

Perspective

Closing the Schools: Legal Issues for School Boards

LISA E. SORONEN

A PROMINENT PANDEMIC CONTAINMENT STRATEGY suggested by many experts is closing schools. Regardless of the merits of this containment strategy, numerous legal and practical consequences could arise if school districts were closed for up to 3 months because of a pandemic. Fortunately, many of the potential legal issues can be averted, or at least minimized, through careful planning, collaborating, and communicating with stakeholders before a pandemic occurs. More specifically, the cooperation of local, state, and federal governments is essential to overcoming most of the legal challenges a school district could face. This article discusses 8 legal issues that could arise in the event that a school district was required to close for a lengthy period of time because of a pandemic. It also suggests ways local, state, and federal governments and other stakeholders, including parents and unions, could work together to overcome legal obstacles before a pandemic occurs.

1. School Board Meetings

School boards are deemed by state law to have the authority and responsibility to govern a school district. School boards are responsible for, among other things, hiring and firing staff, ensuring that schools are safe, and adopting the overall policies that govern many, if not most, aspects of running a school district. School boards generally make decisions at regularly scheduled public meetings. Even if a school board had performed extensive pandemic planning, when a pandemic actually occurs and involves closing schools, the school board would very likely have to meet quickly to make a variety of very serious and difficult decisions. Likewise, during the time school is closed, the school board may want to conduct its regularly scheduled meetings to address more routine issues and issues created by the pandemic.

Most, if not all, states require school boards to conduct “open meetings.” This means school board meetings must be properly noticed and held in a public place where citizens can attend and participate. School board meetings are typically advertised ahead of time and are held in the school district in a room large enough to accommodate an audience. A quorum must meet to make decisions.

Holding a school board meeting without adequate notice, over the phone or via e-mail, or at a school board member’s house, and with less than a quorum, may be sensible or even necessary during a pandemic. However, doing so may not be allowed under state law, even in an emergency. In short, the body directed by state law to govern a school district may not be able to fulfill its governance function lawfully during a pandemic.

State open meetings laws could be modified to make it possible that, in the event of a pandemic or similar disaster, boards could meet without the usual notice and in a less public manner and could make decisions with less than a quorum.

2. Compensation, Benefits, and Work Assignments

One of the biggest legal and practical issues that could arise if a school district is closed for a few months because of a pandemic is dealing with compensation, benefits, and work assignments for employees. Specifically, school districts would have to decide, based on state and federal law, whether they can or must continue to compensate and provide benefit coverage to particular classes of employees while they are not working. Likewise, school districts may want to extend paid leave to employees to ensure they receive compensation and benefits while they are out of work. However, school districts may not have the authority to do so under state law. An-

Lisa E. Soronen, JD, is a Staff Attorney, National School Boards Association, Alexandria, Virginia.

other possible compensation issue is whether employees could receive unemployment compensation under state law during their absence.

To address these issues, school districts should determine ahead of time whether they must, may, or cannot compensate, continue benefits, and extend leave to employees who are not working during the pandemic. Either way, employees should be informed ahead of time so they can plan accordingly. If employees cannot be compensated or granted leave under state laws and school districts would like this flexibility, state legislatures should be informed of this issue and asked to modify state law.

While many employees may not be working at all if a school district is closed because of a pandemic, other employees may be working long hours or working from home. If such employees are nonexempt under the federal Fair Labor Standards Act (FLSA), they must be paid for all hours worked, including time and one-half for all hours worked over 40 in a workweek. Adequate records of hours worked must be kept even if the school district's electronic timekeeping system is not available.

Employees who are likely to be required to work during the pandemic, even if the school district is closed, should be trained ahead of time on the overtime and record-keeping requirements of the FLSA and compensated as required by law.

Legal issues also may arise regarding what criteria are used to determine who will continue to work during the pandemic; what job duties employees will perform, particularly if they are different from the employees' usual job duties; whether employees will receive their regular wage or additional compensation; and whether and on what basis employees can refuse to work without being disciplined or terminated. School districts operating in a unionized environment are typically required to negotiate and come to agreement over "wages, hours, and conditions of employment" and the effects of certain decisions.

Unionized school districts should negotiate the above issues with employee unions ahead of time. School districts that do not have unions should likewise work out these issues ahead of time based on state law and employee feedback.

When employees return to work, the school district may need to increase the number of days worked during the week, lengthen the school day, or increase instruction time to make up for missed days of school. Also, the school district may need to reassign teachers due to changes in attendance patterns and available staff. State laws and collective bargaining agreements might prevent these measures.

State legislatures may want to suspend or modify requirements regarding number of instruction days, amount of instruction time, length of the school day, and limitations on teacher transfers in the event of a pandemic that

closes schools. At the local level, school districts and unions should negotiate modified contract language that gives school districts additional flexibility to meet temporary demands associated with a pandemic, such as making up lost instruction time and transferring teachers.

