SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

DATE: 04/12/2021 TIME: 01:53:00 PM DEPT: N-27

JUDICIAL OFFICER PRESIDING: Cynthia A. Freeland
CLERK: Michael Garland
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00007536-CU-WM-NC** CASE INIT.DATE: 02/16/2021
CASE TITLE: **A.A. vs NEWSOM [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Motion Hearing (Civil)

APPEARANCES

The Court, having taken the above-entitled matter under submission on April 8, 2021, and having fulling considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court's Ruling is attached hereto and incorporated herein.

A.A. Newsom et al v. Gavin Newsom et al
Case No. 37-2021-00007536-CU-WM-NC

The matter came on for hearing on an Order to Show Cause Why A Preliminary Injunction Should Not Issue as against San Marcos Unified School District and Oceanside Unified School District. Having considered the operative pleadings, the moving papers, the opposition papers, the reply papers, and the arguments of counsel, the Court rules as follows:

San Marcos Unified School District (SMUSD)

For a preliminary injunction to issue, the court must consider: (1) whether there is a likelihood that the Plaintiffs will ultimately prevail on the merits, and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction. (*See Butt v. State of California* (1992) 4 Cal.4th 668, 677-78.) Further, and as all parties implicitly if not explicitly acknowledged during the hearing, a mandatory injunction, which is the type sought by Plaintiffs, is only permitted in extreme cases "where the right thereto is clearly established." (*Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493.)

When the preliminary injunction is sought against a public agency/entity, public policy must be considered because there is a "general rule against enjoining public officers or agencies from performing their duties." (*Tahoe Keys Property Owners Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) As there is a presumption that public agencies regularly perform their official duties in accord with constitutional and statutory mandates, the burden lies with a party challenging the agency's performance to demonstrate that there has been an irregularity in the performance of the official duties. (*See* Cal. Evid. Code § 664; *Clark v. Conley School Dist. of Kern County* (1927) 86 Cal.App. 527.)

In this case, the Plaintiffs proffer that "[t]his Court has already found that 'Plaintiffs have demonstrated a likelihood that they will prevail on the fourth cause of action as it is alleged against the Defendant School Districts." (*See* Plaintiffs' Reply to Opposition of Defendant San Marcos Unified School District to Plaintiffs' Request for Injunction, p. 3, ll. 6-9 citing Revised Order on Plaintiffs' Ex Parte Application for Temporary Restraining Order ("Order"), Ex. A, p. 13, fn. 9.) While this is true, the Court's finding in the March 15, 2021 ruling did not end the analysis regarding the likelihood of prevailing on the merits. This is because, as the Court found in issuing the temporary restraining order against the State Defendants, the January 2021 Framework and the Safety Review application denials prevented the districts from reopening.

Since the issuance of the temporary restraining order, all of the Defendant School Districts have taken steps (albeit different steps in varying degrees) to expand in-person learning. As a result, while the Court did conclude that as of March 15, 2021 the Plaintiffs had demonstrated a likelihood of prevailing on the fourth cause of action as alleged against the Defendant School Districts, the landscape of this case has changed significantly since that time.

Further, the Plaintiffs' requested relief has changed since the filing of their application for a temporary restraining order and request for an order to show cause why a preliminary injunction should not issue. More specifically, since the filing of their initial application, Plaintiffs have

retreated from their request for a specific deadline for a full reopening of schools with in-person instruction five days per week. Instead, Plaintiffs have explained as follows:

> OUSD's arguments are based entirely on a mischaracterization of Plaintiffs' motion. ***Plaintiffs are not asking the Court to order OUSD "specifically how and when to open its schools."*** **(OUSD Opp., p. 6.)** ***Plaintiffs only demand that OUSD comply with its constitutional and statutory duty to reopen its schools for in-person instruction "to the greatest extent possible" and not to unreasonably delay its reopening.***

(Plaintiffs' Reply to Opposition of Defendant Oceanside Unified School District to Plaintiffs' Application for Injunction, p. 9, ll. 3-7 (emphasis added).) While at the hearing on April 8, 2021 Plaintiffs argued that this change in requested relief is in response to the Court's modified order to show cause and that it really is not a change at all because the Plaintiffs still are seeking a deadline by which the Defendant School Districts must fully reopen for in-person instruction, the argument is inconsistent with the positions Plaintiffs advanced in the various written submissions provided during the pendency of this matter.

