

Analysis: Education and Litigation Have a Long History. The Challenges of Teaching & Reopening School in a Pandemic Make Lawsuits Even More Likely

By Maria Ferguson



In recent weeks, education groups have put out road maps, blueprints and guides to help state and local leaders manage the impact of COVID-19 on their students and communities. These resources are thoughtfully developed and cover a wide range of pressing issues. And while the recommendations they make are informed by some of the best leaders in the education field, most have ignored an issue that will likely have a profound impact on state and local decision-making.

The fact is, a legal storm is brewing as safety and social distancing requirements for a physical return to school begin to take shape around the country. Equity concerns regarding remote learning have already been at the center of local, state and federal policy discussions, but the return to school — and all the social and safety limitations and requirements that go along with it — has the potential to open the floodgates to all kinds of legal action.

Julie Underwood, a professor of education, law, policy and practice at the University of Wisconsin-Madison, says that for most states and districts, inequities in learning loss and achievement gaps are the biggest concern, especially for at-risk student groups. The digital divide that became so starkly apparent when public schools closed is just one aspect of the disproportionate impacts on an entire generation of low-income students.

Could these concerns add fire to the recent “right to education” debate that has emerged since the *Gary v. Whitmer* case, in which an appellate court found that the terrible conditions of Detroit schools had deprived students of their right to literacy?

Underwood points out that there has never been a ruling affirming a federal right to an education, and the Michigan case is, to date, the only legal grounding there is. Still, I wonder if the blatant systemic inequities that continue to cripple so many public schools, now in full sight as a result of COVID-19, will spur similar lawsuits regarding the rights of low-income students adversely impacted by the pandemic.

Francisco Negrón, chief legal officer at the National School Boards Association, underscores Underwood’s concerns regarding learning loss and equity. He points out that remote learning, while necessary during the current crisis, should not be considered the answer to all the teaching and learning challenges presented by the pandemic. Family resources, such as money, time, access, mental health and language skills, are highly variable, and even under normal conditions, their impact on education is profound. Remote learning, despite all its promise and utility, can worsen those issues as much as ease them.

Special education, no stranger to legal action, is another aspect of the pandemic that will likely provoke litigation. Districts are under tremendous pressure to provide special education services to their students, despite the very real limitations brought on by COVID-19. Congress has not waived federal requirements, so districts are still required to provide the full range of services under the Individuals with Disabilities Education Act. Many groups, including the National School Boards Association, are pushing for at least some flexibility so districts have latitude in planning and providing services — a sentiment not shared by Education Secretary Betsy DeVos, who has steadfastly opposed special education waivers.

But special education families know the legal landscape well, says Underwood. “They are organized, and there is awareness of what their rights are as it pertains to services, Individualized Education Plans and compensatory education.” She adds: “The litigation framework is there.”

The legal ramifications at the state level, Negrón points out, could be huge. “Compensatory services is a judicial mechanism designed to address shortfalls in the provision of a ‘free, appropriate public education’” under IDEA, he explains. “As a result, disagreements between parents and schools regarding the level of services required will generally involve litigation.” He says states need to be prepared for the financial impact of this and other forms of lawsuits.

To help local school boards manage some of these issues and to try to avoid litigation whenever possible, the association is preparing a legal guide for school districts that will be released this summer. In the meantime, Negron offers some insights and advice:

- The implications of the pandemic for schools and school systems are massive and will require planning, collaboration and unity, which are not always present in school systems.
- There are no clear answers to any of these challenges, so striving for agreement through careful, collaborative planning will go a long way to help mitigate both health risks and legal problems. From the outset, all relevant actors should be at the table and part of the decision-making.
- This is an opportunity for communities to come together and share in the responsibility of public education. There are also great opportunities here for innovation. Distance learning, social and emotional health, teacher training and development, and school calendars and schedules are all areas that are ripe for innovation.

Negron's advice is well taken for what public schools are dealing with right now, but it really should be standard operating procedure. Education and litigation have a long history together. Now, with so many high-stakes issues in play, state and local leaders need to do everything they can to avoid lawsuits and focus on collaboration and consensus. These are practices that will ultimately serve everyone in the education community now and in the long, hard months ahead.

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