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13 BOARD OF EDUCATION; SAN FRANCISCO UNIFIED
14 SCHOOL DISTRICT; VINCENT MATTHEWS in his official
capacity as San Francisco Superintendent of Schools

15
16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SAN FRANCISCO - UNLIMITED JURISDICTION

18 CITY AND COUNTY OF SAN
FRANCISCO,
19
20 Plaintiff and
Petitioner,
21
22 v.
23 SAN FRANCISCO BOARD OF
EDUCATION; SAN FRANCISCO
UNIFIED SCHOOL DISTRICT;
VINCENT MATTHEWS in his official
24 capacity as San Francisco Superintendent
of Schools,
25
26 Defendants and
Respondents.

Case No.: CPF-21-517352
[HON. ETHAN P. SCHULMAN, DEPT. 302
Complaint Filed: February 3, 2021
FAC Filed: February 9, 2021
**DEFENDANTS AND RESPONDENTS SAN
FRANCISCO BOARD OF EDUCATION, SAN
FRANCISCO UNIFIED SCHOOL DISTRICT
AND VINCENT MATTHEWS'
RESPONSE/OPPPOSITION TO ORDER TO
SHOW CAUSE RE: PRELIMINARY
INJUNCTION**
Date: March 22, 2021
Time: 1:30 p.m.
Dept.: 302

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
03/03/2021
Clerk of the Court
BY: YOLANDA TABO-RAMIREZ
Deputy Clerk

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1 **I. INTRODUCTION**

2 If the San Francisco Unified School District could have simply flipped a switch to reopen
3 all the schools for in-person instruction without endangering the lives of its more than 60,000
4 students and staff, it would have done so already. The District understands and shares the City
5 Attorney’s sense of urgency to open the schools, but political grandstanding cannot render in-
6 person learning any more “possible” than it was before this writ was filed.

7 The District, like all other school districts in California, ceased delivery of in-person
8 educational services at the start of the COVID-19 pandemic and promptly transitioned to a
9 remote/distance learning instructional model. Education Code sections 43503 and 43504 were
10 enacted, authorizing distance learning and requiring “in-person instruction to the greatest extent
11 possible.” The District has worked diligently since then to assess and prepare its 155 physical
12 facilities for social distancing and other safety measures imposed by state and local authorities,
13 even as evidence and data about COVID-19 transmission and the effectiveness of disease control
14 and mitigation strategies evolved. The District also engaged in lengthy negotiations with the 16
15 bargaining units that represent over 96% of the District’s employees, having just recently reached
16 agreement with most of the units, including the union representing the teachers, regarding the
17 conditions needed for a return to in-person learning.

18 Injunctive relief is not appropriate here because the District is already doing everything it
19 can, as quickly as it can, to begin in-person instruction. Currently, in-person instruction is not
20 possible but will become possible once the City/County is in the Red Tier (provided that teachers
21 have been vaccinated) or the Orange (or a lower) Tier (regardless of vaccination status). The
22 District continues to work on the myriad and complex safety issues, such as COVID-19 testing
23 programs, safety programs, facilities upgrades, and a detailed instructional model, but the work is
24 close to being complete.

25 Plaintiff cannot demonstrate a reasonable probability of prevailing on the merits, for two
26 reasons. First, the act of reopening schools for in-person instruction is not a ministerial duty but
27 instead requires the District to exercise significant discretion and judgment to determine the
28 “extent” that it is “possible.” Second, Plaintiff cannot demonstrate that the District has violated

1 its students’ constitutional rights, nor is it violating its statutory duty to offer in-person instruction
2 “to the greatest extent possible” under the applicable law.

3 **II. STATEMENT OF FACTS**

4 **A. California Law Allowed a Shift to Distance Learning in 2020 Due to COVID-19**

5 Due to the COVID-19 pandemic, the California Legislature made a series of changes in
6 public education, including expressly authorizing school districts to shift to the delivery of
7 instruction via distance learning in order to protect the health and safety of students and school
8 staff. These changes were primarily contained in Stats 2020 ch 24 (SB 98), effective June 29,
9 2020, and Stats 2020 ch 110 (SB 820), effective September 18, 2020, now codified in Education
10 Code sections 43503 and 43504.

11 Education Code section 43503 authorizes delivery of education services via distance
12 learning and explains how that should be done. Education Code section 43504 provides that “[a]
13 local educational agency shall offer in-person instruction to the greatest extent possible.”