More specifically, Plaintiffs, in responding to the State Defendants' Ex Parte Application for an Order Clarifying the Temporary Restraining Order, noted the following:

> county health officials and school districts in California have been uniformly deliberate and cautious in their reopening plans, as evidenced by the declarations of Drs. Haley, Campbell, Phelps and Churchill. ***School districts should be left with discretion to craft their reopening plans, in consultation with the county health officials who have been at the forefront of the response to this pandemic, incorporating recommended mitigation measures to the extent feasible and applicable to local conditions.***

(Plaintiffs' Opposition to State Defendants' Ex Parte Application for Clarification of the Court's Order Granting in Part Plaintiffs' Request for A Temporary Restraining Order, p. 5, ll. 6-12 (emphasis added).)

Moreover, in their reply to SMUSD's Opposition to the Order to Show Cause, Plaintiffs, in furtherance of their explanation as to how OUSD mischaracterized Plaintiffs' motion, represented that:

> ***[n]either Plaintiffs' motion nor this Court's Order seek to direct OUSD specifically how and when to reopen its schools for in-person instruction.*** Within the bounds of the Court's Order, OUSD can establish, and has established, a hybrid model to transition to full-time in-person instruction. OUSD can move to five days a week, or alternatively lengthen the school day and move to four days a week. ***OUSD can take the time necessary –***

> ***but no more than is necessary-to prepare for the transition to full-time in-person instruction.*** What OUSD cannot do is simply declare its "intent" to expand to full-time in-person instruction at some unspecified future time without preparing a plan to do so. (Vitale Decl., ¶ 13.)

(*Id.*, p. 9, ll. 10-16 (emphasis added).) Consequently, in assessing whether the Plaintiffs have met their burden of demonstrating a likelihood of prevailing on the merits, the Court must assess whether there is a likelihood that Plaintiffs will prevail in demonstrating that the Defendant School Districts have not complied with their legal obligation to offer in-person instruction to the greatest extent possible essentially at the earliest possible opportunity. Posited a different way, as set forth by SMUSD in the Opposition of Defendant San Marcos Unified School District to Plaintiffs' Request for Preliminary Injunction, the issues presented by Plaintiffs' Application are two-fold: (1) is there an evidentiary basis for the issuance of a mandatory preliminary injunction, and (2) whether California Education Code section 43504(b), which prescribes that a local educational agency shall offer in-person instruction to the greatest extent possible, requires a local educational agency such as SMUSD (and OUSD) to undertake a ministerial, non-discretionary act.

As set forth above, Plaintiffs have conceded that school districts must be given the discretion to create and implement their reopening plans, in consultation with the county health officials and incorporating recommended mitigation measures to the extent feasible and applicable to local conditions. Indeed, this discretion is vested in the Defendant School Districts by California Education Code section 35160 *et seq.*, which is to be construed liberally. Further, because of the discretion vested in the school districts by the pertinent statutory authority, courts should only disturb decisions of the local educational agencies (i.e. the school districts) upon a clear showing that an agency has abused its sound discretion. (*See Dawson v. East Side Union High School Dist.* (1994) 28 Cal.App.4th 998, 1017-19; *Governing Bd. Of Ripon Unified School Dist. v. Commission on Professional Competence* (2009) 177 Cal.App.4th 1739.) In this case, the Court cannot conclude that there is an evidentiary basis for the issuance of a mandatory injunction nor can it conclude that SMUSD has abused its discretion in the creation and implementation of its reopening plan.

