

MEDIA ADVISORY
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Is Gov. Phil Murphy NJ's "Pontius Pilate"?

Governor Claims No Responsibility/Oversight Of NJ School Closures To Federal Judge Calls For President Biden, AG Garland and Secretary Cardona To "Bring In The Feds!"

NEW YORK, NY – Civil Rights attorney, Patrick Donohue, and Brain Injury Rights Group responded to New Jersey Governor Phil Murphy and his New Jersey Department of Education's ("NJDOE") letter to United States District Judge Vazquez regarding the motion seeking a temporary restraining order (TRO) against all New Jersey school districts on behalf of hundreds of thousands of special education students. The action seeks to have Judge Vazquez, issue an emergency order preventing all New Jersey school districts from closing and unilaterally changing from in-person services to "remote learning" without the consent of over 237,000 parents of special education students.

Judge Vazquez held a hearing on Tuesday, January 4, 2022, for all the parties to appear to discuss the scope of the motion. Governor Murphy and his NJDOE failed to appear at the hearing. Judge Vazquez directed the Defendant school districts and NJDOE to respond via letter by Friday, January 7, 2022.

At close to midnight on Friday night, at 11:16 p.m., Deputy Attorney General, Jaclyn Frey (on behalf of Acting Attorney General of New Jersey, Andrew Bruck), issued a single paragraph response to Judge Vazquez on behalf of Governor Murphy and NJDOE, as follows,

"Please be advised that the State Defendants are not implicated in Plaintiffs' letter of January 5, 2022, as the relief Plaintiffs seek by way of their temporary restraining order, i.e., returning to in-person instruction, cannot be provided by the State Defendants. Moreover, the State Defendants do not have any control over any individual school or district's decision to transition to remote learning, which is guided by a district's consultation with the local health department." (See Case 2:21-cv-18746-JMV-ESK Document 85)

Patrick Donohue responded to Governor Murphy's letter,

"There aren't words to describe the dereliction of duty by Governor Murphy and his administration after more than 18 months of government overreach into every aspect of our lives. Governor Murphy wants to *wash his hands* of his responsibility to parents and special education students in the State of New Jersey two months after he sought re-election! He should be ashamed of himself for his deafening silence while the greatest case of child sacrifice occurs to our children under his watch."

"We are calling on President Joe Biden, Attorney General Merrick Garland and Secretary of Education Miguel Cardona to bring the federal Offices of Civil Rights within the U.S. Departments of Justice and Education to take control of these rogue school districts for violating the civil rights of our most vulnerable children! It is well documented when President Biden and Attorney General Garland attacked parents as domestic terrorists for

participating in school board meetings and President Biden and Secretary Cardona went after states and school districts who would not implement unscientific school mask mandates on children. It's time for President Biden, AG Garland and Secretary Cardona to advocate for parents and kids instead of corrupt teachers unions and unaccountable education bureaucrats! Bring in the Feds! They should immediately file a notice of appearance to Judge Vazquez to support these parents and children!"

Below are some basic legal information and facts detailed in the federal class action lawsuit pending before Judge Vazquez (2:21-cv-18746, *Carmona, et al. v N.J. Dept. of Education, et al.*) which demonstrate how absurd Governor Murphy's claim is to Judge Vazquez:

- The **Individuals with Disabilities Education Act**, 20 U.S.C. §1400, et seq. ("**IDEA**"), guarantees students with disabilities a **free appropriate public education** ("**FAPE**"). The term FAPE refers to special education and related services that are designed to meet a child's unique needs and that will prepare the child for further education, employment, and independent living.
- The **New Jersey Department of Education** is the **State Education Agency** ("**SEA**") which manages and controls the education affairs for all **Local Education Agencies** ("**LEA**"), i.e., school districts. The **Commissioner of Education** adopt regulations to implement education pursuant to New Jersey Law.
- As defined by 20 U.S.C. §§ 1401(14) and 1414(d), the vehicle for the provision of FAPE is the **Individualized Education Program** ("**IEP**"), the document which embodies the school district's recommendations for a particular child. *Bd. Of Educ. v. Rowley, 458 U.S. 176, 181 (1982)*. Once drafted, the IEP is essentially a contract and bears the imprimatur of the State, regardless of the Local Educational Agency ("**LEA**") that created it, and carries a presumption of correctness. *See Letter to Rieser, EHLR 211:403 (July 17, 1986)*.
- Pursuant to **Section 504 of the Rehabilitation Act of 1973**, 29 U.S.C. § 794, et seq. ("**Section 504**"), disabled students who receive special education are entitled to have their educational needs met as adequately as the needs as non-disabled students are met. Section 504 prohibits discrimination against individuals with disabilities and prohibits discrimination to the full range of state and local government services, programs, and activities (including public schools) regardless of whether they receive Federal financial assistance.
- Pursuant to **Title II of the Americans with Disabilities Act**, 42 U.S.C. § 12101, et seq. ("**ADA**"), no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity (State or local government), or be subjected to discrimination by any such entity. This includes disabled students who receive special education.
- NJDOE receives funding pursuant to IDEA, 20 U.S.C. § 1412, the ADA, and § 504, and therefore must comply with the statutes' provisions.
- On March 16, 2020, Governor Phil Murphy signed Executive Order No. 104, indefinitely closing all public and private preschool, elementary and secondary schools. Exhibit 19.
- On March 13, 2020, Commissioner of Education, Lamont O. Repollet, EdD., issued a memo regarding school closures that stated "**the decision to reopen schools lies squarely with Governor Murphy.** We do not intend to assess the reopening of schools until at least April 17, 2020, at the earliest."
- After the closure of in-person instruction, on July 1, 2020, the U.S. DOE approved the NJDOE's "application for Federal Fiscal Year (FFY) funds under Part B of the Individuals with Disabilities Act (IDEA Part B)."