14 **B. SFUSD Has Worked Diligently to Prepare For the Return to In-Person Instruction**

15 Over the entire course of the pandemic, the San Francisco Unified School District
16 (“SFUSD”) has been working diligently in preparing for the eventual return to in-person
17 instruction, with a goal of returning as many students to in person learning as possible, for as
18 many days as possible, for as long an instructional day as possible. (Declaration of Greg John
19 (“John Decl.”), ¶ 2.)

20 Beginning in the summer of 2020, SFUSD began assessing its school sites, identifying
21 and implementing required safety measures, and training site staff on those measures.
22 (Declaration of Dawn Kamalanathan (“Kamalanathan Decl.”), ¶¶ 2-12.) SFUSD has developed
23 COVID-19 health and safety protocols that are in line with the orders, regulations, and guidance
24 issued by federal, state, and local government officials, such as the California Department of
25 Public Health (“CDPH”), the San Francisco Department of Public Health (“SFDPH”) and
26 Cal/OSHA. Of course, new evidence and data about COVID-19 transmission, including
27 variations by age, and the effectiveness of disease control and mitigation strategies continues to
28 emerge regularly. This has required SFUSD to refine and update its health and safety protocols,

1 including as recently as March 2, 2021. (Declaration of Mele Lau-Smith (“Lau-Smith Decl.”), ¶¶
2 2-31.)

3 SFUSD has also been preparing, finalizing and submitting various documents required
4 before schools may reopen for in-person instruction, such as COVID-19 Safety Plans, letters of
5 interest and applications to reopen, as well as arranging site visits/inspections by public health
6 officials. (See Lau-Smith Decl., ¶¶ 14-15, 17- 22, 25-30; Request for Judicial Notice (“RJN”),
7 Exhibits “A” through “E.”)

8 SFUSD has also needed to ensure that its physical facilities can safely accommodate the
9 return of students, faculty and staff for in-person instruction. Because SFUSD operates 155
10 facilities, which serve more than 50,000 students and 10,000 staff, SFUSD has approached the
11 reopening of school sites in waves in order to efficiently plan and implement the required safety
12 measures. As explained more fully in the declaration of SFUSDS’s Chief Facilities Officer,
13 Dawn Kamalanathan, SFUSD has a systemic planning and assessment process to evaluate and
14 address each of the 155 facilities in the District. The process involves assessment, repair and
15 upgrade of HVAC systems and windows, installation of barriers, disinfecting stations and
16 signage, and rearrangement of furniture. Because there are so many facilities, SFUSD has
17 classified school sites into waves (with sites prioritized for reopening) in order to efficiently
18 implement the required safety measures. The first three waves consists of 12, 26, and 52 sites,
19 and additional waves will follow. Assessments are complete for the 90 facilities in the first three
20 waves. All of the repairs and installations are completed for the 12 sites in the first wave. Ninety
21 percent of the repairs/installation are complete for the 26 sites in the second wave and repairs and
22 installation for the 52 sites in the third wave are 35% complete. Overall, six schools have passed
23 a facilities inspection and been deemed compliant for reopening by the San Francisco Public
24 Health Department. (Kamalanathan Decl., at ¶¶ 3-9.)

25 Since the Fall of 2020, SFUSD has also engaged in labor negotiations with the multiple
26 bargaining units that represent over 96% of the SFUSD’s employees, as required by the
27 Educational Employment Relations Act. The negotiations have involved each phase of the return
28 to in-person learning as it is developed, including but not limited to discussing how its plans

1 affect personnel policies, practices, or working conditions for SFUSD employees. (John Decl., ¶
2 2.)

3 **C. SFUSD Has a Detailed Plan For Beginning In-Person Instruction When Certain**
4 **External Conditions Are Met Regarding Tier Levels and Vaccinations**

5 On February 6, 2021, SFUSD reached a tentative agreement with the bargaining unit
6 representing SFUSD teachers, United Educators of San Francisco (“United Educators”) that will
7 allow in-person instruction to resume when either of the following occurs: (1) San Francisco City
8 and County are in the Red Tier (as determined by the CDPH), and all staff reporting to an SFUSD
9 school or worksite have had the opportunity to be vaccinated at the recommended dosage; or (2)
10 San Francisco City and County is in the Orange or any lower Tier (regardless of the availability
11 of vaccines). The Board of Education approved that agreement (hereinafter, “Health and Safety
12 Memorandum of Understanding”) on February 24, 2021. (John Decl., ¶¶ 2-4; RJN, Exhibit “F.”)

