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School-Based Decision Making in Kentucky: Dawn of a New Era or Nothing New Under the Sun?

BY CHARLES J. RUSSO*

INTRODUCTION

For many years Kentucky ranked at or near the bottom in virtually every major index of academic performance.1 Driven by this realization and the recognition of the need to provide equitable funding as an essential factor in remedying the deplorable condition of public schooling in many parts of the Commonwealth, advocates of reform set into motion the forces that led to the enactment of the Kentucky Education Reform Act (“KERA”) of 1990.2

The initial impetus for KERA was provided by a coalition of sixty-six tax-poor school districts joined together as The Council for Better Education, Inc., along with seven other districts and twenty-two students from these districts.3 The Council prevailed upon former Governor Bert Combs, a partner in one of the state’s most prestigious law firms,4 to

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4 For excellent insight into the behind-the-scenes maneuvering in Rose, see Combs, supra note 1. See also Kern Alexander, The Common School Ideal and the Limits of
serve as lead attorney in its challenge to the adequacy of public education financing in Kentucky. Against all apparent odds, the Council’s suit against the Commonwealth succeeded. In *Rose v. Council for Better Education, Inc.*, the Kentucky Supreme Court not only declared the state-wide method of funding to be unconstitutional, but also struck down the entire system of public education. Accordingly, it ordered the General Assembly to enact a more equitable program. A year later, KERA was born.

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5 *Rose*, 790 S.W.2d at 190. *Rose* reflects the national trend of school finance-related litigation; similar suits have been brought in more than half of the states since the seminal state court case of *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (holding California’s method of education financing unconstitutional). The leading Supreme Court case is *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding the Texas system of education financing constitutional because of a lack of demonstrable discrimination based on economic status).

6 Again, the court was very direct:

Since we have, by this decision, declared the system of common schools in Kentucky to be unconstitutional, Section 183 [of the State Constitution] places an absolute duty on the General Assembly to re-create, re-establish a new system of common schools in the Commonwealth . . . . The system, as we have said, must be efficient, and the criteria we have set out are binding on the General Assembly as it develops Kentucky’s new system of common schools.

7 The language of the court was exceptionally blunt:

Lest there be any doubt, the result of our decision is that Kentucky’s entire system of common schools is unconstitutional. There is no allegation that only part of the common school system is invalid, and we find no such circumstance. This decision applies to the entire sweep of the system—all its parts and parcels. This decision applies to the statutes creating, implementing and financing the system and to all regulations, etc., pertaining thereto. . . . It covers . . . the whole gamut of the common school system in Kentucky.

8 For a thorough review of the background and development of KERA, see *Betty*
Among the innovations introduced by KERA are calls for new approaches in curriculum,\textsuperscript{10} finance,\textsuperscript{11} and school governance.\textsuperscript{12} The last of these changes, requiring the creation of school-based decision making ("S.B.D.M.")\textsuperscript{13} councils in virtually every school in the state, involves parents and educators in establishing policies to direct the daily management and operations of local schools.

The S.B.D.M. councils in Kentucky, each of which is typically composed of three teachers, two parents, and a school administrator, bring far-reaching power to the school site.\textsuperscript{14} The inclusion of parents in a partnership with professional educators is particularly important because it offers the involvement of an often under-utilized resource, parental knowledge of and influence over their children, in the quest to improve student academic achievement.\textsuperscript{15} An alliance of this nature with parents

\textsuperscript{11} Id. §§ 157.310 - .440.
\textsuperscript{12} Id. § 160.345 (Michie/Bobbs-Merrill Supp. 1994).
\textsuperscript{13} The terms school-based decision making ("S.B.D.M."), school-based management ("S.B.M."), and site-based management are used synonymously in educational literature. In addition, S.B.D.M. may also be identified as participatory management or shared decision making.
\textsuperscript{14} KY. REV. STAT. ANN. § 160.345(2)(a).
\textsuperscript{15} The need to improve student achievement is great; however, the data available on the academic outcomes associated with school-based decision making are inconclusive at best. The seminal, and perhaps most widely cited, study on point is Betty Malem et al., \textit{What Do We Know About School-Based Management?}, in 2 \textit{Choice and Control in American Education} 289 (William H. Clune & John F. Witte eds., 1990) (providing a comprehensive analysis of the literature on school-based management and concluding that although little quantitative data are available, indications are that S.B.M. has not succeeded in raising student performance levels). See also G. Alfred Hess, \textit{Midway Through School Reform in Chicago}, 1 Int'l J. Educ. Reform 270, 280 (1992) (noting that even though basic mechanisms are firmly in place, student achievement levels have not been affected significantly by the Chicago School Reform Act of 1988 despite its mandate to raise scores); John O'Neil, \textit{Taking Stock of School-Based Management: Reform Tactic Yields More Democracy, But Impact on Classroom Remains Unclear}, ASCD Update, Sept. 1994, at 4 (providing a brief discussion on S.B.D.M. in Kentucky, and noting that in light of KERA's accountability provisions, councils are aware of the need to produce higher student achievement); Brian Peterson, \textit{How School-Based Management is Fairing in Miami}, Educ. Wk., June 12, 1991, at 26 (maintaining, in a letter to the editor responding to paid advertisements in support of S.B.M., that although S.B.M. offers hope, standardized test scores of students in Dade County have not improved); David Peterson, \textit{School-Based Management and Student Performance}, Emergency Libr., Mar.-Apr. 1992, at 34-36 (finding that a synthesis of studies shows that overall, S.B.M. has not contributed to consistent or stable improvement in student performance, possibly due to piecemeal implementation, neglect of instruction, and lack of teacher control); Herbert J.
also has potential utility in considerations associated with gaining broad-based public support for education.\textsuperscript{16} As such, the S.B.D.M. dimension of KERA is perhaps the most radical aspect of the Act since it engages stockholders in policymaking which relates to the daily management of the schools.

Whether adopted statewide as in Kentucky,\textsuperscript{17} Hawaii,\textsuperscript{18} and Texas,\textsuperscript{19} or on a more limited basis as in Dade County, Florida,\textsuperscript{20} and Chicago, Illinois,\textsuperscript{21} S.B.D.M. continues to be one of the most popular

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Walberg & Richard P. Niemiec, \textit{Is Chicago School Reform Working?}, 75 PHI DELTA KAPPAN 713, 716 (1994) (noting little increase in student achievement since the implementation of local school councils in Chicago).


For information specifically on Kentucky, see JANE C. LINDLE, \textit{CHALLENGES AND SUCCESSES WITH INCLUDING KENTUCKY'S PARENTS IN SCHOOL-BASED DECISION MAKING: PILOT YEAR SCHOOL COUNCILS RESPOND} (1992) (discussing an exploratory non-random survey of 66 school councils during the 1991-92 year; two major research questions examined whether councils include only the required two parents or whether they involve more parents and efforts that have been made to address parental concerns; results indicated that while councils have made some efforts to address these issues more needs to be done; suggestions for improvement include encouraging parents to attend meetings and providing notice of meetings in as many ways as possible) and JANE C. LINDLE, \textit{THE IMPLEMENTATION OF THE KENTUCKY EDUCATION REFORM ACT: A DESCRIPTIVE STUDY OF THE PARENT INVOLVEMENT PROVISIONS} (1992) (discussing a follow-up study in which 211 of 385 (55\%) parents, teachers, and administrators responded with regard to their perceptions of the implementation of parental involvement; most councils appoint parents to committees; nearly all councils extend some form of invitation to parents to attend meetings and offer them the opportunity to speak; nearly all councils keep minutes and work from a set agenda; all groups are satisfied with their degree of participation on the councils with principals' scores being significantly higher than those of parents or teachers).

\textsuperscript{17} KY. REv. STAT. ANN. §§ 156.005 - .990 (Michie/Bobbs-Merrill 1992).

\textsuperscript{18} HAW. REV. STAT. § 296C 1-4 (Supp. 1992). Since Hawaii is organized as a single school district, the impact of school councils there may not be as far-reaching as in other locations.

\textsuperscript{19} TEX. EDUC. CODE ANN. §§ 21.930 - .931 (West Supp. 1994) (Chapter 21 is to be repealed in part on September 1, 1995).

\textsuperscript{20} \textit{See infra} notes 60-62 and accompanying text.

\textsuperscript{21} ILL. ANN. STAT. ch. 105, para. 5/34-1.1 to -21.6 (Smith-Hurd 1993). In addition,
governance options attempted in school systems throughout the United States as the decade-old reform crusade makes its way through the 1990s. As interest in S.B.D.M. continues to grow both nationally and in Kentucky, see infra note 65 and accompanying text.

22 As an example of the great interest in the phenomenon of local control of education, a search of the Educational Resources Information Center (June 8, 1994) revealed 956 entries under the search term “school based management” since 1966.

