DENNIS J. HERRERA, State Bar #139669
City Attorney
JESSE C. SMITH, State Bar #122517
Chief Assistant City Attorney
RONALD P. FLYNN, State Bar #184186
Chief Deputy City Attorney
YVONNE R. MERÉ, State Bar #173594
TARA M. STEELEY, State Bar #231775
SARA J. EISENBERG, State Bar #269303
MATTHEW D. GOLDBERG, State Bar #240766
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4602
Telephone: (415) 554-4633
Facsimile: (415) 554-4715
E-Mail: sara.eisenberg@sfcityatty.org

Attorneys for Plaintiff and Petitioner
CITY AND COUNTY OF SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

UNLIMITED JURISDICTION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff and Petitioner,

vs.

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

REPLY IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO'S EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION

Hearing Date: March 22, 2021
Hearing Judge: Hon. Ethan P. Schulman
Time: 1:30 p.m.
Place: Dept. 302

TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

State Statutes & Codes

Federal Cases

Constitutional Provisions

Other References

INTRODUCTION

Since this lawsuit was filed, the School District has made some progress in moving toward a partial reopening of schools. But that progress falls far short of what children deserve and the law requires. Under the latest plan articulated by the District, not a single child will set foot in a public school until April 12, a full month from the date of this filing. The District will not even begin to open sites for any elementary school children in 3rd-5th grade for another two weeks after that—with no indication of how many will return at that time or when the rest can come back. And, other than youth in discrete "priority populations," no 6th-12th graders are scheduled to return this school year. In short, the School District's latest plan brings only a small fraction of students back for a few weeks, while leaving most children in limbo with no anticipated return date. It does not have to be this way.

Public health authorities universally agree that reopening schools for children of all ages is safe for students, teachers, and staff. And a multitude of schools locally, in California, and across the country—including the country's largest urban school districts—have already opened. Los Angeles just announced plans to open for *all* students by the end of April, even though it has much higher virus transmission rates than San Francisco and has had so for many months. And in New York, elementary schools and middle schools are already open, and high schools will be reopening for in-person instruction on March 22. *See* p. 9 & n. 3-4, *infra*. This means that the New York City school district will be offering in-person instruction to nearly a million students before SFUSD offers it to even one.

The School District's current plan is inadequate and violates both the California Constitution and the Legislature's mandate to offer in-person instruction "to the greatest extent possible." Injunctive relief is necessary to force the School District to meet its legal obligations and to prevent further harm to San Francisco and the students and families who live here.

ARGUMENT

I. San Francisco Is Likely To Succeed On The Merits Of Its Claims.

A. San Francisco Is Likely To Prevail On Its Section 1085 Writ Claim.

1. The School District Has A Ministerial Duty To Provide In-Person Instruction To The Greatest Extent Possible.

Education code section 43504(b) provides that "[a] local educational agency *shall* offer in-

person instruction *to the greatest extent possible*." Educ. Code § 43504(b) (emphasis added). The School District argues that mandamus relief is not available to enforce this provision because it is discretionary, not ministerial. Opp. 9-12. The School District misconstrues the relevant standard and cases. That an entity has discretion over *exactly how* to carry out a legislative mandate does not mean there is no ministerial duty *to do it*—and to implement the mandate "'under a proper interpretation of the applicable law.'" *California Hospital Assn. v. Maxwell-Jolly*, 188 Cal. App. 4th 559, 570 (2010) (quoting *Common Cause v. Bd. of Sup'rs.*, 49 Cal. 3d 432, 442 (1989)).

In *Doe v. Albany Unified School District*, 190 Cal. App. 4th 668 (2010), for example, the court considered a section of the Education Code providing that school districts shall include physical education instruction for not less than 200 minutes every ten school days for pupils in elementary school. The Court concluded that the provision "impose[d] a mandatory duty on school districts" and, therefore, writ relief was appropriate. *Id*. at 678. The Court of Appeal reached this conclusion even while recognizing the fact that "individual school districts may have discretion as to how to administer their physical education programs." *Id.* at 673; *see also id.* at 676 (noting that the code section "call[ed] for discretion due to 'economic, geographic, physical, political and social diversity.'"). Unable to meaningfully distinguish this holding, the School District merely notes that *Doe* considered a different provision of the Education Code. Opp. 11.

