SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff and Petitioner,

v.

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

Defendants and Respondents.

Case No. CPF-21-517352

ORDER DENYING APPLICATION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY

On February 3, 2021, Plaintiff and Petitioner City and County of San Francisco (the City) brought this action against Respondents and Defendants San Francisco Unified School District (the District), the San Francisco Board of Education, and San Francisco Superintendent of Schools Vincent Matthews. In its complaint and amended petition for writ of mandate ("Pet."), the City sought an order compelling the District to create a plan to reopen San Francisco's public schools and to offer in-person instruction to students as soon as possible. On February 11, 2021, the Court issued an Order to Show Cause. Having considered the City's application for a preliminary injunction, the pleadings and papers filed in connection with the application, and the oral argument of counsel presented on March 22, 2021, the Court hereby orders as follows:

The City's application for a preliminary injunction is denied, for several reasons. First, the action has been rendered largely moot by recent developments. In early February 2021, when the City filed this action, San Francisco's public school students had been engaged exclusively in distance learning since the beginning of the pandemic in March 2020. While the District had adopted a learning continuity and attendance plan that addressed the reopening of its schools to in-person instruction, that plan was quite general, and did not include any specific milestones or deadlines. Since then, however, the District has entered into detailed Memoranda of Understanding with the unions representing its staff that address health and safety standards in District schools and reopening to in-person and hybrid learning, and it has adopted a detailed reopening plan under which students will begin returning to in-person instruction, by grade and separate "waves" of facilities, on April 12. No purpose would be served in ordering the District what it has already committed to do. (See Part I, *infra*.)

Second, the specific provision of the Education Code upon which the City relies, which states that school districts "shall offer in-person instruction to the greatest extent possible," does not impose a clear, present and ministerial duty on the District that may be enforced by a writ of mandate. The statutory language is a general statement of legislative intent that does not give rise to a mandatory duty. AB 86, recently enacted by the Legislature and signed into law by Governor Newsom, makes that clear. That legislation earmarked $2 billion in funds to school districts that offer in-person instruction to specified groups of students, including those in kindergarten through sixth grade and

one additional middle school or high school grade, during the current school year. If a district does not meet those targets between April 1 and May 15, 2021, its apportionment of funds must be reduced; if it does not provide in-person instruction as specified by May 15, 2021, it forfeits all of the apportioned funds. Thus, the Legislature recognized that school districts may not offer in-person instruction to all students, or even all elementary school students, by the end of the current school year, but it provided financial incentives to encourage them to do so. That approach, which leaves it up to individual school districts to decide how and when to reopen, is irreconcilable with the City's contention that school districts have a clear, present, and ministerial mandatory duty to offer in-person instruction. (See Part II(A), *infra.*) Even if the Education Code did impose a mandatory duty on school districts to offer in-person instruction during the current 2020-2021 school year, that duty could not be enforced by a writ of mandate because it necessarily requires the District to exercise discretion and judgment regarding how best to implement that directive. (See Part II(B), *infra.*)

Third, the very broad injunction the City requests, which would require the District by April 30, 2021 to offer in-person instruction to all students in all grades to the maximum extent allowable under local and state health orders, would be both impermissibly vague and judicially unmanageable. This Court is not in a position to dictate or oversee the District's decisions regarding how to reopen a large public school system comprising over 50,000 students and nearly 10,000 teachers, staff and administrators at 130 schools. (See Part III, *infra.*)[1]

Both parties' unopposed requests for judicial notice are granted. The motion of Disability Rights Education and Defense Fund and Disability Rights California to file an *amicus curiae* brief in support of the City is granted.

FACTUAL AND PROCEDURAL BACKGROUND

When this action was filed, San Francisco's public school students had not attended in-person instruction since the beginning of the pandemic in March 2020. (Pet. ¶ 5.) The City acknowledged that on September 22, 2020, as required by the Legislature, the District had adopted a learning continuing and attendance plan (LCAP) setting forth a description of how the District would "provide

[1] SFUSD, "Facts At A Glance 2020," https://www.sfusd.edu/about-sfusd/facts-about-sfusd-glance.

continuity of learning and address the impact of COVID-19 on pupils, staff, and the community," including "In-person instructional offerings, and specifically, the actions the school district . . . will take to offer classroom-based instruction whenever possible, particularly for pupils who have experienced significant learning loss due to school closures in the 2019-20 school year or are at greater risk of experiencing learning loss due to future school closures." (*Id.* ¶¶ 61, 66 & Ex. A.) However, the City challenged the adequacy of the LCAP adopted by the District, characterizing it as "merely "a plan to make a plan." (*Id.* ¶¶ 13, 16.) The City asserted that the District had "no statutorily sufficient plan for how or when in-person instruction will begin for any of SFUSD's students." (*Id.* ¶ 11; see also *id.* ¶¶ 63, 74-86.) It brought this action "to compel the School District to fulfill its legal duties to create a plan to reopen schools and to reopen schools for in-person instruction as soon as possible." (*Id.* ¶ 19.)