23 See, e.g., Jane L. David, School-Based Decision Making: Kentucky’s Test of Decentralization, 75 PHI DELTA KAPPAN 706 (1994) (a review of the implementation of S.B.D.M. supplemented by author analysis of her work with the Prichard Committee, an educational public interest group); see also JERRY J. HERMAN & JANICE L. HERMAN, SCHOOL-BASED MANAGEMENT: CURRENT THINKING AND PRACTICE (1993) (involving general work on S.B.D.M. with some descriptive material on developments in Kentucky); JOYCE P. LOGAN, SCHOOL-BASED DECISION MAKING: FIRST YEAR PERCEPTIONS OF KENTUCKY TEACHERS, PRINCIPALS, AND COUNSELORS (1992) (providing an attitudinal survey of selected principals, teachers, and school counselors on the implementation of S.B.D.M. in 69 of 70 secondary schools identified by the State Department of Education as participating in S.B.D.M. during the 1991-92 school year; 324 of 558 (58.1%) responded; 67% of respondents believed that S.B.D.M. improved the quality of decisions, and 82% expect this to improve even more in the following year; while 42.5% of respondents indicated that curricular changes have taken place, no overall major changes or trends in curriculum, classes, or programs were reported; 42.3% of respondents noted increased interaction between academic and vocational teachers; of the 40% who stated that significant changes in funding took place, almost twice as many reported decreased rather than increased funding; interestingly, vocational teachers reported representation of 84.6% on councils and 71.7% on committees, but only 53.5% of principals noted the presence of vocational education teachers on councils and 87.8% of principals noted the presence of vocational education teachers on committees); Jane C. Lindle & James Schrock, School-Based Decision-Making Councils and the Hiring Process, 77 NASSP BULL. 71, Mar. 1993 (an overview of S.B.D.M. provisions concerning hiring with a commentary on how they have been implemented by the council at one site); Jane L. David, School-Based Decision Making: Observations on Progress, in FIRST YEAR REPORTS TO THE PRITCHARD COMMITTEE (1992) (the first-year report of a five-year study on the implementation of S.B.D.M.; results indicate that S.B.D.M. was off to a strong start in June 1992 with almost 500 of the 1,366 schools engaged in S.B.D.M.; decision making was shared in four different styles: 1) by principals taking the lead and working with faculties to reach consensus, 2) by principals setting up a structure of committees that report to the principal and council, 3) by principals making decisions independently and involving the council only when challenged, or 4) by principals receiving input from council members and committees; among the benefits of S.B.D.M. are stronger ties between parents and the schools and the ability of councils to select staff; among the major hurdles that lie ahead are possible difficulties in the development of adversarial relationships between and among key players and finding a balance between state requirements and the authority of local councils); Jane L. David, School-Based Decision Making: Progress and Promise, in SECOND YEAR REPORTS TO THE PRITCHARD COMMITTEE (1993) (a second-year report as part of a five-year study indicating that the implementation of S.B.D.M. continues at a reasonably good pace; noteworthy findings
it has generated a voluminous quantity of educational,\textsuperscript{24} if not

\textsuperscript{24} See generally APPALACHIA EDUCATIONAL LABORATORY, 1991 Notes From the Field: Educational Reform in Rural Kentucky Special Feature: School-Based Decision Making 1 (providing an update on the implementation of S.B.D.M. in five rural school districts, including a survey of the attitudes of staff members in two districts indicating that a substantial majority of respondents are familiar with the S.B.D.M. component of KERA and that most have attitudes ranging from ambivalence to very positive feelings); PATRICIA MAGRUDER, CURRENT STATUS AND RECOMMENDATIONS: TRAINING OF SCHOOL COUNCILS FOR SCHOOL-BASED-DECISION MAKING (1991) (providing an overview of training available for school personnel and parents in the process of gearing up for involvement in S.B.D.M.); Linda Olasov, A Teacher's Response to a Systems Change, KY. CHILDREN'S RTS. J., May 1991, at 9 (providing an examination of issues raised by a teacher-turned-professor of education on the relationship between teacher preparation programs and school improvement, and the authority of school boards, superintendents, principals, and teachers under S.B.M.); Charles J. Russo et al., The Kentucky Education Reform Act and School Based Decision Making: A Not So Modest Governance Plan, REC. in EDUC. ADMIN. & SUPERVISION, Fall/Winter 1993, at 71 (providing an overview of the S.B.D.M. statute, its implementation, and implications for practice); STEFFY, supra note 9 (providing in part, an overview of the S.B.D.M. provisions of KERA); Eddy J. Van Meter, Implementing School-Based Decision Making in Kentucky, 78 NASSP BULL. 61, Sept. 1994 (a good overview of the state of S.B.D.M. three years after it was initially mandated; it includes a review of basic features of councils, their activities, and prospects for the future). See also Patricia J. Kannapel et al., Presentation at the Annual Meeting of the American Educational Research Association (Apr. 8, 1994) (providing findings which show that in only one of seven rural Kentucky schools studied did all council
legal,25 literature. However, a great deal remains to be investigated concerning the legal aspects associated with the decentralization of school organizations and the flattening out of district-wide educational bureaucracies in the wake of S.B.D.M. initiatives.26 The need for further legal analysis is especially true with regard to understanding legislative attempts to provide meaningful authority to councils in Kentucky along with strategies involving large-scale adoption of S.B.D.M. and the concomitant sharing of power between school boards and school councils.

In light of the dramatic changes ushered in by the S.B.D.M. provisions of KERA, this article focuses on Kentucky's unique statewide vantage. Part I provides a brief history of the national trend toward

members participate as equals in discussions and decision making; while teachers and principals dominated in three councils, parents in two of these have begun to play a stronger role; the remaining councils served as advisory groups to the principal and did not appear to be moving toward broader participation in decision making; councils practiced some shared decision making in areas such as instructional budgeting, scheduling, and curriculum; all councils participated in discussions about personnel and, to some extent, discipline; in other areas councils mostly rubber-stamped decisions made by the principal or teacher committees; support from the principal, leadership of council members, attentiveness to the need for parental involvement, and council training were factors that contributed to the effective implementation of S.B.D.M.).


decentralization that began in the mid-1960s in New York City and Detroit; it also presents an overview of S.B.D.M. as currently practiced in selected key locations throughout the country. This first section establishes a backdrop against which S.B.D.M. in Kentucky may be measured. Part II reviews the Kentucky S.B.D.M. statute in some detail. Part III considers emerging and unresolved issues involving the implementation of S.B.D.M. in the Commonwealth, with a special focus on relations between school boards and councils.

I. A Brief History of Local Control

In education, as in many other aspects of life, it seems that "there is nothing new under the sun."

In other words, proposals for reforming school governance over the past decade, with their attendant shift from traditional notions of centralized bureaucratic administration toward decentralized school-based management, are not entirely new. In fact, reformers espousing a move to school-based management and local control must do so cautiously in order to avoid the political pitfalls associated with the previous generation of school reform.

The first part of this section examines events in New York City and Detroit. Similar proposals in Chicago, Los Angeles, and Philadelphia, the other major metropolitan areas to have considered such an approach, did not progress beyond the discussion stage. The second half of this section looks at decentralization efforts ranging from county to city to statewide initiatives.

A. The First Generation of Decentralization

The move toward school decentralization and local control in the mid-1960s was largely an outgrowth of the disillusionment with the prospects for school desegregation more than a decade after the Supreme Court's monumental ruling in Brown v. Board of Education. At the

[27] Ecclesiastes 1:9. The concept that little changes over time is, thus, of ancient origins.


[29] 347 U.S. 483 (1954) (holding a state law requiring segregation of public schools based on race to be a violation of the Equal Protection Clause of the Fourteenth Amendment). For an examination of the situations in New York City and Detroit, respectively, see generally Jeffrey Mirel, The Rise and Fall of an Urban School
same time, decentralization was partially motivated by growing dissatisfaction with the increasing bureaucratization of public education.\(^\text{30}\) Despite the promise of Brown, the plight of minorities in urban schools throughout the nation deteriorated. As the condition of urban schools continued to worsen in New York City and Detroit, which at that time were the largest and fifth-largest school districts in the nation,\(^\text{31}\) respectively, activists\(^\text{32}\) in those cities looked to community control as a means of providing parents with a greater voice in determining the future of their schools and children.

1. **New York City**

The struggle to desegregate New York City's public schools received little support from the long-entrenched bureaucracy at the local board of education, even after a formal desegregation plan was announced.\(^\text{33}\) Yet, by the spring of 1967, the move toward decentralization had gathered momentum with the creation of three demonstration districts which experimented with local control of the schools.\(^\text{34}\) However, when the local board of the district in the Ocean Hill-Brownsville section of Brooklyn, ordered the involuntary transfer of nineteen teachers, the district became the center of a maelstrom. The ensuing dispute in Ocean Hill-Brownsville led to a bitter two-month strike during which more than ninety percent of the educators and ninety-five percent of the city's public


\(^\text{31}\) Ornstein, supra note 28, at 209.

\(^\text{32}\) Activists in Detroit, New York City, and other locations included a wide mix of groups, such as representatives from the Black Power movement, from the business community, and from church groups. See Robert C. Maynard, Black Nationalism and Community Schools, in Community Control of Schools 100 (Henry M. Levin ed., 1970); Ornstein, supra note 28, at 238-40.

