IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*, **Petitioners,** **v.** **GOVERNOR KIMBERLY K. REYNOLDS, *et al.*,** **Respondents.**	**Case No. CVCV060611** **RULING ON PETITIONER'S MOTION FOR STAY AND FOR TEMPORARY INJUNCTION**

On August 25, 2020, petitioners Des Moines Independent Community School District (DMPS) and its seven individual board members filed a petition for judicial review of agency action, declaratory ruling and injunctive relief against Governor Kimberly K. Reynolds, the Iowa Department of Education (DE) and its director (Ann Lebo), the Iowa State Board of Education, and the Iowa Department of Public Health (DPH) and its director (Dr. Caitlin Pedati). On the same date, petitioners filed a motion for stay of administrative action, temporary injunction, and request for expedited hearing against the same respondents. The request for expedited hearing was granted and the applications for stay and temporary injunction were set for hearing on September 4, 2020. Plaintiffs were represented by Miriam Van Heukelem. Defendant was represented by Jeffrey Thompson.

STATEMENT OF THE CASE

DMPS is a public school district organized and operated in accordance with the laws of the State of Iowa. DMPS is the largest school district in the state with approximately 32,545 students and 5,141 employees. DMPS is a diverse district with approximately 63 percent of its students being persons of color. (Petition; Exhibit 9).

All school districts in the state shall comply with statutory requirements for number of days or hours of instruction during the school year. Each district shall set a calendar including at least 180 days or 1,080 hours of instruction. Iowa Code § 279.10(1). The district shall also set the number of days or hours of required attendance for its students. *Id*.

Beginning in March of 2020, the governor began issuing proclamations of disaster emergency in response to the COVID-19 crisis. On March 15, 2020, she issued a proclamation closing all schools in Iowa for four weeks. In subsequent proclamations, she extended the school closure to April 30, 2020, and then ultimately cancelled classes for the remainder of the 2019-20 school year. On March 17, 2020, the legislature enacted emergency legislation allowing the governor to waive the instructional time requirements in Iowa Code section 279.10(1). The governor granted such relief in her proclamations on school closures. The legislation provided that the waiver authorization was repealed effective July 1, 2020. (Petition; Exhibits B-D).

On May 8, 2020, the Iowa Department of Education (DE) issued a statement requiring all school districts to submit a return to learn plan for the 2020-21 school year. The only required element of the plan was to provide continuous learning if schools were again closed due to COVID-19 or some other emergency. The districts were also allowed to include plans for on-site education or hybrid models involving a mixture of on-site and remote education. (Petition).

DMPS submitted its plan on July 1, 2020. The plan was created after the district took input from its parents and employees through surveys. The district received excellent response from its surveys: 74.7 percent of parents and 77.6 percent of employees responded. Based on the information it received, DMPS developed a plan with three aspects: 1) 100 percent virtual learning if requested by a parent, 2) a hybrid plan with two days on-site and three days virtual learning for students in grades K-8, and 3) a hybrid plan with one day on-site and four days virtual learning for

high school students. The district estimated from its surveys that ten percent of the students would choose the 100 percent virtual model. It believed it could safely accommodate K-8 grade students on-site two days per week and using Wednesday for deep cleaning.[1] The high schools are at capacity, so the district believed those students could only safely return one day per week. The intent was to give each grade level one day on-site and use Wednesday for deep cleaning. DE initially approved DMPS' return to learn plan. (Petition; Exhibit 9; Ahart testimony).

The Iowa legislature had adjourned for several months during the course of the crisis. It returned prior to the end of the fiscal year to pass budgets and consider other bills. On June 29, 2020, it passed SF 2310, which is the primary subject of this case. The parties focused on the following provisions from that act:

> Sec. 9. Section 279.10, Code 2020, is amended by adding the following new subsection:
>
> NEW SUBSECTION. 3. a. For the school year beginning July 1, 2020, and ending June 30, 2021, any instruction provided in accordance with a return-to-learn plan submitted by a school district or accredited nonpublic school to the department of education in response to a proclamation of a public health disaster emergency, issued by the governor pursuant to section 29C.6 and related to COVID-19, shall be deemed to meet the requirements of subsection 1, regardless of the nature, location, or medium of instruction if the return-to-learn plan contains the minimum number of days or hours as required by subsection 1. Any return-to-learn plan submitted by a school district or accredited nonpublic school must contain provisions for in-person instruction and provide that in-person instruction is the presumed method of instruction.
>
> b. This subsection is repealed on July 1, 2021.
>
> Sec. 14. SCHOOL DISTRICT CLOSURES DURING THE 2020-2021 SCHOOL YEAR. For the school year beginning July 1, 2020, and ending June 30, 2021, if the governor proclaims a public health disaster pursuant to section 29C.6, the board of directors of a school district may authorize closure of the school district or any school

[1] The district planned on splitting children into two groups, with the first attending on-site on Monday and Tuesday, and the second attending on-site Thursday and Friday.

