

January 10, 2021

VIA ECF FILING

The Honorable Judge John Michael Vasquez
United States District Court for the District of New Jersey
50 Walnut Street
Newark, New Jersey 07101

Re: Carmona v. New Jersey Department of Education, et al., 2:21-cv-18746-JMV-ESK

Dear Judge Vasquez:

Please accept this brief reply to the New Jersey Department of Education's January 7, 2022, letter to the Court.

The statement that the New Jersey Department of Education does not have any control over any individual school or district's decision to transition to remote learning is simply untrue. As a State Education Agency, the NJDOE exists solely to manage and control the educational and affairs for all Local Education Agencies in New Jersey, and its sole responsibility is to adopt regulation to and implement education in New Jersey pursuant to New Jersey law.

Under IDEA, the state and local educational agencies are responsible for providing Plaintiffs with a free and appropriate public education. As the State Education Agency (SEA), the NJDOE receives hundreds of millions of dollars in funding pursuant to IDEA and section 504 of the ADA, and is legally required to fully comply with the statutes' provision upon accepting the federal funds. In fact, the NJDOE has established the Office of Special Education ("OSEP") to oversee the provision of special education in New Jersey and ensure that the State is in compliance with federal law.

The IDEA has *not* been amended since the beginning of the pandemic to allow for remote learning for any student with an IEP. It is incredulous that the NJDOE is stating that their obligation and responsibility to comply with all provisions of the IDEA is waived simply because a local board of health has "recommended" that a school operate remotely.

The NJ DOE is also failing to ensure that the local education agencies are complying with state law with respect to school closures. New Jersey must provide 180 days of in-person learning in order to receive state aid. However, N.J.S.A. 18A:7F-9 (b) provides a provision for schools to substitute virtual instruction for in-person learning so as to meet the State's 180-day requirement. The statute states, in pertinent part:

b. Notwithstanding the provisions of subsection a. of this section to the contrary, in the event that a school district is required to close the schools of the district for more than three consecutive school days due to a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related closure, the commissioner shall allow the district to apply to the 180-day requirement established pursuant to subsection a. of this section, one or more days of virtual or remote instruction provided to students on the day or days the schools of the district were

closed if the program of virtual or remote instruction meets such criteria as may be established by the commissioner. A district that wants to use a program of virtual or remote instruction to meet the 180-day requirement in accordance with this subsection shall , with board of education approval, submit its proposed program of virtual or remote instruction to the commissioner within 30 days of the effective date of P.L.2020, c.27 and annually thereafter, provided however that if the school district is unable to complete and submit its proposed program within the 30-day period and the district is required to close its schools for a declared state of emergency, declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related closure, the commissioner may retroactively approve the program.

A day of virtual or remote instruction, if instituted under a program approved by the commissioner, shall be considered the equivalent of a full day of school attendance for the purposes of meeting State and local graduation requirements, the awarding of course credit, and such other matters as determined by the commissioner.

N.J.S.A. 18A:7F-9 (b).

The plain language of the statute provides that when remote instruction is offered for more than three consecutive days, it may only be done so when there is a declared state of emergency, a declared public health emergency, a directive by the appropriate health agency or officer to institute a public health-related closure.

Governor Murphy ended the Covid-19 public health emergency on June 4, 2022, by way of Executive Order 244. The Governor’s powers under the Disaster Control Act, *N.J.S.A. App.A.:9-33, et seq.* remain. However, although he has issued order with respect to masks and vaccinations in school (Executive Orders 251 and 253) Governor Murphy has not issued any orders or declaration with respect to school closures. Therefore, no school in the state is permitted to offer remote learning for more than three days without a directive of the local board of health.

N.J.S.A 18A:40-12 sets forth the actual criteria and requirements for closing schools for health-related reasons:

Closing schools during epidemic. Whenever the board of health of any municipality shall declare any epidemic or cause of ill health to be so injurious or hazardous as to make it necessary to close any or all of the public schools in the municipality, the board shall immediately serve notice on the board of education of the school district situated in the municipality that is desirable to close the school or schools. Upon receipt of the notice, the board of education may close the schools under its control, or such of them as may be designated by the board of health. The schools so closed shall not be reopened until the board of education is satisfied that all danger from the epidemic or cause of ill health has been removed.

*N.J.S.A 18A:40-12.*¹

¹ The provisions of *N.J.S.A 18A:40-12* found in the education code, are mirrored in the health code at *N.J.S.A. 26:4-5* which provides: Each local board [of health] may declare any epidemic or cause or ill health to be so injurious or hazardous as to make it necessary to close any or all of the public or private schools within the jurisdiction of the board [of health]. No public school shall be closed except by the direction of the body having the control or direction of such school. Any such body may cause any school under its control to be closed, if, in its judgment, such closing is necessary because of the injurious or hazardous nature of an epidemic or cause of ill health.

Pursuant to the plain language of N.J.S.A. 18A:40-12, the local board of health must first issue the appropriate declaration and immediately serve notice on the board of education of the school district. However, no directive has been issued by any of the local health agencies related to the districts at issue herein.²

When the local school districts unilaterally, substantially, and materially change their educational programs by closing schools 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 IDEA. *See* 20 U.S.C. § 1415(j), N.J.S.A. § 18A:46-1 *et seq.*, and N.J.A.C. § 6A:14-2.3.

Thank you for the court’s attention to this matter.

Respectfully submitted,

/s/ Keri Avellini Donohue, Esq.

Keri Avellini Donohue, Esq.

cc: All counsel of Record (via Pacer)

² In fact, a cursory review of the City of Newark's Department of Health Coronavirus webpage specifically directs people to the State of New Jersey, “The City of Newark, Mayor Ras J. Baraka and Health Department and Wellness Director Dr. Mark Wade are urging residents with questions about the virus to call the State of New Jersey’s hotline at 1 (800) 222-1222.” (<https://www.newarknj.gov/card/coronavirus-information>). Additionally, there is no reference from the City of Patterson's Department of Health stating schools should be closed (<https://www.patersonnjhealth.gov/>), nor any reference from Jersey City's Department of Health (<https://jerseycitynj.gov/cityhall/health>), nor any reference from Camden County's Department of Health (<https://www.camdencounty.com/service/covid-19-updates-and-preparations/>).