

# Local Decision Making and Flexibility During a Pandemic

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## Introduction

- ❑ State law provides the Governor and Secretary with broad authority over public schools. School boards also have legally prescribed powers and duties to oversee their local school districts in matters of policy, budget, contracts including union agreements, and property. As the CEO, superintendents carry out the policies and rules of the PED and school board. During these unprecedented times, the legal lines of authority have not always been clear including when one authority should give way to another.
- ❑ Experienced school attorneys Elena M. Gallegos and Karla Schultz will discuss COVID-related cases and legal considerations around local control during a pandemic.



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## Federally, What is Local Control?

- ❑ Education is not mentioned in the U.S. Constitution.
- ❑ Education is a function reserved to the state or the people under the 10th Amendment.
- ❑ However, as a governmental entity a public school is subject to the U.S. Constitution and other applicable federal laws.



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## From a State Perspective, What is Local Control?

- ❑ The New Mexico Constitution:
  - ❑ Requires a “uniform system of free public schools sufficient for the education of, and open to, all the children of school age in the state.”
  - ❑ Provides that “schools...shall forever remain under the exclusive control of the state.”
  - ❑ Prohibits districts from having any “religious test” or “religious service” as a condition of attendance or employment.
  - ❑ Requires the admission and integrated attendance of “children of Spanish descent.”
  - ❑ Sets limits on the use of school property and buildings.



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## The Courts vs. Local Control

- ❑ *Meyer v. Nebraska*, 262 U.S. 390 (1923) – Acknowledged a state’s power to “compel attendance at some school and to make reasonable regulations for all schools...[and] to prescribe a curriculum for institutions which it supports,” but then found that “[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”
- ❑ *Epperson v. Arkansas*, 393 U.S. 97 (1968) – “Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint,” and added that “[b]y and large, public education in our Nation is committed to the control of state and local authorities.” Nevertheless, the Court held it unconstitutional for the state to mandate a curriculum premised on the promotion of particular religious beliefs.



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## The Courts vs. Local Control

- ❑ *New Rider v. Board of Ed. Independent School District No. 1*, 480 F.2d 693 (10th Cir. 1973) – In deciding that a local school district’s hair length regulations did not violate three Pawnee students’ constitutional rights, writing that “only where state action impinges on the exercise of fundamental constitutional rights or liberties that the court may interfere with its dedication to local control of education.”
- ❑ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973) – “[L]ocal control means...the freedom to devote more money to the education of one’s children. Equally important, however, is the opportunity it offers for participation in the decisionmaking process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence.”



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## The Courts vs. Local Control

- ❑ *Milliken v. Bradley*, 418 U.S. 717 (1974) – “No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.”
- ❑ *Keyes v. School District No. 1, Denver, Colorado*, 521 F.2d 465 (10th Cir. 1975) – “Local control permits citizen participation in the formulation of school policy and encourages innovation to meet particular local needs. Educational policy, moreover, is an area in which the courts’ ‘lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at state and local levels.’ The policy of the state of Colorado is to encourage local school districts to develop bilingual skills and to assist in the transition of non-English-speaking students to English.”



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## Who are the Education Powerbrokers?

- ❑ Federal Government (all three branches)
- ❑ State Government (all three branches)
- ❑ Local School Board
- ❑ Superintendent
- ❑ Union



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## Powerbroker Pandemonium

- ❑ **In the News:** After union teachers refuse to return to school, Chicago Mayor Lori Lightfoot tells teachers union schools must open now and threatened a lockout. This week the city and the union reached a tentative agreement for return to in-person instruction.
- ❑ **In the News:** San Francisco sues its own school district, demands restart of in-person instruction. This week they reached a tentative deal to reopen schools and resume in-person learning.



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## Powerbroker conflicts: Governor's authority during a pandemic?

- ❑ Executive Order 2020-004, the Governor ordered and directed that "[a]ll cabinets, departments, and agencies shall comply with the directives...and any instruction given by the Department of Health."
- ❑ Executive Order 2020-005, ordered and directed that "[t]he Secretary of Education, pursuant to the government and managing authority over all public schools granted to him in NMSA 1978, Section 22-2-1" has authority to effectuate the Governor's order related to the initial closure of schools. That authority was extended that in Executive Order 2020-012, which extended the closure.
- ❑ The Governor renewed and indefinitely extended all those orders and related powers in Executive Order 2020-022, again in Executive Order 2020-030, and again in Orders 2020-036, 2020-053, 2020-059, and 2020-064.