\(^\text{33}\) Zimet, supra note 30, at 6-7.

school students were absent. The discussions of the proposal that
eventually led to the decentralization of New York City’s public schools
began in the midst of this turmoil.

The Decentralization Act of 1969, a sixty-four page bill, not
only eliminated the three demonstration districts but divided the New
York City Board of Education into thirty-one local community school
districts. The school boards in these local districts had the power to
hire superintendents who, in turn, were given appropriate administrative
authority. In addition, the local boards maintained significant power over
personnel, curriculum, and budget in elementary and junior high
schools. Senior high schools remained within the purview of the New
York City Board of Education.

The power of local boards concerning personnel was limited to a
degree, since the city’s board of examiners retained the right to determine
the fitness of candidates for teaching and administration. Local boards
had the authority to select, from competitive eligibility lists, the educators
assigned to them by the chancellor of the New York City public schools;
to the extent possible, the chancellor was to honor specific personnel
requests from local boards. Perhaps the greatest curricular modification
resulting from decentralization was the phasing out of the city’s official

35 Zimet, supra note 30, at 10. For a more detailed examination of the situation in
Ocean Hill-Brownsville, see Rhody A. McCoy, *The Formation of a Community
Controlled School District*, in *Community Control of Schools* 169, 173 (Henry M.
Levin ed., 1970). In addition to the Ocean Hill-Brownsville conflict, the circumstances
surrounding the creation of the Intermediate School 201 Complex in Harlem, in upper
Manhattan, were accompanied by considerable controversy. The third location, Two
Bridges, on Manhattan’s lower east side, did not experience the same degree of difficulty.
For a detailed study of these two districts as well as Ocean Hill-Brownsville, see Gitell
et al., *Local Control in Education*, supra note 34 and Gitell et al., *School
Boards and School Policy*, supra note 34.

36 La Noue & Smith, supra note 28, at 166-67; see also Ornstein, supra note 28,
at 232-72 (discussing school reform efforts in metropolitan U.S. cities); Zimet, supra note
30 (discussing school decentralization in New York City).

37 The Act is now codified. N.Y. Educ. Law § 2590 (McKinney 1993).

38 La Noue & Smith, supra note 28, at 182.

39 Ornstein, supra note 28, at 85, 233. New York City expanded to its present 32
local community school districts in 1973. Id.


41 N.Y. Educ. Law § 2590-g (McKinney Supp. 1994); Zimet, supra note 30, at 33.

42 The board of examiners has, with considerable controversy, since been disbanded.
N.Y. Educ. Law § 2569 (McKinney 1993); see Michael Newman, *Win in Legislature,
Setback in Court for Fernandez*, Educ. Wk., Aug. 1, 1990, at 8; Chris Hedges,
Chancellor Rebuffs Examiners, Halting Test For Supervisors, N.Y. Times, July 5, 1990,
at A14; Sam H. Verhovek, Accord Reached to Abolish Teacher-Testing Board, N.Y.
policy of tracking and then permitting local boards to make their own decisions with regard to the appropriate placement of students. Various local boards also had extensive budgeting authority, including “the right to allocate funds as they deemed necessary” and “to take bids of up to $250,000 for annual repairs to schools”; the central board controlled most other financial matters. As an additional safeguard, from the perspective of the central office, the Chancellor retained the authority to discipline local boards or their members for official misconduct as well as to determine qualifications for office.

2. Detroit

The April 1966 walkout by students in Detroit’s largely black Northern High School dramatically focused attention on the chasm...
between the programs and services available to minority students and those available to white students. Little more than a year later, beginning on July 23, 1967, six days of catastrophic race riots exacerbated these tensions and further polarized an already dangerously divided city.

It seems clear that at least some of the underlying causes for unrest in Detroit stemmed from the disparity in the quality of public education available for minority students. Moreover, just as in New York, proposed solutions differed dramatically. School leadership in Detroit held fast to the notion that more money would be the cure, while black activists and community leaders, following the example set in Ocean Hill-Brownsville, successfully campaigned for local control.

On January 1, 1971, Detroit decentralized into eight regional school districts, each with its own board. As in New York City, these regional boards had authority over curriculum, personnel, students, and financing. However, in order to help the regional boards, the central office retained authority to coordinate personnel and other services.

Local control, whether in New York City or Detroit, as radical as it may have been at that time, did not provide as much authority to local sites as is provided today, since centralized boards retained significant control over the daily operations of the schools, especially with regard to personnel. Thus, the current trend is to make an even more dramatic break from centralized to local control over the schools.

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47 MIREL, supra note 29, at 300.
48 During the six days of rioting, 43 people were killed, more than 1,000 were injured, and 7,231 were arrested. In addition, 2,500 stores were damaged, looted, or destroyed; the total property damage in the city was estimated at $80 to $125 million. Id. at 311.
49 Id. at 312; see also LA NOUE & SMITH, supra note 28, at 116-19 (analyzing the lack of integration in Detroit schools and the difference in quality between urban and suburban schools).
50 In an attempt to address disparities in Detroit's public schools, the resulting litigation reached the Supreme Court. Milliken v. Bradley, 418 U.S. 717 (1974) (holding that absent findings that predominately white suburban school districts had failed to operate unitary systems or had acted in a manner creating racial segregation in other districts, or a claim that their boundaries were established to foster segregation, the suburban systems could not be ordered to merge with the predominately minority urban district); Milliken v. Bradley, 433 U.S. 267 (1977) (ruling that the state could be ordered to share in the cost of implementing a desegregation order where school children had been subjected to past acts of de jure segregation).
51 ORNSTEIN, supra note 28, at 221-23.
Almost two decades after local control became a reality of sorts in New York City and Detroit, an iteration of the phenomenon emerged nationally in differing locations. Those currently involved in building-level decision making, earlier referred to as decentralization, include parents, teachers, principals, community members, support staff, and students.

The scope and extent of school-based decision making depend upon which of two broad categories of control a state exerts over education. Florida, for example, operates under a “home rule” statute which delegates a great deal of authority to local school districts while retaining little power at the state level. Therefore, Florida districts such as Dade County have the jurisdiction to implement plans granting significant discretion to S.B.D.M. councils. On the other hand, states such as Texas

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Further, at least 44 state departments of education have mandated or permitted voluntary school-based decision making programs. See Janice L. Herman & Jerry J. Herman, A State by State Snapshot of School-Based Management Practices, 2 INT'L J. EDUC. REFORM 256, 260 (1993).

55 See, e.g., ROGERS, supra note 29, at 475 (extensively discussing decentralization in New York City).

56 Id.

57 FLA. STAT. ANN. § 230.03(2) (West 1993).
regulate school districts closely, leaving them to operate within narrowly defined boundaries. Hence, absent specific empowering legislation, the power of a council in a state with the form of control implemented in Texas is limited.

In order to survey the range of power available to councils throughout the nation, S.B.D.M. in three different locations with an assortment of configurations and at varying levels of implementation are examined. Dade County, acting pursuant to local board policy, is the earliest of the three locations to have moved to S.B.D.M. as part of the initial thrust to local governance of the schools that began in the mid-1980s. The Chicago School Reform Act of 1988, enacted little more than a year earlier than KERA, has explicit statutory S.B.D.M. provisions not unlike those in Kentucky. Finally, Texas, the most recent of the three locations to move to S.B.D.M., has a statute that is significantly less prescriptive than those in Chicago or Kentucky; however, based on initial reports, the Texas statute appears to offer the least chance for the development of long-term reform initiatives.

1. Dade County, Florida

In 1986 the school board of Dade County, the fourth largest public school system in the nation, with the strong backing of the local teachers' union, unanimously voted to create school councils in the hope of improving educational outcomes for students. This decision opened the way for shared decision making among elected teacher, student, staff, and parent representatives; principals; and union stewards. After ensuring that two-thirds of a school's faculty voted in favor of submitting a plan to form a council, a ten-member joint task force, co-chaired by the superintendent of schools, Joseph Fernandez, and the executive vice president of the teachers' union, Pat Tornillo, selected thirty-two of the fifty-three proposals for implementation in 1987.

