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## Reimagining Public Education Equity after COVID-19: Will Public Voices from New York's Epicenter Be Heard over the Siren Song of Billionaires?

Natalie Gomez-Velez

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# REIMAGINING PUBLIC EDUCATION EQUITY AFTER COVID-19: WILL PUBLIC VOICES FROM NEW YORK’S EPICENTER BE HEARD OVER THE SIREN SONG OF BILLIONAIRES?

*Natalie Gomez-Velez\**

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## INTRODUCTION

COVID-19's impact has drawn calls for renewing and re-thinking public education in New York and elsewhere. On May 5, 2020, New York Governor Andrew Cuomo announced a plan to “reimagine education”<sup>1</sup> with the Bill and Melinda Gates Foundation.<sup>2</sup> The announcement drew a swift and largely negative reaction from parents, teachers, education advocates, and local elected officials<sup>3</sup> who viewed it as an especially thoughtless approach, given the stark and deadly inequities the COVID-19 pandemic has exposed.<sup>4</sup> A few days earlier, on April 29, 2020, Chancellor of the New York State Board of Regents Betty Rosa announced the establishment of a task force of educational leaders to guide the reopening of the State's schools.<sup>5</sup> Her announcement noted “how schools across the state serve as the cornerstone of our communities” and emphasized the importance of

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1. See *Video, Audio, Photos & Rush Transcript: Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Collaboration with Gates Foundation to Develop a Blueprint to Reimagine Education in the New Normal*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (May 5, 2020) [hereinafter *Video, Audio, Photos & Rush Transcript*], <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-amid-ongoing-covid-19-pandemic-governor-cuomo-announces-19> [https://perma.cc/ZHC3-6CJH].

2. See Peter Greene, *Why Bill Gates Is Not the Man to Reimagine New York Education*, FORBES (May 8, 2020, 4:04 PM), <https://www.forbes.com/sites/petergreene/2020/05/08/why-bill-gates-is-not-the-man-to-reimagine-new-york-education/#685c2ce079cc> [https://perma.cc/J9PT-RSQR]; see also Valerie Strauss, *Cuomo Questions Why School Buildings Still Exist — and Says New York Will Work with Bill Gates to ‘Reimagine Education’*, WASH. POST (May 6, 2020, 3:42 PM), <https://www.washingtonpost.com/education/2020/05/06/cuomo-questions-why-school-buildings-still-exist-says-new-york-will-work-with-bill-gates-reimagine-education/> [https://perma.cc/943F-B6ZX].

3. See Rachel Sandler, *Cuomo Faces Backlash for Enlisting Billionaires Eric Schmidt and Bill Gates to ‘Reimagine’ NY After Reopening*, FORBES (May 6, 2020, 7:09 PM), <https://www.forbes.com/sites/rachelsandler/2020/05/06/cuomo-faces-backlash-for-enlisting-billionaires-eric-schmidt-and-bill-gates-to-reimagine-ny-after-reopening/#3423278a5592> [https://perma.cc/J4HE-KNYG].

4. See Jenni Fink, *School Closures Due to Coronavirus Could Widen Education Inequality Among Students*, NEWSWEEK (Mar. 25, 2020, 3:59 PM), <https://www.newsweek.com/school-closures-coronavirus-inequality-education-gap-widens-1494303> [https://perma.cc/22A8-W46Q].

5. See Press Release, New York State Educ. Dep't, Statement from Chancellor Betty A. Rosa, the Board of Regents and Interim Commissioner Shannon Tahoe (Apr. 29, 2020), <http://www.nysed.gov/news/2020/statement-chancellor-betty-rosa-board-regents-and-interim-commissioner-shannon-tahoe> [https://perma.cc/T4QY-MMP3].

including school-based stakeholders and emphasizing equity in any plan for re-opening or re-thinking public education.<sup>6</sup>

The stark disparate impact of COVID-19 on communities of color and low-income communities is well documented.<sup>7</sup> These disparities mirror deep, longstanding structural inequity along the lines of race, ethnicity, and class.<sup>8</sup> To reimagine public education in light of the experience and lessons of COVID-19, policymakers must meaningfully include the voices and perspectives of marginalized communities most impacted from the start. This must occur within and beyond appropriate public education governance structures.

This Article considers the imperative to “reimagine education” in New York. It does so from the perspectives of equity and democratic governance, as reimagining public education is a quintessentially public and democratic endeavor. Part I of this Article describes COVID-19’s impact on New York City public schools, and what the crisis revealed about the role of public schools in communities across the City. Part II examines the New York Governor’s and Board of Regents’s reopening and reimagining proposals, taking into account the history and structure of education law and policymaking in New York City. This Part includes the backdrop of education governance in New York and takes account of recent New York education reforms emphasizing privatization and market-based models that have failed to improve quality or equity in New York City public schools. It considers the interplay of education and public health governance involving federal, state, and local actors. Against these backdrops, this Article considers the Governor’s and Board of Regents’s approaches and proposals. Part III contends that to effectively combat deep inequities, any re-examination of public education, particularly in light of COVID-19, must begin with a careful examination of the facts and input from the people most affected — not from billionaires. Such reimagining also must take place within accessible, transparent, and inclusive public

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6. *See id.*

7. *See* MAKE THE RD. N.Y., EXCLUDED IN THE EPICENTER: IMPACTS OF THE COVID CRISIS ON WORKING-CLASS IMMIGRANT, BLACK, AND BROWN NEW YORKERS 4 (2020), [https://maketheroadny.org/wp-content/uploads/2020/05/MRNY\\_SurveyReport\\_small.pdf](https://maketheroadny.org/wp-content/uploads/2020/05/MRNY_SurveyReport_small.pdf) [<https://perma.cc/K3YQ-SFA8>]; *see also* Monica Webb Hooper, Anna María Nápoles & Eliseo J. Pérez-Stable, *COVID-19 and Racial/Ethnic Disparities*, JAMA (May 11, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2766098> [<https://perma.cc/E3LJ-9KAP>].

8. *See* Lois Parshley, *The Deadly Mix of Covid-19, Air Pollution, and Inequality, Explained*, VOX (Apr. 11, 2020, 8:50 AM), <https://www.vox.com/2020/4/11/21217040/coronavirus-in-us-air-pollution-asthma-black-americans> [<https://perma.cc/3JZK-8C39>].

structures and spaces. It considers early responses to the COVID-19 pandemic as a lens through which to examine various school governance structures, including single purpose versus general purpose, centralized versus decentralized, as well as the impacts of privatization and federal involvement. This Article concludes with observations about the current proposals and recommendations for community-inclusive approaches that foreground equity and community inclusion as essential to the success of any public school innovation or reimagination.

This Article discusses how New York City public schools planned to reopen in the fall of 2020, given the COVID-19 crisis, and what educators and elected leaders charged with school governance consider when closing and reopening schools to support public health and address and alleviate the stark inequities the pandemic exposed and exacerbated. This Article also explores who should decide the terms and, moreover, what theories and methods of leadership and governance might best respond to the stark social and educational inequities that the pandemic revealed and worsened.

## I. NEW YORK CITY PUBLIC SCHOOL INEQUITIES AND COVID-19'S IMPACT

### A. Existing Inequities in New York City Public Schools

New York City public schools are separate and unequal;<sup>9</sup> indeed, they are among the most segregated in the country.<sup>10</sup> Despite New York City's reputation as a progressive city, stark socioeconomic inequality is longstanding and is reflected in the makeup and resources

9. See, e.g., Gabrielle Kornblau, *Separate But (Still Un)Equal: Challenging School Segregation in New York City*, 46 *FORDHAM URB. L.J.* 641, 644–45 (2019) (“[T]he New York City school system is segregated along economic and racial lines. One highly regarded study, known as the UCLA Study, noted that New York City, despite being one of the most diverse cities in the United States, has one of the most racially and socioeconomically segregated school systems in the country.”); Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, *N.Y. TIMES* (June 9, 2016), <https://www.nytimes.com/2016/06/12/magazine/choosing-a-school-for-my-daughter-in-a-segregated-city.html> [<https://perma.cc/Z3CK-PFZT>]; Sweta Vohra, *Episode 16: ‘Segregated City,’* *N.Y. TIMES: WKLY.* (Dec. 8, 2019), <https://www.nytimes.com/2019/10/18/the-weekly/nyc-schools-segregation.html> [<https://perma.cc/GE72-KTEZ>].

10. See Madina Toure, *NYC Has the Most Segregated Schools in the Country. How Do We Fix That?*, *OBSERVER* (June 14, 2018, 5:03 PM), <https://observer.com/2018/06/new-york-city-public-school-segregation/> [<https://perma.cc/BJ2N-79UJ>].

of its public and private schools.<sup>11</sup> Two-thirds of Black and Latinx students attend schools that are predominantly (80% or more) Black and Latinx.<sup>12</sup> “Half of NYC’s schools are at least ninety percent Black or Latinx, while Black and Latinx students comprise only about sixty-seven percent of the City’s public school population.”<sup>13</sup>

Segregation in New York City public schools tends to track socioeconomic inequality — significant disparities in educational quality and access exist based on race and class,<sup>14</sup> significantly impacting the education opportunity gap between Black and Latinx versus white (and some Asian-American) students.<sup>15</sup> Notably, school segregation in New York City worsened following the implementation of choice- and market-based school policies and practices during the Bloomberg Administration.<sup>16</sup>

Segregated schools, particularly those in isolated areas of concentrated poverty, correlate with negative educational opportunities and outcomes. They tend to have higher teacher turnover, less experienced teachers, and less access to quality facilities, books, technology, and resources necessary for educational success.<sup>17</sup>

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11. See JOHN KUCSERA & GARY ORFIELD, C.R. PROJECT/PROYECTO DERECHOS CIVILES, *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE*, at vi, 22–24, 89–93 (2014), <https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/norfl-et-report-placeholder/Kucsera-New-York-Extreme-Segregation-2014.pdf> [<https://perma.cc/737G-NTUE>].

12. See CITIZENS’ COMM. FOR CHILD. OF N.Y., *KEEPING TRACK OF NEW YORK CITY’S CHILDREN: 2020*, at 31–32 (2020), <https://cccnewyork.org/data-publications/keeping-track-of-new-york-citys-children-2020/> [<https://perma.cc/FYB5-FWQ7>] (stating that of nearly 1.4 million students attending schools in New York City, most attend one of the Department of Education’s 1,800 public and charter schools. The rest attend private schools, which are disproportionately white).

13. Andrea Alajbegović, *Still Separate, Still Unequal: Litigation as a Tool to Address New York City’s Segregated Public Schools*, 22 CUNY L. REV. 304, 306 (2019) (footnotes omitted).

14. See Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York’s Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 CLEVELAND ST. L. REV. 319, 322 (2015).

15. See *id.*

16. See *id.* at 322–23 (citing KUCSERA & ORFIELD, *supra* note 11, at 22).

17. See *id.* at 323.

### **B. The COVID-19 Pandemic Caused School Closures Across New York City**

In either late 2019 or early 2020, the COVID-19 outbreak arrived in the United States as it swept across the rest of the world.<sup>18</sup> New York City soon became a pandemic's epicenter, with cases rising sharply in March 2020.<sup>19</sup> This prompted Governor Cuomo to suddenly close the City's economy on March 22, 2020, and shut down New York City public schools — the nation's largest public school system — earlier on March 16, 2020.<sup>20</sup> New York City teachers and school leaders were given one week to prepare for distance learning. Online classes for New York City's 1.1 million public school students began on March 23, 2020, and continued through the end of the 2019–2020 school year.

### **C. COVID-19 Exposes and Exacerbates Inequities Among New York City Public School Students**

Almost immediately following school closures and the shift to online learning, shortcomings and inequities emerged.<sup>21</sup> Concerns were not limited to struggles with ensuring teaching and learning in an online environment. The multivariate importance of public schools to communities and society quickly came to the fore. For example, school leaders immediately recognized the importance of public schools in supporting children facing food insecurity.<sup>22</sup> The New York City Department of Education (DOE) arranged for families to pick up

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18. See Mike Baker & Sheri Fink, *Covid-19 Arrived in Seattle. Where It Went from There Stunned the Scientists.*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-sequencing.html> [https://perma.cc/DS2Z-FEXP].

19. See Jesse McKinley, *New York City Region Is Now an Epicenter of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 22, 2020), <https://www.nytimes.com/2020/03/22/nyregion/Coronavirus-new-York-epicenter.html> [https://perma.cc/WU5L-CFV8].

20. See Corina Knoll & Matthew Sedacca, *Parents Scramble as N.Y.C. Schools Close over Coronavirus*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/03/16/nyregion/nyc-schools-closed-coronavirus.html> [https://perma.cc/EGY6-SRWA].

21. See Selim Algar, *NYC Education Dept. Rolls Out Remote Learning for One Million City Kids*, N.Y. POST (Mar. 23, 2020, 7:24 PM), <https://nypost.com/2020/03/23/nyc-education-dept-rolls-out-remote-learning-for-one-million-city-kids/> [https://perma.cc/3XJV-AQ22].

22. See Collier Meyerson, *NYC's School Closures Are a Crisis of Their Own for Disadvantaged Families*, N.Y. MAG. (Mar. 21, 2020), <https://nymag.com/intelligencer/2020/03/nycs-school-closures-are-a-crisis-for-low-income-families.html> [https://perma.cc/T36W-LAUP].



meals at school buildings across the city.<sup>23</sup> The shift from in-person to online, remote teaching and learning depended on a technological infrastructure that many students and families lacked, exposing the extent of a pre-existing “digital divide.”<sup>24</sup> This included not only access to computers, laptops, iPads, or other hardware but also internet and Wi-Fi access and home environments conducive to online classes and homework.<sup>25</sup> Despite significant adaptive efforts by teachers, principals, and school leaders, public school closures and the move to remote learning exposed and exacerbated stark inequities in schooling for New York City children and families as well as many of their teachers.<sup>26</sup>

The COVID-19 pandemic laid bare and further fueled the negative impacts of double segregation and inequality in New York City public schools. It unshrouded, for example, housing inequities, the importance of and disparities in teacher-student relationships, and longstanding inequities for English Language Learners (ELLs) and students with disabilities.

### *i. Digital Divide*

One of the most readily notable inequities revealed in the move to remote learning is the so-called “digital divide.”<sup>27</sup> A 2019 New York

23. See Sophia Chang, *NYC Plans to Feed All Students, Deliver Laptops for Remote Learning*, GOTHAMIST (Mar. 16, 2020, 4:02 PM), <https://gothamist.com/news/nyc-plans-feed-all-students-deliver-laptops-remote-learning> [https://perma.cc/JX7G-YT8S].

24. See Pia Ceres, *A ‘Covid Slide’ Could Widen the Digital Divide for Students*, WIRED (Aug. 7, 2020, 7:00 AM), <https://www.wired.com/story/schools-digital-divide-remote-learning/> [https://perma.cc/KW9A-C6Y3].

25. See Tom Liam Lynch, *Distance Learning Didn’t Need to Be This Hard: NYC Schools Failed to Lay the Groundwork for a Transition*, N.Y. DAILY NEWS (Mar. 27, 2020, 8:00 AM), <https://www.nydailynews.com/opinion/ny-oped-distance-learning-this-hard-20200327-xgrb52fwpjglxk4imfjjmuzitq-story.html> [https://perma.cc/D5QJ-TW7E] (stating that some observers charged that the New York City DOE had failed to lay the groundwork that would allow for large scale distance education).

26. See Anna North, *The Shift to Online Learning Could Worsen Educational Inequality*, VOX (Apr. 9, 2020, 1:10 PM), <https://www.vox.com/2020/4/9/21200159/coronavirus-school-digital-low-income-students-covid-new-york> [https://perma.cc/C98B-XVDT].

27. See *NYC’s Digital Divide: 500K Households Have No Internet Access When It Is More Important Than Ever Before*, CITIZENS’ COMM. FOR CHILD. N.Y. (Apr. 24, 2020) [hereinafter *NYC’s Digital Divide*], <https://www.ccnyc.org/blog/new-york-citys-digital-divide-500000-nyc-households-have-no-internet-access-when-it-is-more-important-than-ever-before/> [https://perma.cc/3V9K-6K78].

City Comptroller Report found that “nearly one-third of households lack access to broadband internet at home” — approximately 30% of Hispanic and Black New Yorkers, compared to 20% of White and 22% of Asian New Yorkers.<sup>28</sup>

This digital divide exists across the country. In 2019, 21.3 million people lacked access to broadband connections.<sup>29</sup> Overall, low-income families tend to be more smartphone dependent and lack multiple internet-enabled devices, such as laptops or iPads. School-age children are among those most affected by this lack of access, with 35% of their households lacking broadband service in 2015.<sup>30</sup> The digital divide impacts distance education’s availability and effectiveness. The disproportionate number of school-age children without home broadband access has become clear as schools struggled to substitute in-school resources with online instruction, electronic libraries, streaming videos, and other online tutorials.<sup>31</sup>

These disparities in access took on a new urgency as schools shifted to emergency distance learning. As New York City Schools Chancellor Richard Carranza noted, we “cannot talk about remote learning without acknowledging that there is a technology gap that exists among our school communities.”<sup>32</sup> Amid New York City’s shift to distance learning, Carranza announced plans to distribute an estimated 300,000 tablets or laptops (devices) and noted in late March 2020 that 175,000 devices had been delivered, with the remainder to be distributed in coming weeks.<sup>33</sup> However, by mid-April, nearly 20,000 students who

28. OFF. OF N.Y.C. COMPTROLLER SCOTT M. STRINGER, CENSUS AND THE CITY: OVERCOMING NYC’S DIGITAL DIVIDE IN THE 2020 CENSUS 4–5 (2019), [https://comptroller.nyc.gov/wp-content/uploads/documents/Census\\_and\\_The\\_City\\_Overcoming\\_NYC\\_Digital\\_Divide\\_Census.pdf](https://comptroller.nyc.gov/wp-content/uploads/documents/Census_and_The_City_Overcoming_NYC_Digital_Divide_Census.pdf) [<https://perma.cc/KTS5-2F4E>].

29. See Nicol Turner Lee, *What the Coronavirus Reveals About the Digital Divide Between Schools and Communities*, BROOKINGS INST. (Mar. 17, 2020), <http://brookings.edu/blog/techtank/2020/03/17/what-the-coronavirus-reveals-about-the-digital-divide-between-schools-and-communities/> [<https://perma.cc/R38D-HSX2>].

30. See *id.*

31. See Annie McDonough, *Remote Learning Challenges Will Likely Continue in New York*, CITY & ST. N.Y. (Aug. 30, 2020), <https://www.cityandstateny.com/articles/policy/education/remote-learning-challenges-will-likely-continue-new-york.html> [<https://perma.cc/DS7K-KK4N>] (“[W]hile the existence of high-speed internet infrastructure isn’t lacking as much in New York City, high prices mean that roughly 1.5 million New Yorkers don’t have a home or mobile broadband connection.”).

32. Nikita Stewart, *She’s 10, Homeless and Eager to Learn. But She Has No Internet.*, N.Y. TIMES (Apr. 13, 2020), <https://www.nytimes.com/2020/03/26/nyregion/new-york-homeless-students-coronavirus.html> [<https://perma.cc/G3B9-PVT2>].