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## ***Outlaw Meats, LLC, et. al. v. Michelle Lujan Grisham and Secretary of Health Kathleen Kunke***

- ❑ This case was filed in the 5th Judicial District Court, Eddy County. On July 20, 2020, the District Court issued a TRO against the Governor and Secretary of Health, enjoining them from imposing a ban on indoor dining. In a same day emergency order, the New Mexico Supreme Court allowed the state's restrictions to be maintained. Subsequently on August 26, 2020, after hearing oral argument, the Supreme Court unanimously ruled that the Governor and Secretary of Health have the authority to close down indoor dining at restaurants during the COVID-19 pandemic and ordered the district court to vacate its TRO and dismiss the entire case.
- ❑ During the announcement of the Court's decision, Justice Judith Nakamura explained that the policy of courts is to uphold regulations that are intended to protect public health, unless those regulations "have no real relation to the object for which they were enacted."



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## ***Grisham v. Reeb, --- P.3d ---2020 WL 6538329 (N.M. 2020)***

- ❑ This case also involved restrictions on businesses that resulted from the DOH's emergency public health orders. Specifically, the businesses claimed the Governor lacked authority under the Public Health Emergency Response Act (PHERA) to impose the restrictions, absent statutory rulemaking, and to fine those businesses for noncompliance.
- ❑ On November 5, 2020, the state Supreme Court wrote that, at that time, despite "containment measures," over 200,000 Americans had died of COVID-19, cases in New Mexico had increased to 34,958,922, people have died of the disease, and there was "no vaccine or cure for COVID-19, and preventing transmission of the disease is, to date, the only available means of averting infection."
- ❑ Held the court, in the context of that public health emergency, state law provided DOH authority to 1) impose the orders on businesses, even without engaging in rulemaking; and 2) enforce those orders through civil penalties on noncompliant businesses as these rules were "reasonable and necessary" to "control and abate" the transmission of COVID-19.



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## ***Gallup-McKinley County Schools, et al., v. Ryan Stewart, et al.***

- ❑ On October 6, 2020, eight school districts, led by the Gallup-McKinley Board of Education, initiated litigation against PED Secretary Ryan and the PED for exceeding the scope of their statutory authority to “supervise or otherwise control” the state’s public schools, and thereby supplanting the districts’ statutory authority, by unilaterally compelling compliance with PED directives and guidance. The lawsuit also asked that federal funds intended for public schools be protected by the courts so they are not used by the state to mitigate its school funding deficit.
- ❑ The suit says that by overreaching its authority, the PED has denied students “their constitutional right to a public education.”
- ❑ In short, the litigation wants local boards to be able to “govern and control,” and superintendents to be able to “manage and administer,” school districts without the state “tak[ing] over” without clear statutory authority.



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## ***Gallup-McKinley County Schools, et al., v. Ryan Stewart, et al.***

- ❑ Among the issues being challenged are PED’s mandates that districts must:
  - ❑ Continue paying salaries, regardless of potential violations of the constitution’s anti-donation clause.
  - ❑ Prepare, transport, and provide meals to students, and some non-students, including outside the school calendar, with no additional funding.
  - ❑ Comply with PED guidelines regarding use of district buses.
  - ❑ Use certain air filters, even if they are incompatible with local HVAC systems.
  - ❑ Provide certain supplies to private childcare facilities.
  - ❑ Restrict on-site staff presence and provide alternative work assignments for high risk staff, contrary to the ADA.
  - ❑ Participate in “random” surveillance testing of staff.
  - ❑ Permit PED to direct the terms and conditions of work of local school employees.
  - ❑ Follow PED Reentry Guidance and requirements which allow PED to “take over” districts’ authority to control and manage themselves.



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## New Mexico Pandemic Re-Entry Pandemonium

- ❑ July 24, 2020—"Eligibility date for in-person learning postponed through Labor Day."
- ❑ September 3, 2020—"The hybrid model is being phased in beginning Tuesday for children in grades pre-K through five in approved districts and charters." Must be in green county, have PED approved plan and safety protocols in place. Small group instruction (5:1) for special education and PreK – 3rd grade permitted in red.
- ❑ December 1, 2020—"Secondary Reentry Reminder...Secondary students are still not permitted to return to in-person learning (with the exception of students with IEPs in small groups)."
- ❑ December 11, 2020—"State Announces Temporary School Closure after Winter Break...No in-person learning will be permitted during the weeks of January 4 and January 11, 2021."