Similarly, *Conlan v. Bonta*, 102 Cal. App. 4th 745 (2002), involved federal Medicaid rules, which require states that participate in the program to provide coverage for services rendered during the three months prior to applying for benefits if an individual was eligible for benefits during that period. States cannot rely on providers to reimburse Medicaid recipients voluntarily; they "must take appropriate measures to ensure that prompt reimbursement is made to recipients who incur out-of-pocket expenses for covered services during the retroactivity period." *Id.* at 763-64. Two Medi-Cal recipients filed a writ of mandate to compel the California Department of Health Services to ensure that Medi-Cal recipients were able to secure reimbursement of these costs. The trial court denied the writ. On appeal, the court expressly recognized that "[t]he manner in which the Department chooses to meet its obligations is within the discretion of the Department." *Id.* at 764; *see also id.* (acknowledging that "the method of accommodating such considerations is within the discretion of the

Department"). Nonetheless, the Court of Appeal reversed, holding that the Department's failure to comply with its legal requirement was actionable under section 1085. *Id.*

The School District argues that rather than these cases, *Coachella Valley Unified School District v. California*, 176 Cal. App. 4th 93 (2009), is the relevant precedent. Opp. 11. But a closer look at the facts and opinion in *Coachella* belies that assertion. As the School District correctly notes, the federal laws at issue in *Coachella* "did not direct a specific manner of testing." Opp. 11. To the contrary, they "require[d] only that a state provide 'reasonable accommodations' that include, if practicable, alternative assessments 'in the language and form most likely to yield accurate data.'" *Coachella*, 176 Cal. App. 4th at 115. The court explained that these terms were "statutory signposts calling for broad discretion." *Id.* In other words, the Legislature gave the local districts discretion to both set the standard and determine how it should be met. Here, by contrast, the Legislature did not leave individual districts discretion to determine whether and to what extent to open. It made that policy decision itself, requiring districts to offer in-person instruction "to the greatest extent possible"—*i.e.*, to the greatest extent public health authorities deem it safe to resume (*see* Part I(A)(2), *infra*). Educ. Code § 43504(b).

Notably, the Ninth Circuit has interpreted the analogous phrase, "to the greatest extent feasible," and held that it did *not* give the covered officials broad discretionary authority. *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.2d 97 (1976). *Ramirez* involved a section of the federal Housing and Urban Development Act that required contracts to be awarded to businesses located in or owned in substantial part by persons residing in the area of the project "to the greatest extent feasible." *Id.* at 100. Ramirez's accounting firm bid on a contract to perform the annual audit for the Mission Model Cities. His firm was the only firm bidding on the contract whose business was located in the Model Cities area. When he was not awarded the contract, he filed an action to enforce the HUD Act provision. The district court ruled against Ramirez, concluding that the agency was not required to award the contract to him because "[t]he flexible language 'to the greatest extent feasible' gives broad discretion to the officials charged with the responsibility of awarding contracts." *Id.* at 104-05. The Ninth Circuit reversed, holding that "'to the greatest extent feasible' . . . is strong language. It does not give the City officials the 'broad discretion' that the trial court concluded that it

does." *Id.* at 105. Rather, the Court explained, "'greatest extent' means what it says, the maximum . . . ." *Id.*

In sum, here, as in *Conlan*, "[t]he manner in which the [School District] chooses to meet its obligations is within the discretion of the [District]." *Conlan*, 102 Cal. App. 4th at 764. And like the district in *Doe*, the School District certainly has "discretion as to how to administer their [in-person] programs." *Doe*, 190 Cal. App. 4th at 673. But—as in both of those cases—writ relief is nonetheless appropriate here because, unlike in *Coachella*, the Legislature did not vest districts with broad policy making discretion. It did not give districts discretion about *what* to do, only *how* to do it. The Legislature mandated an action that districts must follow. The School District has no discretion to ignore that legislative mandate by failing to provide the in-person instruction required by state law.