The City seeks to state four causes of action against the District: (1) for violation of students' right to education under Cal. Const., art. IX, sections 1 and 5; (2) for wealth discrimination in violation of the equal protection clause of the California Constitution; (3) for violation of its purported duty to "offer in-person instruction to the greatest extent possible," as required by Education Code section 43504(b); and (4) for violation of the requirement under Education Code section 43509 that it adopt a plan that describes how it will "offer classroom-based instruction whenever possible." In addition to declaratory and injunctive relief, the City seeks a writ of mandate directing the District to offer in-person instruction to the greatest extent possible; to prepare to offer in-person instruction; and to prepare a revised LCAP for the District that, at least: provides a "description of the actions the LEA will take to offer classroom-based instruction whenever possible . . . ."; "address[es] the actions the LEA will take when health and safety allows a return to in-person instruction"; and "describe[s] the LEA's classroom-based instructional schedule model. . . ." (Pet. at pp. 27-28.)

As the City acknowledges on reply, since this action was filed, Respondents have taken "important steps" toward developing and implementing a more detailed plan for reopening San Francisco's public schools to in-person instruction. In particular, on February 23, 2021, the Board ratified a Memorandum of Understanding (MOU) with all unions representing District employees regarding health and safety standards in District schools (RJN, Ex. F); and on March 5, 2021, the

District entered into a second MOU with United Educators of San Francisco, the union representing District teachers, that address reopening to in-person and hybrid learning. (Supp. RJN, Ex. E.) The same day, March 5, 2021, the District announced that it intends to offer in-person learning options for certain public school students starting on April 12, 2021, and a few days later, it posted an updated "In-Person Learning Plan" and other related materials on its public website. (Supp. RJN, Exs, A-C).

The MOUs reflect an agreement between the District and the unions concerning the criteria for reopening schools, tied to COVID community spread thresholds. The District and the unions have agreed that in-person instruction will commence at early education schools, schools with grades TK (transitional kindergarten) through 5, and for moderate/severe special day classes at all grade levels, followed by middle and high schools, when San Francisco is in the red tier under California's Blueprint for a Safer Economy as determined by the California Department of Public Health, and all staff reporting to District school or worksites have had the opportunity (eligibility and access) to be vaccinated at the recommended dosage; or San Francisco is in the orange or any lower tier, regardless of the availability of vaccines. (Supp. RJN, Ex. D at 2.)[2] The MOUs also contain detailed provisions governing testing of students and staff; health screenings; a protocol for monitoring COVID-19 symptoms and positive cases among students and staff; prescriptions for COVID hygiene, including physical distancing, face masks, sanitation stations, personal protective equipment (PPE), and ventilation; cleaning and disinfecting plans; and COVID-19 prevention programs for each school site.

The District explains in the updated Plan that it has undertaken "a phased approach to gradually return students and employees to in-person learning and ensure that students and families who wish to continue with remote learning may do so." (Supp. RJN, Ex. A at 2.) Specifically, the District plans in Phase 2A to offer in-person learning options at a select number of schools for its youngest students (early elementary students in grades pre-kindergarten through second grade) and students with disabilities in Moderate/Severe Special Day Classes starting on April 12, 2021, and to offer in-person options to additional priority students in Phase 2B (homeless and foster youth, students in public

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[2] The Court takes judicial notice that on March 23, 2021, San Francisco moved from the red tier into the orange tier. https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx.

housing, newcomers and those who have shown the lowest overall online engagement) before the end of April. (*Id.* at 2, 15.) The District explains that such a phased approach is necessary because "we will not be able to safely invite all students to return to school buildings at the same time given the need to adhere to social distancing and other safety guidelines." (*Id.* at 2.) "Schools will open on a rolling basis, in waves, in order to monitor the implementation of the health and safety protocols and to learn from sites how we can improve the process as we grow to scale." (*Id.* at 16.) The District intends to open multiple schools and sites in waves beginning on April 12 and more widely later in April. (*Id.* at 16, 21.)

I. THIS ACTION IS LARGELY MOOT IN LIGHT OF THE DISTRICT'S ADOPTION OF A DETAILED REOPENING PLAN.

The City brought this action seeking to compel the District "to create a plan to reopen schools and to reopen schools for in-person instruction as soon as possible." (Pet. ¶¶ 8, 19.) But after the City filed the action, after reaching agreement with unions representing its employees, the District approved a detailed reopening plan and schedule. That plan contemplates the reopening of school facilities in waves, as they are inspected and approved, and the phased return of specified classes and groups of students to in-person instruction. In light of these recent developments, this action is moot in substantial part. "No purpose would be served in directing the [District] to do what has already been done." (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 743.)

