TRACY L. HENDERSON
ATTORNEY AT LAW

P.O. Box 221562
Carmel CA 93923
tracyhendersonlaw@gmail.com
831.917.1593

February 22, 2022

Via Email and U.S. Mail
Dr. Faris Sabbah
County Superintendent
Santa Cruz County Office of Education
400 Encinal Street
Santa Cruz, CA 95060

Dear Dr. Sabbah,

The undersigned counsel represents Santa Cruz County Parents United who have scholars in Pajaro Valley Unified School District ("PVUSD"), Santa Cruz School District ("SCSD"), Twin Lakes Christian School ("TLCS") and Monte Vista Christian School ("MVCS"). My clients inform me that their children have been subjected to endangerment, discrimination and harassment at the hand of district employees due to forced application of California Department of Health's ("CDPH") *non-binding*[1] guidance in relation to testing, masking and quarantining healthy people. This is unfortunate considering each school district has a better solution to address public health concerns – use the COVID funds received to follow the OSHA regulations related to modifying the ventilation systems in buildings – instead of causing mental suffering and learning loss. To that end, the purpose of this letter is to respectfully demand that all schools in Santa Cruz County immediately cease all discriminatory and illegal conduct and adhere to its ministerial duties[2] to improve its ventilation systems in its buildings if you are still worried about COVID. I trust you will find this information helpful and a pathway back to parent choice as it concerns medical issues and public health. **Please respectfully be advised that if the legal violations do not cease upon receipt of this letter, our clients have instructed us to take immediate appropriate legal action.**

First and foremost, I understand that your county office of education ("SCCDOE") purports to follow Santa Cruz County Department of Public Health (SCDPH) guidance which

[1] *California Association of Health Plans v Watanabe et al*, Case No. 20STCP03773. It is well-settled in administrative law that while the "issuance" of agency guidance can be APA-exempt, no guidance may be "enforced" in a binding capacity. (R. A. Anthony, "Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like— Should Federal Agencies Use Them to Bind the Public?", 41 Duke L.J. 1311, 1312, (1992) ("the answer...is no"); California Law Revision Commission, "Advisory Interpretations", 28 Cal. L. Revision Comm'n Reports 657, 669 (1998) (guidance has "no legal effect", "cannot prescribe a penalty [or] obligation" and cannot "in any way bind or compel").

[2] 44.46. The relevant ministerial duties under the APA, but are not limited to, the requirement to provide due process, to provide the "empirical study or other data" on which the agency relies, and to enforce the rule as a "performance standard" establishing flexible means of compliance, when, as present, such flexible enforcement would achieve the same or better result. (Gov. Code §§ 11346.1; 11340; 11340.570; 8 Cal. Code Regs §3205(c)(2)(E).))

purports to align with CDPH Guidance. The problem for the district is this guidance is simply not binding and invalid[3] as it is being applied as a "mandate". As it is being implemented in the school systems based on this complete misunderstanding by your district and its employees of its actual legal import, and because many lawyers who represent the school districts and school boards are giving very poorly reasoned legal advice, significant civil and potentially criminal legal liability attaches on an individual and school board basis.

We have no doubt that your district has been told by either counsel, CDPH, or members of the California Teachers Association that the CDPH guidance has the "force and effect of law" and a failure to apply the guidance in a mandatory way comes with serious penalties. This is simply legally incorrect as there are no penalties for following only a state agency recommendation. Sadly you have been sorely misled otherwise and possibly been given bad legal advice. I suggest you consider seeking a second opinion.

