School Law for Administrators

Headlines on School Law

Court fines California private school

By Rob Taylor, PhD

Governors in many states have taken diametrically opposed positions about COVID-19 and the schools, sometimes ordering schools to close or stay closed, sometimes opting for opening or staying open. In California, Democratic Gov. Gavin Newsom in July ordered schools in 30 of 58 counties to forego in-school instruction, getting sued in the process by plaintiffs claiming he was violating the 14th Amendment's due process and equal protection clauses and trampling the Civil Rights Act of 1964 and the Individuals with Disabilities Education Act.

State officials argued that Newsom's order was based on scientific evidence and the health risk to students meeting in-person was significant. Plaintiffs argued that keeping schools closed would deprive "millions of California children . . . of an adequate education." Parents of private school students joined the case to request not to be lumped together with public schools, which they contended were very different from private schools.

But on September 15 Fresno County Superior Court Judge D. Tyler Tharpe found it necessary to reinforce Gov. Newsom's order by ruling that Immanuel Schools, a private K-12 Christian school of 600 students in Reedley near Fresno, needed to shut down and stay closed until statistics showed the school's COVID-19 infection rates had dropped to an acceptable level according to state public health guidelines.

This mid-September Superior Court ruling came on the heels of Immanuel Schools' refusal to acquiesce to a Fresno County public health order to shut its doors to in-person instruction. Instead, the school continued operating, and according to some reliable observers, without masks and social distancing. The school also filed several lawsuits.

By late September, push came to shove and California Attorney General Xavier Becerra asked the court to step back in and hold the private school in contempt for violating the court's injunction to "immediately cease and desist" holding in-person instruction and for becoming a "public health risk."

As Judge Tharpe considered what he would do next, state and local public health officials agreed to meet with school officials for talks. These talks resulted in an early October tentative settlement agreement in which both parties agreed to drop all pending legal cases. Also, Immanuel Schools agreed, according to an Associated Press article, to follow local and state public health guidelines including stringent requirements on mask wearing and social distancing. Moreover, the school agreed to regular inspections by the county. The county and state, in turn, agreed to withdraw requests that the court fine the school for its refusal to obey the court's September injunction, with an acknowledgment that the court would make any decision related to contempt of court considerations.

Despite the tentative settlement agreement, Judge Tharpe proved to be significantly miffed at what had occurred, as he demonstrated at an October 20 hearing: "The evidence is overwhelming that defendants failed to obey this court's September 15, 2020, injunction forbidding in person class instruction at Immanuel Schools. There was no good cause or substantial justification for this disobedience." Then, in an 11-page decision, he fined the school $50,000 but suspended $35,000 of the fine because of the school's new commitment to obey public health requirements, as evidenced by the recent settlement agreement. Tharpe also threatened to lift the suspension if Immanuel Schools failed to keep to its promise, meaning the court would then collect the entire fine instead of forgiving $35,000.

The school's attorney, Jennifer Bursch, sought to sum up the situation: "Immanuel Schools fought to keep their kids on campus, learning, where they belong, and today the judge decided that this choice to do that means they need to pay a sanction. Although the judge's order was unconstitutional, Immanuel is willing to pay the fine imposed by the court and move forward."

MATHEMATICA REPORTS HOW TO CUT BACK IN -SCHOOL RATES

The all-or-nothing kind of approach exemplified above in Fresno seems destined to end up in court, as the Fresno conflict did. But a recent EdWeek article on a Mathematica study explores a more nuanced approach.

Staff reporter Sarah Sparks writes, "New research suggests that setting up systems that allow schools of different sizes and grade levels to quickly adapt to changing community infection rates can be vital for not only preventing outbreaks but also keeping attendance more consistent for students."

Mathematica collected data from Pennsylvania schools to run nearly 400,000 simulations, focused on different levels of virus community spread, different school sizes and grade levels, and different remote or in-person strategies and quarantine levels for different projected outbreaks.