13 Pursuant to the Health and Safety Memorandum of Understanding, as part of the return to
14 in-person instruction, SFUSD must ensure the means for consistent and routine testing for
15 students and staff members. SFUSD issued a Request for Proposal (“RFP”) for end-to-end
16 testing for employees and students. The RFP closed on February 22, 2021, and the proposals
17 received were evaluated in partnership with SFDPH to select a vendor. The selected vendor and
18 corresponding contract is scheduled to be approved by the SFUSD BOE at their regular meeting
19 on March 9, 2021. In accordance with the Health and Safety Memorandum of Understanding and
20 current public health guidelines, if San Francisco enters and remains in the Red Tier, students and
21 staff reporting to work or school sites need to be tested at least every two weeks. (John Decl., ¶¶
22 5-6; RJN, Exhibit “F” at 4.) If San Francisco moves into the Orange Tier, tests will be available
23 to staff and 20% of students reporting to a school site every two weeks through August 31, 2021.
24 (Id.) If San Francisco moves into a Yellow Tier, tests will be available to 20% of staff and
25 students reporting to work or school sites every two weeks through August 31, 2021. (Id.)

26 **D. SFUSD Is in the Process of Developing Hybrid Instructional Plans**

27 SFUSD continues to meet and consult with United Educators regarding the instructional
28 schedule and continues to bargain the negotiable impacts of SFUSD’s plan for hybrid instruction

1 to be implemented upon students’ return to in-person learning. SFUSD and United Educators
2 have completed bargaining on many of the negotiable impacts including: accommodations
3 necessary for unit members who are unable to return to in-person learning due to COVID related
4 reasons; the number of teacher work days to prepare for students to return; duties for nurses and
5 librarians; details regarding Out of School Time program; safety barriers for unit member work
6 stations; additional paid time per week for educators to attend necessary meetings; adjustment of
7 duties for staff who are assuming additional obligations to administer COVID safety protocol;
8 training on COVID safety protocols; additional PPE for unit members that require a higher level
9 of protection; and terms for unit members who are required to quarantine. (John Decl., ¶ 11.)

10 Although much work has been completed, additional work remains and SFUSD and
11 United Educators continue to meet and discuss terms including: affirmation that Individual
12 Education Plan minutes for students will not be reduced; whether students attending SFUSD’s
13 SOAR program will be permitted to return at the same time as their peers; whether SFUSD may
14 adhere to the most current public health guidelines regarding social distancing if the
15 recommended six feet of distance is reduced; and whether adults may serve students with IEPs
16 and move between stable student groups as permitted by public health guidelines. SFUSD must
17 continue to meet and consult regarding these terms. (*Id.* at ¶ 12.) SFUSD must continue to
18 consult with United Educators about the instructional schedule but is nevertheless fully prepared
19 to begin welcoming students to return as soon as conditions allow (Red Tier with vaccines, or
20 Orange Tier without vaccines).

21 With respect to instructional plans, SFUSD has surveyed students and families in its
22 priority groups to determine whether they wish to return to in-person learning. SFUSD’s priority
23 groups include 937 students in Pre-K/Early Education, 250 students in elementary schools with
24 moderate to severe disabilities, 12,272 students in TK-2nd, 437 students in secondary schools
25 with moderate to severe disabilities, and 105 students that are located in County facilities.
26 Eighty-one percent of those students’ families have responded; only 57% of responding families
27 plan to send their children for in-person learning. (John Decl., ¶ 10.)

28 ///

1 the services, how to logistically deliver services, etc. Even one of the cases Plaintiff cites
2 (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1267) defines a
3 ministerial act as follows: A ministerial act is an act that a public officer is required to perform
4 *in a prescribed manner in obedience to the mandate of legal authority and without regard to his*
5 *own judgment or opinion concerning such act's propriety or impropriety*, when a given state of
6 facts exists.” Discretion, on the other hand, is the power conferred on public functionaries to act
7 officially according to the dictates of their own judgment.” (*Id.* at 1267, quoting *Rodriguez v.*
8 *Solis* (1991) 1 Cal.App.4th 495, 501-502. Emphasis in original.)

