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FISCAL IMPACT REPORT

ORIGINAL DATE 02/01/21
Gallegos/Kernan **LAST UPDATED** 02/08/21 **HB** _____

SHORT TITLE Evaluate On-Campus Learning **SB** 171/ec

ANALYST Chilton

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$30.0	\$100.0	\$50.0	\$180.0	Recurring through duration of pandemic	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Near duplicate of Senate Bill 171

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Schools Facilities Authority (PSFA) (to almost identical HB 182)

Office of the Attorney General (NMAG)

New Mexico Environment Department (NMED)

Public Education Department (PED)

Public Schools Insurance Authority (PSIA)

Department of Health (DOH)

No Response Received

Albuquerque Public Schools (APS)

Regional Education Cooperatives (RECs)

SUMMARY

Synopsis of Bill

Senate Bill 171 would establish a legislative finding that in person or “on-campus” education has advantages over online education, allowing the public schools to better serve the academic and psycho-social needs of students. Further, it asserts that the legislature believes children’s learning to have lost momentum, with a loss of the socialization, the structure, and the emotional support that children get from school, endangering “their entire future.”

In recognizing these assertions, the legislature would cede to local school boards the determination as to when the schools in each district would shift from an all online form of education to a hybrid model, leaving to parents and to school personnel the option as to whether or not to participate in on-campus education, without risking prejudice against those parents or school personnel. School boards would be charged with using federal Centers for Disease Control recommendations to inform their decisions, and would communicate their decisions to district parents.

The legislation would apply to all public school districts and charter schools.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

FISCAL IMPLICATIONS

There is no appropriation in Senate Bill 171.

Whatever form of education is adopted by a school district during the pandemic, all online, a mixed model, or all in-person, it is likely to be expensive compared with non-pandemic education. These costs are difficult to estimate and are not entered into the table above.

NMED, which is responsible for monitoring the safety and health protections of workplaces throughout the state, indicates that it would need one FTE to investigate matters having to do with coronavirus safety, at \$100 thousand for 12 months, prorated over the period the coronavirus pandemic persists.

PSIA would be liable to pay damages if a school employee or parent sued a school district in the case of coronavirus transmission at school.

SIGNIFICANT ISSUES

The issue of whether and when schools should reopen has been a matter of much controversy around the country and the developed world, with the injection of politics into the issue in many jurisdictions.

Reference is often made to the American Academy of Pediatrics' (AAP) statement on the importance to children of attendance in school. Children's socialization, emotional and physical well-being, educational progress and even their nutrition are at stake. These considerations, in addition to the well-referenced lesser proclivity of children to transmitting the infection and lesser serious effects of the infection (less serious disease, hospitalization and death) than among adults, militate toward opening schools sooner rather than later. As of January 28, 2021, more than 2.8 million children (defined slightly differently in different states, but most often as up to 18 years of age) had been infected with the coronavirus. New Mexico reports that approximately 18 percent of its total of almost 175 thousand cases were in individuals less than 18 years of age. Nationally, children represent 1.8 per cent of the total hospitalized. Nationally, only 215 child deaths have been reported, which is 0.06 percent of the total deaths. As of January 28, 2021, 5.6 percent of New Mexico children had had a positive test. (<https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19/children-and-covid-19-state-level-data-report>)

The AAP guidance begins with the statement "The AAP continues to strongly advocate that all policy considerations for school Covid-19 plans should start with a goal of having students physically present in school."

<https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-planning-considerations-return-to-in-person-education-in-schools/>.

The guidance document is nuanced, taking into account the well-being of students, staff, teachers, and communities:

- To be able to keep schools safe, it is vitally important that communities take all necessary measures to limit the spread broadly of SARS-CoV-2 throughout the community.
 - It is critical to use science and data to guide decisions about the pandemic and school Covid-19 plans.
 - School transmission mirrors but does not drive community transmission.
 - Community-wide approaches to mitigation are needed for schools to open and remain open.
 - Adequate and timely Covid-19 testing resources must be accessible.
- School policies should be adjusted to align with new information about the pandemic; administrators should refine approaches when specific policies are not working.¹⁰
- Schools must continue to take a multi-pronged, layered approach to protect students, teachers, and staff. By using different approaches, these layers of protection will make in-person learning safe and possible.
- It is critically important to develop strategies that can be revised and adapted depending on the level of viral transmission and test positivity rate throughout the community and in the schools, recognizing the differences between school districts, including urban, suburban, and rural districts.
- School districts must be in close communication and coordinate with state and/or local public health authorities, school nurses, local pediatric practitioners, and other medical experts.
- School Covid-19 policies should be practical, feasible, and appropriate for child and adolescent's developmental stage and address teacher and staff safety.
 - Special considerations and accommodations to account for the diversity of youth should be made, especially for populations facing inequities, including those who are medically fragile or complex, have developmental challenges, or have disabilities. Children and adolescents who need customized considerations should not be automatically excluded from school unless required in order to adhere to local public health mandates or because their unique medical needs would put them at increased risk for contracting Covid-19 during current conditions in their community
- School policies should be guided by supporting the overall health and well-being of all children, adolescents, their families, and their communities but should also look to create safe working environments for educators and school staff. This focus on overall health and well-being includes addressing the behavioral/mental health needs of students and staff.