2. The School District Is Violating Its Obligation To Provide In-Person Instruction To The Greatest Extent Possible.

The School District next argues that they are not violating section 43504(b) because it is not actually "possible" to return to in-person instruction at this time. Opp. 14-17. The School District does not—because it cannot—deny that public health officials at all levels agree that TK-12 schools can now reopen safely in San Francisco as long as basic mitigation strategies, such as masks, physical distancing, hand hygiene, and basic ventilation are employed. *See* Supp. RJN Exs. F-H. But the District argues that—despite this public health consensus—resuming in-person instruction is not "possible" within the meaning of the statue because of facilities and labor issues.[1]

[1] The School District also argues that "conditions" do not "allow" them to resume in-person instruction until all staff have been vaccinated or San Francisco is reassigned to the State's "orange tier." Opp. 8, 7. As a factual matter, all SFUSD staff have now "had the opportunity (eligibility and access) to be vaccinated" (Supp. RJN Ex. D at 3 & C at 2), and San Francisco is currently meeting the criteria for orange tier, meaning that it will be reassigned to orange on March 23 (effective March 24), unless there is an unexpected surge in COVID-19 cases (Philip Reply Decl. ¶4). But even if this were not the case, the School District's collective bargaining agreements with its employees are subject to the Educational Employment Relations Act (EERA), which establishes that collective bargaining "shall not supersede other provisions of the Education Code." Gov't Code § 3540. Courts often refer to this as EERA's "non-supersession clause" and its meaning is not in doubt: "collective bargaining provisions pursuant to the EERA that annul, set aside, or replace provisions of the Education Code cannot be enforced." *United Teachers of Los Angeles v. Los Angeles Unified Sch. Dist.*, 54 Cal. 4th 504, 520 (2012). As applied here, labor agreement terms cannot "annul" or "set aside" the School District's obligation to provide in-person instruction "to the greatest extent possible," and public health authorities agree that vaccination of staff is not a prerequisite for K-12 schools to open safely for in-person instruction. Vaccination is not a barrier to in-person instruction.

When, to what extent, and under what conditions in-person instruction is "possible" during a pandemic is a decision that properly rests with state and local public health officials, not with individual school districts or their workforce. Indeed, the only section of the Education Code that directly addresses the possibility of shutting down schools due to a contagious disease expressly recognizes that it is public health officials—and only public health officials—who should be making that difficult decision. Education Code section 37202(a) provides:

> Except if a school has been closed *by order of a city or a county board of health, or of the State Board of Health, on account of contagious disease*, or if the school has been closed on account of fire, flood, or other public disaster, the governing board of a school district shall maintain all of the elementary day schools established by it for an equal length of time during the school year and all of the day high schools established by it for an equal length of time during the school year.

This language underscores the Legislature's view that schools should not be shut down as a result of a contagious disease unless public health officials order them to be closed. *Cf. Cty. of Los Angeles Dep't of Pub. Health v. Superior Ct.*, No. B309416, 2021 WL 777699, at *1 (Cal. Ct. App. Mar. 1, 2021) ("We now hold that courts should be extremely deferential to public health authorities, particularly during a pandemic, and particularly where, as here, the public health authorities have demonstrated a rational basis for their actions."); *B.H. v. Manhattan Beach Unified Sch. Dist*., 35 Cal. App. 5th 563, 584 (2019) (internal quotation marks omitted) ("The primary aim of the Education Code is to benefit students, and in interpreting legislation dealing with our educational systems, it must be remembered that the fundamental purpose of such legislation is the welfare of the children.").

Where—as here—health officials universally agree that in-person instruction can and should resume, it cannot be deemed impossible to do so because a school district failed to take appropriate measures to prepare its facilities for reopening over the course of the last year.[2] Nor can a school district legitimately claim that its bargaining obligations render in-person instruction impossible within

[2] Notably, SFUSD's reopening dashboard states that they have "Completed (100%)" the task of stocking a 3-month supply of PPE and cleaning supplies. Supp. RJN Ex. B. The required signage is minimal—and all of it is available to download and print at the City's website. *Id.* Ex. F at 5. To the extent any other facilities issues remain, this is a problem of the School District's own making. School buildings have been empty for a year, during which time all necessary preparations could have—and should have—been made. The School District cannot fail to act for a year, and then claim it is impossible to open because they have not installed safety measures.

the meaning of the law. Were it otherwise, a district or union could take any number of bargaining positions contrary to public health guidance (e.g., no in-person instruction until there are zero cases of COVID-19 in the United States) and thereby make it not "possible" to return to in-person instruction for years. This cannot be what the Legislature intended. Education code section 43504(b) requires school districts to "offer in-person instruction to the greatest extent possible." A school district may offer distance learning in only two circumstances: on "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). California law does not allow labor disagreements or a district's own lack of preparation over an extended period to excuse a district's failure to provide in person instruction.