9 Education Code section 43504(b) does not *prescribe the manner* in which local
10 educational authorities are supposed to perform the duty of providing in-person instruction to the
11 greatest extent possible. In fact, there are almost no ministerial elements to delivery of in-person
12 instruction under a pandemic. Decisions on how to safely return to in-person instruction are
13 discretionary, requiring careful and complex weighing of competing considerations. These
14 discretionary decisions include small details, such as the proper placement of decals to manage
15 the flow of traffic throughout the buildings, to larger scale considerations such as repairs of
16 outdated HVAC units and other airflow mechanisms, such as custom windows. Given number of
17 facilities operated by SFUSD, and the District’s limited resources, it is also not possible to reopen
18 every school site simultaneously. Therefore, SFUSD must also exercise discretion in determining
19 which school sites should be prioritized for implementation of the safety measures that must be
20 put in place prior to reopening. Additionally, due to social distancing requirements, it will not be
21 physically possible for all students to return to in-person instruction full-time. As a result, SFUSD
22 is going to need to determine how many hours of instruction will take place in-person versus
23 remotely. SFUSD needs to determine whether to maximize in-person learning for students in
24 priority groups, or to increase the number of students who have access to in-person learning but
25 for fewer days each week. And, SFUSD and teachers will need to consider how instruction for in-
26 person learning will differ from virtual learning, and how both can be managed by the same
27 instructor.

28 ///

1 Plaintiff's theory—that because the duty imposed by the law is mandatory, it therefore
2 necessarily is ministerial—was rejected in *Coachella Valley Unified School District v. State of*
3 *California* (2009) 176 Cal.App.4th 93. In that case, school districts sought a writ of mandamus
4 against the California Board of Education regarding the state's method of administering certain
5 tests to track compliance with the No Child Left Behind Act ["NCLBA"]). 176 Cal.App.4th at
6 100. The trial court held that the state had not violated any ministerial duty because the NCLBA
7 did not direct a specific manner of testing. 176 Cal.App.4th at 111. The appellate court affirmed,
8 citing, among other cases, *Carrancho, supra*, and holding that the state had to use discretion to
9 comply with the NCLBA testing requirement. The court explained that a contrary holding would
10 result in the court itself having to exercise the discretion vested in the state:

11
12 The School Districts are seeking independent review of the State Board's testing
13 policy for English learners. They have urged there must be a trial, with a battle of
14 experts and the like. And at the end of the day they envision that the trial court
15 would independently evaluate and review the evidence to determine whether the
16 testing regime adopted by the State Board met the statutory requirements... What
is wrong with this picture? ... [T]he court would become the official second-
guesser on the issue of how to assess ... students under the NCLBA, tasked with
the job of figuring out whether the tests are valid and reliable, etc. The NCLBA
confers discretion on the participating states to do this very thing....

17 176 Cal.App.4th at 117. Here, like the Plaintiffs in the *Coachella Valley* case, Plaintiff seeks to
18 make this court the official second guesser regarding all of the efforts SFUSD has made, and
19 continues to make, to make in-person instruction possible.

20 Plaintiff cites to *Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668 in
21 support of its assertion that SFUSD is violating its "ministerial duty" by failing to provide
22 instruction required by law. While the *Doe* court did conclude that the statute at issue in that
23 case, Education Code section 51210 (g), imposes a "mandatory duty" upon school districts to
24 provide first through sixth graders 200 minutes of physical education every 10 schooldays, that is
25 not the section of the Education Code at issue in this matter. SFUSD does not dispute that
26 Education Code section 43504 obligates the District to provide in-person instruction to the
27 greatest extent possible. The issue here is whether performance of that duty is purely ministerial
28 in character. It clearly is not because even the determination as to what constitutes "the greatest

1 extent possible” requires discretion, judgment and a balancing of various competing interests on
2 SFUSD’s part.

3 Ultimately, Plaintiff proffers no clear, present, and ministerial method of managing the
4 return to in-person instruction during the pandemic, particularly given SFUSD’s size, and no
5 workable resolution to the problems about which it complains.