"As a general rule it is not within the function of the court to act upon or decide a moot question." (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 (citations and internal quotations omitted).) Courts do not decide issues that can provide no effective relief for the parties or will have no impact on their future rights. (*Id.* at 1492; see also *Simi Corp. v. Garamendi* (2003) 109 Cal.App.4th 1496, 1503 ["A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief."].) These principles apply equally in mandamus proceedings. (*State Bd. of Education v. Honig*, 13 Cal.App.4th at 742 ["Because equitable principles apply in mandamus proceedings, [a court] may properly consider all relevant evidence, including facts which arose after the [City] filed its petition for writ of mandate."].) "If the evidence, including facts arising after the writ petition is filed, 'demonstrate the [respondent's] willingness to perform without coercion, the writ

[of mandate] may be denied as unnecessary; and if [the respondent] shows actual compliance, the proceeding will be denied as moot.'" (*TransparentGov Novato v. City of Novato* (2019) 34 Cal.App.5th 140, 147-148; see also *Bruce v. Gregory* (1967) 65 Cal.2d 666, 670–671 [mandamus relief may be denied if facts arising after the petition was filed prevent the writ from serving any useful purpose].)

Thus, in *Honig*, the court denied a petition for writ of mandate seeking to direct the Superintendent of Public Instruction to submit proposed program guidelines and reports for review and approval by State Board of Education where the evidence showed that they had already been submitted. (13 Cal.App.4th at 743; see also *California High-Speed Rail Authority v. Superior Court* (2014) 228 Cal.App.4th 676, 684, 710-713 [mandamus will not lie to compel the "idle act of rescinding and redoing" a funding plan which has already been acted upon by the Legislature by appropriating bond proceeds].)

The City contends that its action is not moot because the District's reopening plan does not set deadlines for middle school and high school students to be offered in-person instruction, but currently extends only to elementary school students and certain priority groups of students. As discussed in the next sections, the City's contentions in that regard are not cognizable under the controlling legal standards and therefore cannot support the issuance of a writ of mandate or injunctive relief.

II. THE EDUCATION CODE PROVISION UPON WHICH THE CITY RELIES DOES NOT IMPOSE A CLEAR, PRESENT AND MINISTERIAL DUTY UPON THE DISTRICT.

A writ of mandate is an appropriate form of relief to compel the performance of a ministerial duty. (Code Civ. Proc. § 1085(a).) "A ministerial duty is one that is required to be performed in a prescribed manner under the mandate of legal authority without the exercise of discretion or judgment." (*Cape Concord Homeowners Ass'n v. City of Escondido* (2017) 7 Cal.App.5th 180, 189.) Thus, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." (*Id.*) Conversely, "the writ will not lie to control discretion conferred upon a public officer or agency." (*People ex rel. Younger v. County of El Dorado* (1971) 5 Cal.3d 480, 491; accord,

Common Cause v. Board of Supervisors (1989) 49 Cal.3d 432, 442 ["Mandamus will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in a particular manner."]; *Pacific Bell v. California State and Consumer Services Agency* (1990) 225 Cal.App.3d 107, 118 ["Mandamus is an appropriate remedy to compel the exercise of discretion by a government officer, but does not lie to control the exercise of discretion unless under the facts, discretion can be exercised in only one way."].)[3] "Mandate will not issue if the duty is not plain or is *mixed with discretionary power* or the exercise of judgment. Even if mandatory language appears in the statute creating a duty, the duty is discretionary if the [entity] must exercise significant discretion to perform the duty. We examine the entire statutory scheme to determine whether the [entity] must exercise significant discretion to perform a duty." (*Mooney v. Garcia* (2012) 207 Cal. App. 4th 229, 233 (citations omitted).)

A. Education Code Section 43504(b) Does Not Impose A Mandatory Duty On School Districts To Reopen Schools To In-Person Instruction.

Whether statutes "impose a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation." (*AIDS Healthcare Foundation v. Los Angeles County Department of Public Health* (2011) 197 Cal.App.4th 693, 701.) "We examine the language, function and apparent purpose of the statute." (*Id.* (citation and internal quotations omitted).) Here, the Education Code provision upon which the City principally relies does not impose a ministerial duty because it does not clearly define what school districts must do. Moreover, construing it as imposing a mandatory duty would be inconsistent with recently enacted legislation.

The City relies on Education Code section 43504, subdivision (b), which states that a local educational agency (LEA) such as the District "shall offer in-person instruction to the greatest extent

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[3] See also *State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 350 ["A mandatory duty is created only when an enactment requires an act that is clearly defined and not to the public entity's discretion or judgment. [Citation.] Such an act is mandated only to the extent of the enactment's precise formulation. When the enactment leaves implementation to an exercise of discretion, 'lend[ing] itself to a normative or qualitative debate over whether [the duty] was adequately fulfilled,' an alleged failure in implementation will not give rise to liability."].)

possible."[4] That provision was included in the omnibus education budget trailer bill enacted by the Legislature in 2020. That bill (Senate Bill (SB) 98, Stats. 2020, ch. 24), was enacted as urgency legislation effective June 29, 2020. SB 98 added Part 24.5 to Division 3 of Title 2 of the Education Code, entitled "School Finance, Instruction, and Accountability in the 2020-21 School Year." At that time, because of the pandemic, nearly all schools in San Francisco and across the country had closed and moved to "distance learning." (See Educ. Code § 43500(a) [defining "distance learning"].) In belated recognition of that reality, the Legislature authorized LEAs (school districts, county boards of education, and certain charter schools) to offer distance learning "[o]n a local educational agency or schoolwide level as a result of an order or guidance from a state public health officer or a local public health officer," or "[f]or pupils who are medically fragile or would be put at risk by in-person instruction, or who are self-quarantining because of exposure to COVID-19." (*Id.* § 43503(a)(2).)