> district attendance center due to an outbreak of COVID-19 in the school district or any school district attendance center. School districts care encouraged to follow guidelines issued by the centers for disease control and prevention of the United States department of health and human services and the Iowa department of public health, and may consult with the local board of health when determining social distancing measures or authorizing school closure.
>
> Sec. 15. INSTRUCTIONAL TIME PROVISIONS FOR SCHOOL DISTRICTS AND ACCREDITED NONPUBLIC SCHOOLS FOR THE 2020-2021 SCHOOL YEAR.
>
> 1. Notwithstanding any other provision of law to the contrary, the instructional time requirements of section 279.10, subsection 1, and the minimum school day requirements of section 256.7, subsection 19, shall not be waived any time during the school year beginning July 1, 2020, and ending June 30, 2021, for school closure due to the COVID-19 pandemic unless the school district or the authorities in charge of the accredited nonpublic school, as appropriate, provide compulsory remote learning, including online learning, electronic learning, distance learning, or virtual learning. Unless explicitly authorized in a proclamation of a public health disaster emergency issued by the governor pursuant to section 29C.6 and related to COVID-19, a brick-and-mortar school district or accredited nonpublic school shall not take action to provide instruction primarily through remote-learning opportunities.
>
> 2. If the board of directors of a school district or the authorities in charge of an accredited nonpublic school determines any time during the school year beginning July 1, 2020, and ending June 30, 2021, that a remote-learning period is necessary, the school board or the authorities in charge of an accredited nonpublic school, as appropriate, shall ensure that teachers and other necessary school staff are available during the remote-learning period to support students, to participate in professional development opportunities, and to perform other job-related functions during the regular, required contract hours, even if the accessibility to or by the teachers and other necessary school staff is offered remotely.

On July 17, 2020, the governor issued a new proclamation declaring a continuing state of public health disaster emergency pursuant to Iowa Constitution, Art. IV, §§ 1, 8, and Iowa Code §§ 29C.6(1), 135.140(6, and 135.144. As part of the proclamation, she declared that "in-person

instruction is the presumed method of instruction" for all school districts during the 2020-21 school year. She also allowed for remote learning under the following circumstances pertinent to this case:

A. The child's parent or guardian voluntarily selects remote learning.

B. DE, in consultation with DPH, approves a temporary move to primarily remote learning due to public health conditions.

C. A school district determines, in consultation with state and local public health departments, that individual students or classrooms (but not all of the students in a school building) must temporarily move to primarily remote learning due to public health conditions.

The proclamation added that any remote learning be provided "in accordance with a compliant Return-to-Learn plan," be authorized pursuant to the proclamation, and "is not the primary method of instruction (because at least half of the school district . . . instruction is provided in-person during any two week period)." The proclamation that, under those conditions, any instruction time provided by remote learning shall count toward the hour and days requirements set forth in SF 2310 section 9. (Exhibit 3).

Following the July 17, 2020 proclamation, Thomas Ahart, superintendent for DMPS, realized that the district's previously approved return to learn plan would be rescinded because it was not compliant with the proclamation. At that point, the district had already enrolled more than 25 percent of its total student population. The district reassessed whether it could safely return to all or primary on-site learning. There were two major obstacles. First, DMPS does not have sufficient building capacity, particularly at the high school level, to host students and still implement physical distancing recommendations from the CDC. High school classes are often at capacity with approximately 36 students per class. Many of the classrooms could only accommodate 8 to 9 students with recommended social distancing of at least six feet in the

classroom. Second, DMPS has a significant number of high-risk employees. 31.5 percent of its staff have a health condition that places them at a higher risk of serious harm or death if they contract COVID-19. 10.1 percent of the staff are over the age of 60, which is also a higher risk factor.[2] Accordingly, a large portion of the DMSP staff would be placed at risk of a serious health condition if they returned to buildings where they could not be adequately protected from transmission. (Exhibit 9; Ahart testimony).

