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Dear School District Board Members, Superintendents, and Principals

Please be advised that this law office represents the parents of numerous students that are being discriminated against due to their inability to wear masks, face shields, and/or other same or similar devices. We have been retained to protect the constitutional rights of our clients and their child regarding your mask mandate, as well as regarding your ongoing attempts to coerce the children of our clients into wearing a mask. Please understand that my clients are not asking you to defy the various mandates, they are asking you to obey existing federal and state law.

As counsel for the parents of such children, we are disturbed by reports that some state, county, and school district actors are employing scare tactics, aggressive enforcement policies, and misinformation to achieve compliance with the California Department of Public Health's (CDPH's) K-12 mask mandate.

As you may be aware, more than one firm has filed a lawsuit against the state to challenge the

legality of the CDPH mask mandate. The most recent lawsuit is based on arguments that the mask mandate exceeds the state's authority, is not supported by evidence, and causes harm to children. Multiple studies examining school mask mandates have failed to find any epidemiological benefit from such policies.

Pursuant to the Court's Order in *Let them Breathe v. Newsom*, the Court refers to the challenged "portions of the 'COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School year (K-12 Guidance) (July 12, 2021)'" as "(the "Guidance")". (Order at 2). The Court then resolved the issue "that the testing strategies and quarantine protocols **are recommendations, not mandates.**" (Emphasis added). (Order at 4, Footnote 3). Moreover, the Court concluded, "[g]iven this, the Court's analysis as to whether the Guidance can form the basis for Plaintiffs' nine causes of action, unless otherwise specifically noted herein, **is limited to an analysis of that portion of the Guidance that contains the mask mandate.**" (Emphasis added). (Order at 3).

The Court then found that, "[t]here simply is **no language in the Guidance that requires, directs, or otherwise authorizes schools to force students into an independent study program...**[m]oreover as discussed above, a cause of action for violation of a statute cannot lie where the alleged malfeasance **is a recommendation.**" (Emphasis added). (Order at 10-11).

Forcible removal of students from classrooms violates California law.

Some school districts have implemented policies barring students from their regular classes, or from campus altogether, for failure to wear a mask. We are aware of at least one instance in which a school principal sought assistance from a county sheriff to forcibly remove two elementary school-aged children simply because they had peaceably refused to don a cloth mask. Enforcement strategies involving the involuntary removal or dis-enrollment of children from their school infringe on children's fundamental right to education and violate California law constraining the disciplinary powers of public-school administrators.

California law is clear: “willfully def[ying] the valid authority of supervisors, teachers, administrators, school officials, or other school personnel ... *shall not constitute grounds* for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, *to be recommended for expulsion.*” (California Education Code § (CEC) 48900(k) [emphasis added].) This means that students cannot be removed or dis-enrolled from school for peaceably refusing to wear a mask.¹

Moreover, children in grades K–8 may not be suspended from school for their refusal to wear a mask. (CEC 48900 (k)(3), (4).) Even in those instances where suspension may be a potential disciplinary measure, the school must first exhaust “other means of correction” before imposing suspension as a last resort. (CEC 48900.5(a).)²

A student cannot be suspended for a first offense unless the principal or superintendent determines that “the pupil’s presence causes a danger to persons.” (Ibid.) Where there is no evidence that a student is infectious—that is, the student is not exhibiting symptoms, does not have a diagnosis of COVID-19, and has not had any exposure to a known infected person—a principal or superintendent cannot validly determine the student to be a “danger to persons,” simply because he or she is not wearing a cloth mask.

Finally, no child can be suspended indefinitely. Any suspension must be “no more than five consecutive schooldays” (CEC 48911(a)), and all suspensions cumulatively “shall not exceed 20 schooldays in any school year.” (CEC 48903(a).)

Children cannot be forced to enroll in an independent study program.

¹ Furthermore, a child may not be expelled from school without a full hearing before the governing board. (CEC 48918.) Decisions by the governing board are appealable to the county board of education. (CEC 48919.) A school official cannot simply call the sheriff to escort a child from campus.

² “Other means of correction” might include, among other things, “(1) A conference between school personnel, the pupil’s parent or guardian, and the pupil”; “(2) Referrals to the school counselor, psychologist, social worker, child welfare attendance personnel, or other school support service personnel ...”; or “(7) A positive behavior support approach with tiered interventions that occur during the school day on campus.” (Educ. Code, § 48900.5, subd. (b).)

School officials in some districts have attempted to coerce students who do not comply with the mask mandate to enroll in an alternative independent study program. However, California law requires that enrollment in any such program must be voluntary: “independent study is an *optional educational alternative in which no pupil may be required to participate.*” (CEC 51747 (f)(8) [emphasis added].) Thus, enrollment can occur only if there is a “pupil- parent-educator conference” to determine whether enrollment in independent study is in the best interest of the child (CEC 51747(h)(2)), and “a signed written agreement for independent study from the pupil, or the pupil’s parent or legal guardian if the pupil is less than 18 years of age” (CEC 51747, (f) (9)(F)).

Further, a student who voluntarily enrolls in a distance learning or independent study program cannot be excluded from school facilities. Rather, the school “*shall ensure the same access* to all existing services and resources in the school in which the pupil is enrolled ... *as is available to all other pupils in the school.*” (CEC 51746 [emphasis added].)

And, a student enrolled in an independent study program always retains the option to return to his or her regular classroom for in-person instruction. The school is required to “*transition pupils whose families wish to return to in-person instruction from independent study expeditiously*, and, in no case, later than five instructional days.” (CEC 51747(f) [emphasis added].)

The state’s emergency powers do not allow students to be excluded from school for refusing to wear a mask.