Under the provisions of Dade County's plan, councils were not standardized. Consequently, within limitations, councils have latitude over the extent of the power they wish to exercise. Councils typically have

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55 For a more in-depth discussion of the situation in Texas, see infra notes 79-83 and accompanying text.
assumed the ability to direct discretionary spending in the schools, to make curricular modifications, and to implement differentiated staffing, but not to dismiss school personnel.62 As in other locations, Dade County councils continue to operate, but student achievement has not shown any marked increases.63

2. Chicago, Illinois

In 1987, then Secretary of Education William Bennett labeled the public schools in Chicago as the “worst in the nation.”64 Although supporters might have argued that they were not as bad as critics charged, it was clear that Chicago’s public school system was not performing very well.65 Consequently, the Illinois General Assembly enacted the Chicago School Reform Act of 1988, which went into effect May 1, 1989.66 The goals of this innovative act are to raise student achievement levels to national norms within five years, to reallocate resources from administration to instruction, and to establish Local School Councils (“L.S.C.’s”) in an attempt to reform the system by changing the way individual schools operate.67

The eleven-member L.S.C.’s are comprised of a school principal and ten elected representatives.68 Elected members include two teachers from

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62 Dreyfuss, supra note 60, at 12-14.
63 See, e.g., B. Peterson, supra note 15, at 26; see also Joseph Berger, Miami Finds Mixed Results in Fernandez’s School Plan, N.Y. TIMES, Mar. 9, 1991, at 25 (stating that students’ mathematics and reading scores decreased under school-based management). Meanwhile, education reform continues to forge ahead in Dade County. See Peter Schmidt, Dade to Abandon At-Large Election of School Board, EDUC. WK., May 11, 1994, at 5.
64 See Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283, 1317 (Ill. 1990).
66 ILL. ANN. STAT. ch. 105, paras. 5/34-2.1, 2.3 (Smith-Hurd 1993).
67 G. Alfred Hess, Midway Through School Reform in Chicago, 1 INT’L J. EDUC. REFORM 270, 274 (1992). Along with L.S.C.’s, subdistrict councils and a school board nominating committee were established. Among the duties of the eleven subdistrict councils, each of which include one parent or community member from L.S.C.’s, are evaluating the performance of the subdistrict superintendent and determining whether his or her performance contract is to be renewed. ILL. ANN. STAT. ch. 105, para. 5/34-2.5 (Smith-Hurd 1993). The nomination committee, comprised of eleven members elected by the subdistrict councils and five persons appointed by the mayor, chooses slates of three from which the mayor must select one to form a fifteen-member board of education. Id. para. 5/34-3.1.
68 Council elections have been controversial, to say the least. In fact, shortly after the
the school (also known as an attendance center), six parents of children currently enrolled in the school, and two community residents from the area served by the school; in addition, a nonvoting student representative serves a one-year term on the L.S.C. in each high school.69 Elected members serve for two-year terms.70 As in Kentucky, school councils select a principal. However, unlike in Kentucky, an L.S.C. has the authority to appoint a principal to a renewable four-year term or to fill a vacancy, and it can remove an individual for cause. An L.S.C. also has the capacity to develop specific performance criteria for principals.71

In addition to their authority as it relates to principals, and like their counterparts in Kentucky, L.S.C.'s have far-reaching powers. They approve a school improvement plan,72 make recommendations to the

Act went into effect its election provisions were struck down as violative of equal protection and of the principle of “one person, one vote,” since certain community residents who did not have children in the public schools were ineligible to vote for council members. Fumarolo, 566 N.E.2d at 1283. New election procedures were put into place effective January 11, 1991. ILL. ANN. STAT. ch. 105, para. 5/34-2.1, 2.3 (Smith-Hurd 1993). Yet questions continue to be raised about council elections. See Ann Bradley, Council Votes Spur New Round of Questions in Chicago, EDUC. WK., Nov. 3, 1993, at 1, 14-15.

69 ILL. ANN. STAT. ch. 105, para. 5/34-2.1(a), (m) (Smith-Hurd 1993).
70 Id. para. 5/34-2.1(d)(ii).
71 Id. para. 5/34-2.3.3.

A related issue beyond the scope of this article for a variety of reasons, not the least of which is the absence of teachers' unions as a major factor in Kentucky other than in Louisville, is the potential conflict between teachers qua management and the rights of educators to unionize vis-a-vis Yeshiva. In NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), a bitterly divided Court held that since full-time faculty at Yeshiva University participated in decisions about the tenure and or promotion of their colleagues, they were “managers” within the meaning of the National Labor Relations Act, 29 U.S.C. §§ 152(2)(3), 153(2)(11) - (12) (1935). Consequently, the Court held that the faculty members were not entitled to organize and bargain collectively with the university.


72 ILL. ANN. STAT. ch. 105, para. 5/34-2.3.7 (Smith-Hurd 1993).
principal concerning textbook selection and curricular matters, advise the principal on attendance and disciplinary policies, evaluate the allocation of school personnel, make recommendations to the principal about personnel, and request professional development from the central board. After four years of this reform initiative, the wave of change clearly is underway in Chicago's public schools, but, as in Dade County, little progress has been made toward reaching the primary goal of increasing student outcomes.

3. Texas

A year after KERA was enacted, the Texas legislature, as part of school finance reform, passed new laws mandating that local school districts develop and implement plans for teacher and parental participation on committees dedicated to some form of site-based decision making. Although not as prescriptive as Kentucky’s provisions, since, for example, no deadlines exist by which committees need to be established, the statute does provide committees with broad authority to act on “goal setting, curriculum, budgeting, staffing patterns, and school organization.” Consequently, just as in Dade County, Florida, site-based committees in Texas are likely to be tailored to the unique needs of each school. Unlike in Kentucky, Texas committees may include community representatives encompassing individuals from the business sector. However, since the law was enacted as part of finance reform rather than a broader-based effort, and given the tone of interpretations issued by the Texas Association of School Boards and the State Board of Education, it appears that significant reform at the grassroots level is not likely to occur soon in Texas. Perhaps this is so because the Texas reform law was initiated by the legislature and not the citizenry.

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73 Id. para. 5/34-2.3.5.
74 Id.
75 Id. para. 5/34-2.3.8.
76 Id. para. 5/34-2.3.9.
77 Id. para. 5/34-2.3.10.
80 Id. § 21.931(b)(3).
81 For a discussion of early efforts at implementation in Texas, see Amy M. Praskac & Richard M. Powell, A First Look at Site-Based Decision Making in Texas School Districts (1993).
4. Conclusions

Councils in Florida's Dade County, Chicago, and Texas are similar to their counterparts in Kentucky insofar as all engage parents and teachers in differing levels of control over the governance of local school sites. However, those locations have provisions for greater involvement by the local community and school population than is present in Kentucky. Yet, with the exception of Chicago's grant of authority relating to the employment status of principals and local superintendents, none of the other plans bestows as much power to a council as does Kentucky.

II. S.B.D.M. in Kentucky: A Statutory Analysis

The most comprehensive statewide reform initiative involving local control is currently underway in Kentucky. The move toward S.B.D.M. in the Commonwealth has been spurred by the wave of school restructuring initiated by the National Commission on Excellence in Education's seminal report, A Nation at Risk, and the plethora of other similar documents of the 1980s. This push toward school reform continues unabated in America 2000: An Education Strategy published during the Bush presidency, and by President Clinton's support for the recently enacted Goals 2000. Although the jury will be out for some time on the long-term effects of S.B.D.M., the reality is that the implementation of S.B.D.M. is proceeding at a brisk pace. Consequently, this article now examines the key provisions of the S.B.D.M. statute in Kentucky.

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A. Council Formation

By July 1, 1996, all public schools in Kentucky are required to establish S.B.D.M. councils. Limited exceptions apply to districts with only one school; in addition, schools which have performed above their threshold level of testing accountability, as determined by the State models of S.B.D.M. 702 KY. ADMIN. REGS. 3:245 (1993) provides the school council allocation formula.

Additionally, the Department of Education promulgates Program Reviews ("PRs"). Although these PRs are non-binding, they represent the perspective of the Department of Education, often in conjunction with interpretations of the Attorney General's office, and should therefore be given due consideration.

At its May 18, 1993 meeting, the Kentucky State Board for Elementary and Secondary Education voted unanimously to allow flexibility in the selection of a chair for S.B.D.M. councils. See Minutes of May 1993 Agenda Book for the Meeting of the Kentucky State Board for Elementary and Secondary Education, at 12.

Subsequently, on October 6, 1993, this decision was promulgated as PR No. 93-S.B.D.M.-124, Alternative Chair Person for School-Based Decision Making, under which S.B.D.M. councils are given the latitude to elect a chair of their choice. On the same date two additional Program Reviews were released. PR No. 93-S.B.D.M.-123, School Council Policy on Assignment of Instructional and Non-Instructional Staff Time, clarifies the role of S.B.D.M. councils as they make faculty and staff assignments. PR No. 93-S.B.D.M.-125, School-Based Decision Making Council and Committee Meetings Open to the Public, explains the application of § 61.810 of the Kentucky Revised Statutes, the open meetings law, to meetings of councils and their committees as duly constituted public agencies. Additionally, PR No. 93-S.B.D.M.-105, Suggested Hiring Procedures in S.B.D.M. Schools, offers guidance to superintendents, principals, and councils as they go about the task of filling faculty and staff vacancies. PR No. 93-S.B.D.M.-119, Best Practices/Recommendations Regarding School-Based Decision Making and Exceptional Children Services, clarifies the role of S.B.D.M. councils as they relate to students, programs, and faculty who are involved in special education. PR No. 93-S.B.D.M.-120, Increasing Minority Participation on School Councils, provides suggestions and strategies to increase minority participation in S.B.D.M. However, given recent changes to § 160.345 of the Kentucky Revised Statutes, this PR is apparently superfluous. Finally, PR No. 93-S.B.D.M.-129, Best Practices/Recommendations Regarding School-Based Decision Making and Preschool Programs, Including Collaborative Head Start Programs, clarifies the role of councils in relation to KERA-funded preschool services and federally funded Head Start programs.