The study focused, for one, on how best to reduce infections during in-person instruction. Schools using full-time, in-person classes could reduce infections by using schoolwide three– or 14-day shutdowns but this strategy proved more disruptive than shutdowns needed in hybrid instruction, that is, with half the student body attending two days a week, the other half coming in on alternate two days, along with "rigorous contact tracing and quarantine for students and staff who tested positive for coronavirus."

The study found that hybrid strategies reduced outbreaks and increased attendance at all community infection levels by reducing the number of contacts that any student had, reducing the

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First Amendment

Court declines to dismiss employee's First Amendment complaint

Citation: Williams-Preston v. South Bend Community School Corporation, 2020 WL 6784118 (N.D. Ind. 2020)

A federal district court in Indiana has denied a motion to dismiss brought by a school district in a lawsuit in which an employee of South Bend Community School Corporation (SBCSC) alleged that the district violated her First Amendment rights by retaliating against her when she spoke out about racial disparities in school discipline and the district's attempts to circumvent special education law requirements. While the district sought to have the case dismissed arguing that the employee had failed to state a claim upon which relief could be granted by failing to meet notice requirements, the court found that the First Amendment claim was exempt from such notice requirements. The court declined to dismiss the lawsuit, finding that the employee had made out facts that if true could show a First Amendment violation.

Regina Williams-Preston had worked for the South Bend Community School Corporation for many years. She was also an advocate for racial justice in the South Bend community and was affiliated with many community groups working to address racial disparities in school discipline among other concerns. According to Williams-Preston, she observed these disparities during her work with the district and repeatedly attempted to voice her concerns with district administration. Williams-Preston claims to have spoken out publicly about these concerns at local functions, in public interviews, speeches, and on social media, both as a private citizen and in her role as Second District Councilwoman on the South Bend Common Council from 2016-2019. Williams-Preston accuses the School Board and Superintendent of having been "complacent and indifferent with respect to the racial disparity in the discipline of students, faculty, and staff."

In addition to concerns about racial disparities, Williams-Preston also raised concerns about the district's compliance with special education laws. In particular, she claims that she reported that Clay High School Assistant Principal Robert Smith was "singling out black students for discipline, verbally abusing, threatening, and bullying students, and violating students' rights to a public education by utilizing 'shadow suspensions.'" She also claimed to have reported then–Clay High School Principal Mansour Eid for his failure to address Smith's conduct and collaborated with other local activists to raise public awareness about this failure.

Following Williams-Preston's reports, Eid was promoted to Director of High Schools. In this role, he had decision-making power over non-termination employment decisions pertaining to high school personnel. Along with Matthew Johns, the district's Director of Special Education, Eid made the decision to transfer Williams-Preston from her position at Clay High School to a position at Adams High School, simultaneously moving the staff member who had previously filled the role at Adams into Williams-Preston's position at Clay. The staff member whose place Williams-Preston was moved into specializes in supporting students with autism, which was not something Williams-Preston had done. Williams-Preston claims that this transfer was made in retaliation for her efforts to call attention to the problems she observed. When Williams-Preston voiced her initial concerns, she was told that the transfer was done to better serve students, but she had a different view, believing that the transfer harmed students in both schools by removing Williams-Preston from students who had built a relationship with her and by removing the other staff member from serving the large number of autistic students in the other school. After voicing her concerns to Eid and Johns, Williams-Preston complained to the district's general counsel Brian Kubicki, who promised to investigate. But the result of the investigation was that no further action was required. She was also passed over for several promotions.

As a result of these events, Ms. Williams-Preston filed suit alleging that the district's decisions to transfer her and pass over her for promotions were retaliatory and, therefore, violated her First Amendment rights. The SBCSC filed a motion to dismiss for failure to state a claim.

On a motion for dismissal, the court must view the complaint in the light most favorable to the plaintiff, accepting factual alle-

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amount of time a student had with others in school, and reducing group size to allow more effective social distancing. Some teachers have reported having students get up and move around every 12 to 14 minutes, so as to keep them from being close to any particular person for 15 minutes.

Several factors have emerged as certainly effective in combatting the spread of the virus during in-class instruction. Better ventilation will doubtless reduce the exposure of students to the coronavirus, and conscientious contact tracing and quarantining of students who have been in contact with those who have tested positive has been shown effective in reducing infection, sometimes without needing to go to more disruptive school closures.