On August 17, 2020, DMPS filed a request with DE to approve its return to learn plan. The plan included having students learn remotely in the first quarter and reevaluate conditions before the second quarter. The request noted that approximately 30 percent of the students to date had requested a fully online plan. The request cited to the district's concerns with physical distancing in its buildings and the risk factors present for its employees and students. The request also cited to recommendations from the World Health Organization (WHO) and the CDC as supporting its request because positive testing rates in Polk County and Iowa exceeded the standard of 5 percent. DMPS expressed its intent to return to full-time in-person learning as soon as it could safely do so. (Exhibits 1, 9).

DE developed a guidance document to inform schools what return to learn plans it would approve. It set four categories, all based primarily on the positive testing rate. The first two categories, which were based on positive test rates up to 14 percent, required on-site learning or hybrid learning at parent request. The third category applied once a county hit a 15 percent positive test rate over the past 14 days. Additionally, a district must show a 10 percent absentee rate for students expected in in-person learning. At that point, DE would approve temporary remote learning for an entire school building or district for up to 14 days. (Exhibit 6).

[2] It is not clear how many employees might fit both groups.

Dr. Pedati testified in her affidavit that she took several factors into account when making her recommendations to DE. She understood that in-person learning will create risks to staff and students. She acknowledged that students can suffer serious health conditions, but cited to CDC materials showing the risks to be relatively low for school-age children. She noted that the governor's proclamation allowed parents of children to consent to all remote learning, which allows parents to protect children who are higher risk. Dr. Pedati balanced the relative risks against the benefits children would receive by returning to in-person learning, including "social, emotional, and behavioral health, economic well-being, and academic achievement [] in both the short- and long-term." In particular, she cited to studies showing increasing development and academic gaps for low-income, disabled, and minority students if not allowed access to in-person education. (Exhibit E).

On August 20, 2020, Dr. Ann Lebo, director of DE, issued a letter to DMPS that it denied its plan. The only reason cited was the current 14 day positivity rate in Polk County at 8 percent, as per the guidance document in exhibit 6. The denial acknowledged that DMPS had sent a detailed letter, but stated that: "our consultation with the Iowa Department of Public Health have not identified any other basis for concluding that it is appropriate to start the school year with primarily remote learning." The letter did not specifically respond to any of the points raised in DMPS' request other than the current 14 day positivity rate in Polk County. (Exhibit 2).

On August 25, 2020, DMPS filed this action.[3] In count I, DMPS alleged that the denial of the waiver request by DE should be reversed pursuant to the judicial review provisions in Iowa Code section 17A.19(10). In count II, DMPS sought a declaratory judgment that the governor's proclamation of July 17, 2020, and all of DE's guidance documents were in violation of law. In

[3] Petitioners will typically be jointly referred to as DMPS during most of this ruling. Respondents will typically be referred to as "the state."

count III, DMPS sought injunctive relief preventing respondents from taking adverse action against the district or any of its employees for proceeding on with remote learning.

DMPS also filed a motion for stay of administrative action and a motion for temporary injunction. The motion for stay cites to Iowa Code section 17A.19(5). The motion for temporary injunction cites to Iowa R. Civ. P. 1.1502. Under either or both theories, they seek to prevent the respondents from any action that would prevent DMPS from any adverse action for starting its school year with all-remote learning.

At hearing, DMPS presented the testimony of Dr. Michael Osterholm, who is a professor in the epidemiology department for the University of Minnesota. Dr. Osterholm is a nationally renowned expert and has been consulting with DMPS during the course of its prospective reopening. He stated in his affidavit that in-person instruction should not occur until positivity rates are at 5 percent or below. He stated that other factors might include district and building-specific-factors, such as staffing capacity, building and classroom size and layout, ability to safely ingress, egress and move around the building, and bussing and transportation capacity. At hearing, he stated that six feet social distancing is the standard, but even that may be insufficient. He described DE's standard of 15 percent positivity rate as "really high." He has been reviewing another metric of number of cases per 10,000 persons to better show whether the infection rate is increasing, decreasing, or staying the same. He described Iowa as trending up, referring to the state as a "house on fire" right now. (Exhibit 11; Osterholm testimony).