89 As of September 19, 1994, 782 S.B.D.M. councils are in operation; six schools are exempted since they are the only schools in their districts. Kentucky has a total of 1,363 public schools. Telephone Interview with the Office of Charles W. Edwards, Director, Kentucky's Division of School Based Management (July 27, 1994) (discussing data from KENTUCKY DEP'T OF EDUC., SCHOOL BASED DECISION MAKING SCHOOLS THAT ARE OPERATING IN 1993-94, a list of schools updated as new information becomes available.) For comparative purposes, it may be interesting to note that in a published copy of the list, issued on April 15, 1994, 717 councils, serving 729 schools, were in place. Id.
Department of Education, may petition to be released from S.B.D.M. After July 13, 1990, schools were free to voluntarily initiate S.B.D.M. by a two-thirds affirmative vote of their faculties. No later than January 31, 1991, each local school board was required to have adopted policies regarding S.B.D.M. By June 30, 1991, at least one site in each district was mandated to have a council in place; if none of the schools in a district voted to initiate S.B.D.M., the local board was required to "designate a school of its choice." No provisions in the law afford parents the opportunity to initiate a move to school-based decision making.

Councils ordinarily are composed of six members: three teachers, two parents, and a school administrator. The statute calls for the principal or head teacher to chair a council, but an advisory opinion from the State Department of Education permits another member of a council to serve in this capacity. A school's classified staff members (non-teachers) are ineligible to serve on a council but may participate, along with parents and other interested individuals, on any committees a council chooses to establish.

Subject to provisions for minority involvement, a council may increase in size as long as it maintains proportionate representation. Under recently enacted modifications, a council in a school with eight percent or more minority students enrolled must have at least one

90 If a school performs above its threshold level of accountability, it must be released from the requirement of maintaining a S.B.D.M. council upon filing a petition with the local board. KY. REV. STAT. ANN. § 160.345(4).
91 Id. § 160.345.
92 Id. The initial phase of implementation met with substantial compliance, as 140 of the state's 176 school boards were able to name at least one school that voluntarily had voted to adopt S.B.D.M. Kentucky Department of Education, Division of School Based Decision Making (1992).
93 KY. REV. STAT. ANN. § 160.345(2), (5).
94 Id. § 160.345(2)(b).
95 See supra note 88 (discussing PR No. 93-S.B.D.M.-124).
96 KY. REV. STAT. ANN. § 160.345(2)(d). Committees are intended to serve in an advisory capacity to councils; since students and community members are not explicitly precluded from participation on committees, it appears that they may serve in this capacity. Id.
97 Id. § 160.345(2)(b)(2).
98 Initial discussions of the move to develop guidelines to increase minority participation on school councils were held as part of the May 18, 1993, meeting of the Kentucky State Board for Elementary and Secondary Education. See Minutes of May 1993 Agenda Book for the Meeting of the Kentucky State Board for Elementary and Secondary Education, at 11-12.
minority representative. If such a council does not include a parent of a minority student, then, in a timely fashion, the principal is to call a special election at which a minority parent is to be elected.\(^9\) In addition, minority teachers may select one of their members to serve on a council; if a school has only one minority teacher, then the term limitation does not apply.\(^10\)

Where a faculty has no minority members, teachers can elect an additional member of the council.\(^11\)

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See also Staff Note, Kentucky Department of Education, May 1993, which reported on this action. The first attachment to this Staff Note indicated that based on a June 1992 Department of Education survey, 540 schools in Kentucky reported a minority student population of less than 5%, 392 schools reported a minority student population of over 8%, 328 schools reported a minority student population of over 15%, 263 schools reported a minority student population of over 20%, and 143 schools reported a minority student population of over 30%. Even so, it is not clear exactly where the 8% figure originated.

\(^9\) Included in PR No. 94-S.B.D.M.-136 are discussions addressing three aspects associated with minority representation on councils. First, it notes that the 8% representational figure is to be determined according to the enrollment of the previous October 1. Thus, for example, if an election were necessary in September 1994, it would be based on October 1993 enrollment. Second, a school with a minority principal satisfies the minority representation provision regardless of whether a minority parent or teacher is elected. This second interpretation is questionable to the extent that insofar as the provisions for minority representation appear to focus on the need for parental involvement, permitting a principal, who may not even be a member of the local community, to satisfy the minority provision does not appear to be within the spirit of the legislation. Third, the election of minority representatives applies equally to councils with the standard 3-2-1 model and those with alternative configurations.

However, the important question of whether all parents or only minority parents are eligible to vote for a minority representative has yet to be discussed fully. This lack of clarity has lead to at least one dispute. See Lucy May, Cassidy School Decision Draws Challenge, LEXINGTON HERALD-LEADER, June 22, 1994, at B1, B2 (relating to approval of a plan that would allow white parents to vote for a minority representative); Lucy May, Cassidy Plan Awaits Attorney General’s Ruling, LEXINGTON HERALD-LEADER, Aug. 18, 1994, at C1, C3 (reporting that the Department of Education’s chief legal counsel is of the opinion that the state school board probably does not have the authority to approve a plan to permit white parents to help elect a minority parent to a school council; an official answer is not yet forthcoming).

The Office of the State Attorney General did, in fact, release an opinion which stated that the plan at the Cassidy school which proposed to permit all parents to vote in a special election to elect minority representatives conflicts with the intent of § 160.345(2)(b) of the Kentucky Revised Statutes. The Attorney General’s Opinion also stated that the provision of the plan which called for the holding of the special election on the same night as the regular election violated the same section of the statute. 94 Op. Att’y Gen. 60 (Sept. 7, 1994).

\(^10\) In the unlikely situation that neither eligible minority parents or teachers in a school are willing to serve on a council, the principal should document this and the seat would be left unfilled. PR No. 94-S.B.D.M.-136.

In response to concerns about frequent turnover and lack of continuity, the legislature provided that once elected, a council may set different lengths of terms for subsequently elected councils, but that these terms cannot exceed two years or be consecutive. Thus, a council can establish classified membership with some members serving one-year terms and others filling two-year periods. At the same time, it appears that councils are not precluded from maintaining one-year terms to which individuals can be re-elected.\footnote{126}{Id. \S 160.345(2)(b).}

Teacher representatives are selected by a majority vote of their peers.\footnote{127}{Id.} Parent members are elected by parents of students currently enrolled in a school in an election conducted by the parent and teacher organization or the largest organization of parents formed to elect council members.\footnote{128}{Id. Concerns over fees for membership in any parent and teacher organization, which could possibly have been construed as a poll tax in violation of the Twenty-Fourth Amendment to the United States Constitution, were obviated by recent changes in the statutory language.} However, parents who are employed by the school board, are members of the board, or are married to a member of the board or one of its employees are ineligible to serve on a council.\footnote{129}{Id. \S 160.345(2)(a).}

Although not addressed explicitly in the statute, it appears that parents are eligible to serve on councils only while they have at least one child enrolled in a school. Thus, for example, a parent whose child will be entering kindergarten in August, 1994, is ineligible to vote in the council elections conducted in the spring, creating the apparently anomalous situation wherein a parent can elect a representative at a school where his or her child is not in attendance while not having a say in the selection of a parent member of the council where the child is actually enrolled.\footnote{130}{Id. \S 160.345(2)(a).}

In a related issue, and in light of the long-standing concerns associated with nepotism and favoritism in the Commonwealth, the two anti-nepotism statutes were amended pursuant to the enactment of KERA. Section 160.180 of the Kentucky Revised Statutes prohibits individuals whose family members are employed by the school district from being re-elected; it includes an exception for board members who were in office on July 13, 1990, and whose relatives were not initially hired during their tenure. Section 160.380 places restrictions on the power of superintendents to hire their own relatives or relatives of school board members; it also prohibits a principal from hiring relatives, while granting the same exemptions as in \S 160.180.

The State Department of Education has also promulgated a regulation and policy review. 701 KY. ADMIN. REGS. 5:075 (1992) requires superintendents to file an annual notice of compliance with the anti-nepotism provisions. PR No. 93-DLES-116, Anti-Nepotism Provisions, alerts all superintendents to the change in the regulations; it also provides a brief review of the filing requirements.