The undisputed fact is that the K-12 guidance is a non-binding recommendation pursuant to the Administrative Practices Act that schools can disregard. Gov. Code § 11340.5(a). California law vests state agency officials with substantial authority to resolve certain issues including the issuance of binding public health regulations. However, such official orders may *only* be enforced in a mandatory capacity if officials comply with certain legal requirements of statutory compliance and due process. Specifically relevant to the situation here is in the Administrative Procedure Act (APA), the California Legislature has set forth clear statutory requirements for such orders to be implemented "with the force of law" in the most serious states of public peril, calamity war or emergency. In particular, the language of the APA statutes provide that no state agency "shall issue, utilize, enforce, or attempt to enforce" any "guideline", "instruction", or other rule subject to the APA, unless it "has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]". (Cal. Gov. Code § 11340.5(a).) CDPH has conceded to me personally it has not done this. Other agencies have properly used APA rulemaking, on an emergency and permanent basis, thereby establishing ministerial duties regarding the most effective known ways to prevent against COVID-19 in such settings such as proper ventilation controls consistent with CDC guidelines and standards established by the National Institute for Occupational Safety and Health (NIOSH), (8 Cal. Code Regs §§ 3205(c)(2)(F), 5142-5144.) Most notably the APA makes it clear that if there are performance standards that would suffice to achieve the same objective, which here is to allegedly protect public health, government agencies *shall* actively seek to avoid blindly adhering to unnecessary *prescriptive* standards. Gov. Code §11346.1. And, pursuant to the APA, if the CDPH guidance is not necessary to effectuate the purpose for which it is intended, it cannot be forced on children in our schools. Gov. Code §11342.2. Unfortunately, CDPH and other officials have followed none of the required procedures related to the CDPH guidance, and as a result their attempted enforcement of the challenged guidance is void as a matter of law. For your county and school districts, this means that educators cannot enforce the guidance as if it were a mandate.

---

[3] *Reillly v. Superior Court* (2013) 57 Cal 4th 641, 649; Gov. Code §11356.1(b)(2); Ed Code §33031; Gov. Code 11346.1(b)(2).

The SCDPH guidance based on the CDPH recommendations also do not provide any school with the legal basis to force parents to consent against their will to subjecting their children to emergency use authorized masking or testing. There is also no authority of a school to quarantine a healthy person. Health officers have police power to address public health issues; however, any police power given to a health department in the time of a public health issue is strictly limited by statute. The Health and Safety Code §120140 only authorizes health officers to "take measures that are ***necessary***[4] to …prevent [the] spread of communicable diseases." Thus, CDPH and local health officers derive their authority from this statute to take necessary measures based on actual facts of affliction. This means, if challenged in court, the CDPH would have to prove why it is necessary to mask or test a healthy child who, as a group, rarely get COVID-19, rarely spreads COVID-19, and has a 99.97% recovery rate if he or she does contract it especially since there is conclusive evidence that masks are ineffective[5]. Further, the evidence is coming out that there is no reported case in the United States of a child conclusively transmitting the SARS 2 virus to an adult.

The authority of a school is very different. Education Code § 35160 states "the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner *which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.*" Teachers are likewise held to strict account for conduct. Educators are allowed to exercise the amount of control over child a parent would be privileged to "but which in *no event shall exceed* the amount of physical control reasonably necessary to … to *maintain proper and appropriate conditions conducive to learning*." Cal Ed Code § 44807. Thus, boiling it down the issue to its essence, the only authority schools do have when it comes to infectious diseases, where there is *proof* that a child is actually suffering from an infectious disease, is to simply send them home until they are better. Ed code §49451. Your county's school districts have clearly exceeded that authority.

In general, your county policies of forced implementation of non-binding K-12 guidance relating to COVID are punitive in that the conduct of the employees implementing them is abusive, harassment and discriminatory against children. Government Code §11135, Education code §§§200, 201(a), and 234 et seq.. As you are aware, the California Constitution provide scholars a right to participate fully in the education process *free from discrimination and harassment*. Education code §201. Pursuant to Civ Code §51, all people within the state of California are entitled to all privileges and services without discrimination based on many specifically enumerated qualities. Section 52 of the same code provides for a private right of action against any person *acting under the color of law* who interferes in any way with the exercise of such rights, whether statutory or constitutional, and the statutory penalties include monetary fines up to a maximum of three times the damages and a potential $25,000 civil

---

[4] As to the necessity requirement, under the health and safety code, health officers can only issue health orders that are necessary. In most school districts – which are ALL open – there are not enough facts to support a finding of "necessity." **CDPH derives its authority to "take measures" from** *Health and Safety Code*, section 120140 **only if there is a *necessity and only if they actually work*.** This means, if challenged in court, the CDPH would have to prove why it is necessary to test a healthy child who rarely gets COVID-19, rarely spreads COVID-19, has a 99.97% recovery rate if he or she does contract it.