33. See *id.*

had requested devices reported that they still did not have them.<sup>34</sup> As a result, many New York City students went weeks without consistent access to schoolwork and fell behind their peers.<sup>35</sup>

COVID-19 brought into sharp relief existing disparities in internet access in New York City. During this time, more than 500,000 households (roughly 800,000 people) in New York City lacked internet access — including broadband, dial-up, satellite, or cell phone data plans.<sup>36</sup> Recently, the New York City Mayor's Office estimated the number of New Yorkers lacking a home or mobile internet connection at 1.5 million people.<sup>37</sup> Lack of internet connectivity significantly limits access to critical financial and food supports, education, and health services for some of the City's most vulnerable people. Households lacking internet access are most prevalent in low-income neighborhoods with high rates of poverty.<sup>38</sup> In several neighborhoods, such as northern Manhattan and the Bronx, only one internet service provider (ISP) is available for households, further limiting access and

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34. See Alex Zimmerman & Jessica Gould, *Nearly 20K NYC Students Still Missing Promised iPads*, CITY (Apr. 26, 2020, 2:53 PM), <https://www.thecity.nyc/2020/4/26/21247083/nearly-20k-nyc-students-still-missing-promised-ipads> [<https://perma.cc/9NFU-QTXP>].

35. See *id.*; see also *COVID-19 Affects New York City Schools, Nation's Largest District*, NPR (Mar. 27, 2020, 7:22 AM), <https://www.npr.org/2020/03/27/822411665/covid-19-affects-new-york-city-schools-nations-largest-district> [<https://perma.cc/Z5K9-3ULS>].

36. See *NYC's Digital Divide*, *supra* note 27.

37. See *Universal Solicitation for Broadband: NYCHA*, N.Y.C. MAYOR'S OFF. CHIEF TECH. OFFICER, <https://www1.nyc.gov/assets/cto/#/project/usb-nycha/> [<https://perma.cc/WN8Y-8CGA>] (last visited Jan. 10, 2021).

38. See Marguerite Reardon, *COVID-19 Shines Light on 'Digital Divide' Across the US*, CNET (Mar. 18, 2020, 5:00 AM), <https://www.cnet.com/news/covid-19-shines-light-on-digital-divide-across-the-us/> [<https://perma.cc/XC38-HYSZ>].

choice.<sup>39</sup> An estimated 46% of households in poverty lack broadband access.<sup>40</sup>

In July 2020, Mayor Bill de Blasio announced that New York City’s Internet Master Plan,<sup>41</sup> initially launched in January 2020, would be accelerated, investing \$157 million to expand broadband internet to 600,000 New Yorkers — including 200,000 New York City Housing Authority residents — over the next year and a half.<sup>42</sup> While a sign of progress, the plan does not respond to the urgency of the situation — students need immediate access to the internet to learn remotely during the pandemic.<sup>43</sup> The New York City DOE offered some short-term solutions during the spring 2020 school closures, such as using iPads as mobile hotspots and seeking low-cost internet from providers.<sup>44</sup> The degree to which such efforts will continue, or their effectiveness, is unclear. Thus, the need for access to reliable internet service for distance learning will persist and expand disparities in educational access in New York City.

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39. See N.Y.C. MAYOR’S OFF. OF THE CHIEF TECH. OFFICER, THE NEW YORK CITY INTERNET MASTER PLAN, at iii (2020), [https://tech.cityofnewyork.us/wp-content/uploads/2020/01/NYC\\_IMP\\_1.7.20\\_FINAL-2.pdf](https://tech.cityofnewyork.us/wp-content/uploads/2020/01/NYC_IMP_1.7.20_FINAL-2.pdf) [<https://perma.cc/YZ57-VEJ8>]; see also Ryan Johnston, *New York City Asks ISPs, Technology Companies to Help Close Digital Divide*, STATESCOOP (May 26, 2020), <https://statescoop.com/new-york-city-asks-isps-technology-companies-to-help-close-digital-divide/> [<https://perma.cc/BQR5-T8ZK>]. New York City has asked service providers to “close a digital divide” as part of an Internet Master Plan that calls for investing \$2.1 billion in existing infrastructure, as well as new public and private investment, to expand access to high-speed internet in New York City. See Colin Wood, *New York City Unveils ‘Internet Master Plan’ for Universal Broadband Access*, STATESCOOP (Jan. 7, 2020), <https://statescoop.com/new-york-city-internet-master-plan-universal-access-john-paul-farmer/> [<https://perma.cc/U8GH-JMP7>]. It has yet to come to fruition. See *id.*

40. See N.Y.C. MAYOR’S OFF. OF THE CHIEF TECH. OFFICER, *supra* note 39, at ii.

41. See *id.* at i.

42. See Annie McDonough, *Internet Access Remains a Problem as Schools Plan for Reopening*, CITY & ST. N.Y. (July 10, 2020), <https://www.cityandstateny.com/articles/policy/education/internet-access-remains-problem-schools-plan-reopening.html> [<https://perma.cc/Q6E3-3FDS>].

43. See *id.*

44. See Michael Elsen-Rooney, *300,000 NYC Education Dept. iPads Will Now Function as Internet Hotspots*, N.Y. DAILY NEWS (Aug. 14, 2020, 4:57 PM), <https://www.nydailynews.com/new-york/education/ny-ipad-hotspots-doe-nyc-20200814-nk45ni6cy5arhcxbphz2icg7u4-story.html> [<https://perma.cc/67PW-LME4>].

*ii. Home Environment – from Homelessness to Doubling Up to Second Homes*

The COVID-19 pandemic’s “stay-at-home” remote work and distance learning requirements revealed the importance of home environments for general health and well-being, including access to education. It also revealed wide inequities in the circumstances of students and teachers based on housing and family conditions. For example, some students lack internet access because they are homeless.<sup>45</sup> In fact, recent reports have documented record-high levels of homelessness among New York City public school students in recent years.<sup>46</sup> In New York City, an estimated 114,000 children live in shelters or have unstable housing.<sup>47</sup> According to the City’s Department of Social Services, “[t]here are about 450 shelters for families and single adults in the main shelter system, and most of them do not have Wi-Fi available for residents.”<sup>48</sup> An informal survey of a Bronx shelter residence showed that only 15 of 79 families had devices, and there were 177 school-age children in the shelter attending more than 100 different schools.<sup>49</sup> This means that even the small percentage of students who managed to get iPads or other devices for remote learning could not access coursework and often fell behind their peers. Additionally, the trauma and difficulties associated with experiencing homelessness, including crowding, lack of privacy and places to study, and day-to-day uncertainty about procuring basic needs, impact student performance.<sup>50</sup> For students without stable housing, school is often one of the only constants in their lives. The unavailability of school spaces and regular social connections compounds the myriad crises students face amid the pandemic. Some have suggested that policymakers and childcare specialists “should focus on creating special shelters and housing units, potentially using hotels or empty dorm rooms,” so school-aged youth can attend school or be quarantined in a safe environment.<sup>51</sup>

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45. See Stewart, *supra* note 32.

46. See Eliza Shapiro, *Homelessness in New York Public Schools Is at a Record High: 114,659 Students*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/nyregion/homeless-students-nyc-schools-record.html> [<https://perma.cc/8L5E-VGGT>].

47. See Stewart, *supra* note 32.

48. *Id.*

49. See *id.*

50. See *id.*

51. Rachel I. Sillman Cohen & Emily Adlin Bosk, *Vulnerable Youth and the COVID-19 Pandemic*, 146 PEDIATRICS, at 2 (2020).

Even for students with reliable housing, the COVID-19 pandemic exacerbated socioeconomic disparities and difficulties many students and families experience.<sup>52</sup> State-imposed stay-in-place orders shed light on the degree to which marginalized children, families, and communities rely on public schools for everything from childcare, to supplemental food, to social support. Low-income families and families facing unemployment or furloughs because of the pandemic experienced immediate, severe economic stressors, including food insecurity and possible eviction.<sup>53</sup> Families with multiple children faced great difficulty managing their children's remote learning while also working either outside the home or remotely from home while managing the household. Even middle-class parents described significant difficulties managing working from home while supervising their children's remote learning.<sup>54</sup> In addition, "[f]or teachers with their own school-age children, the situation [wa]sn't just untenable, it[] [was] impossible."<sup>55</sup> The pandemic compounded difficulties many families already faced trying to balance work and parenting obligations without sufficient housing, social, and economic supports.<sup>56</sup> The need to manage school and work in urban home environments, from homelessness to a variety of home arrangements not suited to the task, widened gaps in learning access.

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52. See JAMES A. PARROTT & LINA MOE, NEW SCH. CTR. FOR N.Y.C. AFFS., *THE NEW STRAIN OF INEQUALITY: THE ECONOMIC IMPACT OF COVID-19 IN NEW YORK CITY* 1–2 (2020), [https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e974be17687ca34b7517c08/1586973668757/NNewStrainofInequality\\_April152020.pdf](https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5e974be17687ca34b7517c08/1586973668757/NNewStrainofInequality_April152020.pdf) [https://perma.cc/6EU7-F2GM] (“Nearly two-thirds (64 percent) of jobs lost to date during the pandemic were held by workers paid less than \$40,000 annually. Only 10 percent of lost jobs occurred among those paid \$100,000 or more annually.”).

53. See Jeanna Smialek, *Poor Americans Hit Hardest by Job Losses Amid Lockdowns, Fed Says*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/business/economy/coronavirus-jobless-unemployment.html> [https://perma.cc/E4LY-7V2H].

54. See Deb Perelman, *In the Covid-19 Economy, You Can Have a Kid or a Job. You Can't Have Both.*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/02/business/covid-economy-parents-kids-career-home-schooling.html> [https://perma.cc/A29L-B75V].

55. *Id.*

56. See Lynn Lu, *A Nightmare of Work and Care*, LPE PROJECT (Sept. 2, 2020), <https://lpeproject.org/blog/a-nightmare-of-work-and-care/> [https://perma.cc/MU8M-6HFT].

*iii. Teacher-Student Relationships to Support Students' Social and Emotional Health*

School closures revealed stressors on students and teachers and the importance of robust teacher-student relationships for learning and social and emotional health.<sup>57</sup> Distance learning challenged teachers to maintain connections with and support students. Students and teachers struggled not only with schoolwork but also with sick family members, dislocation, and other variables during remote learning.<sup>58</sup> Many teachers expressed concern about students with whom they had lost connection over the spring, including health concerns, family stresses, and worries about the availability of distance learning infrastructure.<sup>59</sup> Teachers noted how difficult it is to teach students without maintaining a consistent relationship with them.

Much of the experience with remote learning during the spring and summer of 2020 prompted calls for in-person instruction to resume as quickly as possible. In response, and mindful of the continued pandemic public health concerns, New York City's Mayor and Schools Chancellor made plans for in-person, remote, and hybrid learning in the fall of 2020.<sup>60</sup> On August 6, 2020, New York City Schools Chancellor Carranza released an update informing parents about how to opt out of a hybrid model for an all-remote model instead.<sup>61</sup> In the update, Carranza stated that teachers would provide daily live instruction for remote learners and have dedicated time during school

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57. See, e.g., David Saleh Rauf, *Nurturing Teacher-Student Connections in a Virtual World*, EDUC. WK. (July 22, 2020), <https://www.edweek.org/ew/articles/2020/07/23/nurturing-remote-learning-relationships.html> [https://perma.cc/MKH5-PMPS].

58. See, e.g., *Together Apart: How Teachers Are Fighting to Make Meaningful Connections with Students*, N.Y. TIMES (Apr. 28, 2020), <https://www.nytimes.com/2020/04/28/style/teachers-students-coronavirus-help.html> [https://perma.cc/P4XU-ZDJP] (hosted by Priya Parker, available on the website).

59. See Valerie Strauss, *How Relationships Between Teachers and Students Are Being Tested in COVID-19 Crisis*, WASH. POST (Apr. 22, 2020, 8:00 AM), <https://www.washingtonpost.com/education/2020/04/22/how-relationships-between-teachers-students-are-being-tested-covid-19-crisis/> [https://perma.cc/RK9C-QBBV].

60. See *Welcome to the 2020–2021 School Year*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/welcome-to-the-2020-2021-school-year> [https://perma.cc/7TPE-G49L] (last visited Oct. 30, 2020).

61. See *id.*; see also *Messages for Families: August 6, 2020: Update for Families on Instruction*, N.Y.C. DEP'T EDUCATION (Aug. 6, 2020) [hereinafter *August 6, 2020 Update*], <https://www.schools.nyc.gov/about-us/news/chancellor-s-message-for-families> [https://perma.cc/2BEM-YMT4].

days to engage with students and families via video conference or telephone.<sup>62</sup>

The fall 2020 hybrid in-person and remote reopening of the New York City public schools was plagued with difficulties and uncertainty. On August 7, 2020, Governor Cuomo announced that New York State's schools could reopen based on the reduction in COVID-19 transmission.<sup>63</sup> He left to local school districts decisions about whether, when, and how to reopen schools.<sup>64</sup> This meant that New York City's Mayor and Schools Chancellor were to decide. Mayor de Blasio announced an ambitious plan to reopen schools with a blended model of in-person and remote learning on September 10, 2020.<sup>65</sup> The Mayor's determination to reopen was based on a combination of concerns about the effects of school closures on student learning and social-emotional health,<sup>66</sup> as well as on the economy and his legacy.<sup>67</sup> Teachers and principals unions, some parents, and advocates raised several concerns, including school safety, adequate staffing, and scheduling.<sup>68</sup> School leaders had few good choices. Ultimately, New York City public schools reopened under a staggered, blended model mixing partial in-person and distance learning, with options for full

62. See *August 6, 2020 Update*, *supra* note 61. Noting the importance of teacher-student relationships, Carranza highlighted potential community-building routines such as daily morning meetings where the teacher engages students in activities related to social-emotional wellness and community building, or daily closing activities where the teacher recaps learning for the day. See *id.* As of this writing, these plans are preliminary, acknowledging both the importance and difficulty of having teachers establish and maintain connections with students when working remotely or in a hybrid format.

63. See Evan McMorris-Santoro & Yon Pomrenze, *New York City Schools' Return to In-Person Classes Leaves Parents with Tough Choices*, CNN (Sept. 27, 2020, 5:17 PM), <https://www.cnn.com/2020/09/27/us/nyc-schools-reopening-latest/index.html> [<https://perma.cc/UKZ2-FGN3>].

64. See *id.*

65. See Sophia Chang, *De Blasio Unveils Partial In-Person Learning Model for 2020–2021 School Year*, GOTHAMIST (July 8, 2020, 2:05 PM), <https://gothamist.com/news/de-blasio-unveils-partial-person-learning-model-2020-2021-school-year> [<https://perma.cc/WY9F-R84D>]; McMorris-Santoro & Pomrenze, *supra* note 63.

66. See Chang, *supra* note 65.

67. See Madina Touré & Erin Durkin, *De Blasio Stakes His 'Whole Legacy' on Reopening New York Schools*, POLITICO (Sept. 30, 2020, 11:34 AM), <https://www.politico.com/states/new-york/albany/story/2020/09/30/amid-a-spike-in-infections-schools-get-off-to-a-shaky-start-1319112> [<https://perma.cc/49ZT-YE5A>].

68. See, e.g., Anya Kamenetz, *New York City Educators Warn School Reopening Plan Is 'Missing Pieces'*, NPR (Aug. 25, 2020, 12:02 PM), <https://www.npr.org/2020/08/25/905446306/new-york-city-educators-warn-school-reopening-plan-is-missing-pieces> [<https://perma.cc/8WLY-D4C3>].



remote learning.<sup>69</sup> Concerns persist about the social-emotional effects of continued remote learning for many students, as well as the effects of repeated changes in school schedules and the specter that schools will again be forced to close entirely should COVID-19 community spread increase.<sup>70</sup>

*iv. English Language Learners*

COVID-19 exposed and exacerbated educational inequities of New York City's roughly 160,000 ELLs, many of whom are the children of recent immigrants. In New York City, immigrant communities are among the most negatively impacted by COVID-19 in terms of illness, death, and economic loss.<sup>71</sup> A significant proportion of New York City immigrant households include "essential" workers<sup>72</sup> who are required to work outside the home or lost jobs due to pandemic-related business closures.<sup>73</sup> Many recent immigrants live among large families, often in multi-generational households.<sup>74</sup> Often, the older generations in these households do not speak any English and have limited experience with or limited access to technology.<sup>75</sup> This means that many ELL students faced greater challenges shifting to remote learning.<sup>76</sup> At the same time, they lost the support of teachers and school-based services when public schools closed and online classes began.<sup>77</sup>

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69. See McMorris-Santoro & Pomrenze, *supra* note 63.

70. See, e.g., Rosy Chhabra & Alicia Menard-Livingston, *What About Children's Mental Health? Constantly Shifting School Reopening Plans May Have Long-Term Psychological Consequences*, N.Y. DAILY NEWS (Sept. 18, 2020, 5:00 AM), <https://www.nydailynews.com/opinion/ny-oped-what-about-childrens-mental-health-20200918-civeqvspgvbxdnksav5epsulum-story.html> [<https://perma.cc/9FT2-BT7P>].

71. See MAKE THE RD. N.Y., *supra* note 7, at 5.

72. See *id.* at 16 ("Immigrants make up a disproportionate number of New York's essential workers — risking their health and that of their families to care for all of us.").

73. See *id.*

74. See, e.g., Jenny Low, *For Our Most Vulnerable Families, the City Must Delay In-Person School and Improve Remote Learning*, GOTHAM GAZETTE (Aug. 31, 2020), <https://www.gothamgazette.com/opinion/9719-most-vulnerable-families-new-york-city-delay-school-improve-remote-learning> [<https://perma.cc/E3VE-F5ZS>].

75. See Rikha Sharma Rani, *Imagine Online School in a Language You Don't Understand*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/coronavirus-immigrants-school.html> [<https://perma.cc/5UJY-VSJD>].

76. See *id.*

77. See Madina Touré, *English Language Learners Want Voices Heard in School Reopening Talks*, POLITICO (July 30, 2020, 5:00 AM), <https://www.politico.com/states/new-york/albany/story/2020/07/29/english-language-learners-want-voices-heard-in-school-reopening-talks-1304142> [<https://perma.cc/XZ27-KW5A>].

Access to in-person classes, which provide opportunities to engage with supportive teachers, is important for all students but crucial for ELLs.<sup>78</sup> The move to remote learning not only forced students to rely on remote instruction but also limited their communication with teachers through email or scheduled remote conferences.<sup>79</sup> Teachers, who could receive up to 80 to 100 emails a night, found it difficult to answer them all.<sup>80</sup> Many ELL students keenly felt the loss of in-person instruction because they often could not rely on help from their parents, who were likely learning English themselves and disproportionately worked in essential jobs.<sup>81</sup> Accessing translated materials and navigating remote learning software also can be particularly challenging for students and families for whom English is a new language.<sup>82</sup> Reaching and accommodating ELLs is a central education equity concern highlighted by and exacerbated during the COVID-19 pandemic.

Although the DOE provides web-based resources to ELL students and families,<sup>83</sup> several observers view these resources as insufficient to

78. See, e.g., Corey Mitchell, *English-Learners May Be Left Behind as Remote Learning Becomes 'New Normal,'* EDUC. WK. (Mar. 17, 2020, 4:30 PM), [https://blogs.edweek.org/edweek/learning-the-language/2020/03/coronavirus\\_english\\_learners\\_digital\\_divide.html](https://blogs.edweek.org/edweek/learning-the-language/2020/03/coronavirus_english_learners_digital_divide.html) [<https://perma.cc/8XH5-Y63D>].

79. See Shumita Basu & Reema Amin, *For NYC's 135,000 Students Learning English, Remote Education Comes with Steep Barriers,* GOTHAMIST (Apr. 20, 2020, 4:46 PM), <https://gothamist.com/news/for-nycs-135000-students-learning-english-remote-education-comes-with-steep-barriers> [<https://perma.cc/H56R-9MAV>].

80. See *id.*

81. See *id.*

82. See, e.g., *Parents' Survey Identifies Key Needs for New York Families Navigating New Reality,* GLOB. STRATEGY GRP. (Apr. 6, 2020), <https://s3-us-east-2.amazonaws.com/edtrustmain/wp-content/uploads/sites/5/2020/04/07121352/Coronavirus-Parent-Poll.pdf> [<https://perma.cc/PD52-5W5W>].

