

December 20, 2020

VIA EMAIL

gary.johnston@sdcountry.ca.gov

Gary Johnston, Chief Resilience Officer
San Diego County Office of Emergency Services
5580 Overland Avenue, Suite 100
San Diego, CA 92123-1294

Re: Cease and Desist Unlawful Authorization of SDUHSD Reopening

Hello Mr. Johnston,

I represent the San Dieguito Faculty Association. I attempted to contact you via email and by phone last week, but have not received the courtesy of a response. I write to advise you that I have procured evidence that appears to show that your agency has acted outside the scope of authority to unilaterally create and publish an underground County “litmus test” on reopening that violates explicit state orders on school reopenings, and the County’s own December 10th, 2020 Public Health Order which requires school district compliance with state orders.

Additionally, according to a public statement by the San Dieguito Union High School District (SDUHSD), you personally reviewed and condoned a January 2021 reopening plan for in-person instruction at all SDUHSD schools while in the Purple Tier. These Purple Tier school reopenings are clearly unlawful, and are particularly reckless and dangerous from a public health perspective, with record levels of community spread at quadruple the case rate for Purple Tier status, and with the County’s ICU capacity becoming overwhelmed. If you have indeed provided such advice to SDUHSD that they may proceed under these conditions, you have also created significant liability exposure for SDUHSD under the Government Tort Claims Act. Govt. Code § 815.6.

As you may know, SDUHSD approved a December 15, 2020 resolution to reopen for partial week in-person instruction on January 4, 2021, with a further expanded reopening to a full **five days** of in-person instruction on January 25, 2021. Since the board action, we conducted a further factual investigation into the operations of SDUHSD campuses during the Red Tier. We have documented that on several of the largest district campuses, no actual in-person instruction has occurred on the campuses while in the Red Tier- only small cohort operations for the provision of specialized in-person targeted support services occurred during this time. For example, we have evidence of the following:

- During the Red Tier period (August 31-November 10, 2020), Canyon Crest Academy (enrollment of 2499 students) taught no in-person classes on campus and had only a single distance-learning hub for an average of only 9 students a day doing distance learning on campus.

- During the Red Tier period, Torrey Pines High School (enrollment of 2500 students) operated only three small special education cohorts (of 4, 7 and 4 students) for on-campus distance learning, and a learning hub providing individualized support for special education students opting for on-campus distance learning. In other words, no actual in-person instruction occurred on campus during the Red Tier period.
- During the Red Tier period, La Costa County High School (enrollment 1,849 students) provided staff support and a supervised environment for student cohorts with specialized needs through distance-learning hubs on campus, but provided no in-person instruction by certificated staff.
- We have information and believe that several other SDUHSC campuses, including middle schools, have provided only limited distance-learning hubs while in the Red Tier, with supportive services for targeted at-risk students, and no actual in-person instruction on campus.

These small cohort and distance-learning hub operations do not qualify as the kind of initial in-person reopening in the Red Tier that warrants a larger general reopening for potentially thousands of students while in the Purple Tier, under CDPH orders which derive their authority from the Governor's Executive Order to comply with all CDPH guidances. The CDPH's "Guidance on School and School-Based Programs (["CDPH School Guidance FAQ"](#)) is an extension of prior guidances, and has the same force and effect of statute of any prior guidance during a state of emergency. It clarifies that "[s]chools *must have actually reopened for in-person instruction* while the county was in the Red Tier in order to remain open if the county moves back to Purple Tier" (emphasis added). CDPH explains its definition of reopening in its September 4, 2020 Small Cohorts Guidance and Small Cohorts FAQ "[t]he term 'open' or 'reopen,' as used in the framework, refers 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)," as opposed to engaging in educational activities permitted under the CDPH's Cohorting Guidance. "Schools that were operating only in the manner permitted under the Cohorting Guidance are therefore not 'open' under the July 17 framework" (emphasis added).