Notably, California Education Code 43504(b) requires that local educational agencies shall offer in-person instruction "to the greatest extent possible." Plaintiffs argue that this Court, in concluding that the language of the statute, namely the use of the word "shall," creates a mandatory duty, implicitly has concluded that the statute creates a ministerial duty. Plaintiffs' argument, however, ignores the effect that the remainder of the statutory language has on the issue. In essence, the inclusion of the language "to the greatest extent possible" in section 43504(b) means that the duty created by the statute, which is a mandatory duty, is mixed with discretionary power and/or the exercise of judgment by the local educational agency. As courts have explained, "[m]andate will not issue to compel action unless it is shown the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment.

[Citation.]" (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 596 quoting *Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.)

To the extent that Plaintiffs contend that SMUSD has abused its discretion such that it, in essence, is not in compliance with section 43504(b), the Court must respectfully reject this contention. As set forth above, Plaintiffs have conceded that the Defendant School Districts can take the time that is necessary to prepare for the transition to full-time in-person instruction. SMUSD has presented evidence to demonstrate that is precisely what it has done. To the extent that Plaintiffs argue that the Defendant School Districts cannot take more time than is necessary to plan for and to return to full-time in-person instruction, Plaintiffs offer no evidence to suggest what the time limits should be in light of all of the fluctuating issues that the school districts must assess/consider when planning for in-person instruction to the greatest extent possible.

Further, it is not sufficient simply to question what a particular school district has done in relation to resuming in-person instruction to the greatest extent possible or to compare one school district to another to argue what is possible. The evidence presented demonstrates that the Defendant School Districts operate independently of one another and experience different impediments to a return to in-person instruction five days per week such that there is no "one size fits all" approach to reopening. The evidence presented demonstrates that SMUSD is taking steps to expand its in-person instruction while accounting for the various factors that affect the risks to students, which factors include, but are not limited to, the numbers of students availing themselves of the on-campus learning models, teacher recruitment issues, facilities' capacities/ventilation issues, employees' rights to legally authorized leaves and/or medical accommodations, the impact of recruitment and staffing issues on student safety and supervision, and budget constraints. In response, the Plaintiffs have not presented sufficient evidence to demonstrate, in light of its unique situation/circumstances, that there are steps that SMUSD could being taking to implement a full-time in-person instructional model in a more expeditious manner or by a date certain. Simply put, the evidence presented does not support the issuance of a mandatory injunction at this time, and Plaintiffs have not demonstrated a likelihood, at this stage of the proceedings, of establishing that SMUSD has abused its discretion in its efforts to comply with the applicable sections of the Education Code and/or has no intention of complying with the mandates of the Education Code.

While the conclusion reached above as to the issues articulated render a balancing of the hardships unnecessary, the Court nonetheless notes that, in light of the evidence presented by SMUSD, SMUSD will suffer harm if an arbitrary deadline to return to full-time in-person instruction is imposed. The Court further notes that the evidence does support that anything short of full-time in-person instruction has harmful effects on a significant portion of the students affected. However, as the specific harmful effects of a hybrid instructional model on students have not been quantified, the Court cannot conclude that the balance of harms would mitigate in favor of the issuance of a preliminary injunction even if the first consideration discussed at length above had warranted such a conclusion.

Oceanside Union School District (OUSD)

As it relates specifically to OUSD, initially OUSD contends that a preliminary injunction should not issue because it was not properly served with the underlying request for a temporary restraining order. As articulated at the outset of the April 8, 2021 hearing, the Court respectfully disagrees.

Notably, OUSD confirms in its opposition papers that it received notice of the underlying Application for a Temporary Restraining Order and for an Order to Show Cause Why a Preliminary Injunction Should Not Issue. (*See* Opposition Papers of Defendant Oceanside Unified School District to Plaintiffs' Application for an Injunction, p. 3, 11. 10-11.) While OUSD contends that this was not proper service, OUSD acknowledges that the Plaintiffs did not seek a temporary restraining order against it. Instead, the application, about which OUSD had notice, sought an order to show cause why a preliminary injunction as to OUSD, among others, should not be heard.