83. See *Multilingual Learners*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/learning/multilingual-learners> [<https://perma.cc/B9NS-AKJU>] (last visited Nov. 1, 2020); *Multilingual Learners and English Language Learners*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/learning/learn-at-home/activities-and-supports/multilingual-learners-and-english-language-learners> [<https://perma.cc/D37M-FYDZ>] (last visited Nov. 1, 2020). The DOE's website provides information and advice to immigrant families on how to support their children's learning at home. See *id.* It includes tips on accessing e-books in different languages, preparing children for college and careers, and strategies to help children with remote learning. See *id.* The DOE also directs parents to a translation phone line that has over 350 languages to help families understand school communications. See *id.* However, these well-intentioned resources are not sufficient to meet students' needs. There is deep concern among parents, educators, and advocates that learning loss among ELL students will increase significantly because of remote learning.

address the needs of multilingual learners and their families.<sup>84</sup> Recognizing these challenges, advocates called on school leaders to improve the DOE's remote learning approach for ELL students, including stronger communication with ELL families, more bilingual school social workers and guidance counselors, and leveraging ELL experts and lessons from other states to implement the best possible practices in remote ELL instruction.<sup>85</sup>

*v. Students with Disabilities*

Students with disabilities also have been severely affected by COVID-19, school closures, and the shift to remote learning. Out of New York City's 1.1 million students, roughly 228,000 children have disabilities.<sup>86</sup> These students are at the greatest risk of learning loss and developmental setbacks during school closures because they miss out on small-setting classrooms and vital supports — such as speech, occupational, and physical therapy — that are nearly impossible to provide virtually.<sup>87</sup> Because the law requires schools to provide students with disabilities a free appropriate education on terms equal to those provided to the general student population, school leaders must find ways to support students with disabilities during the pandemic.<sup>88</sup> However, many educators and parents take the position that “even if remote learning were executed perfectly, students with

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84. See, e.g., *Advocates Unveil a Comprehensive Plan to Address Educational Equity for Multilingual Learners/English Language Learners and Multilingual Families During the Pandemic*, N.Y. IMMIGR. COAL. (May 7, 2020), <https://www.nyc.gov/2020/05/advocates-unveil-a-comprehensive-plan-to-address-educational-equity-for-multilingual-learners-english-language-learners-and-multilingual-families-during-the-pandemic/> [<https://perma.cc/Q5HT-BY6E>].

85. See *Pandemic Response Education Platform for Immigrant Families*, N.Y. IMMIGR. COAL., [https://mcusercontent.com/514cc0c969e98b57f073ce073/files/e9c8404c-6648-4115-b004-227a4bcc11f3/Pandemic\\_Response\\_Education\\_Platform\\_for\\_Immigrant\\_Families\\_4.13.20.pdf](https://mcusercontent.com/514cc0c969e98b57f073ce073/files/e9c8404c-6648-4115-b004-227a4bcc11f3/Pandemic_Response_Education_Platform_for_Immigrant_Families_4.13.20.pdf) [<https://perma.cc/V29S-ERF3>] (last visited Oct. 30, 2020).

86. See Alex Zimmerman et al., *How Remote Learning Upended NYC Students with Disabilities and Their Families*, CITY (June 17, 2020, 11:05 PM), <https://www.thecity.nyc/education/2020/6/17/21295189/nyc-special-education-students-remote-learning-struggles> [<https://perma.cc/S2BN-YJ5N>].

87. See *id.*

88. See Jennifer Gavin, *Are Special Education Services Required in the Time of COVID-19?*, AM. BAR ASS'N (Mar. 31, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/are-special-education-services-required-in-the-time-of-covid19/> [<https://perma.cc/8DLC-4WHK>] (citing 34 C.F.R. §§ 104.4, 104.33 (Section 504) and 28 C.F.R. § 35.130 (Title II of the American with Disabilities Act)).

special needs would fall behind academically and socially.”<sup>89</sup> The lack of in-person support forced parents to become de facto educators, speech therapists, and counselors for their kids — on top of the economic and emotional fallout of living through the pandemic.<sup>90</sup> Parents have expressed concerns over their children regressing, particularly with respect to social and communications skills as well as learning progress.<sup>91</sup> The situation raises broader concerns about the pandemic’s impact on the education rights of students with disabilities.<sup>92</sup>

Some parents and families sued New York City and other school districts around the country for their inadequate COVID-19 responses to meet special education students’ needs.<sup>93</sup> The class action complaint in *J.T. v. De Blasio* argues that, during the COVID-19 school closures and modifications, the New York City School District and others violated the rights of students with disabilities under federal law, including the Individuals with Disabilities Education Act (IDEA),<sup>94</sup> the Americans with Disabilities Act (ADA),<sup>95</sup> Section 504 of the Federal Rehabilitation Act,<sup>96</sup> and state constitutions or statutes.<sup>97</sup> Two hundred families in ten states have signed on as plaintiffs so far, arguing that remote learning models have been inadequate for students with

89. Eliza Shapiro & Elizabeth A. Harris, *This Is Schooling Now for 200,000 N.Y.C. Children in Special Education*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/nyregion/special-education-coronavirus-nyc.html> [https://perma.cc/9VQF-DUUH].

90. *See id.*

91. *See id.*; see also Anna North, *We Need to Talk About What School Closures Mean for Kids with Disabilities*, VOX (Aug. 6, 2020, 1:40 PM), <https://www.vox.com/2020/8/6/21353154/schools-reopening-covid-19-special-education-disabilities> [https://perma.cc/9LDS-JNGY].

92. *See, e.g.*, Katelyn Li, *For Students with Disabilities, a Pandemic’s Threat to Hard-Fought Educational Rights*, HARV. POL. REV. (Oct. 2, 2020), <https://harvardpolitics.com/pandemic-educational-rights/> [https://perma.cc/ZER5-M97Q].

93. *See* Selim Algar, *Lawsuit Rips Schools for Abandoning Special Needs Kids Amid COVID-19*, N.Y. POST (July 16, 2020, 4:57 PM), <https://nypost.com/2020/07/16/lawsuit-rips-schools-for-abandoning-special-needs-kids-amid-covid-19/> [https://perma.cc/LPM3-65J5]; see also Anya Kamenetz, *Families of Children with Special Needs Are Suing in Several States. Here’s Why.*, NPR (July 23, 2020, 7:06 AM), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why> [https://perma.cc/7E4D-RV22].

94. 20 U.S.C. § 1400.

95. 42 U.S.C. § 12101.

96. 29 U.S.C. § 794.

97. *See* Complaint ¶ 126, *J.T. v. de Blasio*, No. 20 Civ. 5878 (S.D.N.Y. July 27, 2020).

disabilities. The plaintiffs demand the resumption of full-time, in-person special education, new evaluations for children who are regressing drastically, compensation for parental expenses incurred during remote learning, and funding for additional staff.<sup>98</sup> This case and others highlight the difficulties public school leaders face in determining how best to respond to the COVID-19 pandemic, meeting public health and safety imperatives while also serving the educational, social, and emotional needs of so many students, especially those who need more restrictive placement or additional services.<sup>99</sup> Indeed representatives of school districts have requested temporary relief from lawsuits so they may focus funds and attention on how to deliver services during the pandemic.<sup>100</sup> At the same time, disability advocates express fear that the pandemic will result in limiting disability rights.<sup>101</sup>

On July 8, 2020, the DOE announced preliminary plans for staggered in-person schedules for most students; it included an option of providing in-person services for students with disabilities who have Individualized Education Programs to the greatest extent possible.<sup>102</sup>

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98. *See id.* ¶ Prayer for Relief.

99. *See, e.g., L.V. ex rel. J.V.2 v. N.Y.C. Dep't of Educ.*, No. 19 Civ. 5451, 2020 WL 4043529, at \*2 (S.D.N.Y. July 8, 2020), *report and recommendation adopted*, No. 19 Civ. 5451, 2020 WL 4040958 (S.D.N.Y. July 17, 2020) (“At the time of the onset of the COVID-19 pandemic in New York City in mid-March of this year, J.V.2 was not receiving consistent services. L.V., having learned DOE was providing tablet devices enabled with their own WiFi hot-spots to families, applied for such a device in late March. L.V. received the device in late April, but was unable to effectively use the device with J.V.2 for his remote learning sessions, as J.V.2 would not sit still and the device’s internet connection was not reliable.”); *see also Abrams v. Carranza*, No. 20-CV-5085 (S.D.N.Y. Aug. 4, 2020); *L.V. ex rel. J.V.2 v. N.Y.C. Dep't of Educ.*, No. 19 Civ. 5451, 2020 WL 4040958, at \*1 (S.D.N.Y. July 17, 2020) (“The Court holds that the September 2019 PO contemplated delivery of in-person services, and that [Defendant] has not adequately explained how its computer-based services are a satisfactory substitute for J.V.2 during the COVID-19 pandemic, nor conducted an evaluation of how remote services can be delivered to J.V.2 to meet his individual needs.”).

100. *See, e.g., In the News*, 26 SPECIAL EDUC. L. BULL. (2020) (noting requests for “reasonable, temporary, litigation protection for the vast majority of districts that are doing everything feasible to meet IDEA during the pandemic, but simply cannot meet every requirement exactly as intended for every single child”).

101. *See Jasmine E. Harris, The Frailty of Disability Rights*, 169 U. PA. L. REV. ONLINE 29, 33 (2020) (noting that “COVID-19 is a perfect storm of systemic flaws with people with disabilities at its eye” and that difficulties presented during the pandemic may catalyze limits on disability rights).

102. *See Archive: Coronavirus Updates*, INCLUDENYC (July 8, 2020), <https://www.includenyc.org/content/archive-coronavirus-updates> [<https://perma.cc/8R9Q-EUZZ>]. Alternative staggered schedules also might be available for students in District 75 due to that special education district’s smaller class sizes. *See id.*

Each approach presents difficulties and risks for students, families, teachers, and school leaders.

*vi. Intersecting Challenges and the Quest for Reopening Guidelines*

The challenges, choices, difficulties, and associated inequities noted above intersect.<sup>103</sup> Key touchstones are health and justice. The COVID-19 pandemic revealed the urgency of public health and its intersectional relationship to a full range of social markers among individuals and in households, communities, and societal hierarchies.

Health is inextricably linked to virtually all aspects of a good society. Good or bad, health is both a product and a marker of the nature and fairness of political, social, and economic structures. A person's education, level of income, housing, and social status all affect her health, and all are substantially determined by social, political, and economic forces. These forces could reinforce the effects of the tickets we draw in the morally arbitrary "natural and social lotteries." Or, they could counter the effects of these lotteries so that we all may have equal opportunities to flourish — and to be healthy. Who is healthy and who is not, then, is a fundamental issue of justice.<sup>104</sup>

Thus, each challenge to public education access during COVID-19, on its own, tells only part of the story. The challenges for New York City public school reopening continue along with the pandemic. For example, families with school-aged children may include young and elderly members, immigrants, English learners, and students with disabilities. They may experience job loss, housing insecurity or homelessness, lack of internet access, and illness or death due to COVID-19. Taken together, the multiple challenges identified demonstrate the intersecting social dynamics and inequities impacting children and families. An understanding of intersectionality should inform reasoned and equitable decisions about distance learning, reopening public schools, and broader educational equity.<sup>105</sup> The need to address such inequities holistically is particularly urgent as the

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103. See, e.g., Stephanie Pappas, *Fighting Inequity in the Face of COVID-19*, AM. PSYCH. ASS'N (June 1, 2020), <https://www.apa.org/monitor/2020/06/covid-fighting-inequity> [<https://perma.cc/9TT9-P7D6>].

104. Lawrence O. Gostin & Eric A. Friedman, *Imagining Global Health with Justice: Transformative Ideas for Health and Well-Being While Leaving No One Behind*, 108 GEO. L.J. 1535, 1557 (2020).

105. See generally Vivian L. Gadsden, *Gender, Race, Class, and the Politics of Schooling in the Inner City*, 673 ANNALS ACAD. POL. & SOC. SCI. 12, 13 (2017) (noting the salience of intersectional issues of race, gender, class, and social context in urban public schooling).

United States experiences a societal reckoning about deep and longstanding harms associated with inequality and systemic racism.<sup>106</sup>

New York City and State publicly committed to reopening schools both safely and equitably during the pandemic. This is a tall order. Many states, localities, and policymakers looked to New York City as it planned to reopen the nation's largest school district.<sup>107</sup> Policymakers needed to address the conundrum presented by the multiple goals of reopening schools in a way that prioritizes health and safety and supports the economy while responding to the urgent impacts associated with socioeconomic inequality and its effects on public schools.<sup>108</sup> An examination of early decisions regarding school reopening amid the pandemic is instructive.

## II. PUBLIC HEALTH AND SAFETY, EDUCATION, EQUITY, ECONOMICS, AND GOVERNANCE — WHO DECIDES REOPENING?

The stark inequities in public schooling and the lack of technological and pandemic emergency preparedness present significant challenges for school leaders and elected officials. This health crisis is testing education policy, politics, and governance in urgent, new ways. This Part overviews those challenges and considers governance- and policy-related recommendations.

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106. See Catherine Powell, “Viral Convergence”: *Interconnected Pandemics as Portal to Racial Justice*, COUNCIL ON FOREIGN RELS. (Aug. 5, 2020), <https://www.cfr.org/blog/viral-justice-interconnected-pandemics-portal-racial-justice> [<https://perma.cc/UT2N-G9L2>] (noting that “[w]e live in a moment of interconnected pandemics — this era of COVID-19 pandemic has provided a window into the pandemics of policing, poverty, and racism around the globe” and the need to address them holistically); Betty A. Rosa, *So Much More Than A Teachable Moment*, N.Y. ST. BAR ASS’N (July 15, 2020), <https://nysba.org/so-much-more-than-a-teachable-moment/> [<https://perma.cc/4UGB-9L5P>] (“Simply put, COVID-19 disproportionately harms people of color and the poor — in terms of health, in terms of employment, and in terms of the ability to receive a meaningful education.”); see also *Together for Justice: June 3, 2020 Letter from the Chancellor on Striving for Justice*, N.Y.C. DEP’T. EDUCATION (June 3, 2020), <https://www.schools.nyc.gov/about-us/vision-and-mission/together-for-justice> [<https://perma.cc/VKS3-W6DQ>].

107. See, e.g., Eliza Shapiro & Mihir Zaveri, *New York Becomes First Big City in U.S. to Reopen All Its Schools*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/01/nyregion/nyc-coronavirus-schools-reopen.html> [<https://perma.cc/6QRJ-68TA>].

108. See Eliza Shapiro, *Can N.Y.C. Reopen Schools? The Whole Country Is Watching*, N.Y. TIMES (Sept. 1, 2020), <https://www.nytimes.com/2020/08/05/nyregion/nyc-schools-reopening.html> [<https://perma.cc/VG4D-QWZ3>].

### A. Public Officials' Response to COVID-19 and Public Schools: Rhetoric, Responsibility, and Governance

Following the closure of New York City public schools on March 16, 2020,<sup>109</sup> the pressure to reopen schools began to mount as early as mid-April 2020. Public officials, from the U.S. President to New York State's Governor and New York City's Mayor, soon had much to say about school closures and reopening plans. President Donald Trump pressured schools to reopen, emphasizing concerns about the economy and his political fate if schools remained closed.<sup>110</sup> He even threatened "to condition future federal COVID-19 federal relief funds on whether or not states reopen school buildings,"<sup>111</sup> a confusing message that undermined the Centers for Disease Control and Prevention's (CDC) school reopening guidelines, despite questionable authority to do so.<sup>112</sup> This left states and localities scrambling to determine how best to reopen schools amid an ongoing pandemic affecting states and localities to different degrees in a highly politicized and contentious environment.<sup>113</sup>

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109. See Eliza Shapiro, *New York City Public Schools to Close to Slow Spread of Coronavirus*, N.Y. TIMES (Mar. 15, 2020), <https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html> [https://perma.cc/QTG5-BS3X].

110. See, e.g., Laura Meckler, *Trump Pushes Schools to Open in the Fall, Downplaying Risks as Virus Spreads*, WASH. POST (July 7, 2020, 8:35 PM), [https://www.washingtonpost.com/education/white-house-schools-fall-coronavirus/2020/07/07/e2b1a16e-c059-11ea-9fdd-b7ac6b051dc8\\_story.html](https://www.washingtonpost.com/education/white-house-schools-fall-coronavirus/2020/07/07/e2b1a16e-c059-11ea-9fdd-b7ac6b051dc8_story.html) [https://perma.cc/D8A3-5UBN].

111. Evie Blad, *White House to States: Reopen School Buildings or Risk Additional Relief Funds*, EDUC. WK. (July 8, 2020, 3:44 PM), <https://blogs.edweek.org/edweek/campaign-k-12/2020/07/trump-relief-funding-school-reopening-covid.html> [https://perma.cc/68YL-RX3R].

112. See, e.g., Jill Colvin & Mike Stobbe, *Trump Undercuts Health Experts — Again — in Schools Debate*, WASH. POST (July 9, 2020, 10:17 PM), [https://www.washingtonpost.com/health/schools-or-bars-opening-classrooms-may-me-an-hard-choices/2020/07/09/8277ff7c-c253-11ea-8908-68a2b9eae9e0\\_story.html](https://www.washingtonpost.com/health/schools-or-bars-opening-classrooms-may-me-an-hard-choices/2020/07/09/8277ff7c-c253-11ea-8908-68a2b9eae9e0_story.html) [https://perma.cc/2VM4-CLYZ]; Laura Meckler, *Trump Pushes and Threatens in Bid to Fully Reopen Schools*, WASH. POST (July 8, 2020, 8:01 PM), [https://www.washingtonpost.com/education/trump-schools-cdc-pence/2020/07/08/8a52d400-c14b-11ea-b4f6-cb39cd8940fb\\_story.html](https://www.washingtonpost.com/education/trump-schools-cdc-pence/2020/07/08/8a52d400-c14b-11ea-b4f6-cb39cd8940fb_story.html) [https://perma.cc/SXR9-VTFP].

113. See generally Molly Ball, *How President Trump Politicized School Reopenings*, TIME (July 9, 2020, 6:22 AM), <https://time.com/5864680/donald-trump-school-reopenings-coronavirus/> [https://perma.cc/GYE5-W84A].



As the COVID-19 pandemic continued to ravage New York City,<sup>114</sup> New York State’s “Pause” Executive Order,<sup>115</sup> including stay-home directives and the closure of businesses and schools in New York City, began to stem the tide. By mid-April 2020, the number of COVID-19 cases, hospitalizations, and deaths had begun to decrease.<sup>116</sup> However, the pandemic was far from over.<sup>117</sup> The added hardship, economic damage, and worsening inequities that followed public school closures revealed often unacknowledged benefits of in-person, school-based learning, particularly for many low- and moderate-income and marginalized students and their families.<sup>118</sup> School closures also highlighted the value of public schools to the broader community, including their crucial contribution to its economic and social health.<sup>119</sup> Working parents of school-aged children found it extraordinarily difficult to manage the care and supervision of their children while continuing to work.<sup>120</sup> The economy in New York and across the nation was in free fall because of pandemic-related business

114. See, e.g., Ann Choi, Josefa Velasquez & Will Welch, *Coronavirus in New York City*, CITY (Oct. 25, 2020, 5:29 PM), [https://projects.thecity.nyc/2020\\_03\\_covid-19-tracker/](https://projects.thecity.nyc/2020_03_covid-19-tracker/) [<https://perma.cc/7WWB-VYTW>].