- Attached to the July 1, 2020, letter were assurances made by the NJDOE regarding its “policies and procedures in place as required by Part B of the Individuals with Disabilities Education Act.”
- NJDOE assured the U.S. DOE that “[t]he Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (b) of 34 § CFR 300.154 and the State education agency, in order to ensure that the services described in paragraph (b)(1)(i) that are needed to ensure a free appropriate public education are provided, include the provision of such services during the pendency of any dispute under § 300.154(a)(3).”
- NJDOE must ensure that each LEA in New Jersey, i.e., school districts, takes steps to ensure that children with disabilities within its jurisdiction have access to the same educational opportunities as their non-disabled peers. 20 U.S.C. § 1412(a)(2); §1413(a)(1); 34 C.F.R. § 300.110.
- NJDOE and the school districts deprived plaintiffs of their substantive due process rights as guaranteed by the **Fourteenth Amendment to the United States Constitution**, in violation of the Civil Rights Act of 1871, 42 U.S.C. § 1983, when it closed its in-person instruction in March of 2020, and again when they went “remote” in January 2022.
- The **New Jersey Constitution** provides that: “[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State....” N.J. Const. art. VIII, § 4, 1.
- NJDOE and the school districts failed to comply with the procedural requirements for prior written notice, educational placements, pendency placements, IEP Team Meetings and equal access to instruction and services for plaintiffs in violation of N.J.S.A. § 18A:46-1 et seq. and N.J.A.C. § 6A:14-2.3.
- NJDOE and the school districts violated N.J. STAT. ANN. §§ 2A:32C-1—32C-18 by knowingly made, used, or caused to be made and used, **false records, statements and other materials** in order to receive reimbursement in the form of federal funds for related services that were not offered, or alternatively, were offered contrary to the requirements set forth by Medicaid and the IDEA.
- NJDOE and the school districts fraudulently obtained federal funds by and through both the IDEA and Medicaid for unlawful related services purportedly “rendered” to New Jersey students with disabilities.
- There are over 237,000 students in New Jersey (more than 11% of all students) between 3 and 21 years of age receiving special education services. These students have Individualized Education Programs (IEPs) with their local school districts that outline the educational program the student is supposed to receive. When the **local school districts unilaterally, substantially and materially changes their educational programs by closing school and keeping these students home to receive “remote learning”, or no services at all, they violate the federal civil rights of these students under the Individuals with Disability Education Act (IDEA)**. This illegal action by school districts violates the **pendency** or “**stay-put**” rights of each special education student. The specific IDEA provision, 20 U.S.C. § 1415(j), states “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency **AND** the parents otherwise **AGREE**, the child shall **REMAIN** in the then-current educational placement of the child.” The **U.S. Supreme Court** “has emphasized that the provision’s text is ‘unequivocal’ and ‘states plainly’ that the child ‘shall’ remain in his current educational placement ‘during the pendency of any proceedings initiated under the act.’”
- The **temporary restraining order** was filed as part of a pending federal statewide class action lawsuit, 2:21-cv-18746, *Carmona, et al. v N.J. Dept. of Education, et al.*, seeking declaratory and injunctive relief against the New Jersey Department of Education and many local school districts

to enjoin them from violating the Plaintiffs procedural and substantive rights under the Individuals with Disabilities Education Act (IDEA), Section § 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA), New Jersey Administrative Code for special education (N.J.A.C.), New Jersey Special Education Statute (N.J.S.A.), the New Jersey Constitution, New Jersey Civil Rights Act (N.J.C.R.A.), New Jersey Law Against Discrimination (N.J.L.A.D.), and the Equal Protection Clause of the Fourteenth Amendment.

- **Plaintiffs have suffered and continue to suffer irreparable harm** as a result of Defendants' refusal to meet the educational needs of students with disabilities in New Jersey School Districts and will continue to suffer further irreparable harm unless and until the Court grants declaratory and injunctive relief against Defendants to remedy the illegal treatment of and discrimination against students with disabilities in New Jersey School Districts, and to ensure that the educational rights of students with disabilities are not violated.
- The federal lawsuit also alleges the Defendants violated the **Racketeer Influenced and Corrupt Organizations (RICO) Act** of 1970. The RICO cause of action arises from a scheme by defendants to fraudulently use their respective enterprises to defraud plaintiffs, the beneficiaries of IDEA Part B, upwards of approximately \$368,431,755 in 2020, by making **false assurances to the United States Department of Education (USDOE)** that the NJDOE and its local school districts complied with IDEA during the COVID-19 pandemic. In the year 2020, NJDOE received \$393,060,421 in IDEA Part B funds, and anticipated receipt of an additional \$458,567,303 in 2021.

For more information about the lawsuit, please go to www.ReOpenClass.com and if parents want to join the lawsuit they can call the toll-free hotline: 888-927-4332 / 888-927-IDEA.

Patrick Donohue is a civil rights attorney who became an advocate after his daughter, Sarah Jane, was violently shaken by her baby nurse when she was only five days old, breaking four ribs, both collarbones and causing a severe brain injury. The Brain Injury Rights Group is a national civil rights legal advocacy non-profit organization headquartered in New York City. Besides Brain Injury Rights Group, Mr. Donohue has founded one of the largest brain injury programs in the country located in New York City, the International Institute for the Brain (iBRAIN).

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