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## New Mexico Pandemic Re-Entry Pandemonium

- ❑ January 26, 2021—"Beginning February 8, 2021, all schools — elementary and secondary — in all counties (regardless of county color status) will be eligible to enter the hybrid mode of instruction per the guidelines outlined in the current PED Reentry Guidance Document and updated Rapid Response Toolkit. In addition, districts and schools with fewer than 100 students may bring back all students in a 5:1 ratio with no more than six people per enclosed indoor space."
- ❑ Local control—"Decisions on if and when to expand in-person learning options remain the purview of local boards and governing councils."
- ❑ With strings attached—"Because it is important that in-person learning be prioritized before extracurricular activities, schools and districts must shift into the hybrid model prior to beginning NMAA-sanctioned sports activities," and must comply with PED Reentry Guidance and Rapid Response Toolkit.



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## Emergency Rule Definitions, as of 1/29/2021

- ❑ “Remote operating category” means “the instructional model that requires all students to engage in online learning, with limited possible exceptions for small groups of students with disabilities and students in grades pre-kindergarten through grade three to engage in in-person learning, such as students receiving special education services. The student to teacher ratio in small groups shall be provided in department guidance. Schools should ~~ensure~~ take all practical measures to provide each student with ~~has~~ a digital device and to provide support for in-home connectivity.” 6.12.14.7(H) NMAC (N/E 12/3/2020; A/E 1/29/2021).
- ❑ “Hybrid operating category” means “the instructional model wherein schools assign a combination of some in-person learning days and some remote learning days, while limiting the number of students who may be in the school building at any given time by the number that can be accommodated while adhering to at least six feet of social distancing, ~~or fifty percent classroom capacity and other criteria provided in guidance documents.~~” 6.12.14.7(F) NMAC (N/E 12/3/2020; A/E 1/29/2021).



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## Surveillance Testing

- ❑ The ADA requires that any mandatory medical test of employees be “job related and consistent with business necessity.” In the COVID context, this means:
  - ❑ Employers may take screening steps to determine if employees entering the workplace have COVID-19 because an individual with the virus will pose a direct threat to the health of others.
  - ❑ Employers may require COVID-19 testing before initially permitting employees to enter the workplace and/or periodically to determine if their presence in the workplace poses a direct threat to others.
- ❑ Under State emergency rule: “All public schools and local school districts shall ... participate in a surveillance and rapid response testing program for all staff.” 6.12.14.8(A)(2) NMAC [N/E 12/3/2020; A/E 1/29/2021].



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## Vaccinations – Employees

- ❑ The ADA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- ❑ However, if it screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r).
- ❑ Employer must reasonably accommodate individuals with disabilities who because of disability cannot be vaccinated.



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## Employee Accommodations

- ❑ If an employee requests to work from home because he or she has an underlying health condition that does not permit the employee to work on-site, that is a request for an accommodation and should be treated like all other requests for reasonable accommodations under the federal Americans with Disabilities Act (ADA).
- ❑ If there is no disability-related limitation that requires working from home, then federal law does not require the district does to provide telework as an accommodation, but PED’s Reentry Toolkit goes beyond this.
- ❑ If the district can effectively address the need with another form of reasonable accommodation, including temporary reassignment or additional prevention measures, the district can choose that alternative instead of teleworking.
- ❑ If working from home is not reasonable (would be an undue hardship for the district), unpaid leave can be offered as a reasonable accommodation under the ADA if it does not create undue hardship for the district.



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## High Risk Employees Under CDC Guidelines

- ❑ The EEOC has warned against excluding an employee only because the employee is of a particular age or has a condition that the CDC identifies as potentially placing the employee at “higher risk for severe illness” if he or she gets COVID-19. To do that would constitute discrimination based on age or disability.



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## PED and High Risk Employee Accommodations

- ❑ PED’s emergency regulations (12/3/20; 1/29/21) define “high risk” staff (23 conditions) and require districts to:
  - ❑ “establish processes, aligned with school district or charter school human resource departments to ... consider formal requests from COVID-19 high-risk staff to work remotely” (6.12.14.8(C)(2)(a)); and
  - ❑ when in Hybrid, “consult with local school board attorneys and school district human resources officials to offer special accommodations to personnel who are members of high-risk populations, such as alternative teaching assignments.” (6.12.14.10(C)(3)).
- ❑ PED’s reentry guidance (1/26/21) says that must grant an “alternative assignment” to staff who are considered by CDC to be in a high risk group and who request an alternative assignment.