115. See *Governor Cuomo Signs Executive Order Closing Schools Statewide for Two Weeks*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (Mar. 16, 2020), <https://www.governor.ny.gov/news/governor-cuomo-signs-executive-order-closing-schools-statewide-two-weeks> [<https://perma.cc/8ULL-HF3C>].

116. See Jason Slotkin, *New York’s Daily COVID-19 Deaths Below 400 for First Time in April*, NPR (Apr. 26, 2020, 5:23 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/26/845199791/new-yorks-daily-covid-19-deaths-below-400-for-first-time-in-april> [<https://perma.cc/X2UL-TN3D>].

117. See Choi et al., *supra* note 114.

118. See, e.g., *COVID-19 Affects New York City Schools, Nation’s Largest District*, NPR (Mar. 27, 2020, 7:22 AM), <https://www.npr.org/2020/03/27/822411665/covid-19-affects-new-york-city-schools-nations-largest-district> [<https://perma.cc/RRD7-2UEH>].

119. See generally Shapiro, *supra* note 108 (noting the pressure to reopen from some quarters, that New York could take the lead in school reopening, and that its plan could serve as a template for other school districts).

120. See Amelia Nierenberg & Adam Pasick, *Schools Briefing: Parents in New York City Are Stressed*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/08/26/us/germany-nyc-school-reopening.html> [<https://perma.cc/AQ4L-JR9L>]; see also Molly Schwartz, *5 Kids, 5 Virtual Schools: One New York City Mom’s “Totally Impossible” Coronavirus Life*, MOTHER JONES (Apr. 17, 2020), <https://www.motherjones.com/coronavirus-updates/2020/04/5-kids-5-virtual-schools-one-new-york-city-moms-totally-impossible-coronavirus-life/> [<https://perma.cc/4JPC-82Z2>] (describing how a single mother spends 20 hours a week managing her children’s virtual education while also working full time remotely).

shutdowns.<sup>121</sup> A wide range of interests and constituencies quickly emerged to weigh in on public school reopening.<sup>122</sup> The importance of public schools to the economy and society and the complexity of education governance in New York City and State and the United States, particularly as it intersects with a public health emergency, came into high relief.

Yet, in the minds of most parents and teachers, the physical health and safety of children and school personnel were paramount, and schools should not reopen until the pandemic was under control. The virus's impact on school communities was cause for concern.<sup>123</sup> For example, as of June 22, 2020, the DOE had reported 79 employee deaths from COVID-19.<sup>124</sup> Concerns about the underreporting of COVID-19 related cases and deaths in New York City schools arose when an internal DOE memorandum discouraging case reports to the Department of Health came to light.<sup>125</sup> These concerns were magnified by repeated instances of misinformation and inconsistent messaging about the pandemic from the President of the United States.<sup>126</sup> Indeed, a key factor that made the national response to COVID-19 dispiritingly ineffective was the lack of trustworthy leadership from President Trump. His failure to heed — and his statements actively discrediting — the warnings and guidance provided

121. See Patricia Cohen & Jim Tankersley, *America's Economy Begins to Shut Down as Pandemic Measures Take Hold*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/16/business/economy/coronavirus-us-economy-shut-down.html> [https://perma.cc/88TR-E7M7].

122. See, e.g., Editorial Board, *School-Opening Extortion*, WALL ST. J. (Aug. 3, 2020, 7:12 PM), <https://www.wsj.com/articles/school-opening-extortion-11596496376> [https://perma.cc/V92X-UM5Q]; Amy Davidson Sorkin, *The Woeful Inadequacy of School-Reopening Plans*, NEW YORKER (Aug. 9, 2020), <https://www.newyorker.com/magazine/2020/08/17/the-woeful-inadequacy-of-school-reopening-plans> [https://perma.cc/C8AY-R6T7].

123. See, e.g., Sarah Jaffe, *How the New York City School System Failed the Test of COVID-19*, NATION (June 16, 2020), <https://www.thenation.com/article/society/schools-teachers-covid/> [https://perma.cc/FZ2N-SSUA].

124. See *COVID-19 Reporting*, N.Y.C. DEP'T EDUCATION, <https://www.schools.nyc.gov/about-us/news/covid-19-losses> [https://perma.cc/F5XB-UUZ3] (last visited Oct. 23, 2020).

125. See Greg B. Smith, *Memo Ordering NYC Schools to Keep Virus Cases Quiet Probed*, CITY (Apr. 14, 2020, 8:02 PM), <https://www.thecity.nyc/2020/4/14/21247112/memo-ordering-nyc-schools-to-keep-virus-cases-quiet-probed> [https://perma.cc/ULH4-574W].

126. See, e.g., Christian Paz, *All the President's Lies About the Coronavirus*, ATLANTIC (Oct. 1, 2020, 10:25 AM), <https://www.theatlantic.com/politics/archive/2020/08/trumps-lies-about-coronavirus/608647/> [https://perma.cc/S3YC-H2JP].

by public health experts led to confusion, misinformation, and an ineffective and polarized national response.<sup>127</sup> Indeed, the politicization of U.S. responses to the pandemic has been alarming.<sup>128</sup> The abysmal federal response highlighted the importance of state and local leadership in navigating this public health crisis, including the critically important questions of when and how to reopen public schools safely and deliver public education effectively and equitably during and after the pandemic.

### **B. The Constitutional Structure of Education and Public Health Governance in the United States**

Education in the United States has long been understood as structured to be primarily a matter of state and local control.<sup>129</sup> Under the U.S. Constitution, education is considered to be among the powers reserved to the states pursuant to the Tenth Amendment.<sup>130</sup> Nonetheless, over the years, the U.S. Department of Education (ED) has expanded its influence over U.S. education primarily through its spending power. For example, for many years, Congress has exerted significant influence on public education through the Elementary and Secondary Education Act (ESEA), which long has focused federal spending on efforts to achieve educational equity by directing federal funds to states with an aim to ensure equal access to resources and to improve low-income students' academic achievement.<sup>131</sup>

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127. *See id.*; *see also* Michael J. Klarman, *Foreword: The Degradation of American Democracy — and the Court*, 134 HARV. L. REV. 1, 100 (2020) (“The Administration’s response to the pandemic will go down in American history as one of the nation’s greatest intelligence and administrative failures.”).

128. *See, e.g.*, Ball, *supra* note 113; Bill Chappell, ‘Please Don’t Politicize This Virus,’ *WHO Head Says After Trump Threatens Funding*, NPR (Apr. 8, 2020, 12:42 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/04/08/829944795/please-don-t-politicize-this-virus-who-head-says-after-trump-threatens-funding> [<https://perma.cc/RZ7A-EY36>].

129. *See* Kimberly Jenkins Robinson, *Disrupting Education Federalism*, 92 WASH. U. L. REV. 959, 969 (2015) (“The constitutional foundations for [education federalism] lie in the omission of education from the purview of federal authority and the Tenth Amendment’s reservation of state authority in all areas that the Constitution does not assign to Congress.”).

130. *See* U.S. CONST. amend. X (noting matters not enumerated in the Constitution are reserved to the states); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (holding that there is no fundamental right to education in the Constitution).

131. *See* Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1311 (2017).

However, in 2015, ESEA was amended dramatically via the Every Student Succeeds Act (ESSA)<sup>132</sup> to limit federal influence on education in response to a backlash caused by federal testing and accountability measures imposed under the No Child Left Behind Act (NCLB), which ESSA replaced.<sup>133</sup> ESSA's retreat from federal education equity efforts has prompted renewed arguments for a federal constitutional right to an adequate and equitable public education.

A number of theories, recent advocacy, and cases seek recognition of a federal education right, including arguments related to civics and democracy, and to due process and equal protection.<sup>134</sup> Yet, a federal constitutional right to education remains elusive. By contrast, “[e]very state has an express constitutional right to some form of education.”<sup>135</sup> Yet, the structure and governance of education differ among the states. Thus, under federalism, education policy and governance differ among the several states.

As with education, federalism complicates the respective roles of the federal government and states and localities in public health emergency management.<sup>136</sup> Police powers, including primary responsibility for health emergencies, reside in the first instance with state and local governments.<sup>137</sup> These are accompanied by significant

132. Pub. L. No. 114–95, 129 Stat. 1802 (2015).

133. See Black, *supra* note 131, at 1309, 1311–12.

134. See, e.g., Gary B. v. Whitmer, 957 F.3d 616, 621 (6th Cir. 2020), *reh'g en banc granted, opinion vacated*, 958 F.3d 1216 (6th Cir. 2020) (Section 1983 action against the Governor of Michigan and other state officials, where plaintiffs alleged they had been denied access to literacy on account of their races in violation of their rights under Due Process and Equal Protection Clauses of Fourteenth Amendment); see also Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 740–41 (2018) (describing federal lawsuits claiming that the educational inequalities in its state violate the U.S. Constitution as well as theories under the Fourteenth Amendment and the Privileges and Immunities Clause). Indeed, there is a growing interest in identifying and establishing positive constitutional rights at this time of crisis. See, e.g., Ruthann Robson, *Positive Constitutionalism in a Pandemic: Demanding Responsibility from the Trump Administration*, 12 CONLAWNOW 15, 15 (2020) (arguing to “renew the quest for a more positive constitutionalism in which we routinely make demands on government rather than emphasize its limits”). However, unless and until a positive federal right to education is established, state control over education, for better or worse, remains.

135. Carter G. Phillips, *A Class Action Lawsuit for the Right to a Minimum Education in Detroit*, 15 NW. J.L. & SOC. POL'Y 412, 414 (2020).

136. See, e.g., Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 396 (2012) (“Existing legal infrastructure places the nexus of emergency response at the local and state level, with federal officials only intervening once the state requests assistance or the circumstances reach a sufficient level of severity.”).

137. See *id.*; see also *Responsibilities in a Public Health Emergency*, NAT'L COUNCIL ST. LEGISLATURES (Oct. 29, 2014),

federal power to respond to national emergencies. The U.S. Constitution assigns Congress legislative and appropriations powers that may be used to respond to national emergencies, including public health emergencies.<sup>138</sup> The Constitution also accords the President broad executive powers to respond to national emergencies.<sup>139</sup> In addition to emergency powers accorded to the President by Congress through legislation, the Constitution assigns the President certain inherent powers stemming from the executive powers over foreign affairs and national security, among others.<sup>140</sup> The scope and limits of such inherent powers are not well defined.<sup>141</sup> Although the limits of presidential power are obscure, Article II, no less than Article I, is part of “a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>142</sup> While the contours of inherent executive emergency powers remain contested, the trend has been toward according the President broad discretion both by constitutional deference and legislative delegation.<sup>143</sup> Still, the President’s power remains subject to checks and balances and to the limits of federalism.

Federalism is significantly implicated in government public health emergency response. The states, under police powers reserved to them

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<https://www.ncsl.org/research/health/public-health-chart.aspx>  
[<https://perma.cc/YWT2-ZU4U>].

138. See, e.g., Emily Berman, *The Roles of the State and Federal Governments in a Pandemic*, 11 J. NAT’L SEC. L. & POL’Y 61, 62 (2020) (“[U]nder our federal constitutional system, the states enjoy inherent police power to regulate in the service of the public health, safety, and welfare of their people. States thus retain a general authority to regulate that has no federal analogue.”).

139. See Joshua L. Friedman, *Emergency Powers of the Executive: The President’s Authority When All Hell Breaks Loose*, 25 J.L. & HEALTH 265, 267 (2012).

140. See *id.*

141. See, e.g., Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1205, 1209 (2018) (stating “[o]n one side of the debate are those who adhere to *Curtiss-Wright* and national security exceptionalism, . . . stem[ming] from the President’s near absolute constitutional powers over foreign affairs and national security, extreme deference to the President’s national security acts, and limited to no judicial review . . . . Critics of national security exceptionalism . . . point to the inadequate safeguards against the President limited only by political constraints” and argue in favor of the limitations set forth in *Youngstown*).

142. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 661 (1952) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819)).

143. See, e.g., *National Emergencies and the President’s Inherent Powers*, 2 STAN. L. REV. 303, 305 (1950) (“Although enforcing statutory law is one of the President’s major functions, he frequently acts in the absence of statutory authority. He has certain functions wholly derived from constitutional grants of power, and sometimes these have been referred to as ‘inherent powers.’ The most important of these are the war power and the power over foreign affairs.”).

by the Tenth Amendment, have primary authority to manage health crises under their purview, including powers to issue intrastate quarantine orders.<sup>144</sup> At the same time, the federal government has the limited and exclusive authority, for example, to quarantine individuals traveling between the states or coming into the country under legislative delegations enacted under the commerce power and the Constitution's grant of inherent national security powers.<sup>145</sup> Thus, the executive has broad national emergency powers under the Constitution and statutes but limited direct authority over state matters of public health and public school closures or reopening. To the extent the federal government has authority under its commerce, national security, spending, or other constitutional powers, it can play a significant essential role in helping to manage the pandemic response (or not).

### C. The Federal COVID-19 Response: Federalism, Public Health, and Public Education

Both Congress and the President have important tools, powers, and roles in responding to and managing the pandemic. For example, in response to the COVID-19 pandemic's dire impact on all aspects of the economy, Congress overcame significant legislative gridlock to pass the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).<sup>146</sup> “The CARES Act was enacted on March 27, 2020, to provide trillions of dollars in financial relief, and other assistance, to Americans suffering from the coronavirus pandemic and its economic fallout.”<sup>147</sup> It included provisions earmarking approximately \$16 billion to help elementary and secondary schools maintain their operations and provide effective education during the pandemic. Some of this money was distributed to governors to allocate at their discretion to local education agencies most severely impacted by the coronavirus and some was to be distributed “in the same proportion as each State received under part A of title I of the [Elementary and Secondary Education Act]” which directs funds to low-income students to enhance equity.<sup>148</sup>

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144. See Maryam Jamshidi, *The Federal Government Probably Can't Order Statewide Quarantines*, 2020 U. CHI. L. REV. ONLINE \*1, \*1 (2020).

145. See *id.*

146. CARES Act, Pub. L. No. 116–136, 134 Stat. 281 (2020).

147. *Michigan v. DeVos*, No. 3:20-CV-04478-JD, 2020 WL 5074397, at \*1 (N.D. Cal. Aug. 26, 2020).

148. *Id.* (alteration in original).

At the direction of the Secretary of Education, Betsy DeVos, the ED issued guidance providing “that private schools should get a share [of CARES Act education funds] based on their overall student population, and not just their number of low-income students.”<sup>149</sup> Several states successfully challenged the guidance as inconsistent with the Act, winning an injunction against the ED’s interpretation favoring the allocation of CARES Act funds to private schools without regard to their share of low-income students.<sup>150</sup> Secretary DeVos’s approach to administering CARES Act funding demonstrated not only a lack of concern for directing relief funds to reach the most vulnerable students, but also a greater interest in private schooling than in equity. DeVos further revealed a policy agenda favoring privatization over equity when she said that the pandemic provides “good” opportunity to “rethink” education in a manner favoring school choice and privatization.<sup>151</sup> In addition, “[i]n May [2020], while school districts were struggling with the conversion to remote education, [DeVos] announced she was using \$180 million of federal relief aid to create a competition for states to apply for ‘rethinking’ education.”<sup>152</sup> Thus, DeVos has attempted to administer CARES Act funds in a manner that prioritized an education privatization policy agenda over the equitable and effective distribution of emergency funds to schools.

Similar concerns about negligent policy driven by politics have arisen regarding President Trump’s broader coronavirus pandemic emergency response. On March 13, 2020, President Trump declared a national emergency concerning the COVID-19 pandemic.<sup>153</sup> The emergency was declared pursuant to the Stafford Act, Public Health Service Act, and National Emergencies Act.<sup>154</sup> Trump’s emergency

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149. *Id.* at \*2.

150. *See id.* at \*3, \*9.

151. *See* Valerie Strauss, *DeVos: It’s a ‘Good Thing’ That Pandemic Will Force Schools to Make Long-Overdue Changes*, WASH. POST (Aug. 28, 2020, 6:24 PM), <https://www.washingtonpost.com/education/2020/08/28/devos-its-good-thing-that-pandemic-will-force-schools-make-long-overdue-changes/> [<https://perma.cc/92K5-YEJ7>].

152. *Id.*

153. *See Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, WHITE HOUSE (Mar. 13, 2020) [hereinafter *Proclamation on Declaring a National Emergency*], <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/> [<https://perma.cc/F242-V5CV>].

154. *See generally President Trump Declares State of Emergency for COVID-19*, NAT’L CONF. ST. LEGISLATURES (Mar. 25, 2020), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/president-trump-declares-state-of-emergency-for-covid-19.aspx> [<https://perma.cc/QHB3-7NPP>].

declaration under Section 501(b) of the Stafford Act permitted the federal government to declare an emergency without a governor's request, yet made available only certain subsets of Federal Emergency Management Agency (FEMA) recovery funds.<sup>155</sup> The Stafford Act, like most federal emergency management, "epitomizes [a] local-first approach. Primarily a funding mechanism, the Stafford Act authorizes the President to declare an 'emergency' or 'major disaster' at the request of state officials or, in rare cases, without such a request."<sup>156</sup> The National Emergencies Act (NEA) generally gives the President broad discretion to activate a range of statutory powers provided in other statutes.<sup>157</sup> Certain provisions of the Act give the President authority to declare a "national emergency" without a specific state request.<sup>158</sup> "Once one of these declarations has been made, the federal government may provide resources including financial, material, and logistical support through [FEMA]."<sup>159</sup>

The Public Health Service Act authorizes specific federal health emergency powers and provides for the Secretary of the Department of Health and Human Services (HHS) to declare a public health emergency.<sup>160</sup> The HHS Secretary may then make grants, enter contracts, investigate causes of disease and methods of disease prevention, and modify regulatory requirements to encourage effective medical responses.<sup>161</sup> HHS Secretary Alex Azar declared a public health emergency on January 31, 2020, in response to the COVID-19 outbreak, and the Administration established the Coronavirus Task Force led by Vice President Mike Pence.<sup>162</sup> HHS has since issued several policy modifications and waivers to support the health care

155. *See id.*

156. Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 396 (2012).

157. *See id.*

158. *See id.*

159. *Id.*

160. *See Legal Authority*, U.S. DEP'T HEALTH & HUM. SERVS. (Sept. 18, 2019), <https://www.phe.gov/Preparedness/planning/authority/Pages/default.aspx> [<https://perma.cc/PDM4-66AB>].

161. *See* Christina Y. Chan, *Support for the First Line of Defense in Public Health Emergencies*, 105 NW. U. L. REV. 1347, 1354 (2011).

162. *See Proclamation on Declaring a National Emergency*, *supra* note 153; *see also* Carol Pearson, *5 Former CDC Directors Criticize US Handling of Pandemic*, VOA (Aug. 28, 2020, 12:50 AM), <https://www.voanews.com/covid-19-pandemic/5-former-cdc-directors-criticize-us-handling-pandemic> [<https://perma.cc/5AQ2-UVCT>] (having the Vice President, rather than the head of the CDC, lead the Task Force has been a cause for concern among several health experts that the federal pandemic response would be guided primarily by politics rather than scientific data and public health concerns).



community's response efforts.<sup>163</sup> Despite various available federal emergency powers, the Trump Administration's pandemic response was disorganized, inconsistent, and often incoherent.<sup>164</sup>

The President's lax leadership, mixed messages, and politicization of the virus response have hampered the Task Force's ability to curb the spread of COVID-19. Public health experts raised concerns, for example, that political pressure had caused the CDC to change its guidelines in dangerous ways, unsupported by current scientific and public health understandings of the virus.<sup>165</sup> Thus, while CDC guidelines are a public health touchstone for determining school reopening,<sup>166</sup> states largely have been left to fill a federal leadership vacuum in determining school reopening amid the pandemic. Because of this, most U.S. pandemic response efforts, including school closure and reopening plans, have been left to states and localities with insufficient and inconsistent federal guidance or support.