3. Adequate Instruction Time

A number of legal issues could arise surrounding missed instruction time during a pandemic. First, school districts could face lawsuits from parents who do not want a school to close. Closing schools could disrupt a child's ability to compete for an academic scholarship, take a standardized college admissions exam, complete college application forms, or perform for a college athletic scout. This especially could be an issue if not all school districts in the state or country close or if they close at different times or for different periods of time. It is doubtful such lawsuits would be successful, but defending them could be expensive and time-consuming.

Ideally, colleges and universities will work with school districts to accommodate students who missed school and were in the process of applying for college, including students who might be eligible for scholarships.

Second, school districts could face legal issues related to students whose parents remove them from school before the school is officially closed and/or do not allow their children to return to school after it has reopened. Such students may choose not to attend school because they are sick or might become sick or because their parents are afraid they will get sick at school. If such students are not sick, it is possible they could be deemed truant under state law. Likewise, school district policy may not adequately address whether all absent students will be able to make up class work regardless of the reason for and duration of their absence. Disputes over grades and class rank could occur if students feel they are being treated unfairly in how missed classroom work is allowed to be completed. Moreover, particularly if some students have missed more classroom instruction than their peers, teachers may want to hold students back, which may cause disputes between parents and teachers.

Confusion and conflict over grades and course completion may be avoided or minimized by adopting policies ahead of time regarding how absences will be treated and what is required to complete courses when school is closed for a lengthy period of time because of a pandemic. State legislatures also may need to modify truancy laws in the event of a pandemic.

Third, state law typically requires that students receive a certain number of days of classroom instruction per year. Some states also have adopted laws requiring that the school year not begin before Labor Day. Depending on what time of the year a school district must be closed

due to a pandemic, the school day and school year might have to be extended, classes might have to take place on the weekends, and breaks might have to be shortened. Likewise, it might make sense to start the next school year before Labor Day to make up for the lost continuity of instruction in the previous year. The lengthening of the school day or school year, holding classes on the weekends, and shortening breaks might interrupt student and staff religious practices, might overlap with seniors attending college, might annoy parents who have to rearrange daycare and family vacations, and could cause a financial hardship on families of students who work and contribute to the family income.

Here again, alerting parents before the pandemic to the possibility of extending the school day and week and shortening breaks so they can plan accordingly is a good idea. School districts should receive feedback about student and staff religious practices before creating a modified school calendar. In some instances, a school district may simply not be able to instruct students, particularly graduating seniors, for the amount of days required by state law. In this instance, state legislatures may have to modify instruction requirements.

Fourth, under the federal No Child Left Behind Act, students in particular grade levels have to be tested on specific subjects annually. How well students do on these high-stakes tests determines whether schools, school districts, and the state make “adequate yearly progress” under the Act. If schools and school districts do not make adequate yearly progress, the consequences exacted range from students being allowed to transfer to other schools to schools being reconstituted, depending on how long a school or school district has failed to make adequate yearly progress. States also have laws fulfilling these requirements and setting their own, such as annual exams or high school exit exams. If a school district has a high-stakes exam scheduled for May 1 and the school was closed because of a pandemic from February 1 to April 31, students will be unprepared and demoralized, as will schools and school districts that will be judged based on the results of tests students were ill-prepared to take. In some cases, school districts and states could be vulnerable to legal challenges for imposing testing requirements on students who have not had the opportunity to learn the material being tested.

The U.S. Department of Education should clarify whether and how it will waive the testing requirements under the No Child Left Behind Act based on its experience after Hurricane Katrina. States should set forth similar contingencies regarding state testing requirements.

Similarly, the No Child Left Behind Act requires that students taking certain subjects in programs partially funded by the U.S. Department of Education be instructed only by “highly qualified” teachers. Also, states

typically have their own teacher certification and licensing requirements. When a school reconvenes after a pandemic, the number of students attending may have changed as may have the number of teachers reporting to work. At least on a short-term basis, not all students may be able to be taught by “highly qualified” teachers or even certified teachers. Moreover, the entity responsible for licensing teachers may not have been operating during the pandemic. Backlogs may make it difficult for the licensing authority to issue teaching licenses to those eligible to receive them.

Again, the U.S. Department of Education should clarify how it will waive the “highly qualified” teacher requirement on a short-term basis in the event of a pandemic or other disaster. Likewise, the teacher licensing entity should make clear whether and how it will waive certification and license requirements on a temporary basis or grant temporary licenses on an expedited basis.

Finally, even if the school district is closed for an extended period of time because of a pandemic, the school board may want to continue educating students using alternative means, such as distance learning. Telephones, the Internet, television, and other distance learning options, if available, could be vehicles to convey assignments and instruction. However, not all students have access to these technologies. Moreover, where lack of access to technology is correlated with socioeconomic status, race, or national origin, schools could face charges of discrimination.

Continuing instruction while school buildings are closed during a pandemic would require a determination of which forms of communication are available to the majority of students, including students having lower socioeconomic status and minority students. Parents and students should be informed ahead of time about the district’s plan to continue education.

4. Student Populations with Special Needs

School districts serve a wide range of student populations with special needs. It is not clear what legal obligations school districts would have to these groups in the event of a pandemic that results in school closings.

