

December 9, 2020

VIA U.S. MAIL & EMAIL

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Dr. Paul Gothold, County Superintendent
Bob Mueller, Executive Director
San Diego County Office of Education
6401 Linda Vista Rd.
San Diego, CA 92111-7319

Re: Unlawful Purple Tier School Reopenings in San Diego County

Dear Dr. Gothold and Mr. Mueller:

I write on behalf of the San Marcos Education Association (SMEA), San Dieguito Faculty Association (SDFA), and Carlsbad Unified Teachers Association (CUTA). We write to express grave concerns that the San Diego County Office of Education (SDCOE) has apparently trained and advised school districts to violate California Department of Public Health (CDPH) legal orders. These orders prohibit districts who operated small cohorts while in the Red Tier from using these operations as a pretext for reopening to general in-person instruction while in the Purple Tier. By training and encouraging school districts to violate clear CDPH prohibitions of general in-person reopenings during such a manifestly dangerous phase in the pandemic, the SDCOE puts district employees and the public's health at an unjustifiably higher risk. The SDCOE's incorrect advice also creates significant liability exposure for districts under the California Government Tort Claims Act and California Civil Code §1668.

Teachers are the first to recognize that distance learning is a difficult and challenging educational environment for teachers, students, and parents, and that we must all strive to continue to improve our distance learning efforts to make the process more effective. Teachers want to reopen safely for in-person learning, but not under conditions where it endangers public health. We simply cannot ignore the fact that we are in the middle of a deadly pandemic that has already taken the lives of more than a quarter million Americans, including nearly twenty thousand Californians. Currently this pandemic is getting worse, not better. In San Diego County, the case numbers and case positivity rate are skyrocketing. The Los Angeles Times reports that over the past seven days, San Diego County has reported an average of 1,717.7 new cases per day, a 49.5% increase from two weeks ago. Over that same period, there have been 9.9 deaths per day. The number of hospitalizations is growing, and the region's intensive care capacity has dropped

dangerously below 15%. There are now 867 hospital patients with a confirmed case, an increase from fourteen days ago.

It is incumbent upon all of us to act responsibly to bring this emergency to as speedy a conclusion as possible. Students, particularly of secondary and high school ages, are just as efficient at transmitting the virus as any adult. Any school reopening plan must strictly follow the expert advice and guidance of the CDPH, or risk contributing significantly to a level of community spread that will quickly overwhelm our health care system. For its part, SDCOE must provide accurate training and advice to school districts on their compliance with CDPH legal directives.

CDPH Reopening Rules Impose Mandatory Non-Discretionary Duties

As you well know, the CDPH issued rules on reopening for in-person instruction in its [July 17, 2020 Reopening Framework](#) and [August 3, 2020 School Guidance \(updated October 20, 2020\)](#). These rules derive their legal authority directly from Executive Order N-33-20 (March 19, 2020), issued under the California Emergency Services Act. Govt. Code 8567. In other words, the CDPH rules on reopening are legal orders that have the same effect as state statutes. As such, these legal orders are compulsory throughout the state, including San Diego County. While individual counties, county public health departments, and school districts may enact more restrictive measures and a broader prohibition, they have no authority to enact less restrictive measures when the state law is clear and unambiguous. A party's refusal or willful neglect of such orders, particularly during a state of emergency, is subject to criminal prosecution and fines. Govt. Code 8665.

Purple Tier Districts May Not Use Small Cohort Operations to Open In-Person to All Students

CDPH's August 3 School Guidance expressly prohibits Purple Tier districts from reopening for general in-person instruction, except for individual school sites where general in-person instruction actually began 14 days after having previously been out of the Purple Tier. CDPH defines the terms "open" or "reopened" under its July 17, 2020 Reopening Framework as referring "to operations that are permitted only if the county satisfies the eligibility requirements for schools to 'open' or 'reopen' (i.e., red tier for 14+ days)." CDPH's August 3 School Guidance clearly states that schools providing in-person instruction to small cohorts are not "open" under the July 17 Reopening Framework: "Schools that were operating only in the manner permitted under the Cohorting Guidance are therefore not 'open' under the July 17 [Reopening] Framework. For example, a school serving 10 students for in-person instruction under the Cohorting Guidance is not "open" for in-person instruction, *since such operations are permitted regardless of the school reopening framework.*" (emphasis added)

This CDPH definition of a school “opening” is entirely consistent with and reinforced by other CDPH guidance, which also provides that the small cohort operations must be prioritized for targeted students with special needs, and do not allow for in-person instruction for all students. (See CDPH’s “[Providing Targeted, Specialized Support and Service at School](https://files.covid19.ca.gov/pdf/guidance-schoolscohort-FAQ--en.pdf)” (Sept. 4 2020 Update) available at <https://files.covid19.ca.gov/pdf/guidance-schoolscohort-FAQ--en.pdf>.)

Districts have argued that the small cohort operations at school sites are merely an initial stage in a phased general reopening plan initiated while in the Red Tier, and that under CDPH reopening rules, they are permitted to continue that phased reopening for all students at those school sites. However, the state reopening rules are clear and unambiguous that small cohort operations simply cannot constitute a reopening under the July 17 Reopening Framework, irrespective of how a district characterizes these operations, or coordinates them with a general reopening.