CONCLUSIONS OF LAW

A. Legal standard governing this ruling.

Petitioners sought both a motion for stay of agency action and a temporary injunction. There is a slight difference in the standards between a stay and a temporary injunction. In order

to obtain a temporary injunction, the court must consider three factors: 1) whether petitioners are likely to succeed on the merits, 2) whether petitioners would suffer irreparable harm, and 3) whether respondents would suffer harm. *Max 100 L.C. v. Iowa Realty Co.*, 621 N.W.2d 178, 181 (Iowa 2001). When considering a stay of agency action, the court must consider those same three factors, and also whether a stay would benefit or harm the public interest. Iowa Code § 17A.19(5)(c).

In both briefs, the parties focused on the standard for a temporary injunction. At hearing, petitioners solely focused on relief under Iowa Code chapter 17A. The state points out that petitioners cannot combine an original action for law or equity with petition for judicial review. *See Black v. University of Iowa*, 362 N.W.2d 459, 462 (Iowa 1985). That is true – a party seeking judicial review cannot combine the action with common law claims for certiorari, declaratory judgment, or injunction. *Salsbury Labs. v. Iowa Dep't of Envtl. Quality*, 276 N.W.2d 830, 835 (Iowa 1979). Because DMSD cannot combine actions for judicial review with actions for declaratory judgment or injunction, I will apply the standards for a stay under Iowa Code section 17A.19(5).

DMPS continues to face some obstacles even under this standard. A petition for judicial review can only be made to challenge agency action. An agency is defined as a board, commission, department, officer or other administrative office or unit of the state. Iowa Code § 17A.2(1). The governor is not an agency. *Id.* Likewise, the other individual directors of DE and DPH are not agencies unto themselves, although their actions may be imputed to the agencies for which they work. DPH is an agency, but DMPS does not really allege it committed any action that adversely aggrieved it. That leaves DE as the only real nominal respondent in a judicial review action.

The only agency action alleged against DE is that it failed to approve its return to learn

plan. This may constitute a valid petition for judicial review to obtain relief from an adverse agency action, but the pending matter before the court is whether that action can be stayed. Usually, a party seeks a stay preventing an agency from taking action. *See e.g. Farmers State Bank, Kanawha v. Bernau*, 433 N.W.2d 734 (Iowa 1988) (seeking a delay preventing the superintendent of banking from taking over a bank); *R & V, Ltd. v. Iowa Dep't of Commerce, Alcoholic Beverages Div.*, 470 N.W.2d 59, 63 (Iowa Ct. App. 1991) (seeking a stay of a liquor license suspension). In this case, DMPS seeks a stay requiring DE to take an affirmative action to approve its return to learn plan. While the nature of the request is atypical, the court will consider the stay request with the assumption it can act as a temporary approval of the return to learn plan.

B. Likelihood of success on the merits.

The first factor considers the extent petitioners are likely to prevail on the merits of the judicial review. *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008). This factor does not describe the degree of likelihood of prevailing, but only requires the court to consider and balance the extent or range of the likelihood of success. *Id*. (cite omitted). The degree of likelihood of success required to be shown to obtain a stay will necessarily vary with the assessment of the other three factors. *Id*. As a result, the court may grant a stay when the likelihood of success "is not high," but the balance of factors favors the applicant. *Id*.

At hearing, DMPS focused on three provisions of Iowa Code section 17A.19(10). First, it claimed that DE committed a violation of law by not approving its plan. Iowa Code § 17A.19(10)(b). Second, it claimed that DE made an erroneous interpretation of law. Iowa Code § 17A.19(10)(c). Third, it claimed that DE's decision is based on a determination of fact not supported by substantial evidence. Iowa Code § 17A.19(10)(f). The first two claims are similar and will be discussed together.

1. Errors of law. Both parties' arguments centers on the meaning of SF 2310. The polestar of statutory construction is to find the true intention of the legislature. *State v. Dann*, 591 N.W.2d 635, 638 (Iowa 1999). Legislative intent is ascertained not only from the language used but also from "the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." *State v. McCullah*, 787 N.W.2d 90, 94–95 (Iowa 2010) (cites and internal quotes omitted). The courts should not construe a statute to make any part of it superfluous. *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017). Rather, the courts presume the legislature included all parts of the statute for a purpose to avoid reading the statute in a way that would make any portion of it irrelevant). *Id*.