6 **2. Even if the Court Considers Reopening Schools To Be A Purely Ministerial**
7 **Duty, the Writ is Unnecessary and/or Moot Because SFUSD Has Taken and**
8 **Continues to Take All Steps Toward Returning to In-Person Instruction**

9 If a respondent on a writ “shows a willingness to perform without coercion, the writ may
10 be denied as unnecessary; and if the respondent shows actual compliance, the proceeding will be
11 dismissed as moot.” (8 Witkin, Cal. Procedure (5th ed) Extraordinary Writs, § 83, page 970,
12 citing *State Board of Education v. Honig* (1993) 13 Cal.App.4th 720, 742 and *Cooke v. Superior*
13 *Court* (1989) 213 C.A.3d 401, 417). Courts will not issue a writ of mandamus “merely to enable
14 a party to prove a point or to excoriate a public official...” (*Morris v. Harper* (2001) 94
15 Cal.App.4th 52, 60.)

16 In *Cooke v. Superior Court, supra*, the petitioners sought a writ of mandate to compel a
17 County to provide dental care to indigent residents in compliance with the County’s duties under
18 the Welfare & Institutions Code. While the action was pending, and after the trial court denied
19 preliminary injunctive relief, the County adopted a resolution increasing the level of available
20 dental services that met the level of care required by the statute. Although the petitioners urged
21 that the peremptory writ was still needed because they did not trust the County’s health officer to
22 actually authorize the services, the Court of Appeal concluded that the County’s enactment of the
23 resolution showed a good faith willingness to perform, which was sufficient to make issuance of a
24 writ inappropriate. (*Cooke, supra*, 213 Cal.App.3d at 417, disapproved of on other grounds by
25 *Cty. of San Diego v. State of California* (1997) 15 Cal.4th 68.)

26 Here, SFUSD has taken and continues to take all necessary steps toward returning to in-
27 person instruction, including negotiating labor agreements with its bargaining units as well as
28 developing procedures and protocols and preparing its school sites to safely reopen. (See John
Decl., ¶¶ 2-12; Lau-Smith Decl., ¶¶ 2-31; Kamalanathan Decl., ¶¶ 2-12.) SFUSD’s actions,

1 which have been ongoing since well before Plaintiff filed the present action, clearly demonstrate
2 the District’s good faith willingness and desire to return to in-person instruction to the greatest
3 extent possible, without coercion. Accordingly, the writ should be dismissed as unnecessary and
4 Petitioner is not entitled to preliminary injunctive relief.

5 **3. Plaintiff Cannot Demonstrate That SFUSD Has Violated Students’**
6 **Constitutional Rights to an Education**

7 Plaintiff’s argument that a lack of in-person instruction violates the California
8 Constitution is based upon the faulty premise that distance learning—which was implemented
9 across schools and districts throughout the state in response to the pandemic—deprives students
10 of the right to “attend school.” However, while SFUSD acknowledges the shortcomings of
11 distance learning as compared with in-person instruction, there is nothing in the California
12 Constitution that requires in-person instruction or, for that matter, provides a constitutional right
13 to instruction of a particular type, or even to a particular qualitative standard.

14 Plaintiff cites to Article IX, Sections 1 and 5 of the California Constitution in support of
15 its position that distance learning does not constitute attendance at school. Article IX, section 1,
16 of the California Constitution provides that:

17 A general diffusion of knowledge and intelligence being essential to
18 the preservation of the rights and liberties of the people, the
19 Legislature shall encourage by all suitable means the promotion of
20 intellectual, scientific, moral, and agricultural improvement.

21 Article IX, section 5, provides that:

22 The Legislature shall provide for a system of common schools by
23 which a free school shall be kept up and supported in each district
24 at least six months in every year, after the first year in which a
25 school has been established.

26 While Article IX, section 5, has been interpreted to guarantee students a free public
27 education, nothing in the text of either Article IX, sections 1 or 5 provides any support for
28 Plaintiff’s position. Neither section imposes any duties, or creates any rights as to the particular
type of instruction (e.g., in-person) to be offered by schools. (*Campaign for Quality Educ. v. State
of California* (2016) 246 Cal. App. 4th 896, 923 [“the Constitution does not mandate particular
curriculum *or instructional methods*, specifics that are within the discretion of the Legislature to

1 determine.”] Emphasis added.) Nor do they impose even a particular *qualitative* standard. (*Id.* at
2 906 [“sections 1 and 5 of article IX do not provide for a education [*sic*] of ‘some quality’ that may
3 be judicially enforced”].)