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## High Risk Family Members

- ❑ The EEOC has also affirmed that under the ADA, an employee is not entitled to an accommodation, including telework, in order to avoid exposing a family member who is at higher risk of severe illness from COVID-19 due to an underlying medical condition.
- ❑ PED's emergency regulations require districts to:
  - ❑ "establish processes, aligned with school district or charter school human resource departments to ... (b) consider the circumstances of school personnel who live with someone who is in a COVID-19 high risk group." 6.12.14.8(C)(2)(b) NMAC [N/E 12/3/2020; A/E 1/29/2021].
- ❑ Reentry Guidance states that board policy on this issue should be created and set out applicable procedures.



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## Personal Conduct Outside the Workday

- ❑ PED's emergency regulations state: "All school personnel and contractors shall follow guidelines in current statewide public health orders." 6.12.14.8(C) NMAC [N/E 12/3/2020; A/E 1/29/2021].



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## Employee Leave

- ❑ Family Medical Leave (FML) is available for any employee who:
  - ❑ Has worked for the District for at least 12 months and has worked 1250 hours in the preceding 12 months AND
  - ❑ Meets one of the qualifying reasons, including a serious health condition that makes the employee unable to perform functions of job, OR to care for a close family member with a serious health condition.
- ❑ So some employees described above may qualify for FML if their health condition (or family member's condition) cannot reasonably be accommodated.
- ❑ FFCRA expired on 12/31/2020 but the District can agree to provide some similar form of paid leave.



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## What About Collective Bargaining?

- ❑ If you are a union district, moving to Hybrid Instruction will likely trigger bargaining due to "changes in operations that have a significant impact on bargaining unit employees."
  - ❑ What has to be bargained are "the effects, consequences, or impact and implementation [of the management decision] upon bargaining unit employee."
- ❑ An exception to this general rule exists if the terms and conditions of work during hybrid instruction have already been agreed to.
  - ❑ In a 2020 decision, the NMLRB said that a city did not have to re-bargain previously bargained and agreed on Collective Bargaining Agreement ("CBA") provisions just because they were being implemented during COVID-19.
  - ❑ That case also points to the importance of a clear management rights clause in the CBA, where there may be minor deviations from CBA during public health emergency.



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## Contracts for goods and services

- ❑ Neither the Emergency Rule nor the Reentry Guidance address contracts for good and services.
- ❑ After Districts were directed by PED in March of 2020 to honor such contracts, an FAQ was issued in September of 2020. It stated that:
  - ❑ Alternate work could be assigned to contractors “if feasible.”
  - ❑ If good faith efforts to find alternate duties for contractors found there was no work for them to perform, then districts could review relevant contracts and determine whether a reduction in compensation or termination of the contract was permitted.



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## Vaccinations – Students

- ❑ A matter of State law. See Chapter 24, Article 5 NMSA 1978 “Immunization Act”
- ❑ “The public health division of the department of health shall, after consultation with the state public education department, promulgate rules and regulations governing the immunization against diseases deemed to be dangerous to the public health, to be required of children attending public, private, home or parochial schools in the state. The immunizations required and the manner and frequency of their administration shall conform to recommendations of the advisory committee on immunization practices of the United States department of health and human services and the American academy of pediatrics. The public health division shall supervise and secure the enforcement of the required immunization program.” NMSA 1978, § 24-5-1.
- ❑ Immunization Act currently provides medical and religious exemptions. See NMSA 1978, § 24-5-3.



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## Pros/Cons of Local Control

- ❑ Local control allows districts to flexibly operate the district in a manner unique to their own community interests and needs.
  - ❑ *Such local initiatives may provide good models for other districts.*
- ❑ But those local decisions also have the potential to result in more successful legal challenges to decisions made locally, rather than at the state level.
  - ❑ *E.g. Hernandez v. Grisham.*
  - ❑ *The courts have noted too that there is significant local political accountability when decisions are made locally, so some officials may find that uncomfortable.*
- ❑ Required compliance with federal or state regulations and guidance can sometimes provide local districts with legal direction and political cover, especially where those rules address controversial issues.
- ❑ Also, as the cases on issues like admission of undocumented students, desegregation, and even financing show, there can be benefit to some federal or state mandated uniformity at the local level.



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