Section 120230 of the California Health and Safety Code (CHSC) has been cited by some as authority for a school to exclude a child who fails to follow the CDPH mask mandate. This section is being misapplied, as it provides only narrow authority for schools to exclude a child who is subject to an isolation or quarantine order duly issued by a county health officer.

Section 120230 reads, in relevant part: “No ... child *who resides where any contagious, infectious, or communicable disease exists or has recently existed, that is subject to strict isolation or quarantine* of contacts, shall be permitted by any superintendent, principal, or teacher of any ... public or private school to attend the ... school, except by the written permission of the health officer.” (Emphasis added.)

Two things must exist before this section can apply: First, a “contagious, infectious, or communicable disease” must exist or have recently existed at the child’s place of residence. Where a child has not received a diagnosis of COVID-19, and has not been exposed to the disease through a family member or close contact, this condition cannot be met. Second, the child must be subject to a “strict isolation or quarantine” order by a county health officer.³ In all the known instances where a school has excluded or threatened to exclude a child from campus for noncompliance with the mask mandate, neither of these conditions has been met.

CEC 49451 likewise does not authorize school officials to send a healthy child home simply for refusing to wear a mask. Section 49451 provides that “whenever there is a *good reason to believe that the child is suffering from a recognized contagious or infectious disease*, he shall be sent home and shall not be permitted to return until the school authorities are satisfied that any contagious or infectious disease does not exist.” (Emphasis added.) A child’s refusal to wear a mask does not establish “good reason to believe that the child is suffering from” COVID-19, or any other disease.

Article I, section 28, of the California Constitution sets forth “the inalienable right to attend

³ “Strict isolation or quarantine” means a person is subject to an order by a county health officer not to leave his or her place of confinement: “A person subject to quarantine or strict isolation residing or in a quarantined building, house, structure, or other shelter, shall not go beyond the lot where the building, house, structure, or other shelter is situated, nor put himself or herself in immediate communication with any person not subject to quarantine, other than the physician, the health officer or persons authorized by the health officer.” (CHSC 120225.)

campuses which are safe, secure and peaceful.” CDPH, in a letter published on its website August 23, 2021, makes the misleading argument that this constitutional provision imposes a legal and moral imperative on schools to ensure compliance with the mask mandate.⁴ This section, however, is part of a victim’s rights initiative enacted by ballot measure in 2008, and it pertains solely to a person’s safety from the criminal acts of others. While we agree that schools must take reasonable measures to provide a safe environment for students, nothing in the California Constitution allows, much less requires, schools to bar a healthy student from attending class. And, in any event, as explained above, real-world data from the last year and a half has failed to show any correlation between mask mandates for children and a decrease in the spread of COVID-19 in schools.

Schools must issue exemptions for students who, for medical reasons, should not wear a mask.

CDPH’s mask guidance exempts several categories of persons from the mask requirement, including the following:

- “Persons with a medical condition, mental health condition, or disability that prevents wearing a mask....
- “Persons who are hearing impaired, or communicating with a person who is hearing impaired, where the ability to see the mouth is essential for communication.”⁵

These exemptions are self-executing. Nothing in CDPH’s guidance requires a child or his or her

⁴ [Requirement for Universal Masking Indoors at K-12 Schools \(ca.gov\); https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx)

⁵ Cal. Dep’t of Pub. Health, *Guidance for the Use of Face Coverings* (July 28, 2021), available at [guidance for face coverings \(ca.gov\); https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/guidance-for-face-coverings.aspx)

parents to submit an “application” to obtain an exemption. Yet many school districts are not only requiring an application, but are compounding the difficulty by requiring extensive documentation, substituting their own non-medical opinions for those of a child’s own physician, and requiring a child to waive his or her medical privacy rights or agree to other arduous and/or unlawful conditions. Such requirements effectively deprive children of exemptions to which they are legally entitled, violating *their* right to learn in a safe environment, and possibly subjecting the school district to expensive litigation as a result of this discrimination.

We are told that some children who have received an exemption are being isolated from their classmates, or have otherwise been subjected to harassment or discrimination. Many such exemptions arise out of a child’s disability, and any harassment or discrimination against a child based on disability violates both California and federal law—again possibly subjecting the school district to costly lawsuits.⁶

Further, it is improper to ask only one student—as opposed to asking all students—questions designed to determine if [he/she] has COVID-19, or require that this student alone have [his/her] temperature taken or undergo other screening or testing. If you wish to ask only a particular student to answer such questions, or to have [his/her] temperature taken or undergo other screening or testing, you must have a reasonable belief based on objective evidence that this student might have the disease. You may not ask a student who is physically coming into the school campus whether they have family members who have COVID-19 or symptoms associated with COVID-19, as such is a violation of the Genetic Information Nondiscrimination Act (GINA). The Occupational Safety and Health Administration (OSHA) has also recognized that there is “not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-

⁶ See CEC 200 (“It is the policy of the State of California to afford all persons in public schools, regardless of their disability . . . , equal rights, and opportunities in the educational institutions of the state.”); CEC 201(a) (“All pupils have the right to participate fully in the educational process, free from discrimination and harassment.”); CEC 220 (“No person shall be subjected to discrimination on the basis of disability . . . , in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance”)

person. . .”

Conclusion.

Until such time as CDPH withdraws its mask mandate, or a court declares it unlawful, masks are required in schools in indoor settings. But, for as long as the mandate exists, schools may not enforce it by excluding children from classrooms, whether by means of expulsion, suspension, or forced enrollment in an independent study program. Schools must exempt students from mask requirements as provided in the CDPH guidance, without an onerous application process, and all exempt students should be free from all forms of harassment, discrimination, and retaliation.

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