Similarly, the legislation provided that for purposes of calculating apportionments for the 2020-21 fiscal year, "a local educational agency shall offer in-person instruction, and may offer distance learning, pursuant to the requirements of this part." (*Id.* § 43502(a).) It also required LEAs that offer distance learning during the 2020-2021 school year to comply with specified requirements, including requiring them to document pupils' participation on each schoolday for which distance learning is provided and to regularly communicate with parents and guardians regarding a pupil's academic progress. (*Id.* § 43503(b).) It authorized LEAs to meet the minimum requirements for instructional minutes offered during a schoolday and for instruction days offered in the 2020-2021 school year "through in-person instruction or a combination of in-person instruction and distance learning." (*Id.* § 43504(c).)

The same section contains the general provision that the City relies upon, stating that an LEA "shall offer in-person instruction to the greatest extent possible." (*Id.* § 43504(b).) An accompanying statement of legislative intent echoed the same statement.[5] Finally, as discussed above, the legislation

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[4] Although the City's fourth cause of action is based on a different provision of the Education Code, section 43509, it makes no mention of that provision in its moving or reply papers, and thus must be deemed to have abandoned any claim for relief based on that claim.

[5] California Assembly Daily Journal, 2019-2020 Regular Session, 196th Session Day (June 26, 2020) ["While it is the intent of the Legislature that LEAs offer in-person instruction in 2020-21 to the

required LEAs to adopt a learning continuity and attendance plan (LCAP) by September 30, 2020. (*Id.* § 43509(a)(1)(A).) It prescribed a detailed process for developing and finalizing such a plan (*id.* § 43509(b),(c)), and directed the state Superintendent of Public Instruction to develop a "template" for the LCAP that must include, among other things, "[a] description of how the school district . . . will provide continuity of learning and address the impact of COVID-19 on pupils, staff, and the community in the following areas, and the specific actions and expenditures the school district . . . anticipates taking to support its ability to address the impacts of COVID-19: (A) In-person instructional offerings, and specifically, the actions the school district . . . will take to offer classroom-based instruction whenever possible, particularly for pupils who have experienced significant learning loss due to school closures in the 2019-20 school year or are at greater risk of experiencing learning loss due to future school closures," as well as specified "[p]lans for a distance learning program." (*Id.* § 43509(f)(1)(A),(B).)

The statutory phrase stating that districts "shall offer in-person instruction to the greatest extent possible" does *not* "clearly define the specific duties or course of conduct" that the District must take. (*Cape Concord Homeowners Ass'n,* 7 Cal.App.5th at 189.) Far from it. As discussed below, the statute does not define "to the greatest extent possible." It sets no deadlines or targets. It does not specify whether districts should prioritize particular grades or groups of students, or whether they may even reopen on a phased basis rather than all at once. In short, that single general phrase cannot bear the weight the City places on it. The cases relied upon by the City, in contrast, involved far more specific statutory mandates.[6]

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greatest extent possible, Section 43503 of this bill allows LEAs to offer distance learning under either of the following circumstances . . . ."] (Statement of Legislative Intent—Senate Bill No. 98, submitted by Philip Y. Ting, Chair, Assembly Budget Committee).

[6] For example, *Doe v. Albany Unified School District* (2010) 190 Cal.App.4th 668 involved an Education Code provision stating that the course of study in elementary schools "shall include instruction" in physical education "for a total period of time of not less than 200 minutes each 10 schooldays, exclusive of recesses and the lunch period." (*Id.* at 672, quoting Educ. Code § 51210.) Petitioners brought suit claiming that a school district was not complying with the 200-minute requirement. The court held that the statute "means what it says and that, while individual school districts may have discretion as to how to administer their physical education programs, those programs must satisfy the 200-minute per 10-schoolday minimum." (*Id.* at 673.)