Using Mathematica findings, some states plan to require districts to develop multiple reopening plans involving remote learning and in-person schooling, so as to be ready to implement a more or less restrictive plan depending upon "changing conditions in community spread."

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Stay Put Provision

Parents ask court to order school district not to implement new IEP for their autistic son and to allow him to stay in his current placement

Citation: *E.E. v. Norris School District, 2020 WL 5891590 (E.D. Cal. 2020)*

A federal district court in California has granted a family's request for a preliminary injunction to prevent their school district from implementing a new individualized education plan (IEP) which the parents did not agree to. The court found that the school district needed to keep the child's original IEP in place as his "stay-put" placement until the dispute had been resolved.

In 2018, E.E. was a seven-year-old elementary school student who was diagnosed with autism spectrum disorder. His parents, Christopher Escobedo and Laura Hutchinson-Escobedo enrolled him in the Norris School District as he entered kindergarten in August 2018. E.E. attended Norris Elementary School and his IEP had him participating in the general education classroom 98% of the time with 2% of his time spent on speech and language special services. The parents agreed to the original IEP which started on November 27, 2018, ending on November 27, 2019.

In February 2019, E.E. began to be physically aggressive toward teachers, staff, and other students. E.E. was also hurt by aggressive behavior from other students against him. His parents asked to have a trained behavior aide present in the classroom and at the playground, but the school did not provide one. In March 2019, the parents and school representatives met to discuss a new IEP, but a new one was not implemented, and the old IEP remained in effect. The parties met again in the summer but could not decide on a new IEP. Meanwhile, E.E. attended an extended school year (ESY) program that summer.

On November 21, 2019, there was another IEP meeting. On January 22, 2020, the school district presented a new IEP, which would involve moving E.E. to a different school in a special day class with a trained behavior aide instead of a general education classroom. The parents did not agree to the new IEP.

On January 14, 2020, the parents filed a due process complaint against the school district, claiming that E.E. was denied a free appropriate public education (FAPE) as required under the IDEA. The school district filed its own due process complaint against the parents, and the cases were consolidated and heard before an administrative law judge, Adrienne Krikorian, in July 2020. Krikorian issued her decision, finding partly in favor of the parents and partly in favor of the school district. According to Krikorian, the school district had failed to provide E.E. with a FAPE. She also ruled that the new IEP should be implemented, stating that would provide a FAPE for E.E. Krikorian said that the new IEP could be implemented over the parents' objections, and that it would constitute E.E.'s "stay put" provision under the IDEA until the parents agreed to a new IEP or amended the current IEP.

The new school year began in August 2020, and the school district arranged to move E.E. to Bimat Elementary School in September 2020. However, the parents filed a lawsuit asking for a review of the portion of the administrative hearing that approved the new IEP and filed a motion for a temporary restraining order to keep E.E. at Norris Elementary School under the original IEP. The school district argued against the preliminary injunction and temporary restraining order.

The court granted the preliminary injunction in favor of the parents and ordered the school district to continue using the original IEP.

Under the IDEA, if there is a dispute between a school and the parents of a student over the IEP, the parties may file a due process complaint, and may also file an appeal from the results of the due process hearing in court. Pending a final resolution, the student should remain in his existing educational placement. The reason for this is that "there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child

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gations as true and drawing all reasonable inferences in favor of the plaintiff. To determine if a claim should be dismissed, courts evaluate whether the plaintiff's allegations state a claim upon which relief may be granted.

The district's primary support for its motion to dismiss was that Williams-Preston failed to comply with an Indiana law called the Claims Against Public Schools Act (CAPSA), which requires that an individual may not initiate a civil action or administrative proceeding against a public school unless they submit written notice to the public school and governing body to notify them of the alleged violation and the proposed remedy.

Acknowledging that she did not provide written notice to the school district before filing suit, Williams-Preston argued that such notice wasn't required where the alleged violation was a federal law. The court agreed. The plain language of the statute provides: "This chapter may not be construed to restrict or limit the rights, procedures, or remedies available to an individual or entity under (1) the federal or state Constitution; or (2) another federal law." Therefore, Williams-Preston was not required to provide written notice and the district's request for dismissal on this basis was erroneous.