The President and Education Secretary have not supported safe, effective school reopening amid the pandemic, nor have they shown any concern for improving educational equity. Their approach to education has been anti-democratic and non-inclusive with a focus on privatization and deregulation.

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163. See *President Trump Declares State of Emergency for COVID-19*, *supra* note 154.

164. See, e.g., Alejandro E. Camacho & Robert L. Glicksman, *The Trump Administration's Pandemic Response Is Structured to Fail*, *REGUL. REV.* (May 19, 2020), <https://www.theregreview.org/2020/05/19/camacho-glicksman-trump-administration-pandemic-response-structured-fail/> [<https://perma.cc/J5CX-V7UQ>].

165. See, e.g., Miriam Berger et al., *Democrats Denounce CDC Rules Change as 'Political Propaganda'*, *WASH. POST* (Aug. 26, 2020, 11:40 PM), <https://www.washingtonpost.com/nation/2020/08/26/coronavirus-covid-live-updates-us/> [<https://perma.cc/UWV8-HSYB>]; Mark Mazzetti, Noah Weiland & Sharon LaFraniere, *Behind the White House Effort to Pressure the C.D.C. on School Openings*, *N.Y. TIMES* (Oct. 22, 2020), <https://www.nytimes.com/2020/09/28/us/politics/white-house-cdc-coronavirus-schools.html> [<https://perma.cc/KG4N-WSLW>].

166. See generally *Coronavirus (COVID-19)*, *CTRS. FOR DISEASE CONTROL & PREVENTION*, <https://www.cdc.gov/coronavirus/2019-nCoV/index.html> [<https://perma.cc/RM7B-VPQ9>] (last visited Oct. 24, 2020) (providing resources and health guidelines for the public, including information related to schools and child safety).

#### D. The New York State Board of Regents's Education Governance Role

The New York State Board of Regents (the Regents or the Board) governs New York State education policy.<sup>167</sup> In 1784, the Regents was created by statute<sup>168</sup> and was later continued under the New York State Constitution.<sup>169</sup> Pursuant to New York State Constitution Article XI, Section 2, the Board of Regents is given broad regulatory power by the New York State legislature, which has the authority to increase, modify, or diminish the Board's power.<sup>170</sup> Under New York Education Law Section 201, the Board of Regents's primary purpose is to "encourage and promote education."<sup>171</sup> It is responsible for general supervision of all educational services in New York State as well as for setting overall public educational policy in New York.<sup>172</sup>

Because the New York Constitution roots much of the Regents's power in the state legislature, the Regents is given broad statutory authority over education matters. New York Education Law Section 101, for example, grants the Regents the authority to appoint or remove the DOE's Commissioner of Education.<sup>173</sup> It states the purpose of the University of the State of New York, which includes

encourag[ing] and promot[ing] education, . . . visit[ing] and inspect[ing] its several institutions and departments, . . . distribut[ing] to or expand[ing] or administer[ing] for them such property and funds as the state may appropriate therefor or as the university may own or

167. See SCHOOL LAW 1 (Pilar Sokol et al. eds., 37th ed. 2019). The Board oversees the University of the State of New York, which consists of all public and private elementary and secondary schools in the State; all privately and publicly controlled institutions of higher education, including the schools in the State University of New York (SUNY) and City University of New York (CUNY) systems; and all libraries, museums, and other educational and cultural institutions admitted to or incorporated by the University.

168. See James D. Folts, *History of the University of the State of New York and the State Education Department 1784-1996*, N.Y. ST. LIBR. (Nov. 1996), <http://www.nysl.nysed.gov/edocs/education/sedhist.htm#appxa> [<https://perma.cc/XCC7-SWBU>].

169. N.Y. CONST. art. XI, § 2.

170. See CHRISTINE M. G. DAVIS ET AL., 95 N.Y. JUR. 2D SCHOOLS, UNIVERSITIES, AND COLLEGES § 717; see also *10.1 Governance of New York State Education*, SUNY ONEONTA, <https://courses.lumenlearning.com/suny-oneonta-education106/chapter/governance-of-new-york-state-education/> [<https://perma.cc/YUU5-DJTG>] (last visited Oct. 24, 2020) (describing the governing hierarchy of the New York State education system).

171. N.Y. EDUC. LAW § 201 (McKinney 2009).

172. See *id.*

173. See *id.* § 101.

hold in trust or otherwise, and . . . perform[ing] such other duties as may be intrusted to it.<sup>174</sup>

Education Law Section 207 provides that

the regents shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department.<sup>175</sup>

This provision gives the Regents broad authority to craft the State's reopening strategy.

The Board of Regents presides over the New York State Education Department (NYSED), which is responsible for the supervision of all public schools within the State and is responsible for setting education policy<sup>176</sup> — testing, graduation requirements, standards, and curriculum. The Regents and NYSED have the power to enact regulations carrying the force of law for public schools. Thus, the Regents and NYSED, which the Regents oversees, have primary legal authority to determine public education policy, including school reopening policy.

### **E. The New York State Governor's Role in Education and Public Health**

While most state education departments are executive agencies under the control of the Governor, New York State's education structure is more complex. As noted above, in New York, the Governor is not tasked with education policy and does not oversee NYSED. Instead, the New York State Board of Regents is responsible for the general supervision of all educational activities in the State. However, the Governor shares responsibility with the legislature to

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174. *Id.* § 201.

175. *Id.* § 207.

176. *See Harris v. Dutchess Cnty. Bd. of Coop. Educ. Servs.*, 25 N.Y.S.3d 527, 533 (N.Y. Sup. Ct. 2015), *aff'd* but criticized *sub nom. Harris v. Dutchess Cnty. Bd. of Coop. Educ. Servs.*, 93 N.Y.S.3d 910 (N.Y. App. Div. 2019) (“[T]he Board of Regents and the Commissioner of Education are vested with the task of managing and controlling the educational affairs of the State's schools . . .”).

enact laws, including education law, and approves the state budget, which provides funding to all public schools.<sup>177</sup>

New York State schools are organized across 700 school districts. In these districts, geographic boundaries and attendance zones align with residential patterns, creating segregated schools. Public schools are primarily funded by state and local resources; on average, the federal government pays for less than 10% of K–12 education.<sup>178</sup> Having a large number of small school districts in New York State tends to increase inequality. Specifically, smaller districts allow for certain districts to be more homogenous and wealthy and provide fewer opportunities to pool resources to ensure less-resourced communities of color benefit from proximity to wealthy white communities.<sup>179</sup>

The governor and legislature’s budgetary power over education operates within a localist structure that reinforces segregation and unequal funding. Indeed, some have argued broadly for the abandonment of such local education structures in favor, for example, of regional organization of education districts by “shifting much of the power currently enjoyed by local governments into a regional government.”<sup>180</sup> Local control of education, including its influence on education budgets, has been remarkably persistent, limiting the ability of school funding reforms to close inequity gaps.<sup>181</sup>

The Governor has a limited role in crafting education policy under New York State education governance law. However, although the Governor is not given power under law to craft education policy directly, he has several powerful tools at his disposal to impact education. The state budget is perhaps the most potent vehicle through

177. See “Who Is Responsible for Education in NYS?,” LONG ISLAND OPT OUT, <https://lioptout.org/nys-education-policy/> [<https://perma.cc/Y7VG-FTT6>] (last visited Oct. 24, 2020).

178. See *10 Facts About K-12 Education Funding*, U.S. DEP’T EDUCATION (Sept. 19, 2014), <https://www2.ed.gov/about/overview/fed/10facts/index.html> [<https://perma.cc/MQP7-PNSU>].

179. See Elissa Nadworny & Cory Turner, *This Supreme Court Case Made School District Lines a Tool for Segregation*, NPR (July 25, 2019, 5:00 AM), <https://www.npr.org/2019/07/25/739493839/this-supreme-court-case-made-school-district-lines-a-tool-for-segregation> [<https://perma.cc/5K75-F7G8>] (discussing the impact on continued school segregation of the Supreme Court’s decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), which held that federal courts do not have authority to impose a multi-district desegregation plan on schools outside Detroit).

180. Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1454 (2014).

181. See Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 178–79 (2020).

which the Governor can influence education in the state.<sup>182</sup> Thus, even though Governor Cuomo does not have formal legal power over education governance and policy, he has other significant powers that affect education. These include approving legislation, his authority over the budget process, and, more recently, using his public health emergency powers as levers to push education policy reforms.

Of most immediate relevance to COVID-19 school reopening, Governor Cuomo, like other state governors, has significant public health emergency powers.<sup>183</sup> States have significant power to regulate individuals, groups, and property to protect and secure the public's health. These powers include isolation (segregating individuals known to have an infectious disease), quarantine (segregating individuals with suspected or known exposure to an infectious disease), surveillance, property condemnation, and compulsory vaccinations.<sup>184</sup> The powers afforded to state governors to respond to a public health emergency often are sweeping. For example, New York Executive Law Section 29-A provides that

[s]ubject to the state constitution, the federal constitution and federal statutes and regulations, the governor may by executive order temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster.<sup>185</sup>

The law further provides that “[t]he governor, by executive order, may issue any directive during a state disaster emergency declared” in several instances, including an epidemic or disease outbreak.<sup>186</sup> The

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182. See Jessica Bakeman, *Cuomo Moves to Take Control of Education Policy*, POLITICO (Dec. 19, 2014, 5:45 AM), <https://www.politico.com/states/new-york/albany/story/2014/12/cuomo-moves-to-take-control-of-education-policy-018335> [<https://perma.cc/X343-NSFM>] (“Cuomo’s role in crafting the state’s spending plan provides his primary power over the education system, and it also offers him maximum leverage in negotiating with lawmakers, because he typically has lots of bargaining chips.” In 2014, the Director of State Operations, Jim Malatras, stated that the Governor’s power over education is limited to the budget process, and that he intends to introduce reforms during that process).

183. N.Y. Executive Law Section 29-a(1) was amended in March 2020 by the New York State Senate to provide even broader powers related to the COVID-19 pandemic. See *Senate Bill S7919*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2019/s7919> [<https://perma.cc/UW8P-KM74>] (last visited Oct. 25, 2020).

184. See Fazal R. Khan, *Ensuring Government Accountability During Public Health Emergencies*, 4 HARV. L. & POL’Y REV. 319, 322 (2010).

185. N.Y. EXEC. LAW § 29-a (McKinney 2020).

186. *Id.*

limiting principle to the grant of this broad authority is that “[a]ny such directive must be necessary to cope with the disaster and may provide for procedures reasonably necessary to enforce such directive.”<sup>187</sup>

During the COVID-19 pandemic, Governor Cuomo exercised sweeping emergency powers impacting all aspects of government and business. This included the closing<sup>188</sup> (and reopening)<sup>189</sup> of schools and related requirements. For example, on March 7, 2020, the Governor issued Executive Order 202, declaring a state of emergency over the COVID-19 outbreak.<sup>190</sup> That order was followed by numerous executive orders, including those closing schools and suspending laws and regulations that conflict with school closures,<sup>191</sup> suspending businesses,<sup>192</sup> extending court deadlines, providing for quarantine and travel restrictions, and suspending elections.<sup>193</sup> Because public school reopening plans depend heavily on the status of public health emergency declarations and requirements, the Governor has tremendous power in this regard.

The question is how far the Governor may extend these emergency powers in his quest to “reimagine” public education.<sup>194</sup> This is where the Governor’s authority is tenuous at best. On May 5, 2020, Governor Cuomo announced a plan to reimagine education. The Governor’s announcement noted that “[t]he state will bring together a group of

187. *Id.*

188. *See* N.Y. Exec. Order No. 202.4 (Mar. 16, 2020) (providing that “every school in the state of New York is hereby directed to close no later than Wednesday, March 18, 2020, for a period of two weeks, ending April 1, 2020”); *see also* N.Y. Exec. Order No. 202.37 (June 5, 2020) (providing that “special education services and instruction required under Federal, state or local laws, rules, or regulations, may be provided in person for the summer term in school districts. Any district providing such services in person must follow State and Federal guidance”).

189. *See Governor Cuomo Announces That, Based on Each Region’s Infection Rate, Schools Across New York State Are Permitted to Open This Fall*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (Aug. 7, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-based-each-regions-infection-rate-schools-across-new-york-state-are> [<https://perma.cc/E39W-2686>].

190. *See* N.Y. Exec. Order No. 202 (Mar. 7, 2020).

191. *See, e.g.*, N.Y. Exec. Order No. 202.1 (Mar. 12, 2020) (providing, among other things, the suspension of the law to allow a waiver of requirements necessary for the apportionment of school aid so that schools are not penalized for not meeting instructional requirements during pandemic closures).

192. For example, Executive Order Number 202.6 required that to the maximum extent possible, all businesses and not-for profit entities throughout the State utilize work from home and telecommuting procedures. *See* N.Y. Exec. Order No. 202.6 (Mar. 18, 2020).

193. *See* N.Y. Exec. Order No. 202.2 (Mar. 14, 2020) (suspending laws related to elections).

194. *See Video, Audio, Photos & Rush Transcript, supra* note 1.

leaders to answer these questions in collaboration with the Gates Foundation, who will support New York State by helping bring together national and international experts, as well as provide expert advice as needed.”<sup>195</sup> He went on to speak specifically about his plans to replace the “old” education system:

One of the areas we can really learn from is education . . . [because] [t]he old model of [our education system where] everybody goes and sits in the classroom and the teacher is in front of that classroom [is not going to work in the new normal] . . . . When we reopen schools, let’s open a better school and let’s open a smarter education system. I want to thank the Bill and Melinda Gates Foundation. We’ll be working with them on this project. Bill Gates i[s] a visionary in many ways . . . . I think we now have a moment in history where we can actually incorporate and advance [his] ideas [on technology and education].<sup>196</sup>

This is a matter squarely within the purview of the Regents and NYSED. The Governor’s plans to reimagine education for the future are education policy matters, as they consider

[h]ow [they] can use technology to provide more opportunities to students no matter where they are; [h]ow [they] can provide shared education among schools and colleges using technology; [h]ow can technology reduce educational inequality, including English as a new language students; [h]ow can [they] use technology to meet educational needs of students with disabilities; [h]ow can [they] provide educators more tools to use technology; [h]ow can technology break down barriers to K–12 and Colleges and Universities to provide greater access to high quality education no matter where the student lives; and [g]iven ongoing socially distancing rules, how can [they] deploy classroom technology, like immersive cloud virtual classrooms learning, to recreate larger class or lecture hall environments in different locations?<sup>197</sup>

Governor Cuomo’s direct involvement in education policy matters raises serious questions about New York education governance, including who makes policy, who provides input and expertise, and how decisions are made. It also raises questions about the influence of wealthy private actors in New York education policymaking, a matter of particular concern given the Gates Foundation’s fairly recent history

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195. *Id.*

196. *Id.*

197. *Id.*

with education policy blunders in New York City.<sup>198</sup> Indeed, New York City is a primary focus of education equity concerns highlighted by the COVID-19 pandemic.

#### F. New York City and the Mayor's Role in Public Education and Public Health

New York City is one of the several school districts under the New York State Regents's purview. Under New York State law,<sup>199</sup> the New York City School District — once governed by local school boards and a citywide Board of Education — is now under mayoral control.<sup>200</sup> Under mayoral control, the Mayor appoints the DOE's Chancellor and nine of 15 members of the City's Board of Education.<sup>201</sup> The Mayor thus has direct oversight and policymaking control over the City's schools, consistent with state law.<sup>202</sup> New York City's school governance structure also includes Community District Education Councils to permit input at the local school district level.<sup>203</sup> However, the overall structure gives the Mayor and Chancellor authority over, and makes them accountable for, school policymaking and implementation in New York City.

198. See, e.g., Natalie Gomez-Velez, *Common Core State Standards and Philanthrocapitalism: Can Public Law Norms Manage Private Wealth's Influence on Public Education Policymaking?*, 2016 MICH. ST. L. REV. 161, 184–86 (2016) [hereinafter Gomez-Velez, *Common Core State Standards and Philanthrocapitalism*].

199. See N.Y. EDUC. LAW § 2590-b (McKinney 2019) (providing that the “board of education shall consist of thirteen appointed members: one member to be appointed by each borough president of the city of New York; and eight members to be appointed by the mayor of the city of New York”).

200. See Kate Taylor, *Does It Matter Who Runs New York City's Schools?*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/nyregion/new-york-school-control.html> [https://perma.cc/8AXG-BMVH].

201. See N.Y. EDUC. LAW § 2590-b (under a 2019 continuation and amendment of the mayoral control law, “the board of education shall consist of fifteen members: one member to be appointed by each borough president of the city of New York, one member to be elected by community district education council presidents, and nine members to be appointed by the Mayor of the city of New York”).

202. See *id.*

203. See Jason, *supra* note 181, at 186 (“Despite having 1.1 million students, New York City represents a single district among the more than 700 districts in the state. The entire district is run through a centralized Department of Education (‘DOE’) rather than a school board. DOE employees, including the Chancellor, report to the Mayor. The entire district is divided into thirty-two Community School Districts (‘CSDs’), each with a local advisory body called a Community Education Council.”); see also Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?*, 53 VILL. L. REV. 297, 318–19 (2008).



As leaders of one of New York State's many local school districts, the City's Mayor and Chancellor are bound by the Regents and NYSED regulations<sup>204</sup> and are advised to follow policy guidance on education matters. Nonetheless, New York State's governance structure leaves significant public school decision making to local districts, and in New York City, such decisions fall to the Mayor and Chancellor. Of course, the New York City School District, comprised of more than one million students, is the largest in the nation. At the same time, New York City's DOE is just one of many departments under the Mayor's purview.

The Mayor also is responsible for the City's public health. New York State Executive Law Section 24 provides that a governmental "chief executive may promulgate local emergency orders to protect life and property or to bring [an] emergency situation under control."<sup>205</sup> The Mayor's exercise of these powers may not conflict with the Governor's exercise of emergency authority under Executive Law Section 29-A, which permits the Governor to suspend the Mayor's orders where it is applicable. In the face of the Governor's overriding executive order, the Mayor may argue that the New York State Constitution limits the State's ability to control local affairs.<sup>206</sup> But although the New York State Constitution provides certain home rule protections, the New York Court of Appeals has interpreted those protections to be limited.<sup>207</sup> Thus, the Mayor's emergency powers must be consistent with the Governor's and may be suspended by the Governor. Indeed, an amendment to Executive Law Section 29-A passed in response to the COVID-19 pandemic expanded the Governor's emergency response powers.<sup>208</sup>

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204. See N.Y. CONST. art. XI, § 2; N.Y. EDUC. LAW § 207 (McKinney 2012); see also Natalie Gomez-Velez, *Urban Public Education Reform: Governance, Accountability, Outsourcing*, 45 URB. LAW. 51, 78 (2013) [hereinafter Gomez-Velez, *Urban Public Education Reform*] ("Statewide, oversight of the public school system is vested in the Regents of the University of the State of New York. The regents are appointed by the state legislature, oversee the State Education Department (SED) and appoint the Commissioner of Education (Commissioner). The SED and Commissioner supervise and manage the state's public schools, promulgating regulations and determining teaching standards and curricula, among other things.").