It is first important to remember that statutory law requires in-person learning at the number of days or hours set forth in Iowa Code section 279.10(1) unless there is some express exception. Both parties agree with that premise. Notwithstanding DMPS' arguments in favor of local control, the statute clearly establishes state control over the number of days or hours of in-person instruction.

It is likewise important to recognize that neither of the two bills passed by the legislature in 2020 undermined the legislative intent to require in-person learning as the general rule. SF 2408, which was passed on March 17, 2020, permitted the governor to waive the instructional time requirement in section 279.10(1) for a school district that closed to prevent or contain the spread of COVID-19. The bill itself repealed the governor's authorization effective July 1, 2020. This shows the intent of the legislature to return to the general rule requiring in-person learning following the crisis. SF 2310, which was passed on June 29, 2020, contains similar limits. Section 9 is self-repealing effective July 1, 2021. Sections 14 and 15 are expressly limited to the 2020-21

school years. These provisions show the legislative intent to limit any exceptions to the general rule requiring in-person learning to the current health care crisis.

The legislature also placed limits on the ability to receive credit for remote instructional time in the substantive provisions of SF 2310. Section 9 provides a means for a district to meet the required instructional time without providing all in-person learning. The following conditions must be met: 1) the governor must issue a public health disaster emergency pursuant to section 29C.6 and related to COVID-19, 2) the district must submit a return to learn plan to DE in response to the governor's proclamation, and 3) the return to learn plan must provide that in-person learning is the "presumed method of instruction." If all conditions are met, the district will meet the requirements of section 279.10(1) regardless the nature, location, or medium of instruction.

Similarly, section 15 provides that that the instructional time requirement in section 279.10(1) shall not be waived for a school closure unless the district provide compulsory remote learning, including as appropriate, online learning, electronic learning, distance learning, or virtual learning. However, that section also provides that, [u]nless explicitly authorized" in a public health disaster emergency issued by the governor pursuant to section 29C.6 and related to COVID-19, a "brick-and-mortar school district [] shall not take action to provide instruction through *primarily* through remote-learning opportunities." (emphasis added). "Primarily" is reasonably defined as more than 50 percent or "principally." *See Iowa Ag Const. Co. v. Iowa State Bd. of Tax Review*, 723 N.W.2d 167, 176 (Iowa 2006) (enforcing an agency rule defining "primarily" as more than 50 percent of the time); *Banilla Games, Inc. v. Iowa Dep't of Inspections & Appeals*, 919 N.W.2d 6, 15 (Iowa 2018) (holding that the dictionary definition of "primarily" is equated with "principally"); *Remer v. Bd. of Med. Examiners of Iowa*, 576 N.W.2d 598, 601 (Iowa 1998) (also equating the term "primarily" with "principally").

It is difficult to see how DMPS can prevail in this judicial review action under either of these sections. As to section 15, the governor placed explicit conditions before a district would be authorized to offer learning primarily through remote opportunities. One is for students whose parents consent to remote learning. The State agrees that aspect of DMPS plan is within the governor's authorization. As to non-consenting students, the governor has not explicitly authorized the district to proceed with 100 percent remote learning. The only means for the district to meet the governor's authorization for all remote learning is to receive approval from DE on a temporary basis. That has not occurred.

As to section 9, the district's return to learn plan must contain provisions for in-person instruction and provide that in-person instruction is the presumed method. The district argued that the term "presumed" should be interpreted similarly to a legal "presumption," which potentially allows it to rebut the presumption. *See Larsen v. Bd. of Trustees of Police Ret. Sys. of City of Sioux City*, 401 N.W.2d 860, 861 (Iowa 1987) (discussing conclusive and rebuttable presumptions). When considering the context of the term in this bill and as part of the larger statute, it makes more sense to interpret the term similar to "primarily" in section 15. The text of the bill, the text of section 279.10 as a whole, and the legislative history makes clear that the legislature continue to emphasize in-person learning. A school district can only move to remote learning if the governor first acts by proclaiming a public health disaster emergency. There is no language in section 9 that indicates that a school district would be allowed to rebut the presumption in favor of in-person learning. There is no language in the section to give school districts the ability to overcome limits in the governor's proclamation through evidence presented to DE or a court.

