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Via email only

Re: *City and County of San Francisco v. San Francisco Board of Education*, No. CPF-21-517352

Dear Ms. Solomon,

The San Francisco Unified School District (“SFUSD”) and San Francisco Board of Education (“Board”) (collectively, the “School District”) are required by law to offer “in-person instruction to the greatest extent possible.” Educ. Code § 43504(b). In my letter of February 11, 2021, I expressed concern that the School District may be contemplating entering into a Memorandum of Understanding or similar agreement (“MOU”) with the United Educators of San Francisco (“Union”) that would prevent the School District from complying with this legal obligation. In response, you stated that the School District is negotiating in good faith with the Union, that I have no role in those negotiations, and that the School District has no obligation to inform me or my office of the terms being discussed. Although I have no intention to disrupt or delay labor negotiations between the Union and the School District—to the contrary, my interest is to have schools reopen to in-person instruction as quickly as possible according to public health guidelines—I do have a duty to protect the interests of San Francisco and its residents, and a role in ensuring that the School District complies with the law. And the School District has a duty to satisfy its legal obligations to its students.

To that end, be advised that any school reopening plan that fails to offer in-person instruction “to the greatest extent possible” would be unlawful. When, to what extent, and under what conditions in-person instruction is “possible” during a pandemic is a health and safety decision that rests with public health officials, not with individual school districts or their workforce. And federal, state, and local health officials universally agree on what is “possible.”

- The Centers for Disease Control and Prevention (“CDC”), California Department of Public Health (“CDPH”), and San Francisco Department of Public Health (“SFDPH”) all agree that elementary schools can safely reopen for in-person instruction at San Francisco’s current level of COVID-19 transmission as long as core mitigation strategies are followed. Prioritizing vaccinations for teachers and other staff as an additional layer of protection is consistent with CDC recommendations. But *vaccination of staff is not a prerequisite or an essential element for K-12 schools to open safely for in-person instruction*. Accordingly, if the School District’s reopening plan delays in-person instruction subject to staff vaccination, that plan violates the law.

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- There is also consensus that middle and high school students can safely return to in-person instruction when community transmission drops slightly from current levels. We understand the need to prioritize reopening for children who struggle the most with distance learning, including younger children and vulnerable students. But a plan that entirely fails to account for reopening for middle and high school students sets up further imminent violations of the law.
- Public health authorities also agree that schools can provide in-person specialized and targeted support services to vulnerable children and youth—including children and youth with disabilities, children at risk of abuse or neglect, children experiencing homelessness, foster children, children of domestic violence survivors, and English learners—without prior health officer approval or staff vaccinations, as long as certain health and safety protocols are followed. In-person instruction for these children is possible right now. The School District’s failure to do so violates the obligation to provide in-person instruction “to the greatest extent possible.”
- No health authority—not the CDC, not CDPH, and not SFDPH—limits the number of children who can be in a classroom to a specific number. Nor do any of them limit the number of days or hours that students or staff can safely be on campus. They do recommend that student desks be placed at least six feet apart. And, depending on the size of the classroom and the number of students in the class, this spacing recommendation could impose some limitations on the number or percentage of students who can be on site for in-person instruction at a time. But limiting in-person instruction beyond what is required by this physical distancing protocol (e.g., to a hard cap of no more than 14 students or to only two half-days or less per week) would violate the law.

In short, it is “possible” to offer significant amounts of in-person instruction now to elementary students and vulnerable students even in the purple tier at San Francisco’s current level of COVID-19 transmission, without waiting for staff to be fully vaccinated. If the School District’s reopening plan offers students anything less than this in the short-term, I will challenge its legality at the March 22 hearing on the City’s motion for a preliminary injunction. But I hope that will not be necessary. My goal in reaching out to you now is to help ensure that any plan the School District puts in place is legally sound, avoids the need for court intervention, and achieves our shared goal of getting children back to in-person instruction at school to the greatest extent possible as quickly possible and in a setting that public health authorities agree is safe for students, teachers and staff.

Sincerely,



DENNIS J. HERRERA
City Attorney of San Francisco