



SEPTEMBER 2020

UPDATED NO. 20-10

# COVID-19 Litigation Emerges at State and Federal Levels

*AMENDED Sept. 23, 2020*

*UPDATED October 12, 2020*

## Overview

As feared by school districts across the nation, COVID-19 related litigation is beginning to emerge, at both the federal and state level. These legal actions are concerning to everyone who wants to see public education resources focused on services to students, not legal proceedings. There are two federal class action lawsuits that have been filed, in New York and California, respectively, that name all California school districts as defendants. Additionally, due process complaints have been filed with the California Office of Administrative Hearings ("OAH") as companions to the New York class action lawsuit.

What Do I Need To Know About the New York and California Class Action Lawsuits?

- All school districts in California have been named as defendants in both the New York and the California federal class action lawsuits.
- Defendant districts must be personally served with a summons and complaint, unless service of process has been waived by the school district.
- Email service is not sufficient in federal court unless a defendant waives service and accepts electronic service.
- **Any District employee who receives a copy of a complaint and summons with respect to either of the class action lawsuits should immediately tender it to their insurance carrier. Additionally, if service is attempted via email, the recipient should refrain from responding or from clicking on any email links or opening any attachments which may inadvertently waive service. Opening the zip file might also subject the recipient's computer to a virus.**
- **Beginning on October 11, 2020, districts across California received a copy of the California-based class action law suit via email with a request that the district agree to electronic service, a notice of an intent to file a Temporary Restraining Order (TRO), a request that the recipient stipulate to the TRO, and a request that the recipient resolve the matter in some other manner to avoid the TRO. The email included the following attachments: Waiver of Service form, Notice Waiver of Service Request, Memorandum of Points and Authorities and Application For Temporary Restraining Order, and a zip file containing what purports to be a copy of the Complaint and Summons.**

- **Beginning the week of October 5, 2020, several California districts began receiving the New York-based class action Complaint and Summons via Federal Express.**
- **Any recipient of the California-based class action lawsuit email should refrain from responding, clicking anywhere on the email, or opening any attachments, and should immediately notify your legal counsel and tender the Complaint and Summons to their insurance carrier.**
- **Any recipient of the New York based class action via Federal Express should refrain from responding and should immediately notify their legal counsel and tender the Complaint and Summons to their insurance carrier.**
- **Service via email, Federal Express or similar postal delivery companies does not constitute proper service.**

What Do I Need To Know About OAH Due Process Complaints Connected to the New York Class Action Lawsuit?

- *Many school districts have received emailed copies of documents entitled Request for Impartial Hearing and Ten-Day Notice. Service of a due process complaint must be completed via mail or in person. Service via email, fax, or Secure e-File Transfer is only acceptable if the other party has agreed to accept service in this manner.*
- **Any District employee who receives a copy of a Request for Impartial Hearing and Ten-Day Notice should immediately tender it to their legal counsel.**
- OAH has been issuing Orders to Show Cause as to what authority the New York attorneys have to represent families and students before OAH. Several cases have been dismissed as a result of the New York attorneys' failure to respond.
- Until OAH has determined the status of individual complaints, school districts should consult with legal counsel to determine next steps.

**For more detailed information about the class action lawsuits and the OAH complaints, please keep reading: [COVID-19 NEW YORK BASED FEDERAL CLASS ACTION LAWSUIT \(J.T. et al. v. de Blasio et al. \(Case No.: 20-cv-5878\)\)](#)**

On July 28, 2020, in response to nationwide COVID-19 related school closures, Civil Rights attorney, Patrick Donohue, and Peter Albert with the Brain Injury Rights Group, filed a Class Action Complaint For Declaratory And Injunctive Relief in the United States District Court, Southern District of New York. The class action lawsuit was filed on behalf of 104 named students and families and all other "similarly situated students," as Plaintiffs. The class action lawsuit was filed against Defendants Bill de Blasio, in his official capacity as the Mayor of New York City; Richard Carranza, in his official capacity as the Chancellor of New York City Department of Education; the School Districts in the United States; and State Departments of Education in the United States. Nine of the named Plaintiffs were alleged to be living within the boundaries and served by public school districts in California.

The class action lawsuit alleges that COVID-19 related school closures resulted in a denial of free appropriate public education ("FAPE") to every public school student receiving special education and related services under the Individuals with Disabilities Education Act ("IDEA"). The class action lawsuit also alleges that every disabled student was discriminated against because of the COVID-19 related school closures, in violation of Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. The class action lawsuit seeks injunctive and declaratory relief, compensatory and punitive damages, orders requiring Defendants to provide independent educational evaluations and compensatory education, and attorney's fees.

On August 8, 2020, the United States District Court issued a Summons that allowed Plaintiffs to proceed with their class action lawsuit and serve the Complaint and Summons on the Defendants. Pursuant to the Federal Rules of

Civil Procedure, the Summons and Complaint must be personally served on each Defendant, unless the Plaintiffs request that the Defendants waive service and accept electronic service. Personal service requires that a copy of the Complaint and Summons be delivered to the named individual personally; or a copy may be left at the individual's home or usual place of abode with someone of suitable age and discretion who resides there; or by delivering a copy to an agent authorized by appointment or by law to receive such service of process. The request for waiver of service must be in writing, addressed to the individual defendant, and be sent by first-class mail or other reliable means.

Shortly after the United States District Court issued the Summons, attorneys for Plaintiffs began attempting service of the Complaint and Summons on school districts throughout California by emailing a copy of the Summons and Complaint to school district employees, with the body of the email asking the recipient to forward the email to the appropriate person and copy the sender. The email did not reference a request for a waiver of personal service. Other states have reported that some of the emails purporting to effect service also contained a link in the body of the email that once clicked, notified the recipient that they had waived personal service. In addition, the Brain Injury Rights Group created a website to recruit volunteers across America, who are willing to personally serve the school district with the Complaint and Summons and then complete an Affirmation of Service and send the completed Affirmation to an email account associated with the Brain Injury Rights Group.