The City contends that the phrase "to the greatest extent possible" should be construed to mean "to the greatest extent that state and local health authorities allow." But that is not the language that the Legislature used, although it would have been a simple matter for it to add it. Moreover, it is far from self-evident that the City's interpretation is what the Legislature intended to convey. "To the greatest extent possible" could mean any number of things, including:

- Physically possible: E.g., are the classrooms large enough to accommodate in-person instruction while allowing for physical distancing of students?
- Technologically possible: E.g., have the school ventilation and HVAC systems been upgraded so as to minimize the risks of transmission and infection? Are there adequate internet connections and video equipment to facilitate remote instruction for those students who cannot or do not wish to attend in person?
- Politically possible: E.g., have unions representing teachers and school staff agreed to return to work? Are parents and students willing to return as well?
- Financially possible: E.g., does the school district have the necessary funds available to retrofit school buildings and classrooms to safely allow in-person instruction?
- Medically possible: Have all teachers and staff been vaccinated, or at least been offered the opportunity to receive a vaccine?

Until all of these preconditions, and many more, are met, it would not be "possible" for school districts to offer in-person instruction, whether or not public health authorities say that it would be permissible.

As the City conceded at the hearing, there is nothing in SB 98's plain language or its legislative history that sheds any light on what the Legislature meant. That being so, this Court is not free to adopt the City's preferred interpretation. In construing statutes, a court may not "insert what has been omitted." (Code Civ. Proc. § 1858; see *Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1298 ["Both this court and the high court have cautioned against reading into a statute language it does not contain or elements that do not appear on its face"]; *People v. Guzman* (2005) 35 Cal.4th 577, 587 ["as we have often explained, inserting additional language into a statute violates the cardinal rule of statutory construction that courts must not add provisions to statutes." (citations and internal quotations omitted)].)

If there were any doubt as to whether the Legislature intended to require school districts to reopen as soon as permitted by health authorities, that doubt was removed by a second bill, Assembly Bill (AB) 86, which the Legislature enacted and the Governor signed into law just three weeks ago, on March 5, 2021. (Stats. 2021, ch. 10.) That bill appropriated a total of $6.6 billion in funds from the State's general fund to LEAs, of which $2 billion were earmarked to provide incentives to LEAs to provide in-person instruction to specified groups of students by stated deadlines. (Educ. Code § 43521(c).) Under this so-called "Safe Schools for All" plan, if a district does not meet those targets between April 1 and May 15, 2021, its apportionment of funds must be reduced by 1 percent for each day of instruction that it does not provide in-person as specified; if it does not provide in-person instruction as specified by May 15, 2021, it shall forfeit all of the apportioned funds. (*Id.* § 43521(c)(2)(A),(B)(i),(ii).)[7] In particular, whether a district "shall be considered to be offering in-person instruction" (*id.* § 43521(c)(3)) depends on the color tier under the State Department of Public Health's Blueprint for a Safer Economy of the county where it is located.[8] For counties like San Francisco that are no longer in the most restrictive purple tier, a district shall be considered to be offering in-person instruction for elementary schools if, "when eligible pursuant to COVID-19 industry sector guidance for schools and school-based programs," it offers optional in-person instruction to the following:

> (i) pupils with exceptional needs and certain prioritized pupil groups, as defined, "unless the number of pupils in the prioritized pupil groups seeking in-person instruction exceeds the practical capacity of a local educational agency to maintain health and safety pursuant to its COVID-19 safety plan" (*id.* § 43521(c)(3)(A);
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> (ii) all pupils in kindergarten and grades 1 and 2 (*id.* § 43521(c)(3)(B)(i); and
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> (iii) all pupils in grades 3-6. (*Id.* § 43521(c)(3)(B)(ii.))

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[7] The bill's legislative history refers to these appropriations as "School Reopening Incentive Grants" (AB 86 (Assembly Comm. on Budget, Concurrence in Senate Amendments (Mar. 3, 2021) at 1) or "In-Person Instruction Grants." (AB 86, Sen. Rules Comm., Ofc. of Sen. Floor Analyses (Mar. 3, 2021).

[8] Cal. Dept. of Public Health, "Blueprint for a Safer Economy," cdph.ca.gov.

For middle schools and high schools, similarly, "when eligible pursuant to COVID-19 industry sector guidance for schools and school-based programs to provide in-person instruction for kindergarten and grades 1 to 12, inclusive," an LEA is eligible for the funding if it "offers optional in-person instruction" to all pupils with exceptional needs and prioritized pupil groups, "and to all pupils in at least one full grade level." (*Id.* § 43521(c)(3)(C).) By June 1, 2021, LEAs are required to certify their compliance with these provisions governing in-person instruction to the State Department of Education. (*Id.* § 43521(c)(5).)

AB 86 reiterated a general statement of legislative intent that LEAs offer in-person instruction "to the greatest extent possible" during the current 2020-21 school year. That statement also makes it clear that the Legislature contemplates that the return to in-person instruction will be a gradual one that will extend into the 2022-23 school year:

> It is the intent of the Legislature that local educational agencies offer in-person instruction to the greatest extent possible during the 2020-21 school year, consistent with subdivision (b) of Section 43504, and, *starting in the 2020-21 school year and continuing into the 2022-23 school year, expand in-person instructional time* and provide academic interventions and pupil supports to address barriers to learning and accelerate progress to close learning gaps.

