC@NMLEGIS.GOV](mailto:LFC@NMLEGIS.GOV)

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:  
**Original**     **Amendment**      
**Correction**     **Substitute**   

**Date** 2/6/2021  
**Bill No:** \*SB171

**Sponsor:** David M. Gallegos  
Gay G. Kernan  
**Short Title:** ON-CAMPUS ED. IN PUBLIC  
HEALTH EMERGENCY

**Agency Name and Code** PED-924  
**Number:** \_\_\_\_\_  
**Person Writing** John Sena  
**Phone:** 505-570-7816 **Email** John.Sena@state.nm.us

**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

| Appropriation |      | Recurring or Nonrecurring | Fund Affected |
|---------------|------|---------------------------|---------------|
| FY21          | FY22 |                           |               |
| N/A           | N/A  | N/A                       | N/A           |
| N/A           | N/A  | N/A                       | N/A           |

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

| Estimated Revenue |      |      | Recurring or Nonrecurring | Fund Affected |
|-------------------|------|------|---------------------------|---------------|
| FY21              | FY22 | FY23 |                           |               |
| N/A               | N/A  | N/A  | N/A                       | N/A           |
| N/A               | N/A  | N/A  | N/A                       | N/A           |

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

|              | <b>FY21</b> | <b>FY22</b> | <b>FY23</b> | <b>3 Year<br/>Total Cost</b> | <b>Recurring or<br/>Nonrecurring</b> | <b>Fund<br/>Affected</b> |
|--------------|-------------|-------------|-------------|------------------------------|--------------------------------------|--------------------------|
| <b>Total</b> | N/A         | N/A         | N/A         | N/A                          | N/A                                  | N/A                      |

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB139, Leg. Oversight of Emergency Declarations; HB159, Rulemaking during Public Health Orders; \*HB182, Evaluate On-Campus Learning; SB40, K-5 Plus & Extended Learning at All Schools; and SB74, Public Health Order Termination & Renewal;

Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis: \*SB171 proposes new sections of the Public School Code that would grant local school boards – defined, here, to include charter school governing boards – the authority to determine when public schools may reopen during a public health emergency. The bill permits local school boards to open schools in a hybrid model of on-campus and virtual instruction during a public health emergency, while also permitting students and teachers to choose fully virtual instruction. \*SB171 would also permit teachers to opt for work duties other than classroom instruction, rather than participate in in-person learning. The bill prohibits discrimination against those school personnel and students who do opt for fully virtual instruction during a public health emergency, after a school board reopens schools to hybrid instruction. The bill explicitly applies similar provisions to the current COVID-19 pandemic for as long as it may continue, while requiring decisions and methods of reopening schools be based on the recommendations of the federal Centers for Disease Control and Prevention (CDC). \*SB171 contains an emergency clause, rendering it immediately effective upon signing by the Governor if it passes each chamber with a two-thirds majority.

**FISCAL IMPLICATIONS**

\*SB171 does not contain an appropriation.

**SIGNIFICANT ISSUES**

\*SB171 defines “local school board” to include a charter school governing body, and “school district” to include a charter school, for purposes of each proposed section.

Section 1 of the bill establishes legislative findings that: public schools are in the essential business of taking care of the socioemotional needs of students; that students are suffering from lack of structure, socialization, and emotional support during the COVID-19 pandemic; and that even limited access to on-campus instruction may benefit students by providing a missing sense of stability and normality. That section of the bill then bestows upon local school boards the duty of conferring with school personnel and health officials to determine when public schools safely may reopen in a hybrid model, while prohibiting discrimination against both school personnel who opt for fully virtual instruction or other work duties, and students who opt for fully virtual

instruction.

Section 2 of the bill specifically would permit public schools to open in either a fully in-person or hybrid model of instruction during the existing COVID-19 pandemic, provided that parents are permitted to choose all-virtual instruction for their children. Local school boards are directed to base their re-opening decisions upon recommendations of the federal CDC. School boards are then to disseminate to parents the details of the reopening model they decide to implement, while parents are directed to inform the school district of their choice of instructional model for their children – whether fully in-person, hybrid, or entirely virtual. Finally, local school boards are explicitly directed to make these decisions and follow the other requirements of the bill for the remainder of the current 2020-2021 school year, and any other school year affected by the current public health emergency order, going forward.

The bill appears to posit that local school boards are better suited to determine the needs of their students and families than is the state; yet the bill also requires that local school boards base their reopening decisions upon the recommendations of the *federal* CDC, rather than the New Mexico Department of Health, which presumably is likewise better suited to determine the immediate needs of the state’s political subdivisions and citizens than is a federal agency.

\*SB171, as written, appears to substantially conflict with the provisions of the All Hazard Emergency Management Act (EMA), which apply to all political subdivisions of the state, including school districts, reflecting the vital need for state-coordinated responses to public emergencies. \*SB171, however, would confer sole authority upon local school boards to decide when public schools may safely reopen, while only requiring that undefined “health officials” be consulted and that such decisions be based upon CDC recommendations. To the contrary, EMA:

- Section 12-10-3 NMSA 1978 requires the Director of Homeland Security and Emergency Management to direct and coordinate *all* emergency management activities of the state and its political subdivisions, including school districts.
- Section 12-10-4(B) NMSA 1978 authorizes the Governor to coordinate the preparation of emergency operations plans and programs by the several political subdivisions of the state, and to coordinate mutual aid agreements among the several political subdivisions of the state.
- Section 12-10-5 NMSA 1978 makes appointment of local emergency management coordinators subject to the approval of the state Director of Homeland Security and Emergency Management.
- Section 12-10-6 NMSA 1978 allows mutual aid agreements between political subdivisions, but only to the extent they are consistent with the state-level emergency plan.
- Section 12-10-7(B) NMSA 1978 permits political subdivisions to accept federal and private gifts, grants, and loans related to a declared emergency, with the consent of the governor.
- Section 12-10-9 NMSA 1978 directs political subdivisions of the state to cooperate with and extend services not only to local emergency coordinators, but also to the governor and the Homeland Security and Emergency Management Department (HSEMD), upon request;
- Section 12-10-10(A) NMSA 1978 explicitly makes it the duty of *all* political subdivisions of the state and all local emergency coordinators to comply with all executive orders and rules made by the Governor or under the Governor’s authority.
- Section 12-10-10(B) NMSA 1978 requires political subdivisions of the state to meet all state and federal requirements before they may become eligible to participate in state and federal emergency management assistance programs. Further, failure of any political subdivision to comply with all state and federal rules and procedures requires the HSEMD Director to

remove them from participation in assistance programs.

- Section 12-10-18(A) NMSA 1978 permits the Governor to proclaim any designated number of people from assembling in any public building, which includes public school buildings.

\*SB171 also potentially conflicts with certain provisions of the Public Health Emergency Response Act (PHERA):

- Section 12-10A-5(B)(2) NMSA 1978 of PHERA requires the Governor, when declaring a public health emergency, to specify the political subdivisions *or* geographic areas affected by the emergency, meaning a declared public health emergency may cross political subdivision boundaries, or affect only part of a political subdivision, or both.
- Section 12-10A-17 NMSA 1978 of PHERA directs the Secretary of Health, the State Director of Homeland Security and Emergency Management and, where appropriate, other affected state agencies, such as PED, to promulgate and implement such reasonable and necessary rules to implement and effectuate the requirements of the act. The provisions of \*SB171, therefore, potentially may conflict with that necessity and with any rules PED or other state agencies may implement for the protection of all the state's citizens.
- Section 12-10A-18 NMSA 1978 of PHERA permits the Secretary of Health, the State Director of Homeland Security and Emergency Management, and other agencies, as appropriate, to enter into memoranda of understanding with Indian Pueblos or Tribes in order to effectuate the purposes, procedures, and standards of the act. Such memoranda may come into conflict with the decisions and directives of local school districts that are located on or otherwise affect Indian lands and their populations. Thus, the provisions of \*H182 potentially may create conflict between local school boards and the Pueblos, Tribes, and Nations with whom the state government executes such memoranda, possibly encroaching upon issues of tribal sovereignty.

## **PERFORMANCE IMPLICATIONS**

None for the Public Education Department (PED).

## **ADMINISTRATIVE IMPLICATIONS**

No immediate implications for PED, although the responsibility to issue guidance or rules to school districts and schools during a public health emergency, including the currently declared COVID-19 emergency, may be eliminated or limited.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB139, which proposes to end all states of emergency declared under the EMA after 90 days unless the Governor calls the legislature into special session to address the crisis, during which the legislature may restrict, terminate, or suspend a declared emergency.

Relates to HB159, proposing to prohibit rulemaking during a public health order, unless the Governor publicly declares the necessity of such a rulemaking in an emergency order.

Duplicates SB171, Evaluate On-Campus Learning

Relates to SB40, which would require all public schools, during the 2021-2022 school year, to

provide K-5 Plus or Extended Learning Time Programs to all students if in-person instruction is not prohibited by executive order or resolution of the local school board.

Relates to SB74, which would terminate emergency orders 14 days after issuance, and prohibit their reissuance except by joint resolution of the legislature.

## **TECHNICAL ISSUES**

Subsection C of Section 1 of the bill requires local school boards to confer with school personnel and “health officials” to determine when public schools may safely reopen and participate in a hybrid model of instruction. The bill fails to define “health officials,” and that term is not defined elsewhere in the Public School Code. Given the direction to school boards, in Section 2 of the bill, to base their reopening decisions on recommendations of the federal CDC, rather than the New Mexico Department of Health, it is unclear whether the “health officials” to be consulted are federal, state, or local health officials, or some combination thereof. Further, the bill does not create similar requirements to consult with school personnel, health officials, or the CDC regarding reopening schools to fully in-person instruction.

The bill prohibits “discrimination” against school personnel who opt for virtual instruction or other work duties, and against students who opt for virtual school attendance when a local school board reopens schools to hybrid instruction while a state public health emergency is in effect, yet fails to define or otherwise delineate what actions or failures to act may be considered “discrimination.” The bill further does not provide protection from this undefined discrimination when school personnel or students opt to continue virtual instruction after a local school board decides to reopen school to fully in-person instruction during a state public health emergency.

## **OTHER SUBSTANTIVE ISSUES**

The Court in the *Martinez* and *Yazzie* consolidated lawsuit found legislative findings and statements of legislative purpose to create actionable requirements upon the state and the legislature. The particular wording of the legislative findings in Subsection B of Section 1 of \*SB171 may, therefore, create actionable duties against local school boards, including the governing bodies of charter schools, for which they may be sued and held liable for injunctive relief and, possibly, money damages. Further, Section 12-10A-14 NMSA 1978 of PHERA makes political subdivisions liable for the death of a person, or for injury to a person or property, to the extent that is permitted by the Tort Claims Act. Given the isolation of responsibility to local school boards proposed by \*SB171, and the actionable nature of legislative findings, any finding of liability against a school district resulting from the provisions of \*SB171 may eliminate the possibility of recourse to the state by a local school district for defense or indemnification.

## **ALTERNATIVES**

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

## **AMENDMENTS**