Shortly after the changes in the law went into effect, a challenge to their validity was raised by two local board members who had relatives employed by the local school board.
Once a council has been elected, it has a reasonable time within which to establish itself; this step is accomplished by the chair formally convening the first meeting of the council. Among the council’s initial responsibilities are determining whether it will have committees\textsuperscript{106} and setting a schedule and agenda for meetings.\textsuperscript{107} All council meetings are subject to the state’s open meetings law.\textsuperscript{108} Sound practice dictates the adoption of bylaws to regulate council activities.\textsuperscript{109}

Before examining council functions, and in light of nascent conflicts with school boards, the limitations on the authority of S.B.D.M. councils must be recognized. School boards retain their general powers and duties to establish and operate schools,\textsuperscript{110} along with such traditional functions as setting tax rates and formulating a school budget,\textsuperscript{111} providing student transportation,\textsuperscript{112} and planning and building new facilities.\textsuperscript{113}

Council authority is also limited in five other areas. A council may not violate state or federal laws or regulations; may not place the health or safety of faculty, staff, or students at risk; may not unreasonably risk liability of a lawsuit; may not exceed its available resources; and may not breach existing contracts with school personnel or outside providers of

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In Chapman v. Gorman, 839 S.W.2d 232 (Ky. 1992), the Kentucky Supreme Court upheld the constitutionality of the laws. The court ruled that the state’s interest in rooting out nepotism justified incidental limitations on the First Amendment, equal protection, and employment rights of the affected individuals; the court also denied a challenge based on overbreadth. \textit{Id.} at 234. For a more detailed discussion of this case and its implications, see Charles J. Russo & Betty E. Steffy, \textit{The Chapman v. Gorman Decision and its Impact on Kentucky’s School Boards}, Ky. Sch. Boards Ass’n J., Jan. 1993, at 33.


\textsuperscript{107} \textit{Id.} § 160.345(e).

\textsuperscript{108} \textit{Id.} §§ 160.345(f), 61.805 - .850.

\textsuperscript{109} For example, the statute maintains that the principal “...shall select personnel to fill vacancies, after consultation with the school council ....” \textit{Id.} § 160.345(i). However, as the law does not spell out the meaning of “consultation,” councils would be well advised to set their own standards in their bylaws. In addition, it would be helpful if bylaws included directives on how a council should reach decisions. In other words, deciding in advance whether a council will act on a majority vote or by consensus and setting as many ground rules as possible early on should help avoid friction at a later date. Further, as a practical matter, bylaws should be re-evaluated and updated at regular intervals, such as during the summer, as this routine will help to keep them current. Changes should not be made in the midst of a controversy but should be decided upon after a situation has returned to a more normal course of events, for this approach should allow for a more rational decision making process.

\textsuperscript{110} \textit{Id.} § 160.290.

\textsuperscript{111} \textit{Id.} §§ 160.460, .470.

\textsuperscript{112} \textit{Id.} § 160.305.

\textsuperscript{113} \textit{Id.} § 162.060.
goods and services. Needless to say, a council may not exceed the authority delegated to it by the school board within these parameters, but a board is free to grant a council any other authority permitted by law.

B. Council Responsibilities

Councils have or share in sixteen governance functions. Although the councils' responsibilities are not fully defined, it appears that at least eight of the functions set forth herein fall within the sole purview of the councils. In light of the authority vested in S.B.D.M. councils, two of the most far-reaching powers shared by the councils, filling vacancies for school personnel and selecting textbooks and instructional materials, are explored in some detail.

114 704 KY. ADMIN. REGS. 7:110(2) (1993). Although this regulation expired on April 15, 1994, it is the author's opinion that these limitations apply to a council's authority.

115 KY. REV. STAT. ANN. § 160.345(4). This same subsection of the statute also mandates that the "[t]he board shall make available liability insurance for the protection of all members of the school council for liability arising in the course of pursuing their duties as members of the council." For example, while a council's power is limited to determining how school space is used during the school day, a school board is apparently not precluded from granting councils the authority to determine how school space and facilities are to be made available after school hours, such as relating to access to athletic facilities. Id.

116 Section 160.345 of the Kentucky Revised Statutes provides that councils share authority to set school policy consistent with district board policy, to provide an environment to enhance the students' achievement and to meet performance goals mandated by KERA, id. (2)(c); to determine, within the parameters of available funds, the number of persons to be employed in each job classification, id. (2)(g); to select textbooks, instructional materials, and determine student support services, id. (2)(h); to select a new principal and to consult with the principal to fill vacancies, id. (2)(i); and to develop procedures, consistent with local board policy, for determining alignment with state standards, technology utilization, and program appraisal, id. (2)(j)(9).

As long as they act within the boundaries of the law, councils have the sole authority to determine the curriculum, including needs assessment and curriculum development, id. (2)(j)(1); to assign instructional and noninstructional staff time, id. (2)(j)(2); to assign students to classes and programs within the school, id. (2)(j)(3); to set the schedule of the school day and week, subject to the calendar established by the local school board, id. (2)(j)(4); to determine the use of school space during the school day, id. (2)(j)(5); to plan and resolve issues relating to instructional practice, id. (2)(j)(6); to select and implement discipline and classroom management techniques, id. (2)(j)(7); and to select extracurricular programs and determine policies relating to student participation, id. (2)(j)(8).

117 KY. REV. STAT. ANN. § 160.345.

118 The duties listed in § 160.345(j)(1) - (8) refer to the policymaking authority of the councils.
S.B.D.M. councils are responsible for determining the number of school personnel to be employed in each job classification. In doing so, they must act within the parameters of available funds, and they cannot violate existing contracts by recommending the transfer or dismissal of tenured employees. Councils are free to act when an individual leaves or retires or when they deem it necessary to create a new position, although that freedom is not without limits. For example, if a school operating under S.B.D.M. has an opening, and a tenured teacher from another site in the district is subject to an involuntary transfer due to a decline in student enrollment, then the school may have no choice but to hire that teacher.

When a vacancy occurs, the superintendent of schools is required to provide the principal with a list of qualified applicants. Although no authoritative interpretation has been forthcoming, apparently the role of the superintendent is to determine whether applicants are qualified by virtue of certification and experience, and not to make the final decision about which candidate is best suited for the position. After consultation with the council, the principal makes the final decision about whom to hire.

The S.B.D.M. council exercises perhaps its most significant authority when a principalship becomes vacant since it alone has the power to choose as principal. In addition, pursuant to PR No. 93-S.B.D.M.-105, Suggested Hiring Practices in S.B.D.M. Schools, the power of a council to fill a vacancy may be limited by a number of factors. Among these may be the existence of a collective bargaining agreement, a voluntary or judicially mandated affirmative action plan, an employee returning from a leave of absence, a court-ordered reinstatement of an employee, or the demotion of an administrator who has the right to a placement in a classified position.

This issue has been raised in at least one circuit court action. See Lucy May, Elsmere Principal Search Shows Loopholes in KEA, LEXINGTON HERALD-LEADER, Aug. 28, 1993, at A1, A8 (Kenton County Circuit Court Judge Raymond E. Lape denied an injunction by the superintendent to order the council to select a principal immediately; even so, the previous principal, who had been demoted to a teaching position after receiving her first and only negative evaluation in more than 20 years as an educator in the district, was not reinstated to her position. An interim principal, named by the superintendent, is now in place at Dorothy Howell Elementary School).

The need for consultation notwithstanding, the final decision rests with the principal and cannot be delegated to a vote of the council. Anciotal though it may be, based on the author's experiences working as a provider of Professional Development for school councils located in member districts of the Central Kentucky Education Cooperative, councils have had no difficulty in recognizing the authority of the principal to act in this regard.

119 KY. REV. STAT. ANN. § 160.345(2)(g).
120 Id.
121 Id.
122 In addition, pursuant to PR No. 93-S.B.D.M.-105, Suggested Hiring Practices in S.B.D.M. Schools, the power of a council to fill a vacancy may be limited by a number of factors. Among these may be the existence of a collective bargaining agreement, a voluntary or judicially mandated affirmative action plan, an employee returning from a leave of absence, a court-ordered reinstatement of an employee, or the demotion of an administrator who has the right to a placement in a classified position.
123 KY. REV. STAT. ANN. § 160.345(2)(i).
124 This issue has been raised in at least one circuit court action. See Lucy May, Elsmere Principal Search Shows Loopholes in KEA, LEXINGTON HERALD-LEADER, Aug. 28, 1993, at A1, A8 (Kenton County Circuit Court Judge Raymond E. Lape denied an injunction by the superintendent to order the council to select a principal immediately; even so, the previous principal, who had been demoted to a teaching position after receiving her first and only negative evaluation in more than 20 years as an educator in the district, was not reinstated to her position. An interim principal, named by the superintendent, is now in place at Dorothy Howell Elementary School).

123 The need for consultation notwithstanding, the final decision rests with the principal and cannot be delegated to a vote of the council. KY. REV. STAT. ANN. § 160.345(2)(i). Anciotal though it may be, based on the author's experiences working as a provider of Professional Development for school councils located in member districts of the Central Kentucky Education Cooperative, councils have had no difficulty in recognizing the authority of the principal to act in this regard.
a new principal. As with the selection of other school personnel, after receiving a list of qualified applicants from the superintendent, the council designates the new principal.

Decisions about textbooks and instructional materials also rest within the purview of councils. Once a council decides which required textbooks, if any, it wishes to use, it notifies the board which receives funds for textbooks directly, rather than requisitioning them from a state program. All schools serving students in grade eight or below must adopt a six-year plan for acquiring textbooks and instructional materials.