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to a potentially inappropriate educational setting. In light of this risk, the stay put provision acts as a powerful protective measure to prevent disruption of the child's education throughout the dispute process *(Joshua A. v. Rocklin Unified Sch. Dist.)."*

The chief issue in this case was that the parties disagreed on what legally constituted E.E.'s current placement. The parents claimed it was the original placement at Norris Elementary School, while the school district claimed it was the special day class at Bimat Elementary School. The court noted that, typically, the current educational placement was "the placement described in the child's most recently implemented IEP" *(Johnson v. Special Educ. Hearing Office)*.

However, the school district argued against this conclusion. The school district cited Krikorian's decision calling the new IEP the stay-put placement moving forward. However, Krikorian gave no explanation for this statement, and the decision did not seem to have considered the stay put meaning in the law. The new IEP had never been implemented, and so the court found the most recently implemented IEP was the original IEP.

The school district also argued that Krikorian found the original IEP was lacking and that the new IEP would provide a FAPE. Since the parents had argued that the original IEP did not provide a FAPE, the school district considered Krikorian's ruling meant to change the stay-put placement. However, although the parents agreed the original IEP did not provide a FAPE, the court noted there was no agreement between the parents and Krikorian as to what to do moving forward.

Although the parents did complain that the original IEP did not provide a FAPE, they cited the First U.S. Circuit which stated, "the stay-put placement was merely the lesser of two evils" when the parents believed both the existing and proposed IEPs were inadequate *(Me. Sch. Admin. Dist. No. 35 v. R.)*. The stay-put placement was simply a temporary situation to provide continuity and stability to the student.

The school district contended that because E.E. attended the ESY program in the summer of 2020, the parents had essentially agreed to the new IEP. The school district argued that the new IEP consisted of two stages, ESY in the summer of 2020 and the special day class in the fall of 2020. However, the parents disagreed. The parents considered that the new IEP included only the plans for day classes at Bimat and did not include the summer program, in which E.E. had participated as part of the original IEP anyway. The parents argued the 2020 ESY program was simply a continuation of the original IEP.

Taken altogether, the court found that the parents did not agree to the 2020 ESY program as part of the new IEP, and that the old IEP remained the stay-put placement.

Regarding the preliminary injunction, the court noted that the stay put functioned as an automatic preliminary injunction, in that the parents did not have to show irreparable harm to obtain preliminary relief. However, the school district argued that the stay put provision preventing a change in placement should not be automatic: "[A]n order from a due process hearing held under IDEA is not automatically stayed when an aggrieved party files an appeal" *(Tamalpais Union High School Dist. v. D.W.)*.

The court responded that the school district had to show: (1) the likelihood it would succeed on the merits; (2) the likelihood that it would suffer irreparable harm without preliminary relief; (3) that the balance of equities tipped in its favor; and (4) that an injunction was in the public interest. As to the irreparable harm element, the school district stated that: "(1) it would be prohibited from providing a FAPE to E.E., (2) state funding to [the school district] could be withheld for its failure to follow an [Office of Administrative Hearings] order, and (3) E.E. will suffer irreparable harm from not receiving a FAPE."

The court noted that the first and third elements were linked, and stated that even if the new IEP would provide a FAPE as opposed to the original IEP, there were other ways of providing a FAPE besides enforcing the new IEP. The school district could try to modify the original IEP to correct the problems addressed in the hearing officer's decision. The court also noted that the second element was not supported by adequate proof. No enforcement action from the state's department of education had been threatened. "This does not rise to the level of showing that the [school district] is likely to suffer irreparable harm." Therefore, the court found the school district failed to meet its burden of showing a likelihood if irreparable, and the preliminary injunction analysis weighed in favor of keeping the stay-put placement.

The court directed the school district not to implement the new IEP, and ordered it to continue implementing the original IEP unless it came to a different agreement with the parents regarding a placement for E.E.

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