(Educ. Code § 43520 (emphasis added).)

Read in this context, it is clear that the snippet of section 43504 on which the City places so much emphasis does not impose an independent mandatory duty on the District. When it enacted AB 98 in June 2020, the Legislature recognized that most school districts were then unable to offer in-person instruction, and it specifically authorized them to continue to provide distance learning during the 2020-21 school year, conditioned upon their compliance with certain requirements and upon adoption of a LCAP. Section 43504, subdivision (b) simply articulated the Legislature's general intent that, while districts might continue to offer both distance learning and in-person instruction, they should offer the latter "to the greatest extent possible."

More recently, in AB 86, the Legislature appropriated extraordinary funding to provide school districts with a financial incentive to reopen and offer in-person instruction to their students. That legislation's proviso that a district that fails to meet certain targets by specified dates will have its funding reduced or forfeited is irreconcilable with the City's contention that section 43504,

subdivision (b) imposed a mandatory duty. The legislation does not mandate reopening schools. Rather, it explicitly contemplates that school districts will make their own choices regarding phased reopening of their schools, and will either enjoy or suffer the financial consequences. AB 86 thus contradicts the notion that any duty the District may have is a "clear, *present*, and ministerial" one, since it explicitly anticipates that school districts may not provide in-person instruction before May 15, and it authorizes them to continue offering distance learning through the end of the school year—albeit at the cost of foregoing funding that would otherwise be made available to them. If, as the City contends, school districts currently are required by law to reopen schools to in-person instruction, the Legislature would have had no reason to appropriate hundreds of millions of dollars to pay those districts to do what the law already required. Still less can the City explain why the Legislature would have chosen to make such payments in May to districts that, according to the City's theory, are *violating* their duty to reopen schools.

The only reasonable interpretation is inherent in the structure of the legislation itself: while districts are under no such current legal obligation, the Legislature appropriated those funds to encourage them to reopen schools as quickly and as safely as possible. For this Court to find that the District has a mandatory duty to offer in-person instruction *immediately*, as the City urges, would run afoul of this explicit legislative scheme. (See *Treber v. Superior Court* (1968) 68 Cal.2d 128, 134 [rule that the applicant for a writ of mandate must show that "the respondent has a present duty to perform the act he seeks to compel" is "most commonly invoked in denying an application to compel the performance of future acts"]; *California High-Speed Rail Authority*, 228 Cal.App.4th at 710 ["mandate does not lie to vindicate abstract rights. Mandamus is steeped in practicality. For this reason, there must be a present duty for a writ of mandamus to issue."]; *Bayside Auto & Truck Sales, Inc. v. Dept. of Transportation* (1993) 21 Cal.App.4th 561, 565 [trial court correctly reasoned that respondent did not have a *present* duty to offer certain land for sale as excess property, since it had a valid hold on the property].)[9]

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[9] The City also relies on Education Code section 37202, but that provision is inapposite. That provision requiring districts to keep schools open for an equal length of time unless it has been closed by a public health agency because of contagious disease tells us nothing about the issues presented here. In any event, the specific and more recent provisions of SB 98 and AB 86, which are

In short, the City's interpretation of an isolated statutory phrase comprising an aspirational statement of legislative intent conflicts with the overall statutory scheme, and cannot give rise to a mandatory duty. "[A] statute's statement of legislative intent does not create any affirmative duty that is enforceable via writ of mandate." (*Physicians Committee for Responsible Medicine v. Los Angeles Unified School District* (2019) 43 Cal.App.5th 175, 189.)

B. Even If Section 43504(b) Were Mandatory, Mandate Does Not Lie To Control The District's Exercise Of Discretion.

For these reasons, Education Code section 43504, subdivision (b) does not impose a mandatory duty on the District to reopen. Even if it did, however, it cannot be enforced by a writ of mandate because the District necessarily must exercise significant discretion and judgment in determining how (and when) best to comply with that requirement. "While a writ of mandate may issue to compel compliance with a ministerial duty—an act the law specifically requires—it may not issue to compel an agency to perform that legal duty in a particular manner, or control its exercise of discretion by forcing it to meet its legal obligations in a specific way." (*Marquez v. State Dept. of Health Care Services* (2015) 240 Cal.App.4th 87, 118-119.) As noted above, it is immaterial that the statute may contain mandatory language such as the word "shall": " 'Even if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty.'" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.)