205. N.Y. EXEC. LAW § 24 (McKinney 2012).

206. See N.Y. CONST. art. IX, § 2(b)(2).

207. See, e.g., *Greater N.Y. Taxi Ass'n v. State*, 21 N.Y.3d 289, 301–02 (2013).

208. N.Y. Executive Law Section 29-a now authorizes the Governor, "by executive order," to

temporarily suspend any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency, if compliance with such provisions would prevent, hinder, or delay action

In response to the COVID-19 pandemic, in March 2020, Mayor de Blasio issued executive orders declaring a local state of emergency<sup>209</sup> and closing schools.<sup>210</sup> He thereafter issued a series of executive orders suspending council meetings, hearings, and elections; relaxing regulatory requirements to permit non-essential personnel to remain at home; and closing or limiting the number of people in congregate care settings.<sup>211</sup> The Mayor's and the Governor's initial COVID-19 responses were critiqued as being too slow to impose needed limits and "hampered by their own confused guidance, unheeded warnings, delayed decisions and political infighting."<sup>212</sup> Part of the initial delay was due to an inept federal response.<sup>213</sup> Still, one of the strongest critiques of the City's response was its delay in closing schools, which would entail a "virtual shutdown of the city."<sup>214</sup> The State's and City's approaches to school closure have implications not only for the economy and educational efficacy, but also for equity.

### III. SCHOOL GOVERNANCE MODELS AND EQUITY IMPLICATIONS AMID COVID-19

A key question related to prioritizing equity in public schools' coronavirus response relates to whether and how particular governance models enhance or diminish attention to educational equity. As noted above, public school governance in New York State and New York City involves a complex mix of systems and approaches. Education scholar Jeffrey Henig categorizes school governance into "single-purpose" and "general-purpose" structures and centralized and de-centralized organization.<sup>215</sup> New York includes single-purpose education governance at the state level by the Regents and NYSED, an independent department focused exclusively on education and not

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necessary to cope with the disaster or if necessary to assist or aid in coping with such disaster.

N.Y. EXEC. LAW § 29-a (McKinney 2020).

209. *See* N.Y.C. Exec. Order No. 98 (Mar. 12, 2020).

210. *See* N.Y.C. Exec. Order No. 99 (Mar. 15, 2020).

211. *See, e.g.*, N.Y.C. Exec. Order No. 100 (Mar. 16, 2020).

212. J. David Goodman, *How Delays and Unheeded Warnings Hindered New York's Virus Fight*, N.Y. TIMES (July 18, 2020), <https://www.nytimes.com/2020/04/08/nyregion/new-york-coronavirus-response-delays.html> [<https://perma.cc/VJA3-2W5X>].

213. *See id.*

214. *See id.*

215. *See* JEFFREY R. HENIG, *THE END OF EXCEPTIONALISM IN AMERICAN EDUCATION: THE CHANGING POLITICS OF SCHOOL REFORM* 5–7, 14–19 (2013).

under the general purview of the State's Governor.<sup>216</sup> It also includes general-purpose education governance in New York City centralized under mayoral control where the City's DOE is one of several departments under the Mayor's purview.<sup>217</sup> This contrasts with decentralized, local governance in other school districts around the State. New York's public school governance also includes privatization influences in its charter school system and the influence of private corporate and philanthropic actors on public education policy influencing a variety of school "reforms" over the last two decades.<sup>218</sup>

According to Henig, many recent education shifts may be viewed as part of a broader trend away from single-purpose education governance to structures under which education competes among the many priorities considered part of general-purpose governance.<sup>219</sup> Henig casts this as a move away from "exceptionalism" in education.<sup>220</sup> In lieu of special purpose, localized education governance structures dominated by highly focused interest groups (and insulated to some degree from "normal politics"), Henig observed a trend toward the "gradual reabsorption of educational decision making into multilevel, general-purpose government and politics."<sup>221</sup> He attributes much of this reabsorption to the increasing involvement of executives — presidents, governors, and mayors — in education policy, while also noting the roles of legislatures and the judiciary at all levels.<sup>222</sup> The trend away from education exceptionalism and single-purpose government "means that education is becoming more like other domestic policy areas" with implications for how it is shaped and influenced.<sup>223</sup>

The COVID-19 emergency and its implications for public schools have demonstrated the importance of strong leadership and governance. This is a critical moment to examine the effect of education governance structures on decision making and policy development, particularly with respect to issues of effectiveness and

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216. *See id.* at 3–4, 16.

217. *See id.*

218. *See generally* Gomez-Velez, *Common Core State Standards and Philanthrocapitalism*, *supra* note 198, at 170 (describing how some critics are concerned that reforms encouraged by a small group of philanthropic billionaires will actually have the effect of privatizing public education, to its detriment).

219. *See* HENIG, *supra* note 215, at 3–4.

220. *See id.* at 4.

221. *Id.* at 3 (discussing the trend away from single-purpose education governance and other education governance trends).

222. *See id.* at 4.

223. *Id.*

equity. The pandemic laid bare stark inequities in public education along with the critical importance of governance. It therefore provides a unique chance to examine how different forms of education governance serve to support effective and equitable education at a time of crisis and opportunity. This crisis marks a flashpoint to examine, for example, the benefits and drawbacks of single-purpose versus general-purpose structures on the state level; centralized versus decentralized organization on the local level; and the influence of privatization and the treatment of education as a commodity rather than a public good. It is also a moment to consider the federal government's role in supporting public education across the country, including its relationship to state and local governance and how it might catalyze (or thwart) equity in states and localities.

### **A. Single-Purpose Versus General-Purpose Public Education Governance**

While New York City's education governance combining both single-purpose governance by the Regents and NYSED and general purpose by the Mayor may be considered a historical anomaly, there are good reasons to cloister education governance and policymaking. These include a certain insulation from the ordinary political hurly-burly and a focus on educational expertise in policymaking and on the civic and democratic purposes of public education. A primary theory supporting single-purpose education governance is that it insulates education policymaking — supporting a unique focus on ensuring substantive education goals are considered apart from other political and budgetary imperatives. The model also is thought to enhance the inclusion of education professionals in decision making, bringing the benefit of pedagogical expertise and practical experience to governance. A different theory of education governance models categorizes New York State's school governance model as "Platonist."<sup>224</sup> According to this categorization, New York State has a local-centric level of control, a consolidated distribution of authority, and a restricted degree of public participation.<sup>225</sup> These characteristics place authority "in the hands of those deemed fit to govern."<sup>226</sup> This includes state structures that "harmoniz[e] the different levels of the

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224. See DARA ZEEHANDELAAR ET AL., THOMAS B. FORDHAM INST., *SCHOOLS OF THOUGHT: A TAXONOMY OF AMERICAN EDUCATION GOVERNANCE* 54 (2015), <https://fordhaminstitute.org/national/research/schools-thought-taxonomy-american-education-governance> [<https://perma.cc/YJ3E-2DQ3>].

225. See *id.* at 46.

226. *Id.* at 54.

education system — much as Plato’s ‘philosopher kings’ were charged with preparing their subjects for effective citizenship.”<sup>227</sup> Though based on very different organizing principles, both categorizations of New York State’s governance note their emphasis on allocating authority to educational experts on the statewide and local levels. This is thought to be a central benefit of single-purpose governance.<sup>228</sup>

Drawbacks of single-purpose governance include its tendency to silo education policymaking apart from other relevant public policy decisions. This can foster inefficiency and establish a closed universe resistant (or even hostile) to innovation or integrated governance. It also may also impede more comprehensive approaches to multifarious impacts on educational inequity and outcomes.<sup>229</sup>

General-purpose education structures situate education alongside many policy choices faced by executives and legislatures. The benefit of general-purpose governance placing education among other governmental priorities is that it allows for more efficient governance overall. This may include a broader and more inclusive understanding of education that fosters a “multisector approach to improving learning” equitably.<sup>230</sup> A major drawback of general-purpose governance is that education easily could be subordinated to other priorities, including business concerns and broad budgetary imperatives.<sup>231</sup>

## B. Centralized Versus Decentralized Structures

Another current trend in public school governance, particularly in large cities, is toward centralized, mayoral control. Larger cities such as Boston, Chicago, and New York have shifted control of their school systems from local, elected school boards to mayors.<sup>232</sup> In New York

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227. *Id.*; see also HENIG, *supra* note 215, at 164 (notably, Henig rejected the idea that the development of education exceptionalism can be traced to a deliberate process involving political philosophy).

228. See HENIG, *supra* note 215, at 172–73.

229. See *id.* at 178.

230. See *id.* at 164.

231. See *id.* at 173, 179.

232. See Robert A. Garda, Jr. & David S. Doty, *The Legal Impact of Emerging Governance Models on Public Education and Its Office Holders*, 45 URB. LAW. 21, 30–31 (2013) (“In a ‘mayoral takeover’ mayors do not directly run the schools as a superintendent but instead control the school board by appointing the members, effectively displacing the electorate’s choice of school board composition. Over a dozen major urban school districts permit mayors appointment power over most or all of the school board and there is expected to be a “new wave” of switches to mayoral authority.’ While this mayor-centric approach is sometimes adopted and promoted by local interests, more often than not it involves intervention by governors and state

City, mayoral control, first enacted during the tenure of billionaire Mayor Michael Bloomberg, has had significant implications for education reform and the balance of power in education decision making. New York City's move to mayoral control in 2002 was a departure from the local school board structures that govern education for most of the state.<sup>233</sup>

Proponents argue that centralization supports both equity and efficiency to a greater degree than local control<sup>234</sup> by supporting expertise and accountability.<sup>235</sup> While proponents frame centralization largely as a management tool, others see its implications extending more broadly. For example, Henig suggests that the rationale for and effects of mayoral control are to reconfigure “the constellation of interest groups and political actors that has traditionally set the agenda for local education.”<sup>236</sup> New York City's experience with mayoral control thus far has demonstrated its impact as both a management tool and a mechanism for reordering the range of stakeholders and their influences on education policy. Indeed, one of the most potent effects of New York City mayoral control was to bring a range of external stakeholders (including the business community, advocacy organizations, philanthropists, and others) to the table, often with less-than-optimal outcomes.<sup>237</sup>

At the same time, the influence of formal governance structures is not as straight forward as proponents suggest. For example, centralization's general effect on education equity is unclear,<sup>238</sup> though in New York City, it helped to usher in reforms that exacerbated segregation and failed to close achievement gaps. Centralization has,

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legislatures who maintain that they must take ‘extraordinary steps in order to rescue a faltering system unable to heal itself.’ The result is typically state legislation targeted at a specific major urban school district granting the mayor power to appoint the school board.”).

233. See Eloise Pasachoff, *Equality, Centralization, Community, and Governance in Contemporary Education Law*, 42 *FORDHAM URB. L.J.* 763 (2015); see also Robert Garda, *Searching for Equity Amid a System of Schools: The View from New Orleans*, 42 *FORDHAM URB. L.J.* 613, 615 (2015).

234. See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 *VA. L. REV.* 1963, 1983–84 (2008); see also Garda, Jr. & Doty, *supra* note 232; Pasachoff, *supra* note 233.

235. See, e.g., James S. Liebman, Elizabeth Cruikshank & Christina Ma, *Governance of Steel and Kryptonite Politics in Contemporary Public Education Reform*, 69 *FLA. L. REV.* 365, 374 (2017).

236. HENIG, *supra* note 215, at 146.

237. See generally Gomez-Velez, *Common Core State Standards and Philanthrocapitalism*, *supra* note 198.

238. See Pasachoff, *supra* note 233, at 771.

however, reordered the positions of education stakeholders. In this regard, Henig refers to the concept of “governance regimes” as perhaps more relevant than formal government institutional structures.<sup>239</sup> New York City’s experience with centralization has borne this out. The shift to mayoral control in New York City changed the constellation of relevant constituencies, giving greater voice to the business community and wealthy philanthropists and ushering in a series of “business model” reforms.<sup>240</sup>

Even following a change in mayoral administrations, under centralized control, the business community, wealthy philanthropists, and other politically powerful constituencies continue to exercise significant influence over the City’s public policy, which necessarily includes public education policy.<sup>241</sup> Indeed, it can be quite difficult to

239. See HENIG, *supra* note 215, at 146–47 (governance regimes include not only formal actors “but also the informal yet patterned interactions among government, business, unions, the nonprofit sector, and a diverse array of interest groups [that] shape local policy priorities and the prospects for getting things accomplished”).

240. See Gomez-Velez, *Urban Public Education Reform*, *supra* note 204, at 85 (noting the introduction of “high stakes tests, school closures, and expansion of charter schools” under mayoral control).

241. See generally David Freedlander, *On Behalf of the Plutocrats: Kathy Wylde’s Winding Path from Community Organizer to Head of the Partnership for New York City*, CURBED N.Y. (Nov. 25, 2020), <https://www.curbed.com/2020/11/kathy-wylde-partnership-for-new-york-city.html> [https://perma.cc/9BJ6-3GVH] (describing the work of Kathy Wylde and the Partnership for NYC in engaging wealthy business leaders in public policy). Kathy Wylde also serves as Secretary of the Board for the Fund for Public Schools, a non-profit arm of the NYC DOE that raises private corporate and philanthropic funds to support New York City public schools. See *Board of Directors*, FUND FOR PUB. SCHS., <https://www.fundforpublicschools.org/our-board> [https://perma.cc/ESD9-FCPG] (last visited Jan. 5, 2021); *Our Mission*, FUND FOR PUB. SCHS., <https://www.fundforpublicschools.org/mission> [https://perma.cc/VK9Q-VEV2] (last visited Jan. 5, 2020). New York City’s business community engages in public policy in multiple ways, including philanthropy, service in policy positions, political action, and advocacy. For example, in September 2020, 177 wealthy business leaders signed an open letter criticizing the Mayor’s leadership with respect to public safety, sanitation, and re-opening businesses during the pandemic while local chambers of commerce separately organized similar charges. See J. David Goodman, Emma G. Fitzsimmons & Jeffrey C. Mays, *Inside the Clash Between Powerful Business Leaders and N.Y.C.’s Mayor*, N.Y. TIMES (Sept. 13, 2020), <https://www.nytimes.com/2020/09/12/nyregion/coronavirus-business-nyc-reopen.html> [https://perma.cc/N95U-LB5L]. That same month, when de Blasio pushed to reopen schools, he “took heat from all sides” and the principals union voted no confidence in Mayor de Blasio’s handling of public school reopening. See Tommy Beer, *NYC Principals Union Unanimously Votes ‘No Confidence’ in de Blasio*, FORBES (Sept. 27, 2020, 3:42 PM), <https://www.forbes.com/sites/tommybeer/2020/09/27/nyc-principals-union-unanimously-votes-no-confidence-in-de-blasio/?sh=7fc5979645e1> [https://perma.cc/2HXJ-CRQF]; Eliza Shapiro, *How de Blasio Backed Himself into a*

disentangle how public education policy is influenced by private philanthropy and the extensive web of constituencies and influences at play with respect to education policy in a milieu of general-purpose, centralized governance.<sup>242</sup> Thus, for example, even though Mayor de Blasio has positioned himself as a progressive concerned about equity based on race, ethnicity, and class, his policy actions have been constrained by structures and forces shaped by wealthy interests, unions, and other powerful constituencies.<sup>243</sup> In addition, the influence of market models of public education remains strong, driving education policy and practice in ways that compete with or displace conceptions of education as an urgent public good. Shifts from single-purpose, localized education governance to a general-purpose, centralized model relate to competing visions of public education as a public good, on the one hand, and as a publicly funded private commodity on the other, with implications for public education's role in democracy and society.

### C. The Relationship Between Governance and Market-Based Versus Democratic Visions of Public Education

General-purpose and centralized governance structures impact the balance of relevant constituencies driving education policy. The trend away from education exceptionalism toward general, centralized governance tends to support a vision of public education that emphasizes economic concerns and considers policy through a market competition lens. This is problematic because it strays from a democratic vision of education, to be provided equitably and inclusively, as a public civic good centrally important to democratic

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*Corner on Closing Schools*, N.Y. TIMES (Dec. 7, 2020), <https://www.nytimes.com/2020/11/24/nyregion/deblasio-school-reopening.html> [<https://perma.cc/T9J3-9SA7>].

242. See generally Valerie Strauss, *Bill and Melinda Gates Have Spent Billions to Shape Education Policy. Now, They Say, They're 'Skeptical' of 'Billionaires' Trying to Do Just That.*, WASH. POST (Feb. 10, 2020, 4:59 PM), <https://www.washingtonpost.com/education/2020/02/10/bill-melinda-gates-have-spent-billions-dollars-shape-education-policy-now-they-say-theyre-skeptical-billionaires-trying-do-just-that/> [<https://perma.cc/7TUA-C6WD>].

243. For example, despite long-stated commitments to tackle school segregation, Mayor de Blasio's recently announced plan to change selective school admissions policies that contribute to segregation will take place during his last year as Mayor because it has faced fierce opposition from parents and others invested in the current system and its notions of competition. See Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/nyregion/nyc-schools-admissions-segregation.html> [<https://perma.cc/C8E3-LB7E>].



governance.<sup>244</sup> As the Supreme Court noted in *Brown v. Board of Education*,

[t]oday, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>245</sup>

This longstanding, if largely unrealized, vision of public education as a common endeavor and a public good is critically important for equity purposes. Public education must be considered a public good that is crucial to society as a whole if the goal of equal access for all is to be achieved. “The production, provision, and governance of public goods represent a crucial front line in the legal construction of the privileges and immunities of citizenship, understood here not as a matter of constitutional doctrine but as a matter of lived reality.”<sup>246</sup>

This is not to say that only single-purpose, locally based education governance can achieve public goals. It does require that any governance structure give attention to the societal purposes of education as a public good rather than a private commodity paid for with public funds. It also requires public law norms be applied in public school governance. The ascendance of market models of education<sup>247</sup> (and more broadly privatization of public goods) presents significant governance challenges, including competition among constituencies and schools, and over access to public funds. Education governance,

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244. See generally *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (“We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government.’” (quoting *Abington School District v. Schempp*, 374 U.S. 203, 230 (1963))).

245. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supplemented sub nom. Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

246. K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2451 (2018).

247. See Daniel Kiel, *The Endangered School District: The Promise and Challenge of Redistributing Control of Public Education*, 22 B.U. PUB. INT. L.J. 341, 352 (2013).

whether general purpose, single purpose, or otherwise, must remain true to public law norms and values.<sup>248</sup>

#### **D. The Overlay of Public Health Emergency Governance During COVID-19**

Consideration of public school governance in the COVID-19 context requires consideration of public health emergency law and governance. As noted throughout this Article, public health concerns are and have been the priority in school reopening decisions. The need to prevent and slow transmission of the virus led to school closures, quarantine, mask requirements, and facilities requirements to ensure adequate space, ventilation, and cleaning. Public health emergency prerogatives also impacted public information and responses to the pandemic.

Accordingly, the impact of education law and governance must be viewed in the larger context of the wider system of the public health emergency response. A range of factors and actors are involved in emergency governance outside of the formal education policy governance and legal infrastructure. Nongovernmental actors (such as nonprofit organizations), private corporations (including hospitals and pharmaceutical companies), and volunteers may play key roles in providing services and support during a public health emergency, yet these roles may not be formally recognized by the emergency response infrastructure. Furthermore, these actors are regulated and influenced by a wider set of laws, social traditions, and economic factors that exert control and pressure on their actions. Thus, while it can be said that law is the most influential factor in governing a public health emergency, numerous other factors measurably affect governance as well.<sup>249</sup>

The COVID-19 emergency and its relationship to school reopening necessarily implicate general-purpose governance. It also highlights a need to focus public health governance on public law norms and the equitable distribution of an important social good that affects all

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248. See Natalie Gomez-Velez, *Why Matter of Devera Matters: Universal Pre-k, Quality, Oversight, and the Need to Restore Public Values in New York Statutory Interpretation*, 23 CUNY L. REV. 238, 278 (2020) (“The language of ‘public law values’ is used here to refer to basic values of fairness, equality, expertise, competence, and adherence to the rule of law, all of which hold government agencies accountable and work in favor of the greatest common good.”).