Excluding additional resources available due to participation in federally or state-funded special programs such as Chapter I, the Individuals with Disabilities Education Act, or state programs for exceptional children, schools are entitled to an allocation for instructional supplies and materials based on the prior year's district average expenditure adjusted by the current year's percentage change for each pupil based on the projected full-time equivalent student enrollment. Any funds remaining in a council's budget after making allocations for certified staff, classified staff, and instructional materials are to be distributed either by an amount equal to projected full-time equivalent student enrollment, per pupil need, or a combination of the two.

In addition to these duties, councils are responsible for establishing policy in eight areas. Included here are control over the curriculum and instructional practices, staff and pupil assignment, school space and schedules, discipline and classroom management, and extra-curricular policies. Since data are just beginning to emerge concerning the

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126 KY. REV. STAT. ANN. § 160.345(2)(f).
127 Id.
128 Id. § 160.345(2)(h); see also id. §§ 156.395 - .476 (Michie/Bobbs-Merrill 1992) (relating to the Textbook Commission); id. §§ 157.100 - .190 (regarding textbooks).
129 Id. § 156.439(2).
130 Chapter I, formerly Title I, of the Elementary and Secondary Education Act, 20 U.S.C. §§ 2701 - 2976 (1993), furnishes federal financial assistance to local school districts for the purpose of supplementing, not supplanting, programs for educationally deprived children from low-income families.
134 Id. 3:245(7).
135 See supra note 116 (discussing these policies).
effectiveness of councils in formulating these policies, they are beyond the scope of this article. Finally, it must be kept in mind that councils establish policy, but they are not involved in actually carrying out their directives. It is the duty of the principal or head teacher, with the assistance of the total school staff, to implement the policies developed by a council.

C. Enforcement

The law provides sanctions for individuals, including council members, who seek to circumvent or interfere with the implementation of S.B.D.M. An aggrieved party may submit a complaint in writing to the Office of Educational Accountability, a separate office of state government specifically established by KERA which has the authority either to resolve the conflict or to pass the complaint on to the State Board for Elementary and Secondary Education. The penalty for a first offense is a reprimand. A superintendent or board member who commits a second infraction may be subject to removal from office; other employees are subject to dismissal for misconduct or willful neglect of duty. In addition, under the most recent changes in the S.B.D.M. statute, a council member may be removed for cause, subsequent to a hearing before the local board of education, and by a vote of four-fifths of the board after the recommendation of the State Education Commissioner.

III. S.B.D.M. in Kentucky: Emerging Issues

Given the short time that KERA and S.B.D.M. have been in effect, it should be expected that important policy and legal questions have not

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135 For a review of materials on policy formation and implementation, see supra note 116.
137 KY. REV. STAT. ANN. § 160.345(2)(c).
138 Id. §§ 156.132, 160.345 (providing sanctions for council members by recent amendment to these statutes).
139 Id. § 160.345(9).
140 Id. §§ 156.132, 160.340(c).

In a related development, the Kentucky Supreme Court has upheld the authority of the State Board of Education, pursuant to KERA, to dismiss school board members for misconduct. See State Bd. for Elementary and Secondary Educ. v. Ball, 847 S.W.2d 743, 745 (Ky. 1993). The upholding of KERA and the authority of the State Board, acting in and through the office of the Commissioner of Education, to discipline board members for official misconduct supports the argument that a challenge to the S.B.D.M. provisions will be resolved in a similar fashion.
been fully explored or have answers which are in need of refinement. In fact, at least four significant issues, each of which has implications for attorneys and educators, remain unresolved. Moreover, to the extent that the reforms initiated by KERA are so far ahead of developments in other states, the courts in the Commonwealth will most likely be left to their own designs in fashioning remedies.

A. School Boards and School Councils

The first emerging issue relates to the relationship between school boards and S.B.D.M. councils. The nub of the matter appears to be that even though councils are designed as policy-type bodies intended to operate in an overlapping sphere with boards, the local boards fear an erosion of their power. As such, it should not be surprising that the battle for control over the schools has been engaged.

To date, the one case on point, Bushee v. Board of Education, has been decided in favor of the councils. The dispute in Bushee arose when the Boone County Board of Education sought to review and to approve the plans of one of the school councils concerning its goals and objectives, implementation, and evaluation. After declaratory judgment was entered on behalf of the board, the court of appeals reversed in favor of the council.

In Bushee the court of appeals began its opinion by briefly reviewing the role of councils under KERA, noting that they neither abolish boards nor have absolute power over the schools within which they function. Reasoning that any other interpretation of the statute would have been contrary to the intent of the General Assembly, the court ruled that the councils do exercise real authority over school improvement plans, while boards are limited to an oversight capacity. Thus, it reversed the declaratory judgment on the ground that the board exceeded its statutory power. The Kentucky Supreme Court has since granted discretionary review.


142 No. 91-CI-00817 (Boone Cir. Ct. Sept. 17, 1992).


144 Id.

145 41 KY. L. SUMM. 32 (Apr. 13, 1994). The Kentucky Supreme Court also ordered that the opinion of the court of appeals not be published. Id.
While *Bushee* is the first case involving a direct conflict between school councils and school boards, it may be a harbinger of actions to follow. However, to the extent that the Kentucky Supreme Court has generally upheld legislation enacted as part of KERA, and in the absence of any explicit statutory language granting local school boards the authority to review or approve the plans of school councils, it appears unlikely that the Kentucky Supreme Court will disturb the judgment of the circuit court. At the same time, hopefully the court will do more than merely affirm and will provide positive direction to facilitate the legislative mandate of KERA.

Regardless of how the Kentucky Supreme Court may rule in *Bushee*, it is imperative for school boards and councils to develop strategies to learn to work collaboratively for the benefit of public education in Kentucky. To this end, it would be most useful if the State Department of Education, acting in conjunction with the General Assembly, enacted

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146 A second unreported case has reached the court of appeals. Blackburn v. Board of Educ., No. 91-CI-0097 (Johnson Cir. Ct. June 2, 1992), aff'd, No. 92-CA-1419-MR (Ky. Ct. App. 1993). In affirming, the court of appeals did little more than annotate the judgment of the circuit court by upholding two board policies regulating council actions. First, it ruled that, consistent with the anti-nepotism provisions of KERA, a board policy providing that a teacher representative on a council could not be a relative of another employee at the school was valid. No. 92-CA-1419-MR at 2, 3. Second, it held that the board had discretion to adopt a policy establishing a process by which school council decisions are appealed. Id. at 4-7. The appellate tribunal also summarily affirmed two other aspects of the trial court ruling. It found that a board policy calling for the broadening of the composition on councils was invalid since the statute emphatically defined and limited council memberships. At the same time, the court held that permitting a council to disband by a 50% vote of the faculty was inappropriate, reasoning that insofar as a two-thirds vote was required to form a council, a like percentage must be required to disband a council. Id. at 3-4.

*Blackburn* is more a clarification of the delimitation of responsibilities between councils and boards than a conflict between these two important bodies. Thus, the ruling does not pose a threat to councils. In fact, if anything, the two points that the court of appeals affirmed without comment support a strict construction of the law in the face of board action to modify council structure and operations.

147 In two of the three cases relative to KERA, the state supreme court has upheld provisions enacted as part of KERA. See Chapman v. Gorman, 839 S.W.2d 232, 243 (Ky. 1992) (upholding anti-nepotism provisions); State Bd. for Elementary and Secondary Educ. v. Ball, 847 S.W.2d 743, 744-45 (Ky. 1993) (upholding the authority of the State Board of Education to remove local school board members for cause). Moreover, in the one case where the court struck down part of a statute enacted pursuant to KERA, it allowed the unconstitutional provision to be severed, thereby upholding the remaining portions as constitutionally valid. See State Bd. for Elementary and Secondary Educ. v. Howard, 834 S.W.2d 657, 665 (Ky. 1992) (striking down as unconstitutionally vague a provision in the statute prohibiting school employees from engaging in political activities).
regulations to provide guidance and to further explicate the changing roles of these two important elected bodies.

B. Accountability

A second unresolved question involves accountability issues based on the authority of councils to develop policies concerning curricular and instructional practices. One innovative approach in the monitoring process to ensure that schools make progress toward realizing increased student outcomes is the creation of the Kentucky Distinguished Educator ("K.D.E.") Program.148

Under the K.D.E. Program, individuals selected from among the state’s most outstanding and highly skilled certified educators are provided with special preparation before being sent to work in so-called “schools in crisis,” where the proportion of successful students is declining by five percent or more.149 In a “school in crisis,” the K.D.E. is assigned to work with the principal and staff to implement a school improvement plan.


