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School reopenings in California are dangerous and unnecessary

In the middle of the most devastating public health crisis in more than a century, the Trump administration and its supporters argue that more harm results from keeping students home from school than from subjecting them to the coronavirus pandemic.

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In the middle of the most devastating public health crisis in more than a century, the Trump administration and its supporters argue that more harm results from keeping students home from school than from subjecting them to the coronavirus pandemic.

Despite guidelines from the Centers for Disease Control and Prevention, including a call for measured and thoughtful reopenings, school districts across the country are barreling ahead with plans to bring classes back to campuses without social distancing or face masks.

Everyone agrees that in-person learning is better, period. The CDC guidelines are unobjectionable, but they are mostly conjecture and supposition. Because schools have been shut down since the early days of the pandemic, we know very little about in-person transmission of the virus among children and between children and adults.

The CDC website is replete with preliminary studies on COVID-19 and children, but includes nothing definitive. We know almost nothing about how teachers and other school employees will be impacted, yet we are asking them to put themselves in jeopardy without any real economic or other help from the federal government.

On July 17, Gov. Gavin Newsom mandated that schools in 32 counties being monitored by the state for COVID-19 spread stay closed. On July 21, a group of parents filed a complaint for declaratory and injunctive relief in U.S. District Court for the Central District of California against the governor, Attorney General Xavier Becerra, Department of Public Health Director Sonia Angell, and State Superintendent of Public Instruction Tony Thurmond demanding that schools open for in-person instruction. *Brach et al. v. Newsom et al.*, 2:20-cv-06472 (C.D. Cal., filed July 21, 2020).

A couple of weeks later, the Orange County Board of Education announced it plans to file its own lawsuit after approving on July 13 recommendations for schools in the high-risk county to teach students in-person and suggesting guidelines against students wearing masks and social distancing.

The Central District lawsuit is being brought pursuant to 42 U.S.C. Section 1983, the statute that authorizes an individual right to sue for civil rights violations committed under the color of law. The plaintiff parents are alleging deprivation of their civil rights, including equal protection and due process, and they are asserting the right to be free from actions that have a disparate impact on minorities, despite the fact that no minorities are identified in the complaint.

Although minorities are being disproportionately impacted by the coronavirus both economically and in terms of health, the lawsuit alleges that school closures violate California's constitution by disproportionately harming marginalized children.

The lawsuit is both wrong-headed and destined to fail. The attorney general and superintendent of education are not proper parties because they have not done anything yet. Even if they were properly named, both are subject to broad immunities when acting pursuant to the authority granted by law to their offices.

The governor, the only named party who has taken action, is acting well within the emergency authority granted to him under Government Code Sections 8567, 8627 and 8665 by issuing an emergency order to protect public health.

Most critically, the plaintiffs are alleging only the potential to be harmed. They are not making allegations of actual harm or offering proof about how that harm might occur. Pursuant to Section 1983, actual damages must have resulted from the deprivation of a constitutionally protected right.

School has not started yet, and declaratory relief should not be a remedy for speculative injury to the plaintiffs under the civil rights laws. Their lawsuit is nothing more than smoke and mirrors at this point.

Most important, distance learning does not mean no education. We do not yet know what a remote return to learning will look like, but a lot has to happen before these parents can assert any claims for inadequate or inappropriate education.

Before the start of each school year, minors with learning disabilities and other recognized disabilities are expected to meet with their school representatives to fashion individual educational plans. Each school is obligated to determine the best course for their affected students and to adhere to the requirements of those plans. It is therefore patently premature to sue for due process violations of an individual educational plan before any violations have occurred.

We still have time to review the processes that schools will follow to ensure students learn safely and effectively, but we will have no time to unwind exposure to the coronavirus once it starts spreading through classrooms.

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