The bill and the governor's response to it leaves some open questions. First, there is nothing in the bill that expressly gives the governor the ability to place terms or conditions in her

emergency proclamations. However, section 9 does use language tying the form of educational instruction in a return to learn plan submitted to DE "in response to" the governor's emergency proclamation. This language may indicate the ability for the governor to place conditions in the proclamation to which districts must respond. Further, section 15 limits remote limiting "as explicitly authorized" under the governor's proclamation. The use of the word "explicitly" may be interprested to give the governor some leeway to set conditions. This reading seems reasonable and consistent with the legislative intent to allow for the option for remote learning even as it prefers in-person learning. Further, it is reasonable and consistent with allowing the governor some flexibility to respond to evolving information and conditions during this crisis.

Second, the bill does not expressly delegate approval power to DE. Section 9 only references submitting a return to learn plan to DE. It does not expressly give DE approval power or establish any standards that DE should consider. Still, the governor's earlier declarations had required school districts to submit return to learn plans to DE. The legislature had reason to know about the process the governor was using. The legislature's reference to return to learn plans submitted to DE in response to the governor's proclamation could reasonable be seen as an endorsement of that practice.

DMPS makes excellent policy points in support of its arguments for local control, but state law trumps local control in this area of education. School district are a creation of state law and have no rights beyond those given by the legislature. *See Exira Cmty. Sch. Dist. v. State*, 512 N.W.2d 787, 790 (Iowa 1994). In *Exira*, the school district brought claims against the state after the implementation of open enrollment led to significant financial losses when students enrolled in neighboring school districts. The court noted that when the legislature enacted open enrollment legislation, it did so understanding that its impact might lead to the closure of smaller schools. *Id*.

at 795. In denying the claims of the district, the court observed:

> Despite this knowledge, the legislature made a policy decision—right or wrong—to go with open enrollment. It is not for us to judge the wisdom of such a policy. That was a legislative call.

Id.

The same result applies here. The question is not whether the governor and DE has made a better policy decision than the seven-person elected board of the DMSD. The question is which government body is authorized to make the decision. This is an area in which state law controls. The language in the governing law and SF 2310 does not permit DMPS to implement a return to learn plan that primarily provides for remote learning without authorization from the governor. The governor, through the conditions laid out in her emergency declaration, has not granted such authorization. DMPS cannot show a likelihood of success on the merits on its claims under Iowa Code sections 17A.10(b) or (c).

2. <u>Substantial evidence</u>. Substantial evidence claims are primarily considered when reviewing appears of contested cases. *See Greenwood Manor v. Iowa Dep't of Public Health*, 641 N.W.2d 823, 831 (Iowa 2002) (cites omitted). This case does not involve the review of a contested case action before DE. Therefore, the court would ordinarily focus on whether DE acted unreasonably, capriciously, or arbitrarily.[4] *Id.* However, in making that determination, the court may consider whether the decision was without regard to law or facts. *Id*. An agency decision based on facts will be deemed unreasonable if the agency acted "in the face of evidence as to which there is no room for difference of opinion among reasonable minds ... or not based on substantial evidence." *Id*. By this means, the unreasonableness standard of reviewing "other agency action"

[4] The code sections were renumbered following *Greenwood*. The unreasonable, arbitrary, and capricious standard is now set forth in section 17A.19(10)(n). DMPS did not focus on this subsection at hearing, but did raise it in its petition for judicial review.

may still require the courts to consider whether the decision was based on substantial evidence.

DMSD spent considerable time and effort discovering and reviewing information to weigh the risks and benefits of in-person learning versus remote learning (or a hybrid of the two). The district worked with Dr. Osterholm, a nationally known infectious epidemiologist, and other local health professionals to learn about the rates and risks of infection. It received considerable input from teachers and staff. It reviewed its facilities to learn the limits of physical distancing. It discovered how many staff members have higher risk factors if they contracted the virus. It considered the number of low-income and minority families, which may also factor into risk levels. It presented this information to DE as part of its return to learn plan.