First, public school districts are required under the Individuals with Disabilities Education Act to provide to students with disabilities a free and appropriate public education in the least restrictive environment. Students with disabilities may be more severely affected than other students by the loss of continuity in education during a pandemic. As a result, parents of special education students may request additional services once school has reconvened, which may be difficult for the district to fulfill, due to a lack of human and financial resources. Moreover, a new delivery method of instruction is con-

sidered a change in placement under the Individuals with Disabilities Education Act, which requires an individual education plan (IEP) meeting and may lead to a due process hearing.

The U.S. Department of Education and state departments should provide guidance and flexibility to school districts that are unable to meet the needs of students with disabilities in the usual manner or to adhere to the myriad of mandated timelines for evaluations, IEP development, and due process procedures during the pandemic. IEPs created by parents and educators for educating students with disabilities could address the education of special education students during a pandemic. Also, agreement could be reached about how a change in placement and other instructional issues will be decided short of IEP team meetings during the pandemic. Such plans might include the assistance of family members or teachers using distance learning.

Second, schools also serve homebound students with a variety of educational needs. It is unclear whether school districts would be required to continue educating homebound students while a school is closed during a pandemic.

Again, planning with the parents of homebound students about creative ways to continue educating homebound students in some capacity in the event of a pandemic is key.

Finally, schools also provide free and reduced breakfast and lunch to millions of children every day. Schools may be unable to serve the needs of these students if the district is closed.

The U.S. Department of Agriculture should inform school districts of whether and how it plans to continue providing free and reduced breakfast and lunch if school is closed. If no plans from the U.S. Department of Agriculture are forthcoming, school districts should inform recipients of free and reduced meals that these meals may not be provided during a pandemic if the school is closed. School districts also may be able to coordinate ahead of time with other social service agencies that provide support to poor and vulnerable populations to make sure these families have adequate food supplies during a pandemic.

5. Using the School Facility as a Healthcare Facility

In the event of a pandemic resulting in a school's closing, very likely the local health department will want to use the school building as some type of temporary healthcare facility, including, possibly, a morgue. Legal issues may arise over who gets to decide whether, how, and when the school buildings will be used and how long the buildings will be used, especially if the school board

wants to begin instructing students again while the space is still being used as a healthcare facility. Other issues include when the school buildings will be safe for use again as schools, what temporary or permanent modifications can be made to the buildings, and whether and how much compensation the school district will receive for use of its facility.

Ideally, the local school board and the local public health department can work out most, if not all, of these issues before a pandemic occurs.

6. Financial and Governance Issues

State law may require school districts to submit budgets and other financial information to the state and the public on a certain date. Also, state and federal grants have due dates to submit paperwork. Likewise, in many states "student count" days, to determine how much state aid each district receives, occur annually on a date determined by state statute, as do school board elections. If a pandemic occurs and schools are closed for an extended period of time, school districts may need more time to put together budgets and financial documents, grant deadlines might have to be extended, "student count" days may have to be changed, and school board elections may need to be rescheduled.

State legislatures and state and federal agencies providing schools grants could provide needed flexibility by modifying these dates on a one-time basis because of the pandemic.

7. Contracts

School districts, like other entities and employers, have a multitude of contracts with suppliers and service providers that may range from school bus services to office supplies. If school districts are not open, they will not need these products and services, at least on a short-term basis. Many contracts contain "Act of God" clauses that may allow districts to be excused from performance. Also, the long-term nature of many contracts with school districts provides incentives for suppliers and service providers not to demand performance in the event of a pandemic. Nevertheless, school districts may not be able to void or suspend all contracts. Even if they can, time and money must be expended to negotiate these terms in contracts.

School districts should try to negotiate clauses in contracts ahead of time that specifically excuse performance in the event of a pandemic.

8. Communicating with Parents

School districts in some instances can be liable for injuries caused to students. Students and parents have

an expectation that school will take place on the designated dates and times for which they have been notified. Canceling school without adequately notifying parents could put students in harm's way as they travel to and from school and try to enter a school building that may not be open or that may have been converted to a temporary healthcare facility. Accordingly, schools could face legal liability if they fail to provide parents adequate notice that school is canceled and a student gets injured going to or coming home from school or being in the unoccupied or converted school building.

Schools can minimize exposure to liability if they inform parents ahead of time that school likely will be canceled for a lengthy period of time during a pandemic and tell them how to receive information about school cancellations because of a pandemic. Also, when the pandemic occurs, schools should disseminate the school cancellation information broadly, particularly if the usual communication channels are not available.

CONCLUSION

In conclusion, many legal issues could arise if school districts were to be closed for a lengthy period of time because of a pandemic. While these legal issues would add to the significant challenges communities would already be facing in the event of a pandemic, none of them are likely insurmountable, especially if school districts plan ahead and are able to work in cooperation with the federal, state, and local governments and other stakeholders, particularly parents and unions.

Address reprint requests to:

Lisa E. Soronen, JD

Staff Attorney

Office of General Counsel

National School Boards Association

1680 Duke Street

Alexandria, VA 22314-3493

E-mail: lsoronen@nsba.org