[5] https://www.lifesitenews.com/news/47-studies-confirm-inefectiveness-of-masks-for-covid-and-32-more-confirm-their-negative-health-effects/

penalty against each person who denies, aids or incites a denial of the right. Many statutes in this context provide for an award of reasonable attorney's fees to be determined by a court. Additionally, there is no legal way a school can refuse the fundamental right of in person instruction based on a refusal to test, mask or quarantine. The only authority provided to schools for removing children from in person learning in the law is pursuant to education code section 48900 which requires facts of a clear and present danger. Because SCCDOE has now been put on notice, any *continued* forced implementation of the non-binding CDPH guidance will constitute intentional disregard of the laws every educator knows it must follow rendering this district liable.

More specifically, **my firm's clients are suffering from unspeakable conduct unbecoming an educator whose priority is to act in the best interest of children by educators at school employee's direction.** Teachers, principals and superintendents are taking it upon themselves to act in the role of a police officer or health officers to "police" students in regards to testing, quarantining and mask wearing. Among the most egregious examples are demanding unilaterally unenrolling a two year old because their parents were not wearing masks outside in their own cars at pick up and drop off. A kindergartener, a five year old, was refused in person instruction because the parents chose not to enter the five year old into a medical trial by getting her the COVID injection[6]. Healthy children with absolutely no evidence or physical signs of illness are being illegally quarantined even if they come to school with a negative COVID test based on alleged exposures by other kids *only because they have not been given the experimental COVID injection.* High School children are being illegally prevented from playing sports because the parents do not consent to testing. Teachers are embarrassing and bullying children because their parents have declined consent to experimental COVID injections. Horrifyingly, children are being isolated from contact with other students when they are not sick then embarrassed by the teacher when he spoke up about the tragic incident! Teachers in your schools are making children feel "diseased" and "dirty" because they take off their masks just to breathe. Lives are being put at risk when teachers force mask children during physical education at your schools. Children are not allowed by some teachers to even eat or drink in class because it requires that they pull down their masks. Coaches are passing around lists of the un-injected to embarrass students. Threats of detention are being made if a child has to be reminded to pull up their masks. The children were also forced to download the inspire app and provide *private* medical information without parent consent. Finally, several children have been forced to miss school for upwards of 10-28 days for allegedly coming in contact with someone who allegedly tested "positive." Not only are the COVID injected children the ones actually testing positive and spreading the virus, but it is the un-injected that are discriminated against and sent home for being unvaccinated when no evidence they are sick is provided. This conduct in your schools results in severe learning loss and lasting emotional trauma. Each of these acts by school personnel have serious consequences. All of these stories are tragic because the conduct of your

[6] The FDA has not approved any of the COVID-19 shots currently available in the United States. On August 23, the FDA granted BioNTech Manufacturing GmbH's Biologics Licensing Application to distribute the Comirnaty vaccine in the United States once certain conditions are met; however, the Comirnaty vaccine is not currently available in the United States and will not be until the supply of the Pfizer-BioNTech vaccine is first exhausted. See https://www.fda.gov/media/151710/download. The Pfizer-BioNTech vaccine is currently available only under an EUA, which the FDA extended also on August 23, 2021. See https://www.fda.gov/media/150386/download.

county's school district and other school employees intentionally disregards well known rights and harms children.