Phased reopening plans that are permitted to continue while in the Purple Tier must be *general* reopenings initiated while in the Red Tier, based on grades and schools, and excluding any small cohort operations at the site. Most of the district schools for which general reopenings are being planned for January 2021 have only been open for small cohort instruction while in the Red Tier. For the purposes of general reopenings while in the Purple Tier, phased reopenings cannot be based solely on small cohort operations in the Red Tier. While some portions of the various CDPH Guidances provide districts with some discretion over whether to implement recommended state health and safety protocols, CDPH does not provide such discretion in its reopening rules- it imposes a clear, express prohibition on Purple Tier reopenings, with only a limited exception. Small cohort operations under the state’s Cohorting Guidance do not qualify a district for such any exception, and any efforts to characterize them as such are an evasion of the state’s reopening rules.

SDCOE Improperly Condoned Unlawful In-Person Instruction in Purple Tier Districts, Despite Rising Public Health Threats and a Lack of District Capacity to Safely Reopen

We are informed that SDCOE recently conducted webinar training for district administrators on CDPH’s reopening rules, and that these district administrators have individually consulted with SDCOE on the issue of whether to reopen to general in-person instruction for all students while in the Purple Tier. Some of these administrators have reported to association leaders and staff that the SDCOE has condoned, or, as one administrator put it, “given its blessing,” for districts to improperly characterize small cohort operations under the Cohorting Guidance as initial school reopenings, in direct contravention of CDPH reopening rules.

School districts in San Dieguito, San Marcos, and Carlsbad have now cited SDCOE’s training and advice as the basis for publicly announcing plans to bring back thousands of students for general in-person learning. These students will begin circulating in-person at multiple secondary and high school sites as early as January 4, 2020, irrespective of the increasingly dire and severe public health conditions in their local communities. Problematic conditions at these districts - including substitute staffing shortages, insufficient social distancing in classrooms, and

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inadequate ventilation - threaten to drastically worsen the public health consequences of premature reopening.

Unlawful In-Person Reopenings Greatly Increase District Exposure to Tort Liability

Under the Government Tort Claims Act, “[w]hen a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” Govt. Code § 815.6. The SDCOE’s failure to properly advise Purple Tier districts on their duty to remain closed for general in-person instruction has encouraged these districts to violate their mandatory duty to heed CDPH reopening rules. Far from exercising reasonable diligence here in the discharge of this duty, the Districts- with the SDCOE’s advice and encouragement--blatantly disregard such duty. As a consequence, every district that uses small cohorts operations as a pretext for proceeding with unlawful general reopenings may be exposed to substantial tort liability in the event of any serious COVID infections, injuries or deaths that arise in local communities that can be traced back to unlawful in-person instruction.

We understand that districts have also sought to mitigate the risk of tort liability during these reopenings by requiring parents and teachers sign broad waivers of liability and a general release of claims. These districts should be made aware that these forms do not provide an effective shield from COVID-related tort liability, particularly when a district’s liability arises from a decision to reopen in violation of state law. California Civil Code section 1668 provides that “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.” Pursuant to Civil Code section 1668, a public service provider, such as a school, may not exempt itself from liability even for ordinary negligence if the service it provides implicates public interests. See *Gavin W. v. YMCA of Metro. Los Angeles* (2003) 106 Cal. App. 4th 662. Surely, SDCOE could not have meant to train and encourage school districts to engage in unlawful school reopenings, thus putting at risk the public resources that districts have a fiduciary responsibility to protect, not to mention the health of thousands of parents, teachers, students and the general public. This is not to say, of course, that the District must cease *all* in-person services. The District may properly continue with general education reopenings begun in the Red Tier (ie., at their elementary schools) and the small cohort in-person services and instruction that are already in place. But it may not open all its classrooms for general in-person instruction while in Purple Tier. As the CDPH has made clear in its reopening rules, that step must wait until San Diego County has been in the Red Tier for at least fourteen days. We hope that this “dark COVID winter” ends soon and that the County is removed from the Purple Tier, so that the District may once again resume general in-person instruction. But we are not there yet—and it almost certain that we will not be there by January 4, 2021.

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We request that SDCOE immediately contact school districts that have received SDCOE's inaccurate guidance, in order to correct or clarify any prior communication that condoned unlawful in-person instruction. Districts must cease in-person instruction that was not initiated 14 days out of the Purple Tier, save only for appropriate small cohort instruction and approved elementary educational waivers, pursuant to CDPH reopening rules. We trust that upon due consideration and with updated advice from SDCOE, districts will reconsider planned returns to in-person hybrid instruction anytime in January 2021. It is not only the wrong step at the wrong time, but also prohibited by governing CDPH guidelines. Please provide us with written confirmation, not later than the close of business tomorrow, December 14, 2020, that the SDCOE will take the necessary steps to correct or clarify its position on CDPH reopening rules.

Also be advised that SMEA, SDFA, ACT, and CUTA reserve all rights in this respect and will not hesitate to exercise the same.

Very truly yours,



York Chang
CTA Staff Counsel

cc: Rick Shea, President, SDCOE Board (*via email: rick.shea@sdcoe.net*)
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