

As Unions and Public Officials Push to Keep Schools Closed, Parents Fight Back

Lawsuits filed on behalf of special-needs students and private-school parents have the greatest chance of prevailing in courtrooms

by JOSHUA DUNN

ACROSS THE COUNTRY, teachers unions have led the effort to prevent schools from reopening. In Florida, California, and Iowa, they have gone to court to demand that instruction remain remote. In Los Angeles, the union padded its opposition to reopening with additional demands to remove police from schools and to impose a moratorium on charter schools. In Chicago, Mayor Lori Lightfoot initially proposed a hybrid-instruction model but relented when the union threatened to strike. Detroit teachers resorted to direct action, physically blocking school buses trying to pick up students for summer school.

All of this was cheered on by Randi Weingarten, president of the American Federation of Teachers, who threatened “safety strikes” if needed to keep schools closed. Many parents, however, are fervently hoping schools will reopen and have filed their own lawsuits demanding in-person instruction. Their claims have taken four primary forms: challenges based on legal protections for special-education students; challenges under the 14th Amendment; challenges based on the education clauses of state constitutions; and challenges by private-school parents objecting to government limits on in-person instruction.

In the summer, parents of special-education students filed a nationwide class-action lawsuit in federal court demanding that school districts reopen in fall 2020 or provide “pendency vouchers” so parents could secure services on their own. They are also demanding compensatory damages for the out-of-pocket expenses they incurred in the spring after schools went remote. The lawsuit was filed in New York City and specifically cites Mayor Bill de Blasio and the city education department for failing to meet requirements of the Individuals with Disabilities Education Act, or IDEA. So far more than 500 children from more than 30 states have joined as plaintiffs.

In California, a group of parents has challenged an order from Governor Gavin Newsom that effectively barred in-person instruction for 80 percent of the state’s students. While their lawsuit includes claims under IDEA, it also argues that the school closures violate the Due Process and Equal Protection clauses of the 14th Amendment. They assert that a right to a



Parents, students, and education activists who want schools open for in-person learning hold a news conference to announce a lawsuit against the Los Angeles Unified School District.

basic minimum education is deeply rooted in America’s history and tradition and that equal protection prohibits classifications that affect one group of citizens differently than others.

Perhaps the most interesting case comes from Stillwater, Oklahoma, where parents have filed suit in state court relying on the same logic that school-funding advocates have used repeatedly in the past. For decades, unions have vigorously lent their support to so-called adequacy lawsuits, in which plaintiffs demand increases in education funding based on the education clauses in state constitutions. These lawsuits have sought, and

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often won, significant spending hikes by claiming that the education clauses require states to provide an adequate public education for all children and that the state is not delivering sufficient funding to fulfill that aim.

In Stillwater, parents have repurposed this logic for the age of Covid. If state education clauses require states to provide an adequate education, then they must require schools to provide in-person instruction, since remote instruction is manifestly insufficient for many students. These Oklahoma parents contend that their children are experiencing irreversible harm as a result of the school board's imposition of an entirely remote delivery model. The parents are seeking a restraining order forbidding the school district from preventing in-person instruction for the children of parents who prefer it. Citing the Oklahoma Constitution's education clause, they argue that remote instruction not only "falls short of meeting Oklahoma's minimum education standards" but also, citing precedents from the U.S. Supreme Court and the state supreme court, that it violates the fundamental right of parents to determine the education of their children.

Private-school parents have also joined the legal fray. Lawsuits have cropped up in several states, including California, Wisconsin, Oregon, and New Mexico. In Wisconsin, religious schools and parents sued in Dane County when a local health order prohibited in-person instruction. The plaintiffs claimed that the ban infringed on parents' free exercise rights as well as their rights to control the education of their children. In Oregon, a group of Christian schools has argued that an executive order issued by the state's governor violates their free exercise rights. They argue that they should be treated like daycare centers and public universities, which did not fall under the governor's order. In New Mexico, the father of a junior-high prep-school student contends that the governor's health order violates the Equal Protection Clause because it allows public schools to operate at 50 percent capacity but limits private schools to 25 percent capacity. The state secretary of education justified the disparate standard by saying private schools are like retail businesses and it's easier for the state to oversee public schools.

Among the kinds of legal challenges that parents and schools are mounting, the first and last—lawsuits launched on behalf of special-needs students and suits brought by private-school parents—have the best odds of succeeding. From the start of the Covid pandemic, many school districts recognized that special-needs students were likely to be more adversely affected than others. Initially, some even chose not to provide any remote instruction whatsoever, to avoid being held liable for not providing an "appropriate education" to special-needs students. Judges are unlikely to second-guess the decisions made by school and health officials early in the pandemic. The uncertainty about Covid last spring would almost certainly justify in the minds of most judges

the precautions taken by schools. But as more schools around the country have reopened safely, it is becoming more difficult to justify keeping schools shuttered, and particularly keeping them closed to students with special needs.

The Stillwater lawsuit, while cleverly conceived, faces steep odds. In 2007, the Oklahoma Supreme Court rejected an adequacy lawsuit on the grounds that education policy was "vested exclusively in the legislature." Such a lawsuit in a state with a previous successful adequacy case might have a better chance of passing muster, since the remedy in that instance would simply mean compelling schools to supply the same kind of education they provided before the pandemic. Such a remedy would presumably alleviate concerns about judges creating policy out of whole cloth.

The California case involving 14th Amendment claims is the least likely to succeed, at least on those constitutional grounds. The U.S. Supreme Court has explicitly said that education is not a fundamental constitutional right. What's more, students adversely affected by remote instruction do not constitute a "discrete and insular minority" and therefore can't be considered a "suspect class," that is, a group that has historically faced discrimination.

The challenges by private schools or private-school parents have seen some limited success. In Wisconsin, the state supreme court granted the schools' and parents' request for an injunction, which allowed the schools to reopen. The court also held that the case was likely to succeed on its merits and that the local health order "intrudes upon the freedoms ordinarily retained by the people under our constitutional design." However, in Oregon a trial-court judge has already ruled against the Christian schools, on the grounds that they are not being treated differently from other K–12 schools, whether public or private. In New Mexico, a federal judge denied the request for an injunction that would have lifted the state's school-closing order. Following that ruling, and with no middle or high schools yet open for in-person instruction, the parent withdrew the suit. However, he promises to refile if future health orders maintain the different standard for private schools.

Given the long odds most of these suits face, it seems reasonable to classify the majority of them as "the continuation of politics by other means." For example, in Montgomery County, Maryland, in August 2020, a then-pending lawsuit by parents along with pressure by the governor forced the county's health officer to rescind his order forbidding private schools from opening for in-school instruction. Even if families do not succeed in court, they can still win by keeping up the political pressure until government officials relent.

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