4 Though Plaintiff argues that distance learning is not “school,” the California Legislature,
5 in response to the pandemic, enacted Education Code section 43503 which specifically authorizes
6 districts to shift to delivery of services via distance learning. Courts have held that “the
7 Legislature's power over our public school system is plenary, subject only to constitutional
8 restraints. [Citations.]” (*Campaign for Quality Educ., supra*, 246 Cal.App.4th at 915.) If
9 SFUSD’s provision of distance learning was not unconstitutional when the Legislature initially
10 enacted SB 98 and SB 820, it remains so now. SFUSD’s delivery of education through distance
11 learning, as expressly permitted under Education Code section 43503, does not violate the
12 California Constitution.

13 **4. Plaintiff Cannot Demonstrate That SFUSD is Violating Ed. Code § 43504(b)**

14 Plaintiff argues that, because Education Code § 43504(b) requires that “A local
15 educational agency shall offer in-person instruction to the greatest extent possible,” and because it
16 supposedly is “possible” to offer in-person instruction according to state and local health officials,
17 SFUSD is now in violation of its statutory duty to offer in-person instruction.

18 Plaintiff’s erroneous assertion is based upon a facile view of what is “possible.” That state
19 and local health officials have authorized in-person instruction is but one of several factors that
20 are determinative of whether it truly is “possible” for SFUSD to return to in-person instruction.
21 Plaintiff disregards other factors such as whether SFUSD’s school sites have installed the
22 necessary safety measures to allow for in-person instruction (e.g., adequate ventilation,
23 functioning HVAC and windows, PPE, soap dispensers, signage, etc.), and whether SFUSD has
24 the necessary labor agreements in place to ensure there are faculty and staff willing and able to
25 work in order to actually provide in-person instruction to students. Without teachers and staff,
26 and without necessary safety measures in place at SFUSD’s school sites, it is has not yet been
27 possible to offer in-person instruction.

28 ///

1 Whether other, smaller, public school districts have been able to open has no bearing on
2 whether and when it will be possible for SFUSD to begin in-person instruction. Plaintiff's
3 reference to these other districts ignores the difference in size between those districts and SFUSD,
4 as well as the differences in the Tier system among every county. The planning and resources
5 required to return to in-person instruction across an entire school district, with over 50,000
6 students and 10,000 employees across 155 facilities, are significantly more complex and time
7 consuming than what is needed for a small district. For the same reason, Plaintiff's citation to the
8 vastly more limited experiences of the 114 individual private, parochial and charter schools that
9 have reopened--with a mere 15,831 students and 2,396 staff between them--rings hollow.
10 Though not dispositive, the reality is that no California school district the size of SFUSD or larger
11 has yet to return to in-person instruction.² And, of course, the status changes weekly as counties
12 move up and down the Tier system. There are simply an exponentially greater number of moving
13 parts and careful considerations that must be addressed before it is actually possible for a school
14 district the size of SFUSD to return to in-person instruction.

15 Contrary to Plaintiff's assertions, SFUSD has been working diligently to accomplish this
16 essential planning and preparation all in an effort to allow for the return to in-person instruction.
17 SFUSD has developed a number of health and safety protocols and procedures that are in line
18 with the orders, regulations and guidance being issued by federal, state, and local government

19
20 ² On February 8, 2021, Los Angeles Unified School District announced a timeline to reopen
21 schools for in-person instruction within 60 days, i.e., April 9, 2021
22 ([https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/930/Austin%20Beutner Marc
h%201 Update%20to%20the%20School%20Community Speech%20Transcript English.pdf](https://achieve.lausd.net/cms/lib/CA01000043/Centricity/Domain/930/Austin%20Beutner%20Marc%20h%201%20Update%20to%20the%20School%20Community%20Speech%20Transcript%20English.pdf)).
23 San Diego Unified School District has set a target date to reopen the week of April 12, 2021, but
24 only once/if San Diego County drops into the Red Tier
25 ([https://sandiegounified.org/about/newscenter/all_news/new_s_r_e_l_e_a_s_e_schools_to_re
open_in_april](https://sandiegounified.org/about/newscenter/all_news/new_s_r_e_l_e_a_s_e_schools_to_reopen_in_april)). Fresno Unified School District does not have plans to reopen for in-person
26 instruction until Fresno County returns to the moderate (i.e., Orange) Tier
27 (<https://www.fresnounified.org/covid19/> (COVID FAQs)). Long Beach Unified School District
28 announced a phased reopening beginning March 29, 2021
(<https://www.lbschools.net/Departments/Newsroom/article.cfm?articleID=3003>). Elk Grove
Unified School District's first classes will return to in-person instruction on March 11, 2021
(<http://www.egusd.net/wp-content/uploads/2021/02/School-reopening-Dates.pdf>). For San
Bernardino City Unified School District, the Board voted on November 17, 2020, to remain in
distance learning for the remainder of the 2020-2021 school year
(<https://sbcusd.com/cms/One.aspx?portalId=59953&pageId=32806897>).