DE denied DMPS' plan based solely on one factor, that is, the positivity rate in Polk County over the prior 14 day time period. DMPS does not dispute that positivity rate is a relevant factor, but argued that is just one part of the equation. The agency did not even consider the other factors cited by DMPS. Further, DE will not consider approving remote learning under its guideline until the positivity rate for the county is at 15 percent or greater. Dr. Osterholm has recommended 5 percent as a guide and described 15 percent as "really high." Dr. Osterholm's recommendation is consistent with WHO and CDC standards. Additionally, DE's calculation is based on the whole county as opposed to the Des Moines school district which is more densely populated than some of the suburban and rural areas of the county. There is no question that DMPS is using a more robust collection of factors than the simplistic model used by DE.

Still, this does not mean that DE's decision can be reversed because it disregarded the facts. In fact, the actions by the governor through her emergency proclamations and the legislature through its enactments over the last several months show that they are acutely aware of the risks and dangers of COVID-19. This is confirmed by Dr. Pedati, who testified in her affidavit that she

weighed the health risks against the benefits that children would receive by returning to school. Basically, the legislature and the governor and DE has made a judgment call that the benefits of sending kids back to school outweigh the increased risks of illness and death. Certainly, that decision is subject to debate. However, the legislature, governor, and state agencies make and implement policy. Whether right or wrong, that is their decision to make.

The state cited to *King v. State*, which has some relevance to this issue. 818 N.W.2d 1 (Iowa 2012). In *King*, a number of parents sued the state to impose educational mandates over local school districts. *Id*. at 10-11. The state filed a motion to dismiss claiming the petition raised a non-judiciable political question. *Id*. at 21-22. The court declined to rule on that issue and dismissed the action on other grounds. *Id*. In doing so, the court recognized that the courts do not have the discretion to make policy decisions involving the merits of state mandates versus local control in public education. *Id*. at 18. As stated by Justice Waterman in a concurring opinion: "[w]e do not sit as the supreme school board of the State of Iowa, and we are unwilling in the guise of adjudication to usurp powers the Iowa Constitution cedes to the elected branches to run our public schools." *Id*. at 40 (Waterman, J. concurring).

DMPS' request to move to remote learning is well-supported by the facts. I am sympathetic to its arguments of local control, as its board and management staff are in a better condition to understand the conditions and obstacles in the district than officials at the state level. However, DE's decision is not really one of fact, but one of policy as directed by the legislature and the governor. As such, DMPS cannot show that it would prevail on a substantial evidence theory.

C. Extent to which DMPS will suffer irreparable harm.

DMPS claims that DE's denial of its return to learn plan has put in the position of making a "Hobson's choice."[5] If DMPS proceeds with its current return to learn plan, it will not receive credit for days it provides remote-only instruction. As a result, it would be force to make-up those days to receive credit under Iowa Code section 279.10(1). Dr. Ahart testified that it costs approximately $1.5 million per day to operate the district. It has approximately 2.3 percent of excess spending authority which would run out after four additional school days. At that point, the district could only lay off staff to save on expenses because it would have no means to raise additional revenues. At some point, it would have to close due to an inability to pay expenses.

The other option is to file a new return to learn plan that complies with the governor's conditions for on-site learning. DMPS will violate physical distancing recommendations from the CDC if it does that. Accordingly, it will be placing its students and staff at an increased risk of exposure to COVID-19. Based on the large proportion of staff members who have higher risk medical conditions and/or are 60 years of age or older, DMPS believes that more staff members will get serious ill and/or die. They also believe that children and families are at greater risk of exposure, which is more concerning in light of the risk factors with more low-income and minority families living in the district.

The courts have typically taken a strict view of irreparable harm. *Grinnell College v. Osborn*, 751 N.W.2d 396, 402 (Iowa 2008). For example the loss of revenue, even if substantial, does not amount to irreparable damage. *Grinnell*, 751 N.W.2d at 402. An applicant may show

[5] A Hobson's choice is a reference to Thomas Hobson. According to lore, Hobson owned a stable of horses that he would rent out to customers. The advertisement claimed 40-some horses, indicating a choice. However, once the customer passed through the door, he or she was told they must choose the horse in the stall closed to the door. If the customer did not like that horse, the customer was denied services. Accordingly, a Hobson's choice is described as a choice between something or nothing. DMPS' position is better described as a dilemma, which is a choice between two choices it considers undesirable. *See* Wikipedia, defining Hobson's choice.

that extreme circumstances of financial loss, although recoverable, could amount to irreparable injury. *Id*. This factor is "meant to impose a strong showing on the applicant." *Id*. As an example, the petitioner in *R & V, Ltd. v. Iowa Dep't of Commerce, Alcoholic Beverages Div.*, 470 N.W.2d 59, 63 (Iowa App. 1991) was able to show irreparable harm, but only after putting on evidence that a 45 day liquor license suspension would act to close the business.