In response to a December 14, 2020 cease and desist letter, SDUHSD issued the following public statement, representing that the County Public Health Officer and the County Office of Emergency Services is advising them that they may proceed with the reopening:

On Wednesday, December 9, 2020, The California Teachers Association emailed the San Dieguito Union High School District a letter on behalf of the San Dieguito Faculty Association demanding the district cease and desist from further expansion of our reopening. The basis for this demand, they assert, is that the district, by expanding reopening while San Diego County is in the Purple Tier, is unlawful and contrary to the guidance issued by the California Department of Public Health. Attached to the district

letter was one that was sent to the San Diego County Office of Education that asserted they were responsible for giving school districts incorrect advice about expanding reopening plans.

The district did not, and is not, relying on advice from the SDCOE for our expanded reopening plans. The controlling authority regarding whether schools can open or expand openings in San Diego County is the Public Health Officer, Dr. Wooten. She issues orders, which we are required to follow. We have been in constant contact with her staff and rely on them for guidance. The Chief Resilience Officer for San Diego County is responsible for compliance and he has assured us that unless a written clarification comes from CDPH that changes San Diego County's interpretation of existing guidance, we can continue to expand our reopening. If we do receive updated guidance from San Diego County that indicates we must pause or change our expanded reopening plans, we will comply.

The district response assumes that the County has independent "controlling" authority to create their own local "litmus test" for reopening school districts, inconsistent with state rules. Like any local entity during a state of emergency, the County is strictly subject to state emergency orders, and may only enact local rules if those rules are more restrictive- the County has no authority to enact less restrictive rules. Additionally, the district's response ignores the County's own December 10, 2020 public health order, which explicitly requires schools districts to follow state orders. Effectively, there are no local rules in San Diego County, there are only the state rules on reopening. Moreover, state law under the California Emergency Services Act requires that local county entities and officials, including the County Public Health Officer and the County Office of Emergency Services (and its "Chief Resilience Officer") must subordinate their authority to those state orders. Gov't Code § 8614(a-b).

Based on the SDUHSD's public statement, we filed a CPRA request with the SDCOE for their correspondences with the County's Office of Emergency Services. In reviewing your emails with SDCOE staff, you appear to be a source of the County's deviation from state orders. In the documents, you indicated disagreement with the CDPH's rule that small cohort operations while in the Red Tier, including targeted support services, supportive care environments, and distance-learning hubs, cannot qualify a district to reopen in the Purple Tier. The emails show your primary concern was that the state rule would adversely impact a small private school. You indicated that you found the FAQ's were confusing and not authoritative, but the FAQ's need no clarification, and, as described earlier, have the same force and effect as any CDPH guidance. Instead, you insisted on the publication of a County "litmus test" on the County's website, which incorrectly provided that any in-person instruction by certificated staff, including small cohort operations, supportive care environments, or distance learning hubs, constitute a valid reopening. This is directly contradictory to the CDPH's FAQ's explicit explanation of its own rules. Now,


the County Office of Emergency Service's local "litmus test" is being used as the legal justification for opening all of the schools in SDUHSD to thousands of students, in what will likely be the worst phase in the pandemic, at the crest of a winter surge upon a holiday surge. Our public health experts indicate that the region's COVID-19 mortality rate will increase as a result of these actions.

CDPH rules are clear that any school that has not reopened for actual in-person instruction by certificated staff, or has only implemented small cohort operations while in the Red Tier, such as supervised care environments, targeted supportive services, or distance-learning hubs, is prohibited from reopening while in the Purple Tier. Other school districts in the area have now complied with this rule. Only SDUHSD continues to insist on proceeding, risking the public health on the slender reed of an incorrect and unauthorized County FAQ, and, if they are to be believed, your apparent blessing.

On Friday, we filed a petition for a writ of mandamus in San Diego Superior Court. Please see attached. In short order, we will be filing a motion with the court to enjoin the reopening. The SDUHSD board has now called a special meeting for Tuesday, December 22, 2020. You still have time to resolve this matter. We demand that you correct any inaccurate advice or consent you may have provided to SDUHSD, de-publish the County "litmus test" on reopenings on the County website, and bring any exercise of your agency's authority under the California Emergency Services Act into compliance with state law.

Thank you for your anticipated cooperation.

Very truly yours,



York Chang
CTA Staff Counsel

Cc: Robert A. Haley, Ed.D., Superintendent, San Dieguito Unified High School District
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Fern Steiner, Esq., Smith Steiner Vanderpool

Attachment: December 17, 2020 Petition for Writ of Mandamus