The laws being broken are many. First, it is illegal to quarantine healthy people per California law. Personal restraint can *only* be imposed where, under the facts as brought within the knowledge of the health authorities, reasonable ground exists to support the belief that the person is *actually afflicted*. *In re Application of Arata* (Cal. App. Apr. 29, 1921), 52 Cal. App. 380. Restraint and seclusion of children in school who have a fundamental right to be there should only be used as a safety measure of last resort and should never be used as punishment or discipline or for staff convenience. Ed. Code § 49005(c). Children have a fundamental right to be in person instruction free from harassment and discrimination. Ed. Code §201. Next, prescribing, or even promoting, medication or medical products such as experimental masking, testing or injections is not something that a school district, a school board or superintendent of schools can properly do as it violates the Business and Professions code §2052 for practicing medicine without a license. It is important to note that this particular statute has serious potential criminal consequences. Third, schools are also not allowed to "use a physical restraint technique that obstructs a pupil's respiratory airway" Cal Ed Codes §§48213, 48900. Fourth, under Gov. Code, § 815.2, subd. (a), a school district is vicariously liable for injuries proximately caused by negligence under which negligent supervision for failing to prevent bullying like the embarrassment going on in your county schools would lie. *C.A. v. William S. Hart Union High School Dist.,* 53 Cal. 4th 861, 862; Ed. Code 234 et seq. Most notably, there is no legal grounds to refuse a child in person instruction under these circumstances. The willful disobedience statutes no longer exist. Instead, the education code is very clear that suspension or expulsion cannot be based on perceived willful disobedience. Cal Ed Code § 48900 This statute applicable to suspension or expulsion only allow exclusion of students from attendance if there is a *clear and present danger* which requires actual facts such as violence or drugs to support such an action. Cal Ed Codes §§48213, 48900. Fifth, it is illegal to discriminate against an athlete for not testing or not being COVID injected. Extracurricular activities constitute an integral component of public education. Such activities are "'generally recognized as a fundamental ingredient of the educational process.'" *Moran v. School District #7, Yellowstone County*, 350 F.Supp. 1180, 1184; *Kelley v. Metropolitan County Bd. of Ed. of Nashville, etc.* (M.D.Tenn. 1968) 293 F.Supp. 485, 493; *Alexander v. Phillips* (1927) 31 Ariz. 503. Sixth, unilaterally disenrolling a student violates their constitutional right to in person instruction as independent study is voluntary. Seventh, discriminating against the un-injected children in any way violates the civil code and carries significant civil penalties. Finally, I am sure I do not need to inform you that contracts must be entered into voluntarily so attempting to require a parent to sign an independent study agreement under duress would void or render voidable the contract for that reason. These are just some of the violations of law resulting from the employees forced implementation of CDPH non-binding guidance in your county.

It is truly important for your district to consider the true legal ramifications of mandating a non-binding government recommendation in a punitive, discriminatory and harassing manner. This conduct simply needs to stop. The breaking of these *actual* laws could subject credentialed employees to discipline per Ed. Code §44421.

As to attempting to mandate the COVID injection or coerce others to enter themselves into a medical trial, this is also illegal. There is a list of ten childhood immunizations required in order for students to gain admittance to public schools in California at certain stages of their education, and this list does not include any COVID-19 injections. See Cal. Health & Safety Code § 120335(a)(1)-(10). Under California Health & Safety Code § 120335(a)(11), only the California Department of Public Health (the "Dept" or "CDPH") can add a new vaccine to this childhood immunization schedule, and *at this time, CDPH has not done so*. No matter how eagerly your school districts would like to impose a new vaccine on unwilling students and their parents, California law simply does not allow individual public schools or school districts to unilaterally decide which additional vaccines its students must take prior to being allowed to enjoy an in-person public education, an education guaranteed by our California Constitution, Article IX.

Moreover, even if the legislature itself elected to mandate a COVID-19 injection under Section 120335(a)(11) for all relevant California public schools at some point, California law also requires that both medical and personal belief exemptions be allowed. See Cal. Health & Safety Code §120338. Accordingly, any unilateral COVID-19 mandate that your school district is even indirectly imposing on its students, and particularly without allowance for medical and personal belief exemptions, is illegal under California law and is also unconstitutional on its face.

Most importantly, while neither CDPH nor our state legislature has mandated any COVID-19 vaccine for public or private school attendance, *neither authority can do so while the vaccines are still under emergency use authorization without express informed consent*. 21 U.S.C. § 360-bbb-3 (the "EUA statute") and Health and Safety Code Section 24176. This EUA[7] statute explicitly states that anyone to whom an EUA product is administered must be informed of the option to refuse the product, as well as the risks and benefits of receiving it. Although the FDA has purportedly approved one of the mRNA injections, in reality, the approved injection, the Pfizer Comirnaty vaccine, is not available or in widespread circulation in the United States. Instead, the only COVID-19 injections being offered to members of the public in California, including students 12 years of age or older, are still under emergency use authorization, including the Pfizer BioNtech COVID-19 vaccine product. There is consequently no full FDA approval of *any* COVID-19 injection that is available for anyone in California. In addition, all COVID-19 vaccines, including the Pfizer Comirnaty vaccine, remain authorized only under emergency use for ages 12-15, and thus no public entity can mandate or condition participation on such an experimental vaccine for students in that age range. If neither CDPH nor our state legislature can currently mandate these vaccines due to federal EUA law and federal pre-emption