In this case, DMPS has shown irreparable harm. If it proceeds forward with the current plan, it will have used up its excess spending authority by the end of the week. Any cuts in staff will be substantial and will dramatically impact teaching and safety in the buildings. The concept that the largest school district in the state could have to close down due to lack of funding is incomprehensible. This is not comparable to a business potentially facing fiscal harm due to an impending regulatory action. This is a public school district who is diligently trying to protect its employees and students while advancing children learning.

On the other hand, if DMPS proceeds forward with on-site education, it will face the likelihood that more staff members and students will be at greater risk of infection. The state argues that this is speculative, but DMPS has presented evidence to show it will necessarily be out of compliance with CDC guidelines due to lack of available space in its buildings. Just last week, the governor shut down bars because people were not socially distancing and transmission rates in Polk County (and five other counties) increased accordingly.[6] It is disingenuous to argue that the same risks are not presented under the evidence presented by DMPS.

D. <u>Extent to which the state will suffer harm.</u>

The harm to the state is difficult to quantify. There may be some harm solely because it is not able to implement a law that has been duly passed by the legislature and signed and

[6] *See Riley Drive, et al. v. State of Iowa, et al.*, Polk Co. No. CVCV060630.

implemented by the governor. *See New Motor Vehicle Bd. Of Cal. V. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Renquist, J., order on stay). However, the harm to the state is not comparable to that of DMPS. The state would suffer no economic harm. It would lose enforcement of the in-person learning requirement, but DMPS is prepared to offer learning remotely. Even assuming on-site learning is better, the state is not able to quantify the differences between the two. The state would only suffer negligible harm if a stay was granted.

E. <u>The public interest.</u>

The final factor considers the public's interest. This factor helps distinguish stays involving agency action from stays or injunctions involving purely private parties. *Grinnell*, 751 N.W.2d at 403. This means the interest of private litigants in agency action may need to ultimately yield to the greater public interest. *Id*. As once stated by our supreme court:

> In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interest of private litigants must give way to the realization of public purposes.

Teleconnect, 366 N.W.2d at 513.

On this point, the state has a better argument. The legislature and governor are elected to provide for the best interests of Iowans, just as the members of the board of DMPS are elected to provide for the best interests of persons in their district. The legislature and governor have valid policy reasons to promote on-site learning, even in the face of the pandemic. In fact, the surveys from DMPS provide some support for the state's decision. The surveys initially reported that 90 percent wanted some form of on-site learning. Even as more information became available and registration proceeded, approximately two-thirds wanted some on-site learning. So, the record shows that even most Des Moines school district families wanted at least a hybrid learning system.

Both parties have reasonable grounds for their policy decisions. DMPS considered multiple factors before deciding to move to remote learning. The state's policy decision also considered multiple factors before reaching a conclusion favoring more in-person instruction. Both sides agree that students benefit from in-person learning. The public interest factor is a draw between both parties.

F. Summary.

There are a balance of factors on both sides of the motion for stay. DMPS can show irreparable harm. The state cannot show significant harm if a stay is issued, and the public interest is fairly balanced between the two.

The problem with DMPS' request is that they cannot show a path to success on the merits. The in-person attendance requirement is a matter of state law, not local control. The legislature has repeatedly reinforced that if prefers in-person learning even as it allowed some leniency during the pandemic. There is nothing in SF 2310 granting individual school districts the right to unilaterally choose remote learning. The districts only have the opportunity to use remote learning if allowed to do so by a proclamation of the governor. The legislature has tied the governor's proclamations to return to learn plans submitted to DE. There are no legal grounds in the bill to support the request made by DMPS in this case. As such, there are no legal grounds to grant a stay of agency action when the requesting party is not likely to prevail on its case.

RULING

Petitioners' motions for stay and temporary injunction are denied. Further proceedings in this case will be addressed by a separate order.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV060611	DES MOINES IND CSD V GOV REYNOLDS ET AL

So Ordered

Jeffrey Farrell, District Court Judge,
Fifth Judicial District of Iowa