OUSD's counsel appeared at the hearing on Plaintiffs' Application for a Temporary Restraining Order and an Order to Show Cause Why a Preliminary Injunction Should Not Issue. At that hearing, the Court granted the temporary relief sought and issued an Order to Show Cause ("OSC), ordering that the OSC and supporting papers be served on all parties by electronic service by March 16, 2021. The OSC was served electronically on OUSD's counsel on March 15, 2021. (*See* Register of Actions (ROA) # 83.) The revised OSC issued on March 17, 2021, at which hearing OUSD's counsel was present and to which OUSD joined in the request for clarification, also was electronically served on OUSD's counsel on March 17, 2021. (*See* ROA #101.) Thereafter, OUSD filed a substantive opposition (albeit one that also argued improper service) on April 1, 2021, with service of said opposition being accomplished electronically.

As OUSD has not denied receiving the underlying papers and has not been deprived of any opportunity to respond meaningfully to the Plaintiffs' requested provisional relief, the Court declines to deny the Plaintiffs' request for a preliminary injunction on the ground of improper service. This conclusion is further dictated by case law addressing defects in a noticed motion. As courts have explained:

> it is well settled that the appearance of a party at the hearing of a motion and his or her opposition to the motion on its merits is a waiver of any defects or irregularities in the notice of the motion. [Citations.] This rule applies even when no notice was given at all. [Citations.] Accordingly, a party who appears and contests a motion in the court below cannot object on appeal or by seeking extraordinary relief in the appellate court that he [or she] had no notice of the motion or that the notice was insufficient or defective. (*Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1288, 56 Cal.Rptr.3d 216, quoting *Tate v. Superior Court* (1975) 45 Cal.App.3d 925, 930, 119 Cal.Rptr. 835.)

(*Felisilda v. FCA US, LLC* (2020) 53 Cal.App.5th 486, 493.)

Alternatively, at the time of the hearing, OUSD argued that C.U., who is the only plaintiff affiliated with or otherwise zoned for OUSD, does not have standing to seek the relief requested. More specifically, OUSD argued that, as reflected in the operative pleading[1], C.U.'s child has withdrawn from OUSD and is taking classes through an online university. (*See* First Amended Complaint, ¶¶ 32-42.) In response, Plaintiffs' counsel argued that: (1) the standing issue had not been raised in OUSD's written opposition, and (2) C.U. nonetheless satisfies the standing requirement because the evidence demonstrates that C.U.'s child, who resides within OUSD's boundaries, has suffered harm that is traceable to OUSD's conduct. For several reasons, the Court must agree with Plaintiffs.

Initially, the Court notes that it is not significant that OUSD did not raise the standing issue in its opposition. One aspect of justiciability is standing. (*See Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1221-22.) Lack of standing is a jurisdictional defect. (*People v. Sup. Ct. (Anh)* (2018) 29 Cal. App. 5th 486. As courts have explained:

> To have standing, a party must be beneficially interested in the controversy; that is, he or she must have 'some special interest to be served or some particular right to be preserved and protected over and above the interest held in common with the public at large.' [Citation] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical."

(*Teal v. Sup Ct.* (2014) 60 Cal.4th 595, 599.)

In this case, the evidence demonstrates that C.U.'s son attended a school within the boundaries of OUSD during the 2020/2021 school year when instruction transitioned from in-person to remote. C.U. has declared that OUSD's failure to provide in-person learning to the greatest extent possible has irreparably harmed C.U.'s son. (*See* Declaration of C.U. in Support of Plaintiffs' Ex Parte Application for a Temporary Restraining Order, ¶¶5-16.) Consequently, C.U. has demonstrated a special interest to be served and a particular right to be protected over the interest held in common with the public at large.

Moreover, even if C.U.'s child's withdrawal from the OUSD as a result of remote learning calls into question C.U.'s standing, "[i]f the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." (*People v. Superior Court (Anh), supra,* quoting *National Audubon Society* (1983) 33 Cal.3d 419, 432 fn. 14.)