On September 2, 2020, Judge Colleen McMahon issued an Order to Show Cause ordering the Plaintiffs' attorneys to brief why the Complaint should not be dismissed as against all school districts outside the state of New York, and as to why venue was proper for any New York school district outside the jurisdiction of the Southern District of New York, and lastly as to why all defendants other than the New York City Department of Education should not be severed and the complaint dismissed against them.

On September 9, 2020, Lewis Silverman, of Silverman & Associates, legal counsel for approximately 93 school district Boards of Education in the Hudson Valley of New York brought to Judge McMahon's attention that upon investigation into at least four of the state-based due process complaints, the named parents had not retained the Brain Injury Rights group nor any of its listed attorneys to represent the family in any legal proceedings. Similar investigations of behalf of

F3 clients have resulted in similar findings, namely that parents did not retain the Brain Injury Rights Group nor any of its attorneys to represent them in any legal proceedings.

On September 14, 2020, Judge McMahon issued another Order to Show Cause and a Temporary Restraining Order directing Peter Albert to provide the Court with a list of all impartial due process hearings he has commenced on behalf of any member of the putative plaintiff class along with copies of retainer letters by which he was specifically authorized to commence the impartial due process hearings. The Order also temporarily restrained Mr. Albert from commencing any impartial due process hearings on behalf of any putative member of the putative plaintiff class.

On September 22, 2020, Judge McMahon denied Plaintiffs' Motion for Leave to Amend, on the basis that there is a Pending Motion to Dismiss. Additionally, the Court has yet to rule on Plaintiffs' responses to the Court's September 2, 2020 Order to Show Cause.

#### DUE PROCESS HEARING REQUESTS FILED BEFORE OAH RELATED TO THE NEW YORK FEDERAL CLASS ACTION COMPLAINT

The IDEA requires that before a complaint may be filed in federal court, the Plaintiffs must first exhaust their remedies at the state level, except for in limited circumstances which are not applicable here. This means that a Plaintiff must first file a due process complaint with OAH before filing a complaint in federal court. *Service must be completed via mail or in person, unless the other party has consented to service via email, fax, or Secure e-File Transfer.*

Beginning in August 2020, the Brain Injury Rights Group and the Patrick Donohue Law Firm began *emailing* various school districts in California with a "Request for Impartial Hearing" accompanied by a "ten day notice." The documents were also filed with OAH. Shortly after OAH began receiving the requests for impartial hearings, OAH, on its own motion, began issuing Orders to Show Cause as to what authority the attorneys from New York, who did not appear to be licensed to practice law in California, had to represent the students and families before the OAH. The parents' attorneys were ordered to provide a response by a date certain. In those cases where the deadline has passed without a response, OAH is dismissing the complaints.

#### COVID-19 CALIFORNIA BASED FEDERAL CLASS ACTION LAWSUIT (*Martinez et al. v. Newsom et al.*, Case 5:20-cv-01796)

On August 31, 2020, attorneys Fazil Munir, Diana Renteria, Deborah Reisdorph, and Andrew Price, filed a Class Action lawsuit in the United States District Court, Central District of California, naming Governor Gavin Newsom, State Superintendent of Public Instruction Tony Thurmond, State Public Health Officer Sonya Angell, the California Health and Human Services Agency, California Department of Public Health, and every public school district in the State of California. The lawsuit is filed on behalf of three named plaintiffs and four identified students, and on behalf of "all others similarly situated." As with the New York class action lawsuit, the California class action lawsuit seeks declaratory and injunctive relief and damages related to allegations that all California public school students eligible to receive special education and related services were denied a FAPE during the COVID-19 related school closures. The class action lawsuit asks the Court to require defendants to comply with the IDEA for the 2020-2021 school year, as well as "catch-up assistance" to compensate plaintiff students for their alleged loss of a "basic minimum education" for the end of the 2019-2020 school year. It also seeks an injunction against Governor Newsom enjoining him from assigning special needs students to distance learning, an order that all special needs students be reassessed "before the start of the 2020-2021 school year," a restraining order requiring defendants to amend their guidance or issue new guidance allowing special needs students to return to in-person learning, an order granting compensatory education, and attorney's fees. The class action lawsuit specifically asserts that plaintiffs do not have to exhaust their remedies by filing due process complaints with the OAH. Thus, we do not anticipate that school districts will receive companion OAH complaints in this matter.

On September 10, 2020, Judge Dolly M. Gee issued a Summons which allows the plaintiffs to now serve all named defendants with the Complaint and Summons. As explained earlier, the Federal Rules of Civil Procedure require personal service or that plaintiffs seek a waiver of personal service from each named defendant.

If you have any questions regarding this topic and how it affects your agency, please call one of our six offices.

**F3 NewsFlash® Written by:**

*Melanie Larzul, partner, Lenore Silverman, partner and Dee Anna Hassenpour, associate*

FRESNO | INLAND EMPIRE | LOS ANGELES | OAKLAND | SACRAMENTO | SAN DIEGO  
[www.f3law.com](http://www.f3law.com)

**This F3 NewsFlash® is a summary only and not legal advice. We recommend that you consult with legal counsel to determine how this legal development may apply to your specific facts and circumstances.**

© 2020 Fagen Friedman & Fulfroost LLP All rights reserved, except that the Managing Partner of Fagen Friedman & Fulfroost LLP hereby grants permission to any client of Fagen Friedman & Fulfroost LLP to use, reproduce and distribute this NewsFlash intact and solely for the internal, noncommercial purposes of such client.