249. See Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 399–401 (2012).

aspects of life.<sup>250</sup> The current struggles over how to implement public health and safety guidance during the reopening and running of public schools in New York City reveal the many fault lines between single- and general-purpose governance, formal and informal governance, and tensions between public and private influences on education decision making. It also revealed key benefits and drawbacks of a mixed system of government involving federalism, state, and local control of education.

#### IV. RE-OPENING AND RE-IMAGINING PROPOSALS: LAW, GOVERNANCE, GRANDSTANDING, AND PUBLIC AND PRIVATE POWER

Public school closures in response to the COVID-19 pandemic and plans for reopening schools have become a political flashpoint and have presented significant governance, policy, planning, and implementation challenges. As the pandemic continues, policymakers face multiple concerns driven by the interests and agendas of myriad stakeholders at a time of uncertainty and significant public mistrust. Discussion and debate about whether and how best to reopen schools amid a continuing pandemic, where U.S. infection and transmission rates are among the highest in the world,<sup>251</sup> have dominated COVID-19 policy planning and the news cycle throughout the spring and summer of 2020. Schools in some states reopened in August 2020 and then closed again following spikes in COVID-19 infections.<sup>252</sup> Other school districts opted for continued distance learning for the fall 2020 semester despite concerns about its efficacy and impact on equity and expanding achievement gaps.<sup>253</sup>

New York City's spring 2020 COVID-19 distance learning experience was quite mixed. While many praised the City's quick

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250. See, e.g., Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLAL. REV. 758, 792 (2020) (“[H]ealth is not just an individual good; it is distinctively a public good, too.”).

251. See Soo Kim, *U.S. Coronavirus Cases Have Been Highest in the World for 6 Months*, NEWSWEEK (Sept. 26, 2020, 6:09 AM), <https://www.newsweek.com/coronavirus-most-cases-worldwide-1534421> [<https://perma.cc/7MU3-WYBY>].

252. See Tawnell D. Hobbs, *Schools Are Reopening, Then Quickly Closing Due to Coronavirus Outbreaks*, WALL ST. J. (Aug. 17, 2020, 5:48 PM), <https://www.wsj.com/articles/schools-are-reopening-then-quickly-closing-due-to-coronavirus-outbreaks-11597700886> [<https://perma.cc/ZF5Y-BRPU>].

253. See, e.g., Tracey Tully, *Why New Jersey's Plan for In-Person Schooling Is Falling Apart*, N.Y. TIMES (Aug. 28, 2020), <https://www.nytimes.com/2020/08/28/nyregion/nj-coronavirus-schools-reopening.html> [<https://perma.cc/W3V4-XDDJ>].

transition to remote learning, distance education exposed and reinforced deep inequities in public schooling related to longstanding socioeconomic inequality in New York City. By the end of the school year, studies showed learning loss and widening socioeconomic achievement gaps.<sup>254</sup> The summer of 2020 brought arrangements for summer school distance learning in New York City as well as questions about how to plan for school reopening in the fall. Fall 2020 reopening plans raised significant questions about governance, leadership, and responsibility. COVID-19 had a starkly disproportionate negative impact on communities of color and those facing the greatest socioeconomic marginalization. The closure of schools and the move to distance learning compounded the harms of double segregation and inequity, widening disparities across New York City’s public schools.

In April 2020, New York education leaders and government officials began planning for school reopening in the coming fall. The reopening plans exemplified various governance approaches as well as the scope and limits of education actors’ powers to influence and implement safe, effective, and equitable school reopening amid the continuing and uncertain trajectory of the COVID-19 pandemic. This Part addresses State and City efforts to reopen schools, placing such efforts within governance models and examining their implications for equity and inclusion of stakeholder voices.

### A. Regents’s Reopening Plan

#### *i. Education-Focused Task Force on Reopening to Develop Rules and Guidance*

On April 29, 2020, New York State Board of Regents Chancellor Betty Rosa announced plans to form a task force to determine how to reopen New York City schools successfully and appropriately.<sup>255</sup> In

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254. See, e.g., Emma Dorn et al., *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> [https://perma.cc/49SA-CTEW] (“Data . . . suggest that only 60 percent of low-income students are regularly logging into online instruction; 90 percent of high-income students do. Engagement rates are also lagging behind in schools serving predominantly black and Hispanic students; just 60 to 70 percent are logging in regularly . . . .”); see also Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html> [https://perma.cc/3FE9-G8VU].

255. See Press Release, *supra* note 5.

the announcement, Chancellor Rosa noted that, “[t]hroughout the pandemic, we have seen many examples of how schools across the state serve as the cornerstone of our communities, which is why it is imperative that they are included in any reopening strategy.”<sup>256</sup> The task force would include “educational leaders, including superintendents, principals, teachers, parents, school board members and other stakeholders, to guide the reopening of our schools.”<sup>257</sup>

The Board of Regents and State Education Department Regional Reopening Task Force (Task Force) members were announced on June 8, 2020. The Task Force was created to help the Regents and NYSED receive input from parents, teachers, school and district leaders, non-instructional staff, school board members, health experts, and other interested parties from every region of the State.<sup>258</sup> The Task Force structured its work around four regional meetings throughout New York State. NYSED also held a virtual Youth Forum, which over 100 students from across the state attended.<sup>259</sup> The students spoke about their remote learning experience and proposed creative solutions to improve their educational experience going forward. Those meetings informed the Regents and NYSED’s work in developing regulatory changes and guidance to support school reopening. Each regional task force provided input in nine different areas: health and safety; teaching and learning; social-emotional needs; special education; bilingual and multilingual education; digital equity and access; budget and finances; transportation, facilities, and nutrition; and staffing and human resources.<sup>260</sup> The Task Force used

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256. *Id.*

257. *Id.*

258. *See Reopening Schools: Recover, Rebuild and Renew the Spirit of Our Schools*, N.Y. ST. EDUC. DEP’T, <http://www.nysed.gov/reopening-schools> [https://perma.cc/6T28-AUPW] (last visited Nov. 1, 2020).

259. *See* N.Y. STATE EDUC. DEP’T, RECOVERING, REBUILDING, AND RENEWING: THE SPIRIT OF NEW YORK’S SCHOOLS 6 (2020) [hereinafter REOPENING GUIDANCE], <http://www.nysed.gov/common/nysed/files/programs/reopening-schools/nys-p12-school-reopening-guidance.pdf> [https://perma.cc/89DN-RCCK].

260. *See id.* at 4–5 (“Each regional meeting included more than 350 experts and stakeholders from health and education fields. In all, more than 1,650 parents, students, teachers, administrators, school board members, and stakeholders, representing New York’s diversity, attended and provided valuable feedback.”). The Author was invited to participate and participated in the June 24, 2020, Regional Task Force meeting and its Teaching and Learning breakout session. For descriptions and online recordings of the Regents Regional Task Force meetings, see *Regional Task Force Meetings*, N.Y. ST. EDUC. DEP’T, <http://www.nysed.gov/reopening-schools/regional-task-force-meetings> [https://perma.cc/32ME-5RXT] (last visited Oct. 24, 2020). *See also Board of Regents and State Education Department Announce Regional Reopening Task Force Meeting*,

input from the structured regional meetings to craft regulations and guidance for school reopening across New York State. The regulations and guidance prioritized health and safety concerns, including the social and emotional needs of students and those who engage them. While deferring to New York State Department of Health (DOH) guidelines for health and safety, the NYSED guidance gives close attention to particular concerns involving schools, including achieving social distancing in a school setting, handling persons who become ill, and considering specific needs for school facilities, student nutrition, transportation, and scheduling.<sup>261</sup>

The Regents and NYSED reopening guidance also brings attention to social-emotional wellbeing as key to effective teaching and learning. Recognizing widespread trauma related to the pandemic and the importance of robust teacher-student relationships, the guidance calls for counseling plans, mental health support systems, and trauma-responsive practices.<sup>262</sup> The guidance also gives attention to practical concerns like scheduling, budgeting, attendance, technology, and connectivity. It considers equity imperatives, including appropriate support for ELLs, multi-lingual learners,<sup>263</sup> students with interrupted formal education, students with disabilities, and other vulnerable populations. With respect to each of these populations, the guidance prioritizes the “health, safety, and well-being of the children and adults in . . . schools.”<sup>264</sup> The guidance calls for developing plans for identifying student needs for “additional social, emotional, or academic support.”<sup>265</sup> It requires “continuity of learning plans” that prepare for in-person, remote, and hybrid models of instruction.<sup>266</sup> It also emphasizes the importance of both clear guidance and the flexibility to present local solutions.<sup>267</sup> While providing general direction for local school districts to follow the guidance, it addresses specific issues that arise in various school settings.

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N.Y. ST. EDUC. DEP'T (June 8, 2020), <http://www.nysed.gov/news/2020/board-regents-and-state-education-department-announce-regional-reopening-task-force> [<https://perma.cc/EC8M-9H35>].

261. *See generally* REOPENING GUIDANCE, *supra* note 259.

262. *See id.* at 56–74.

263. *See* OFF. OF BILINGUAL EDUC. & WORLD LANGUAGES, N.Y. STATE EDUC. DEP'T, BLUEPRINT FOR ENGLISH LANGUAGE LEARNER/MULTILINGUAL LEARNER SUCCESS 1, <http://www.nysed.gov/common/nysed/files/nys-blueprint-for-ell-success.pdf> [<https://perma.cc/D8SR-22DN>] (last visited Oct. 25, 2020).

264. REOPENING GUIDANCE, *supra* note 259, at 6.

265. *Id.* at 90; *see also id.* at 64.

266. *See id.* at 89.

267. *See id.* at 6.

*ii. Regents Approach – Single Purpose, De-Centralized, and Inclusive*

The Regents and NYSED’s approach to school reopening planning, regulation, and implementation demonstrated several benefits of single-purpose governance. Primary among these are the focuses on education, the practical and theoretical expertise about pedagogy and educational delivery, and an understanding of the importance of meaningful stakeholder inclusion in education decisionmaking. In addition to including a wide variety of education stakeholders, the Regents and NYSED worked closely with the New York State DOH on directives for school reopening that were based on scientific and public health principles. The guidelines were consistent with information provided for reopening other public buildings and managing individual and community health in public spaces. Thus, the Regents and NYSED’s approach in developing guidance exemplified several benefits of single-purpose governance, with few drawbacks related to engagement with broader state planning efforts.

**B. Governor’s Reopening and Reimagining Plans**

*i. Reimagining Education While Managing the Pandemic*

On May 5, 2020, Governor Cuomo announced a plan in collaboration with the Gates Foundation to “reimagine education” based on how the COVID-19 pandemic had shown “how unprepared the country was for such a transition.”<sup>268</sup> His description of the Task Force and its focus contrasted sharply with those of the Task Force Chancellor Rosa announced:

When does change come to a society? Because we all talk about change and advancement, but really we like control, and we like the status quo, and it’s hard to change the status quo . . . . But you get moments in history where people say, “Okay, I’m ready. I’m ready for change. I get it.” I think this is one of those moments. And I think education, as well as other topics, is a topic where people will say, “Look, I’ve been reflecting, I’ve been thinking, I learned a lot.” We all learned a lot about how vulnerable we are and how much we have to do, and let’s start talking about really revolutionizing education. And it’s about time.<sup>269</sup>

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268. Strauss, *supra* note 2.

269. *Id.*

The Governor's announcement centered on his and Bill Gates's view of what needed to be done to reimagine education, along with a relatively small, hand-picked group of Task Force members.

The announcement drew immediate ire — mostly because of the Gates partnership.<sup>270</sup> Critics of partnership with the Gates Foundation noted the Foundation's backing of several failed and roundly disparaged public school “reform” efforts, including the rushed Common Core State Standards project and a failed cloud-based school technology initiative that risked student privacy and security.<sup>271</sup> Educators and parents also expressed concern about the Gates Foundation's past failures in shaping education in several school districts, its crucial role in developing the Common Core academic standards, and its role in the nationwide linking of student test scores to teacher evaluations.<sup>272</sup> Among several New York educators and education advocates, the Gates Foundation is infamously regarded as one of the drivers of “teaching to the test,” which has “withered arts education, health and sex ed, social studies, and other subjects the Common Core devalues.”<sup>273</sup>

Governor Cuomo also was criticized for his exclusion of educators and other key stakeholders from the Task Force, particularly snubbing New York City teachers, parents, and education leaders who were then at the United States' epicenter of the pandemic.<sup>274</sup> The exclusions were especially egregious given Governor Cuomo's stated intent to “develop a blueprint to reimagine education in the new normal.”<sup>275</sup> At

270. See, e.g., Anne McCloy, *Parents, Teachers Unions Concerned After Cuomo's Comments on Bill Gates, Distance Learning*, 6 NEWS ALBANY (May 8, 2020), <https://cbs6albany.com/news/coronavirus/parents-teachers-unions-concerned-after-cuomos-comments-on-bill-gates-distance-learning> [https://perma.cc/BR4L-2NQY]; Johanna Miller, *Bill Gates Shouldn't Be the One 'Reimagining' NY's Public Education*, N.Y.C.L. UNION (May 8, 2020, 1:45 PM), <https://www.nyclu.org/en/news/bill-gates-shouldnt-be-one-reimagining-nys-public-education> [https://perma.cc/D2J8-PMQK].

271. See Miller, *supra* note 270.

272. See Gomez-Velez, *Common Core State Standards and Philanthrocapitalism*, *supra* note 198, at 184–85; see also Dave Lucas, *Educators React to Cuomo's "Reimagine Education" Plan*, WAMC (May 12, 2020), <https://www.wamc.org/post/educators-react-cuomos-reimagine-education-plan> [https://perma.cc/FU4X-CMB8].

273. Miller, *supra* note 270.

274. See Reema Amin, *Cuomo's Gates-Led 'Reimagine' Schools Bid Snubs Current NYC Teachers, Parents*, CITY (May 10, 2020, 12:10 PM), <https://www.thecity.nyc/education/2020/5/10/21257166/cuomo-s-gates-led-reimagine-schools-bid-snubs-current-nyc-teachers-parents> [https://perma.cc/E4LJ-F4V4].

275. Alejandra O'Connell-Domenech, *City Hall Snubbed from Seats on Governor's 'Reimagine Education' Schools Council*, AMNY (May 8, 2020),



the time of his announcement, Cuomo did not provide details as to the scope or aim of the State's work with the Gates Foundation. Instead, he posed a number of questions that would drive the Foundation's work, including "[w]here can we use technology to provide more opportunity to students no matter where they are?" and "[h]ow can we use technology to meet educational needs of students with disabilities?"<sup>276</sup> The Gates Foundation's Director of K-12 Education provided little detail about its specific role in reopening New York's education system and said the Foundation had been supporting other education partners in "expanding online learning... for K-12 students, and helping lessen the financial shock felt disproportionately by low-income college students due to lost housing, food, and wages."<sup>277</sup>

Some education experts believed that the proposal "focused too heavily on technology, overlooking the value of in-person education and supporting students' growing social and emotional needs as the state recovers."<sup>278</sup> Others feared that, by strengthening technology in learning, Cuomo "was looking for ways to supplant some in-person teaching."<sup>279</sup> New York State United Teachers President Andy Pallotta said that the State should focus on other issues, such as the need for social workers, mental health counselors, school nurses, and smaller class sizes.<sup>280</sup>

New York State educators also expressed concern that New York City school officials were excluded from the Governor's plan to craft guidelines to "reimagine education." Soon after this announcement, Cuomo announced the names of those appointed to the advisory

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<https://www.amny.com/education-2/city-hall-snubbed-from-seats-on-governors-reimagine-education-schools-council/> [<https://perma.cc/JC2P-UT54>].

276. Evie Blad, *New York State Teams with Gates Foundation to 'Reimagine Education' Amid Pandemic*, EDUC. WK. (May 5, 2020, 4:43 PM) (quoting Governor Cuomo),

<https://blogs.edweek.org/edweek/campaign-k-12/2020/05/new-york-gates-coronavirus-education.html> [<https://perma.cc/L2VG-RLJ4>].

277. *Id.*

278. *Id.*

279. Reema Amin, *No Current NYC Educators Named to Cuomo's 'Reimagine Education' Council*, CHALKBEAT (May 8, 2020, 5:47 PM), <https://ny.chalkbeat.org/2020/5/8/21252576/no-current-nyc-educators-named-to-cuomo-reimagine-education-council> [<https://perma.cc/N85H-EXHS>].

280. *See NYSUT Statement on Governor's Comments About Reimagining Education*, NYSUT (May 5, 2020), <https://www.nysut.org/news/2020/may/media-release-schools> [<https://perma.cc/58VF-X6PP>].

team.<sup>281</sup> Members ranged from the former New York City schools' Chancellor under former Mayor Michael Bloomberg to district superintendents outside New York City to the president of SUNY's student assembly.<sup>282</sup> However, unlike the Regents's regional task forces, Governor Cuomo's council did not include "any K–12 students or any current teachers, principals, parents, district leaders, or administrators from the New York City Department of Education" even though one-third of students in the State attend a New York City public school.<sup>283</sup> Furthermore, the Governor's Reimagine Education Advisory Council coordinated with the DOH rather than the DOE. This prompted some concerns that the Council would just allow for the "protection of old policies and personnel," avoiding the systemic changes necessary to face the pandemic's challenges.<sup>284</sup> It reflected, however, an attempt by the Governor to use his public health powers to influence education policy.

On July 13, the DOH, in concert with Cuomo's Reimagine Education Advisory Council, released an interim guidance for the State to reopen its public schools.<sup>285</sup> The guidance document focused primarily on COVID-19 public health protocols (e.g., mask wearing and social distancing) as applied to schools, including transportation, food service, aftercare, and extracurricular activities.<sup>286</sup>

Nonetheless, embedded in the reopening guidance was an effort by the Governor to set education policy through his Reimagine Education Advisory Council. In some ways, the Governor's effort to influence

281. *See Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Members of the Reimagine Education Advisory Council*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (May 8, 2020), <https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-members-reimagine-education-advisory> [<https://perma.cc/JL6J-8BBN>].

282. *See id.*

283. *See* Amin, *supra* note 279.

284. *See* Bob McManus, *Rhetorical Camouflage on Education*, CITY J. (May 11, 2020), <https://www.city-journal.org/governor-cuomo-reimagine-education-advisory-council> [<https://perma.cc/2A4C-L6D6>].

285. *See* N.Y. STATE DEP'T OF HEALTH, INTERIM GUIDANCE FOR IN-PERSON INSTRUCTION AT PRE-K TO GRADE 12 SCHOOLS DURING THE COVID-19 PUBLIC HEALTH EMERGENCY (Aug. 26, 2020) [hereinafter DOH INTERIM GUIDANCE].

286. *See* Kaitlin Lyle, *Area Schools Try to Answer the Big Question: Should New York Schools Reopen Come Fall with COVID Concerns?*, TRICORNERNEWS (July 22, 2020), <https://tricornernews.com/millerton-news-regional/area-schools-try-answer-big-question-should-new-york-schools-reopen-come> [<https://perma.cc/2GAY-LHF6>].

education policy is not surprising.<sup>287</sup> Governor Cuomo's decision ultimately to incorporate the Reimagine Education Advisory Council's findings and recommendations into the DOH's interim guidance may indicate a recognition of the Council's lack of authority to shape education policy as well as the unpopularity of the initiative and the Gates partnership.