[7] The FDA has not approved any of the COVID-19 shots currently available in the United States. On August 23, the FDA granted BioNTech Manufacturing GmbH's Biologics Licensing Application to distribute the Comirnaty vaccine in the United States once certain conditions are met; however, the Comirnaty vaccine is not currently available in the United States and will not be until the supply of the Pfizer-BioNTech vaccine is first exhausted. See https://www.fda.gov/media/151710/download. The Pfizer-BioNTech vaccine is currently available only under an EUA, which the FDA extended also on August 23, 2021. See https://www.fda.gov/media/150386/download.

issues, clearly your school district cannot unilaterally mandate an experimental use COVID-19 vaccine for its students either.

For your information, when a product is not yet licensed or approved by the FDA, it is considered "investigational."[8] This "investigational" status does not change, even if an EUA is granted.[9] Per the FDA, an investigational drug can also be called an "experimental drug"[10] and when an experimental drug is administered, it is the equivalent of entering the recipient into a clinical trial. **Federal laws explicitly prohibit a child from being enrolled in the clinical trial of an "investigational" or "experimental" product without the parents' express consent, and even then, only under certain conditions. A child cannot be entered into a clinical trial without express consent from their parents, and *only if* there is a benefit and a minimal risk to the child. 45 CFR 46.404,45 CFR 46.408.** Further, if there is a *greater than minimal* risk to the child, there must first be a "direct benefit" to that specific child, and any risk must be "as favorable as" those presented by alternative approaches. 45 CFR 46.405. Whereas, here, children have an undisputed 99.97% chance of surviving COVID-19, face serious threats of life-altering conditions and even death *from administration of the COVID injection*, and have safe, alternative treatments available to them, this legal threshold cannot be met and these children cannot be forced to enroll in these medical trials, with or without their parents' consent.

The California Unruh Act is very clear – discriminating against someone based on a medical condition – such as their vaccination status - violates the law. Specifically, pursuant to Cal Civ Code §51(b), (e)(3), all people within the state of California are entitled to all privileges and services without discrimination based on many things including medical conditions. Section 52 of the same code provides for a private right of action against any person acting under the color of law who interferes in any way with the exercise of such rights, whether statutory or constitutional, and the statutory penalties include monetary fines up to a maximum of three times the damages, which in this case would be lost wages, and a civil penalty of $25,000 against each person who denies, aids or incites a denial of the right. §52 (b)(1-2). This statute also provides for attorney's fees to be determined by a court. 52 (b)(3). The Health and Safety code mentioned earlier carries similar statutory penalties whether the forced entry into a medical trial is negligent or intentional. Health and Safety Code § 24176(a)-(c).

I trust this provides a clear and appropriate pathway back to learning environments where children thrive instead of suffer, parents are afforded the normal participation in their children's activities, **and the discrimination, harassment and endangerment will stop**. Let me know if you have any questions.

---

[8] *COVID-19 Vaccine: Questions and Answers,* https://www.niaid.nih.gov/diseases-conditions/covid-19-vaccine-faq ("A vaccine available under emergency use authorization is still considered investigational.") [September 13, 2021]
[9] *Ibid.* ("A vaccine available under emergency use authorization is still considered investigational.")
[10] *Understanding the Regulatory Terminology of Potential Preventions and Treatment of COVID-19,* https://www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventions-and-treatments-covid-19 [as of September 13, 2021]

Sincerely,

Tracy L. Henderson, Esq

Cc: Clients
Nikki Daniels
Michelle Rodriguez
Meg Imel
Kris Munro
Tanya Krause
Scott Trumball
Jim Hart
Jeffrey S. Rosell
Christopher Schiermeyer
Eric Gross
Megan Tresham
Daisy Morales