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[1] At the hearing, OUSD initially argued that there was no evidence submitted relating to any harm suffered by C.U. However, C.U. submitted a declaration in support of the underlying request for a temporary restraining order and order to show cause why a preliminary injunction should not issue. (*See* Register of Actions (ROA) # 31.) As no evidentiary objections were submitted to the Declaration of C.U. in Support of Plaintiffs' Request for a Temporary Restraining Order, the Court considers the declaration as admissible evidence.

Finally, in mandate cases, the California Supreme Court has held:

> "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has a legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced." [Citation] . . . We refer to this variety of standing as 'public interest standing.' [Citation]."

(*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166.) While the parties take issue with whether a writ of mandamus can issue in this case, the case has been pleaded as a writ, with the requested relief, among others, being a writ of mandamus. Consequently, even if C.U. did not have standing under the other theories addressed above, there can be no dispute that a question posed by this litigation is one of a public right and the object is to procure enforcement of an alleged public duty. Consequently, C.U. does have standing to pursue the claims against OUSD.

As to the substance of the request for a preliminary injunction, the Court must conclude, for the reasons set forth above in the discussion pertaining to SMUSD, that Plaintiffs have not met their burden of demonstrating a need for a preliminary injunction. To reiterate, in essence, because Plaintiffs concede that they are not seeking to dictate how or when the Defendant School Districts reopen their respective schools, Plaintiffs are seeking a preliminary injunction that mandates that OUSD comply with the law. The Court concludes that an injunction of this type, particularly in light of the fact that there is insufficient evidence that OUSD is not complying with the law, simply is not necessary pending a trial in this matter.

In an effort to demonstrate that OUSD is not offering in-person instruction to the greatest extent possible, Plaintiffs argue that: (1) Dr. Vitale, the district superintendent, does not identify any health requirements that would prevent a full reopening, and (2) the only constraint to a full-reopening is a "ten working day notification requirement to the Oceanside Teachers Association and a 48-hour notice requirement to the California School Employee Association." (Plaintiffs' Reply to Opposition of Defendant Oceanside Unified School District to Plaintiffs' Application for Injunction, p. 6, l. 28 – p. 7, l. 2.) From this, Plaintiffs conclude that OUSD has admitted that it could transition to a full-time in-person learning model in approximately "two to three weeks." (*Id.*, p. 7, ll. 2-4.) Plaintiffs seem to misunderstand Dr. Vitale's declaration.

Notably, Dr. Vitale does not declare that OUSD could return to full-time in-person instruction in two to three weeks. Instead, her declaration reveals, as was confirmed during oral argument, that once the appropriate measures are in place to implement a full-time in-person instructional model, measures that account for the health and safety of all students, staffing issues, and county health mandates, then the transfer of students from one model to the other will take two to three weeks. Dr. Vitale does not declare how long it takes to create and implement a full-time in-person instructional model. She nonetheless does declare that OUSD intends to continue its focus "on offering and expanding [its] in-person instruction while following the guidelines and

direction of the San Diego County HHSA and California Department of Public Health." (Declaration of Julie A. Vitale, Ph.D. on Behalf of Oceanside Unified School District, ¶ 13.) While Plaintiffs are correct that it is not the intent that matters, the intent coupled with the statutory requirements of the Education Code lead the Court to conclude that an injunction, which in this case would do no more than require compliance with the law, is unnecessary at this time.

In light of all of the above, the Court declines to issue a preliminary injunction. Indeed, the outcome Plaintiffs are seeking is mandated by the California Education Code, and the Defendant School Districts have discretion in how best to effectuate the mandate of the Education Code that schools in the respective districts offer in-person learning to the greatest extent possible at the earliest opportunity.

IT IS SO ORDERED.

Dated: April 12, 2021

Cynthia A. Freeland
Cynthia A. Freeland
Superior Court Judge