Moreover, this arguments rests on the notion that reaching an agreement with the union is an impossible task, which it is not. Districts around the country have demonstrated that setting up school sites and reaching labor agreements with employees are *not* insurmountable hurdles, even for large urban school districts. The Los Angeles Unified School District—the second largest school district in the country—just reached an agreement with its labor unions to "reopen in mid-April for preschool and elementary schools, and the end of April for secondary schools." Supp. RJN Ex. I.[3] The nine other largest school districts have already opened.[4] And many other urban school districts—like Philadelphia, Denver, and Boston—that are the same size as SFUSD or larger have also reached agreements and resumed in-person instruction.[5]

---

[3] *see also* https://achieve.lausd.net/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=4466&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=104059&PageID=1 (LAUSD board member stating: "I am grateful that *all* students will have the chance to be in person with their teachers and peers soon.") (emphasis added)

[4] In New York City, elementary schools and middle schools are already open and high schools will be reopening for in-person instruction on March 22. *See* Supp. RJN Ex. J; *see also, e.g.*, https://www.wbez.org/stories/cps-elementary-students-are-back-in-class-after-a-year-filled-with-the-pandemic-loss-and-labor-strife/2ba4b215-f10a-45a4-a548-527ddf7cb3d0 (Chicago); https://www.cnn.com/2021/01/11/us/ miami-dade-schools-open-coronavirus-wellness/index.html (Miami-Dade); https://www.reviewjournal.com/local/education/ccsd-announces-plan-to-return-all-grade-levels-2288008/ (Clark County, NV); https://www.nytimes.com/2021/02/10/magazine/school-reopenings-rhode-island.html? (Broward County, FL); https://www.houstonisd.org/reopening (Houston).

[5] *See* https://www.inquirer.com/news/philadelphia-school-district-reopening-deal-20210301.html (Philadelphia); https://www.dpsk12.org/our-dps-weekly-welcome-back-as-we-plan-

In light of the above, because public health officials have determined that schools can and must be reopened safely for all grades, the School District is obligated do so. It cannot rely on a lack of box fans, soap dispensers, or its inability to come to terms of labor agreements to avoid that legal obligation.

B. The School District's Failure To Provide In-Person Instruction Violates The California Constitution.

While recognizing the "shortcomings of distance learning as compared with in-person instruction" (Opp. 13), the School District argues that San Francisco school children do not have a constitutional right to attend school in person. Under its logic, the School District *could keep schools closed permanently* without violating the right to attend school. That is not the law.

The fundamental right to attend school has always meant the right to attend school *in person. See, e.g.*, Cal. Const., art. IX, §§ 1, 5; *Ward v. Flood*, 48 Cal. 36, 50-51 (1874) ("The advantage or benefit thereby vouchsafed to each child, *of attending a public school* is, therefore, one derived and secured to it under the highest sanction of positive law. . . . Under the laws of California children or persons between the ages of five and twenty-one years are entitled to receive instruction *at the public schools*.") (emphasis added); *see also Board of Sup'rs of Merced Cty. v. Cothran*, 84 Cal. App. 2d 679, 682 (1948) ("[T]he word 'school' is variously defined as an institution or place for instruction or education; a place for learned intercourse and instruction; a place for acquiring knowledge and mental training; a place for the instruction of children; a place where instruction is imparted to the young; an educational establishment.")

The City recognizes that teachers in San Francisco have done their best under trying circumstances to provide academic instruction through distance learning. But providing instruction to students exclusively through computers while classrooms sit empty does not satisfy the constitutional right to attend school. It does not provide "the practical training and experience—from communicative skills to experience in group activities—necessary for full participation in the 'uninhibited, robust, and wide-open' debate that is central to our democracy." *Hartzell v. Connell*, 35

---

our-return-to-schools/ (Denver); https://www.nbcboston.com/news/local/boston-mayor-walsh-to-provide-coronavirus-update-8/2312633/ (Boston).

Cal. 3d 899, 908 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). It deprives students of the ability to form relationships across racial and class divides and to learn the lessons of "justice, fair play, and good citizenship." *Hartzell*, 35 Cal. 3d at 910. It deprives students of the many lessons that can only be learned through in-person interactions.

