
UPDATE: Ninth Circuit Finds Lawsuit Regarding COVID-19 Limits on In-Person Learning Now Moot

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The plaintiffs in *Brach v. Newsom* (9th Cir. June 15, 2022, No. 20-56291) __ F.4th __, originally filed a case in U.S. District Court for the Central District of California, challenging various orders, including the 2020-2021 Reopening Framework, issued by California government officials concerning the operation of both public and private schools during the COVID-19 pandemic. The District Court denied the plaintiffs' request to prevent the State from enforcing the Reopening Framework, finding that a judicial order requiring the State to reopen all schools for in-person instruction would not be in the public interest, and that the plaintiffs had not met their burden of establishing a likelihood of success on their constitutional claims. (See [2021 Client News Brief Number 27.](#))

On July 23, 2021, a three-judge panel of the U.S. Ninth Circuit Court of Appeals issued an opinion holding that the Fourteenth Amendment rights of *public school* students and their parents were not violated when the State prohibited in-person learning in counties with high rates of COVID-19. However, the Ninth Circuit's rationale did not extend to *private school* students and their parents, for which the court held that the limitations placed on private school operations infringed on parents' constitutional right to educational choice as a matter of parental due process rights.

On December 8, 2021, the Ninth Circuit agreed to hear the case *en banc*, meaning the chief judge and 10 additional judges would hear the case, thus vacating the July 2021 opinion. The subsequent *en banc* opinion was issued on June 15, 2022.

Ninth Circuit's *En Banc* Opinion

In its *en banc* opinion, the Ninth Circuit dismissed the appeal as moot, holding that there is no longer a live controversy for the court to rule on.

The plaintiffs sought a declaratory judgment that the executive order issued by Governor Newsom providing guidance on school reopening was unconstitutional and an injunction against the Reopening Framework; however, since the District Court issued its original ruling, Governor Newsom had rescinded the challenged executive orders and revoked the Reopening Framework. Schools now operate under the 2021-2022 guidance, which provides that all schools may reopen for in-person learning.

As a result, since approximately April 2021, there has been no State-imposed barrier to reopening for in-person instruction. Accordingly, there is no longer an active controversy between the plaintiffs and the State.

The Ninth Circuit rejected the plaintiffs' assertion that the case survived under two exceptions to mootness, i.e., the "voluntary cessation" exception and the "capable of repetition yet evading review" exception. Neither exception was found to apply here.

Takeaways

The Ninth Circuit found there is no longer any State order related to this case and the provision of in-person learning for the court to declare the constitutionality of or to enjoin enforcement of. The significant changes from the beginning of the pandemic to now, including the relaxing of restrictions on in-person learning, fundamentally altered the basis of this dispute.

Accordingly, the Ninth Circuit court dismissed as moot this challenge and appeal of early pandemic restrictions.

If you have any questions regarding the Ninth Circuit's opinion in this case or about COVID-19 restrictions, please contact the authors of this Client News Brief or an attorney at one of our [eight offices](#) located statewide. You can also subscribe to our [podcast](#), follow us on [Facebook](#), [Twitter](#) and [LinkedIn](#) or download our [mobile app](#).

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