149 KY. REV. STAT. ANN. § 158.6455(5)(d) (Michie/Bobbs-Merrill 1992). A related question beyond the scope of this examination concerns what may be described as “districts in crisis,” where, acting pursuant to § 156.132 of the Kentucky Revised Statutes, the Commissioner of Education may recommend that the state take control of a school district that is being operated ineffectively. In at least one district being considered for a state takeover, the situation continues to evolve. See Lucy May & Karen Samples, State Seeks Takeover of Letcher Schools, LEXINGTON HERALD-LEADER, May 5, 1994, at A1, A5 (discussing proposed takeover); Karen Samples, School Board’s Reversal Surprised Letcher Parents, LEXINGTON HERALD-LEADER, May 26, 1994, at A1, A16 (reporting that the board agreed to a one-year state takeover); Karen Samples, Letcher Board Chooses New Schools Chief, LEXINGTON HERALD-LEADER, May 31, 1994, at B1, B4 (according to the subtitle of the article, “[board] members also reject bid to change their minds about state takeover fight”); Lucy May, Attorney Calls Attempt to Oust Letcher Schools Chief a Waste of Money, LEXINGTON HERALD-LEADER, June 2, 1994, at B3 (discussing arguments against takeover); Lucy May, Letcher County Superintendent Suspended, LEXINGTON HERALD-LEADER, June 10, 1994, at A1, A6 (discussing the suspension of Superintendent Burkich); Lucy May, Board Drops Charges Against Retired Burkich, LEXINGTON HERALD-LEADER, July 8, 1994, at A8 (reporting that charges were dropped upon retirement of Letcher County Superintendent).

150 KY. REV. STAT. ANN. §§ 158.6455(5), .782(1)(c). The other duties of K.D.E.’s are: “(a) serving as teaching ambassadors to spread the message that teaching is an important and fulfilling profession; [and] (b) assisting the Department of Education with research projects and staff development efforts.” Id. § 158.782(1)(a)(b).

151 Id. §§ 158.6455(5), .782(1)(c).
Six months after entering a "school in crisis," the K.D.E. has the power to make a recommendation to the superintendent regarding the retention, dismissal, or transfer of all certified staff.\(^{152}\) Recommendations for dismissal are binding on the superintendent, and calls for transfer must conform to any bargaining agreement in effect in the district.\(^{153}\) This evaluation process is to continue every six months until the school is no longer a "school in crisis."\(^{154}\)

A recent change in the legislation has delayed the implementation of sanctions until at least 1996.\(^{155}\) Consequently, it is unlikely that any K.D.E. will be applying such a draconian measure any time in the immediate future. However, given the far-reaching power of K.D.E.'s, a serious concern arises regarding the protection of the rights of continuing contract teachers who have a substantive due process property interest in tenure\(^{156}\) that cannot be abrogated absent explicitly identified statutory criteria, including appropriate procedural due process.\(^{157}\) Thus, a major battle looms should the K.D.E. recommend the dismissal of a continuing contract teacher.

Perhaps the most troubling aspect associated with the authority of the K.D.E. to recommend the dismissal of certified staff is that the sanction may be invoked after the relatively short period of six months. Noting how brief a period this is and how serious the sanction may potentially be, it is unreasonable to expect a significant change in just six months. Moreover, two important points must be kept in mind. First, student test scores may be influenced by a myriad of factors, many of which are not under the control of educators. Second, the certified staff is responsible for carrying out the curricular and instructional practice policies developed by a council.\(^{158}\) Yet, despite these realities, educators alone face possible sanctions should the policies prove ineffective.

The concerns voiced here suggest neither that parents alone ought to be held accountable for the poor academic performance of their children, as this itself could present a nightmare, nor that ineffective or obstructionist educators should be left unchallenged. Rather, this is a call to formulate safeguards and procedures for resolving legitimate differences of opinion if certified staff and parents on a council disagree with other

\(^{152}\) Id.

\(^{153}\) Id.

\(^{154}\) Id. § 158.6455(5)(d).

\(^{155}\) Id. § 158.683(c) (Michie/Bobbs-Merrill Supp. 1994).

\(^{156}\) Id. § 161.720 - .800 (Michie/Bobbs-Merrill 1992).

\(^{157}\) Id. § 161.790.

\(^{158}\) Id. § 160.345(2)(c) (Michie/Bobbs-Merrill Supp. 1994).
school personnel over policies that have an impact upon student achievement or if a “school in crisis” has not improved sufficiently within six months.

Vesting power to dismiss certified employees, even those who arguably may not be performing as they ought, in the hands of a single K.D.E. without including safeguards or language on whether existing tenure provisions can be superseded presents a very troubling situation. At the very least, it is necessary to keep in mind the relative brevity of six months in seeking to change a teacher’s professional performance. Therefore, before the K.D.E.’s recommendation of dismissal can be carried out, a tenured teacher should be given the opportunity to appeal an adverse decision and to complete a period of remediation and reassessment. Hopefully, the General Assembly and/or the Kentucky Department of Education will provide further clarification on the role of K.D.E.’s.

C. Membership

The third possible issue relates to the composition of councils. Since membership presently is limited to teachers, parents, and administrators, a question can be raised whether taxpayers and other interested parties should be entitled to a more active voice by a further expansion of council membership. The Chicago School Reform Act was struck down for violating the principle of “one person, one vote” because members of the community who did not have children in a school were denied the opportunity to cast ballots in council elections. Admittedly, the S.B.D.M. statute in Kentucky was recently modified to permit “a policy to facilitate the participation of interested persons, including, but not limited to, classified employees and parents through service on committees. Yet, if the Chicago experience serves as precedent, it does not appear that the present modification would be sufficient to withstand a similar attack from community members seeking greater involvement in council activities.

A closely related membership question addresses the place and role of students. Since KERA is designed to provide a better education for students in the Commonwealth, one can only wonder why these important


160 KY. REV. STAT. ANN. § 160.345(2)(c)(2).
stockholders, especially those in secondary schools, are excluded from participating formally in council decisions. As young adults with a vested interest in what transpires in the schools, high school students in the Commonwealth, no less than their peers in Chicago, ought to be granted a greater say in helping to direct their futures.

D. Compliance

A final emerging concern relates to what might transpire when or if a school has not formed a council prior to the statutorily mandated deadline of July 31, 1996. Schools were authorized to implement S.B.D.M. after July 13, 1990; by June 30, 1991, each district was required to have a council in place. Yet, as of the summer of 1994, two years prior to the required date of full implementation of S.B.D.M., little more than one half of the schools have councils in place. Concomitantly, it is unclear what might occur if a council disbands unilaterally without petitioning for a release based on having achieved its threshold level of accountability, leaving a school in violation of the law.

Unfortunately, the S.B.D.M. statute offers neither guidance nor remedies. Thus, the time to speculate on enforcement strategies is rapidly approaching. Three potential options may be considered.

The first possibility to speed up the full-scale adoption of S.B.D.M. is to change the required vote of a faculty before school-based decision making can be implemented from two-thirds to a bare majority; this alteration might help by strengthening the newly enacted provisions dealing with the removal of council members and other school personnel who engage in a practice which is detrimental to S.B.D.M. or who seek to circumvent its successful implementation. Whether this language will be construed to apply in such a situation remains to be seen. While hopefully it will be unnecessary to impose sanctions on schools or individuals who fail to comply with the law, it would be helpful if the General Assembly or the Kentucky Department of Education would act expeditiously in offering counsel in this area as well.

A second possible remedy, in light of the abolition of the common law writ of mandamus, might be to file suit to compel a board of education to order a principal to conduct a faculty election. However, even if this were successful, it is not clear what could be attempted to

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161 Id. § 160.345(5).
162 See supra note 89 (fully discussing data on the implementation of school councils).
163 KY. REV. STAT. ANN. § 160.345(9).
164 KY. R. CIV. P. 81(b).
gain compliance from parents who refuse to select their own representatives. Clearly, this is one aspect of the law that needs serious attention before too much time is permitted to pass.

A third alternative might be to provide parents with a more active say in initiating school-based decision making. Under such a circumstance, if sufficient parental participation were present, then perhaps legal action could be taken to compel the teaching staff to act. Although these matters should play themselves out over the next two years, clearly this is one aspect of the law that merits prompt serious attention.

CONCLUSION

Since it has been little more than four years since the enactment of KERA, it is much too soon to reach any definitive conclusions about the effectiveness of councils or any of the other aspects of this innovative legislation. What should be clear is that to the extent to which KERA has brought parents and educators together to work for the common good of students, it is off to a promising start. However, as vocal and well-organized opposition persists, perhaps the one element KERA most needs to succeed, time, may not be on its side. Time is such a crucial aspect because a reform as systemic as KERA can take effect and transform an entire educational organization in all of its parts and parcels, from its youngest students to its senior educators and policymakers, only if it has the opportunity to permeate the entire system of common schools in the Commonwealth.

If the S.B.D.M. provisions of KERA are to continue to have a positive impact on education in the Commonwealth, then supporters and critics alike must remember that since the condition of the schools in the Commonwealth leading to the Kentucky Supreme Court’s ruling in Rose v. Council for Better Education did not reach its nadir over night, it reasonably cannot be expected to reach its zenith by means of a quick fix. Whether S.B.D.M. is a panacea remains to be seen, but all those concerned about the future of Kentucky’s most valuable resource, its children, must maintain a vested interest in providing KERA, with its provisions for school-based decision making, the time to prove or disprove its worth.

165 For an update on developments, both in support of and in opposition to KERA, in light of the 1994 session of the General Assembly, see Lonnie Harp, The Plot Thickens: The Real Drama Behind the Kentucky Education Reform Act May Have Just Begun, EDUC. WK., May 18, 1994, at 19.