DOH comments extensively on the problems (and some benefits) of remote learning:

There are benefits and challenges to remote learning. Benefits include safety of the students and staff, flexibility in learning times and places, increased comfort for students who prefer remote learning, reduced expenses, more time for review and revision of assignments, and an increase in self-motivation. Challenges include the lack of physical and social interaction, technological shortfalls, and fewer opportunities to practice interpersonal skills.

Additional unintended consequences of remote learning include: 1) at-risk children have been kept out of sight of teachers and other mandated reporters of child abuse, 2) lack of food for many students who would otherwise eat at school, 3) the impact on many students' education may be detrimental.

(<https://today.law.harvard.edu/will-online-schooling-increase-child-abuse-risks/>)

It is estimated that one in five children and youth have a diagnosable emotional, behavioral, or mental health disorder and one in ten young people have a mental health challenge that is severe enough to impair how they function at home, school or in the community. It is unknown if these behavioral health concerns will be resolved by returning to school. (<http://www.acmh-mi.org/get-help/navigating/problems-at-school/>) The disease aspects of the pandemic and economic stressors (if a parent or caregiver has lost a job, if there has been income or residential instability) are all part of students' experiences and will play a role in the adjustment. Some could be experiencing the pandemic as a traumatic event, for instance if they've lost a loved one to Covid complications. (<https://www.hsph.harvard.edu/news/features/kids-may-face-mental-health-issues-as-school-begins-amid-pandemic/>) ...

National surveys of teachers, parents, students, and school administrators conducted over the past few months offer evidence that remote learning has exacerbated inequities. Black and Hispanic students and students from low-income families faced more roadblocks to learning, driven in part by gaps in access to technology and the internet. (<https://www.chalkbeat.org/2020/6/26/21304405/surveys-remote-learning-coronavirus-success-failure-teachers-parents>)

Centers for Disease Control guidance, referred to in Senate Bill 171, is entitled "Operating schools during Covid-19: CDC's Considerations" and updated February 1, 2021, is consistent with the AAP guidelines:

As communities in the United States consider how to safely re-open K-12 school buildings for in-person learning and activities and keep them open, CDC offers updated considerations for mitigation strategies that school administrators can use to help protect students, teachers, and staff and slow the spread of the virus that causes Covid-19. These updated considerations for Schools are intended to aid school administrators as they consider how to protect the health, safety, and wellbeing of students, teachers, staff, their families, and communities:

1. Promoting behaviors that reduce Covid-19's spread;
2. Maintaining healthy environments;
3. Maintaining healthy operations; and
4. Preparing for when someone gets sick.

Schools should determine, in collaboration with [state and local health officials](#) to the extent possible, whether and how to implement each of these considerations while adjusting to meet the unique needs and circumstances of the local community. Implementation should be guided by what is feasible, practical, acceptable, and tailored to the needs of each community. It is also critically important to develop strategies that can be revised and adapted depending on the level of viral transmission in the school and throughout the community, as this may change rapidly. Strategies should be implemented in close coordination with state, local, or tribal public health authorities, recognizing the differences between school districts, including urban, suburban, and rural districts. These

considerations are meant to supplement—**not replace**—any Federal, state, local, territorial, or tribal health and safety laws, rules, and regulations with which schools must comply (e.g., [Individuals with Disabilities Education Act](https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html)). (<https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/schools.html>)

PED makes note of numerous conflicts between this bill and education and health statutes:

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 *SB171 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.

PSFA indicates that “This bill does not provide local school boards with sufficient resources necessary to properly determine whether a school facility is safe to re-open or how to safely reopen a school facility during a public health emergency. School personnel and health officials may not always have the expertise to assist local school boards regarding essential requirements that may provide for the safe operation of school facilities. In some instances, the expertise may require contracting with qualified engineers or other technical professionals.” PSFA also notes the importance of assuring internet connectivity for all students using virtual learning opportunities.

PSIA notes concern over possible liability issues that would occur surrounding a school district’s determination to open for on-campus instruction, “While NMPSIA is offering coverage to its members under the Tort Claims Act, there are many claims and issues which could be litigated in the case of school exposure.” PSIA notes concern over the adequacy of ventilation systems in many schools.

DUPLICATION of House Bill 182, except in that Section 2A differs in the two bills. In HB 182, public schools are given the choice of opening “using an all in-person model or a hybrid model of on-campus and virtual instruction,” whereas SB 171 allows a public school only to choose a hybrid model. The bills are otherwise identical.

TECHNICAL ISSUES

The bill does not specify whether “charter schools” include only state-chartered schools, locally-chartered schools, or both.

AOC notes that “Section 1(A) and 2(D) are identical. Drafters may want to consider removing Section 2(D) as there is no need for both sections.”

PED adds the following points:

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

PED indicates that this bill may open up liability for school districts for death or illness (for example, from Covid-19).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Decisions on the timing of re-opening of on-campus learning would continue to be made on a state level, using the best available scientific data.

LAC/rl/al/rl