Thus, in *AIDS Healthcare Foundation*, the petitioners sought a writ of mandate directing the Los Angeles health officer to require performers in adult films to use condoms and obtain hepatitis B vaccinations, to curb the spread of sexually transmitted diseases and HIV. (*Id.* at 696.) The petitioners relied on statutes providing a health officer aware of communicable diseases "shall take measures as may be necessary to prevent the spread of the disease or occurrence of additional cases," and, with respect to sexually transmitted diseases, shall take "all measures reasonably necessary to prevent the

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specific to COVID-19, control over section 37202, which dates to 1976 and was last amended in 2017. (See, e.g., *State Dept. of Public Health v. Superior Court* (2015) 61 Cal.4th 960 [" 'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones'" (citations omitted)].)

transmission of infection." (*Id.* at 701.) The Court of Appeal, considering the statutory language and statutory scheme, concluded these provisions "impose a mandatory duty on a health officer to take measures to prevent the spread of contagious and communicable diseases," but "leav[e] the course of action to the health officer's discretion." (*Id.* at 702.) Because "[t]he decision on what steps to take to control the spread of sexually transmitted diseases is entrusted to the [public agency]," the petitioners were not entitled to a writ mandating their preferred steps. (*Id.* at 704.)

Similarly, in *Marquez*, the petitioners sought a writ of mandate to compel the state agency administering Medi-Cal to provide medical services to beneficiaries who were mistakenly "coded" in the agency's database as having other health insurance coverage and were denied Medi-Cal services on that ground. (240 Cal.App.4th at 92, 117.) The petitioners relied in part on a statute stating that Medi-Cal's "health care benefits and services" "shall be provided" to eligible state residents to the extent those services and benefits are not "provided nor available under other contractual or legal entitlements of the person." (*Id.* at 117-118.) *Marquez* explained that the agency had existing procedures to correct code errors, after which the beneficiary could receive Medi-Cal services. The petitioners' "arguments, therefore, do not show that [the agency] fails to comply with [the statute], but merely debate *how* [the agency] should comply." (*Id.* at 118.) Because mandamus "may not issue to compel an agency to perform [a] legal duty in a particular manner, or control its exercise of discretion by forcing it to meet its legal obligations in a specific way," denial of the writ was proper. (*Id.* at 118-119; see also, e.g., *Center for Biological Diversity v. Dept. of Conservation* (2018) 26 Cal.App.5th 161, 177-173 [in action seeking writ of mandate directing state department to order immediate closure of oil and gas wells injecting fluids into certain underground aquifers, statute providing agency "shall require . . . that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources" and regulation providing agency "shall protect" all nonexempt aquifers, even assuming they imposed duties on department, did not require it to order the immediate cessation of injections into nonexempt aquifers because they "do not mandate a specific course of action to carry out those obligations"].)

Here, likewise, while the statutory language directs the District to provide in-person instruction "to the greatest extent possible," it does not mandate a specific course of action to carry out that

obligation. Indeed, the statutory language the City seeks to enforce is even more general than that involved in the cases discussed above. Further, it is necessarily implicit in the statewide direction to school districts to offer in-person instruction "to the greatest extent possible" that each district must exercise discretion and judgment in determining, based on its own unique conditions and characteristics, what is "possible" and how best to achieve that goal. (See, e.g., *Coachella Valley Unified School Dist. v. California* (2009) 176 Cal.App.4th 93, 113-115 [federal No Child Left Behind Act's requirement that limited English proficient students "shall be assessed in a valid and reliable manner" affords participating states "considerable discretion" in fashioning required assessment program].)

For these reasons, the Court concludes that the City has not shown a likelihood of prevailing on the merits of its claim under Education Code section 43504, and that writ or injunctive relief therefore is not warranted. (See *Aiuto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1355 [referring to "the well-established principle that a preliminary injunction granted without a likelihood of success on the merits is an abuse of discretion and will be reversed"]; *Costa Mesa City Employees' Assn. v. City of Costa Mesa* (2012) 209 Cal.App.4th 398, 309 [no injunction may issue unless there is at least "some possibility" of success]; see also *County of Los Angeles Department of Public Health v. Superior Court* (Mar. 1, 2021) 2021 WL 777699, at *4 [same, reversing preliminary injunction].)

III. THE INJUNCTIVE RELIEF SOUGHT BY THE CITY WOULD BE BOTH IMPERMISSIBLY VAGUE AND JUDICIALLY UNMANAGEABLE.

In addition to writ relief, the City also seeks injunctive relief on the basis of its constitutional claims. The City does not show, however, that its constitutional claims have any independent vitality that warrants such relief. While a public school education undoubtedly is a fundamental right, the City cites no case, nor is there one of which the Court is aware, which holds that there is a constitutional right to in-person instruction, much less during a pandemic or other natural disaster. To the contrary, "our Constitution vests the Legislature with sweeping and comprehensive powers in relation to our public schools, including broad discretion to determine the types of programs and services which further the purposes of education," including "educational focus, *teaching methods*, school operations,

furnishing of textbooks and the like." (*Wilson v. State Bd. of Educ.* (1999) 75 Cal.App.4th 1125, 1134-1135 (citations omitted and emphasis added); cf. *Hernandez v. Grisham* (D.N.M. Dec. 18, 2020), 2020 WL 7481741, at *56 ["Even if a constitutional fundamental right to education exists, when a State provides students with online instruction, rather than in-person instruction, the State has not violated automatically a child's right to education."].) As discussed above, the Legislature has not ordered school districts to offer in-person instruction during the current school year, and in fact has authorized them to continue offering distance and hybrid learning. The same principles that apply to writs of mandate also apply to injunctions. (See *Common Cause*, 49 Cal.3d at 442 ["An order after trial requiring the implementation of an employee deputization program, even if captioned an injunction, would be identical in purpose and function to a writ of mandate. Thus, we evaluate the merits of plaintiffs' claim for this relief in light of the legal principles governing mandamus actions."].) For the same reasons that writ relief is unwarranted, injunctive relief is also unavailable.