1 agencies. (Lau-Smith Decl., ¶ 2.) For a school to be eligible to reopen under the SFDPH
2 guidance, it must submit a written application, which is followed by an on-site review of each
3 school facility. To date, SFUSD has submitted a letter of interest for 72 schools, 24 applications
4 have been submitted, and six site visits have been completed. Site visits are currently in progress
5 for the 18 remaining schools that have applications submitted. SFUSD is currently completing the
6 applications for submission for the 48 remaining schools and will be submitting letters of interest
7 for two county schools. (Lau-Smith Decl., ¶ 15.)

8 The SFDPH application process is designed to ensure that the school reopening plan
9 complies with SFDPH Interim Guidance. Each SFUSD school is unique in its facilities plan and
10 instructional plan such that each school site must embark on a partnership protocol to reimagine
11 and redesign the physical space as well as the instructional model to ensure health and safety
12 protocols are implemented. The SFUSD partnership protocol is a complex process that includes a
13 thorough building systems assessment of the working condition of mechanical, electrical and
14 plumbing systems, the presence and functionality of operable windows, handwashing sinks, and
15 other classroom conditions. In addition to identifying any repairs that are required prior to
16 reopening, partnership protocol requires designing building usage and circulation paths, which
17 then require a cadre of movers and laborers to come into a school to physically redesign each
18 classroom and work area, along with installing abundant signage to ensure students and staff
19 circulate throughout the school without mixing of stable cohorts, as discussed below. (Lau-Smith
20 Decl., ¶¶ 15-20; Kamalanatihan Decl., ¶¶ 6-8.)

21 SFUSD also created a public facing dashboard to keep SFUSD families, students and staff
22 informed of the progress towards reopening. (See [https://www.sfusd.edu/services/health-
23 wellness/covid-19-coronavirus-resources-families-students/person-learning-readiness-dashboard-
24 phase-2a](https://www.sfusd.edu/services/health-wellness/covid-19-coronavirus-resources-families-students/person-learning-readiness-dashboard-phase-2a).) SFUSD updates the public facing decision tree dashboard on a weekly basis. SFUSD's
25 facilities team is responsible for the following operational indicators of the SFUSD Decision
26 Tree: (1) COVID 19 General Safety Measures in Place and Staff and Student Testing Plan in
27 Place; (2) All staff trained in COVID 19 health and safety protocols; (3) COVID 19 Prevention
28 Measures in Place. To date, the COVID 19 General Safety Measures in Place and Staff and

1 Student Testing Plan is 95% complete pending the completion of the Student Testing Plan
2 requirement announced on January 14, 2021 by CDPH and on January 27, 2021 by SFDPH. The
3 COVID 19 Prevention Measures in Place is 95% complete pending the completion of the training
4 of staff to prepare them to conduct health screenings. The training will be completed by March
5 22, 2021. All staff who are currently reporting to a SFUSD facility are required to have
6 completed the COVID 19 health and safety modules. All staff returning to in-person instruction
7 are required to be trained two weeks prior to returning to in-person learning. (*Id.* at ¶¶ 21-22.)

8 Accordingly, while SFUSD has completed the majority of the work needed to reopen at
9 least some of its school sites for in-person instruction, as of the date of filing, it is not actually
10 “possible” for the District to offer in-person instruction.

11 **IV. CONCLUSION**

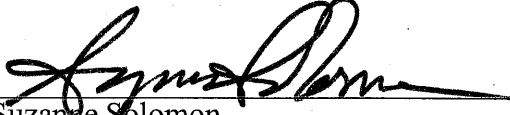
12 Re-opening schools for in-person instruction “to the greatest extent possible” is not a
13 ministerial duty. SFUSD has not violated the constitution or any state law. Accordingly, Plaintiff
14 has not shown a probability of success on the merits. SFUSD therefore respectfully requests that
15 the request for preliminary injunctive relief be denied.

16
17
18 Dated: March 3, 2021

Respectfully submitted,

LIEBERT CASSIDY WHITMORE

19
20 By:


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VINCENT MATTHEWS in his official
capacity as San Francisco Superintendent of Schools