The Governor announced guidelines for school reopening in the summer of 2020 that included both the Regents and NYSED guidance and the DOH's data-driven plans to guide school reopening.<sup>288</sup> Since the initial school reopening announcements, the Governor has based decisions about whether and how schools open or close amid the pandemic on testing and data about community spread.<sup>289</sup> Thus, the

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287. See Bakeman, *supra* note 182. New York law's allocation of education policy authority to an independent Education Department under the Board of Regents has been a sore point for Governor Cuomo and several of his predecessors. For example, at an event in 2014 Cuomo said, "I wish I could say I run education in this state. I don't . . . . It's run by the Board of Regents . . . . I don't even appoint anyone to the Board of Regents." *Id.* The Regents's independent authority over New York State education has created some tensions with the Governor. In his bid for re-election in 2014, for example, Cuomo presented an aggressive education agenda and vowed "to break what is in essence one of the only remaining public monopolies." Valerie Strauss, *Cuomo Calls Public School System a 'Monopoly' He Wants to Bust*, WASH. POST (Oct. 29, 2014, 4:00 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/10/29/cuomo-calls-public-school-system-a-monopoly-he-wants-to-bust/> [https://perma.cc/XS7S-B9W7]. Despite these promises though, Cuomo was unable to wrest control of education policy from the Regents.

Abolishing the Board of Regents altogether, so the education department would report to the governor's office instead, would be difficult. It would require a constitutional amendment, which means it would have to be passed twice by the Legislature in successive terms and then approved by the public in a referendum.

Bakeman, *supra* note 182.

288. See *Cuomo Unveils Guidelines for Reopening NY Schools; Will Announce Decision in August*, NBC N.Y. (July 13, 2020, 1:46 PM), <https://www.nbcnewyork.com/news/coronavirus/cuomo-unveils-guidelines-for-reopening-ny-schools-will-announce-decision-in-august/2513211/> [https://perma.cc/Y9EU-TXR9].

289. Nonetheless, on occasion Governor Cuomo has continued to express his concern for and flex his control over public schools. For example, as part of his October 2020 announcement in response to a spike in cases, Cuomo said, "[m]y number one concern has always been schools. I said to the parents of this state, I will not allow your child to be sent to any school that I would not send my child, period. And you have my personal word on that." *Governor Cuomo Updates New Yorkers on State's Progress During COVID-19 Pandemic*, N.Y. ST.: GOVERNOR ANDREW M. CUOMO (Oct. 5, 2020), <https://www.governor.ny.gov/news/governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-pandemic-41> [https://perma.cc/PD5K-VCFZ].

Governor’s school reopening plan centered primarily on public health indicators, including infection rates and the degree of community spread. Still, the Governor continued to spar with Mayor de Blasio regarding closures and other virus-related directives.<sup>290</sup> In October 2020, in response to a spike in cases in several New York City neighborhoods, the Governor overrode Mayor de Blasio’s decision to order business and school closures in certain zip codes.<sup>291</sup> Instead, the Governor ordered closures in the same neighborhoods, but according to zones related to the clusters of increased rates of COVID-19 infection.<sup>292</sup> This highlights not only the complexity of state and city public health governance, but also the degree to which politics drives general-purpose governing.

*ii. Governor’s Approach – General Purpose, Centralized Power, Economic Focus, and Private Influence*

Governor Cuomo’s public health approach to school reopening provided important guidance based on current scientific understanding of COVID-19 and the public health implications relevant to reopening schools. It focused on ways to identify cases early and minimize community spread. It considered public health concerns involving school buildings and provided guidance. Its guidance, however, was general and coordinated with NYSED’s rules and guidance. Concrete reopening plans were left to the local school districts. DOH requested school reopening plans be submitted to it and NYSED that, “at minimum, cover[]: (1) Reopening of school facilities for in-person instruction, (2) Monitoring of health conditions, (3) Containment of potential transmission of the 2019 novel coronavirus (COVID-19), and (4) Closure of school facilities and in-person instruction, if necessitated by widespread virus transmission.”<sup>293</sup>

The DOH interim guidance identifies responsible parties, including school district superintendents, their designees, heads of schools, or

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290. See David Giambusso, Sally Goldenberg & Amanda Eisenberg, *‘It Is Not Acceptable’: Cuomo, de Blasio at Odds as COVID Surges in New York*, POLITICO (Oct. 5, 2020, 10:34 PM), <https://www.politico.com/states/new-york/albany/story/2020/10/05/it-is-not-acceptable-cuomo-de-blasio-at-odds-as-covid-surges-in-new-york-1321450> [https://perma.cc/3W3G-NHT7].

291. See Associated Press, *WATCH: New York Gov. Cuomo Gives COVID-19 and School Reopening Updates*, PBS NEWS HOUR (Oct. 6, 2020, 4:43 PM), <https://www.pbs.org/newshour/education/watch-new-york-gov-cuomo-gives-covid-19-and-school-reopening-updates> [https://perma.cc/K2RJ-DDJC].

292. See *id.*

293. DOH INTERIM GUIDANCE, *supra* note 285, at 1.

others in charge, to prepare and submit reopening plans.<sup>294</sup> DOH's interim guidance includes among its core principles ensuring appropriate personal protective equipment (primarily face coverings), social distancing protocols and procedures, density reduction plans, the prioritization of in-person instruction, and using "cohorts" and other methods to limit COVID-19 exposure.<sup>295</sup> The interim guidance also requires schools to implement mandatory health screenings and contact tracing as part of their reopening plans, as well as protocols and procedures detailing requirements for return to school after a positive COVID-19 test.<sup>296</sup> The guidance then sets forth parameters and requires school reopening plans to address transportation, food services, ventilation, hygiene, and cleaning and disinfection, among other physical plant protocols.<sup>297</sup> The DOH interim guidance provides an example of several benefits of general-purpose governance, such as "mobilizing and coordinating resources and knowledge across a broader range of government" and establishing priorities among competing concerns amid resource constraints.<sup>298</sup> To the extent the DOH guidance addresses foundational public health concerns that apply to educational institutions as well as other public facilities and endeavors to provide consistent, health- and science-based parameters, it is an example of effective general-purpose governance within the Governor's purview.

The interim guidance strays, however, in moving beyond its focus on public health concerns that intersect with school reopening to issuing education policy recommendations. This is where Governor Cuomo's "reimagine education" initiative appears to seek authority and a place on the agenda. For example, the guidance says:

On May 8, 2020, Governor Cuomo launched New York's Reimagine Education Advisory Council — made up of educators, students, parents, and education leaders — to help school districts, colleges, and universities reimagine teaching and learning as they prepare to reopen while protecting the health and safety of students and educators. The collective expertise and experience of this advisory council helped address key questions about how to strengthen New York's entire education system and helped inform this guidance.

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294. *See id.* at 1.

295. *See id.* at 1–3.

296. *See id.* at 2–3.

297. *See id.* at 3–6.

298. Henig, *supra* note 215, at 17–18.

Specifically, this distinguished Council recommended . . . key principles, which are reflected throughout these guidelines . . .<sup>299</sup>

Most of the principles reflected in the DOH interim guidance emanate from either broader public health guidance issued by the World Health Organization and the CDC or are consistent with the guidance issued by NYSED following its Reopening Task Force recommendations, rulemaking, and guidance documents.<sup>300</sup>

### C. New York City Mayor's Plan

#### *i. Planning School Reopening with the Entire City in Mind in an Education-Focused System*

In May 2020, Mayor de Blasio announced the creation of a series of sector advisory councils, including a 45-member education advisory council, to “serve as critical links to disseminate information about reopening and provide guidance to shape the City’s response to the COVID-19 pandemic”<sup>301</sup> and to “guide New York City in reopening school buildings.”<sup>302</sup>

New York City’s plans were subject to state approval prior to reopening. New York City issued a survey to parents and students requesting they choose whether to enroll in full-time remote learning or default to an in-person or hybrid learning model, and register their choice with the DOE in the summer of 2020.<sup>303</sup> While reports of the

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299. DOH INTERIM GUIDANCE, *supra* note 285, at 8.

300. *See id.*

301. *Mayor de Blasio Appoints Members to Sector Advisory Councils*, OFF. MAYOR, CITY OF N.Y. (May 8, 2020), <https://www1.nyc.gov/office-of-the-mayor/news/332-20/mayor-de-blasio-appoints-members-sector-advisory-councils> [<https://perma.cc/6ZVS-6CX9>].

302. Annalise Knudson, *These 45 Education Experts Will Advise NYC on Reopening Schools*, SILIVE.COM (May 22, 2020), <https://www.silive.com/coronavirus/2020/05/these-45-education-experts-will-advise-ny-c-on-reopening-schools.html> [<https://perma.cc/843G-EX5X>].

303. *See* Madina Touré, *Parents, Teachers Say de Blasio Is Downplaying Real Concerns over Schools*, POLITICO (Aug. 14, 2020, 05:03 AM), <https://www.politico.com/states/new-york/albany/story/2020/08/14/parents-teachers-say-de-blasio-is-downplaying-serious-concerns-over-schools-1308667> [<https://perma.cc/U7HF-5EHK>].

survey's methodology and results were hotly contested,<sup>304</sup> it indicated that a number of parents expressed interest in in-person learning.<sup>305</sup>

The Mayor's school reopening plan stated an emphasis on health and safety. It is a hybrid distance-learning and in-person schooling plan. Much of it is focused on logistics to ensure physical distancing, manage capacity, hygiene, cleaning, and disinfection, as well as procedures for monitoring, containment, contact tracing, and plans for school closures, should the virus spread.<sup>306</sup> The plan gives guidance on nuts-and-bolts issues, including facilities, nutrition, and transportation. It gives some attention to social-emotional well-being, referencing counseling and providing guidance on and procedures for school scheduling models, attendance, technology, continuity of learning, special education, multilingual learners, and staffing. However, the plan mostly provides only general guidance and does not address concerns about available staff and resources to enable school districts and individual schools to carry it out. Nor is it clear whether school districts and schools have the resources to carry out the reopening plan as envisioned. Given competing concerns and logistical and budget constraints, New York City school leaders struggled mightily with planning and executing the particulars of fall 2020 school reopening.<sup>307</sup> Teachers and principals unions expressed concerns over inadequate facilities planning, staffing support, and logistical planning to ensure safe and effective reopening. In the wake of concerns raised by parents, teachers, and principals, and a strike threat by the teachers union,<sup>308</sup> the initial plan to reopen on September 10, 2020, was delayed

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304. See Elizabeth Kim, *De Blasio Says Survey Shows Most NYC Public School Children Will Return to In-Person Instruction*, GOTHAMIST (Aug. 10, 2020, 12:39 PM), <https://gothamist.com/news/nyc-public-school-children-expected-return-person-instruction> [<https://perma.cc/D9XS-Z9K5>].

305. For example, according to the plan, the survey found that "53% of parents feel very or mostly comfortable sending their child back to school. 24% feel a little comfortable and 22% feel not at all comfortable." *2020–2021 New York City Department of Education's School Reopening Plan Submission to the New York State Department of Education*, N.Y.C. DEP'T. EDUCATION 10 (2020), <https://cdn-blob-prd.azureedge.net/prd-pws/docs/default-source/default-document-library/2020-nycdoe-reopeningplan.pdf> [<https://perma.cc/XL9A-6ANK>].

306. See *id.* at 15–34.

307. See *id.*

308. See Elizabeth Kim, *De Blasio and NYC Teachers Union Are Heading Toward a Showdown over School Reopenings. Who Will Blink First?*, GOTHAMIST (Aug. 30, 2020, 5:49 PM), <https://gothamist.com/news/de-blasio-and-nyc-teachers-union-are-heading-toward-showdown-over-school-reopenings-who-will-blink-first> [<https://perma.cc/FZX3-XJAF>].

twice. New York City's schools achieved staggered reopening as of October 1, 2020.<sup>309</sup>

*ii. New York City Mayor's Approach — General Purpose, Centralized, and Local Under State Control*

In planning for school reopening, New York City's DOE had to follow the DOH and NYSED reopening rules and guidance. Within those parameters, the DOE, centralized under mayoral control, issued its reopening plan.

The process in New York City exemplified some of the benefits and drawbacks of its mayoral control governance structure as well as the operation of school "governance regimes" influencing education policymaking beyond formal governance. A prime benefit is accountability. The Mayor and Chancellor are clearly responsible for the schools. Mayoral control prevents the kind of finger pointing and diffusion of responsibility that once plagued New York City schools. Another benefit is coordination with public health, transportation, and other agencies in planning school reopening.

A downside of centralized control is the effect, as in single-purpose governance, of having education decisions and policymaking compete with the broad range of interests and concerns facing the City, particularly during a public health and fiscal emergency when resource competition is at its most intense. This is a particular concern for public education given the current climate in which privatization is in ascendance, and there is a risk that wealthy private interests will take precedence over public interests and goals in setting policy.<sup>310</sup> As noted above, centralized mayoral control in New York City brought with it a slew of market model reforms. Similarly, the federal government's inept response to the pandemic so as not to upset the markets, the President's tweeted declarations that "SCHOOLS MUST OPEN IN THE FALL!!!"<sup>311</sup> to serve his political and business interests, and Education Secretary DeVos's bald-faced attempts to use the pandemic to accelerate her education privatization agenda demonstrate a powerful and concerted push to have public education serve private market interests. This is why Governor Cuomo's proposal to reimagine education with the Gates Foundation was

309. See Shapiro & Zaveri, *supra* note 107.

310. See *supra* notes 149–152 and accompanying text.

311. See Eliza Shapiro, *How Trump's Push to Reopen Schools Backfired*, N.Y. TIMES (Aug. 15, 2020), <https://www.nytimes.com/2020/08/13/us/trump-schools-reopen.html> [https://perma.cc/TS92-UL25].



received with such alarm. One of the only things slowing his proposal is the structure of education governance in New York.

#### **D. Education Governance for Equity — Observations from New York’s COVID-19 Experience Thus Far**

Determining the most appropriate governance mechanisms to ensure effective and equitable public education requires consideration of multiple factors and consulting history.<sup>312</sup> While single-purpose education governance is in decline across the country, it remains a key structure in New York State. Despite trends toward general-purpose governance, Henig does not project the end of special-purpose education governance.<sup>313</sup> Instead, he observes its slow erosion over time as more school systems are absorbed into general-purpose and centralized governance models.<sup>314</sup>

New York’s experience with school governance amid the pandemic supports the argument in favor of preserving single-purpose governance on the statewide level and perhaps on the local level as well. The Regents’s approach to school reopening exemplified many of the theoretical benefits of single-purpose education. It included a range of key stakeholders with education expertise to help craft guidance that considered substantive education issues, including equity, the inclusion of all students, and the importance of social-emotional learning as part of reopening plans. The Regents’s plan also gave attention to practical issues — like transportation, meals, staffing, as well as local variation across the State and built-in flexibility in its responses, while coordinating with the DOH and following developing scientific understanding of COVID-19 from state and federal experts.

The Regents’s approach contrasted sharply with Governor Cuomo’s impulse to use the pandemic as an opportunity to reimagine education and to absorb education policymaking into his general-purpose pandemic response. The most striking contrast in the Governor’s approach is his proposal to involve the Gates Foundation before engaging in any meaningful consultation with education experts in the state. This set off alarm bells for many teachers, school leaders, and education advocates precisely because of their experience with reforms driven by the Gates Foundation and other private entities seeking to influence education policy, and in some instances, to profit from education privatization.

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312. *See generally* Taylor, *supra* note 200.

313. *See* HENIG, *supra* note 215, at 171.

314. *See id.*

To the extent that the Governor's reimagine education proposal portends what general-purpose education governance might look like in New York State, it may serve as a clarion call to preserve New York's single-purpose structure, no matter how anomalous. The Regents and NYSED's efforts on the state level and their guidance to local school districts heavily emphasized issues of equity, and a reopening response that closely considered the multiple impacts that COVID-19 has had on students, teachers, families, communities, and school leaders.<sup>315</sup> The response exemplified many of the theoretical benefits of single-purpose governance.

To be sure, the pandemic called for a multisector approach. It might be argued, therefore, that the COVID-19 experience, with its need for government to coordinate a response across sectors, argues for general-purpose education governance. Yet, both the Governor's and Mayor's responses to school closure and reopening demonstrated little to be gained from a general-purpose, centralized education governance structure. Indeed, thus far, the voices that most accurately identified key concerns and problems with distance learning and school reopening and effective methods for resolving them have been those of educators heeding the guidance of health experts and applying it to the realities of public schooling in New York. For example, much of the rush to reopen schools was in response to pressure from business interests based on economic concerns. Though it is true that in-person instruction is clearly preferable to distance learning, careful planning focused on the needs of students, staff, and parents was needed for successful reopening.

For purposes of equity, the larger issue is whether *any* governance arrangement can shield public education policymaking from forces associated with extreme segregation and an expanding wealth gap. Pressures toward education privatization — from wealthy philanthropists, the corporate sector, and government actors who share their goals — impact all forms of education governance.<sup>316</sup> As New York City's experience with mayoral control under both Mayor Bloomberg and Mayor de Blasio demonstrates, centralized control of the schools exposes school policymaking to wealthy business interests and corporate models. This is largely because general-purpose governance places education governance under the purview of

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315. See *supra* notes 258–268 and accompanying text.

316. See Gayle Greene, *Ed Tech Cashes in on the Pandemic*, AM. PROSPECT (Aug. 10, 2020), <https://prospect.org/education/ed-tech-cashes-in-on-the-pandemic/> [https://perma.cc/U3NW-PVKK].

executives who are more directly mindful of politics and more beholden to wealthy interests.<sup>317</sup>

To be sure, single-purpose governance is not immune to political forces. Yet, as the NYSED's response to COVID-19 demonstrates, single-purpose governance allowed for a more singular focus on key educational requirements for distance learning and for school reopening. The Regents and NYSED planning process and resulting guidance for school reopening was not drawn into the political storm that has accompanied the Governor's and Mayor's processes for implementation. The Governor's attempted overreach through his reimagined education proposal provides a glimpse of what general-purpose education might look like in New York. That perhaps provides a strong argument for preserving New York's anomalous single-purpose structure.

### CONCLUSION

If the COVID-19 pandemic has taught us anything, it is that governance matters. Leadership matters. Facts and science matter. Most of all, public health matters. And public education is crucial to public health, the economy, and human dignity and potential. COVID-19 also has demonstrated stark inequities in access to education, health care, and economic well-being. Such inequities indicate a failure of leadership and governance.

To address inequity and pursue equitable access to excellent education, governance matters. In New York, mixed educational governance models, a lack of understanding of school governance, political battles over decision-making power, credit for success and blame for failure, and the needs of multiple constituencies present a complex system that is often difficult to navigate. That system exemplifies several trends and tensions involving school governance that have significant implications for the future, particularly as related to privatization and the influence and interests of billionaires and lobbyists on education policymaking.

The New York State Board of Regents's decentralized, inclusive governance model at the state level was carried out by an education department independent of the Governor focused on education fundamentals and necessary supports in planning school reopening. Its approach to COVID-19 modeled an inclusive, fact-based, deliberative, and pragmatic approach that considered the needs of a variety of

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317. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2009) (noting the increasing impact of wealthy interests on politics).

schools and school districts across the State. By contrast, Governor Andrew Cuomo sought to use his emergency powers to venture into education policymaking. His vision for reimagining schools represented a top-down approach focused on the interests of the wealthy and well-connected. Under the Governor's general-purpose vision, public education appears to operate in service to the broader economic interests and opportunities, not as a valued public good in itself. The Governor's approach also strikes a more political tone.<sup>318</sup> Of perhaps most concern is the degree to which the Governor's apparent push for a general-purpose, centralized school governance regime under his purview would serve to smooth the way for private interests to have a greater hand in dictating public education policy. At the same time, COVID-19 reinvigorates questions about the appropriate federal role and responsibility for ensuring safe and equitable education access and whether education governance at every level might be reconsidered.

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318. This is particularly true regarding his interactions with Mayor de Blasio, including numerous clashes about the COVID-19 response and school reopening decisions related to it.