When asked precisely what injunctive relief the City would have the Court award, the City requested that it order the District, by April 30, 2021, to "offer in-person instruction to all students in all grades to the greatest extent that state and local health orders allow." However, that formulation is problematic, for several reasons. *First*, as discussed above, any injunction requiring the District to accelerate its existing reopening schedule, or requiring the District to expand its reopening plan to additional schools or cohorts of students, would conflict with AB 86. As discussed above, that legislation set deadlines for school districts, depending on the county in which they are located, to offer in-person instruction to specific grades of students by stated deadlines, or lose the opportunity to receive additional funding. That legislative determination as to the appropriate timing and approach to reopening necessarily displaces any judicial role in determining the same issues.

Second, such a broad, general injunction would violate a fundamental principle: that "[a]n injunction must not be uncertain or ambiguous and defendant must be able to determine from the order what he may and may not do." (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 534.) A recent case is closely on point. In *Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, adult entertainment businesses brought an action alleging that COVID-19-related public health restrictions violated their First Amendment right to freedom of expression. The trial court issued a

preliminary injunction prohibiting San Diego County, its public health officer, the California Department of Public Health, and the Governor from enforcing COVID-19-related public health orders against any business offering restaurant service in the county, subject to safety protocols. The injunction generally prohibited the respondents from enforcing the public health orders, but allowed the enforcement of "protocols that are no greater than is essential to further Defendants' response to control the spread of COVID." (*Id.* at 392.) The Court of Appeal held that the injunction was "unreasonably vague." "Where, as here, an injunction does not provide adequate notice of its scope, it cannot be enforced." (*Id.*) As the court explained,

> The injunction does not identify which "essential" protocols remain enforceable, and it provides little guidance to the State and County parties going forward. It does not address physical distancing, capacity limits, indoor and outdoor operation, opening and closing times, self-service and table service, mask requirements, physical barriers, safety and training plans,; cleaning protocols, and ventilation requirements, among many other areas that are regulated by public health authorities. It is unreasonably vague.

(*Id.* at 413.) Thus, because "the injunction did not give reasonable notice to the State and County parties of the conduct that it prohibits," it was invalid. (*Id.*)

Precisely the same conclusion follows here as to the City's proposed injunction, which is so broad and vague that the District could not possibly determine how to comply with it. Must the District offer in-person instruction to students in *all* grades and in *all* schools simultaneously, rather than pursuing its current phased approach? Must the District offer in-person classes at particular schools even before they have been cleared for occupancy, or before unions representing teachers and District staff have agreed to come back to work at those schools? Must the District offer in-person classes five days per week, rather than two or three? Must it place desks in classrooms three feet apart, or six feet? The City offers no answers to these myriad complicated questions, and a host more.

Third, for similar reasons, the injunctive relief the City seeks not only would be impermissibly vague, it would be judicially unmanageable. This Court lacks the public health, educational, and operational expertise to oversee the District's compliance with such a broad injunction. (See *Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 Cal.App.3d 166, 176-177 [court properly declined to supervise "complicated" restoration of golf course]; *Thayer Plymouth Center Inc.*

v. Chrysler Motors Corp. (1967) 255 Cal.App.2d 300 [permanent injunction denied, as it would impose on the court the "impossible task of supervising continuous performance by the parties"].) Boards of education, not judges, are charging with running public schools. Absent a clear statutory or constitutional violation and a workable remedy, neither of which is present here, this Court may not supplant the Board in its duties.

CONCLUSION

The Court does not question the gravity of the concerns posed by the year-long suspension of in-person instruction caused by the pandemic. There can be no doubt as to the adverse effects of the past year on learning, particularly for students from our neediest and most vulnerable communities, not to mention the economic, emotional, and psychological burdens on students, parents, families, teachers, and District staff. For the foregoing reasons, however, in light of the governing statutes and the limitations on writs of mandate, there can be no effective judicial remedy. Accordingly, the City's application for a preliminary injunction is denied.

IT IS SO ORDERED.

DATED: March 25, 2021

Hon. Ethan P. Schulman
Judge of the Superior Court

CPF-21-517352 CITY AND COUNTY OF SAN FRANCISCO VS. SAN FRANCISCO BOARD OF EDUCATION ET AL

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on March 25, 2021 I electronically served the foregoing on the following counsel of record by causing a copy thereof to be sent by email to the email addresses indicated below.

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