The School District has prevented San Francisco students from attending school—from having in-person instruction with teachers and peers in a common space—for the entire school year to date. That substantial infringement on students' right to attend school is subject to strict scrutiny, and is permitted only if it is supported by a compelling state interest and is narrowly tailored to meet that end. *See, e.g., Serrano v. Priest*, 5 Cal. 3d 584, 610 (1971). Despite its burden under strict scrutiny, the School District offers nothing to show a compelling state interest in keep classrooms empty, while public health experts agree that in person instruction should resume for all students. Nor has the School District explained why keeping huge numbers of San Francisco children completely out of school is narrowly tailored. The School District ignores the strict scrutiny standard all together.

The School District notes that the California Legislature authorized distance learning in response to the pandemic, and claims that, "[i]f SFUSD's provision of distance learning was not unconstitutional when the Legislature initially [authorized it], it remains so now." Opp. 14. That argument is plainly incorrect. The School District's refusal to open schools for all students "imposes current burdens and must be justified by current needs." *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 536 (2013). No one disputes that closing schools satisfied strict scrutiny *at the beginning of the pandemic* when public health officials concluded closing schools was temporarily necessary. But now, public health officials *unanimously agree that schools should reopen and can do so safely*. And that has been the prevailing health opinion for some time. Keeping schools closed when it is no longer necessary is both unconscionable and unconstitutional.

C. San Francisco's Claims Are Not Moot And The Relief It Seeks Remains Necessary.

The School District's final argument on the merits is that relief is unnecessary and/or moot because of the steps SFUSD has taken toward reopening. Opp. 12-13. Not so. San Francisco acknowledges that important steps have been taken since this case was first filed. Specifically, the

School District entered into two memorandums of understanding with the United Educators of San Francisco (Supp. RJN Exs. D-E), and announced that in-person instruction is expected to resume for PK-2 grade and moderate/severe special day classes on April 12, April 19, or April 26, 2021. Also on April 26, the School District expects to "[b]egin opening sites for Phase 2B student groups"[6] and to "[b]egin to open sites for grades 3-5." Supp. RJN Ex. A at 21. Though progress, this is distinctly *not* offering in-person instruction "to the greatest extent possible," and does not remedy the statutory or constitutional violations. There is no indication that *any* non-priority 6th-12th graders will be able to return to school this year. There is no information about how many 3rd-5th grade classes are scheduled to return on April 26 (with four weeks left in the school year) and when, if at all, the 3rd-5th grade classes that do not resume on that date will reopen. And there is no explanation as to why not a single student will resume in-person instruction before April 12—a full month from the date of this filing.

As such, the situation here is a far cry from the one presented in *Cooke v. Superior Court*, 213 Cal. App. 3d 401 (1989), on which the School District relies. Opp. 12. As the School District itself explains, the respondent county in *Cooke* "adopted a resolution increasing the level of dental services *that met the level of care required by the statute*." *Id.* (emphasis added). The court rejected petitioners' argument that judicial intervention was still necessary "because they did not trust the County's health officer to actually authorize the services." *Id.* Here, by contrast, the School District's stated partial plan *does not* meet the requirements of the law. If they were to commit to such a plan—a plan to reopen for all grades in a reasonable time and manner—*Cooke* would potentially be relevant and court intervention may become unnecessary. Unless and until they do, injunctive relief is warranted.

II. The Harm From Denying The Injunction Greatly Exceeds Any Potential Harm That Would Result From Granting It.

When deciding whether to grant a preliminary injunction, a court must consider two

[6] Phase 2B students includes the following priority populations: homeless and foster youth, newcomer students, students residing in public housing, and students demonstrating limited online engagement. Supp. RJN Ex. A at 15.

interrelated factors: (1) the likelihood that the plaintiff will succeed on the merits, and (2) the relative interim harm from granting versus denying the injunction. *See, e.g., Butt v. State of California*, 4 Cal. 4th 668, 677-78 (1992). "The trial court's determination must be guided by a 'mix' of the potential merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." *Id.* Thus, for example, "if there is an extreme disproportionality of harms favoring a plaintiff, the strength of the case on the merits may be correspondingly less," and injunctive relief is appropriate as long as there is "some possibility" that the plaintiff will ultimately prevail on the merits. *AFT Local 2121 v. Accrediting Comm'n for Cmty. and Jr. Colleges*, No. CGC 13-533693, 2014 WL 280530, at *8 (Cal. Super. (Karnow, J.) Jan. 2, 2014) ((citing California Practice Guide: Civil Procedure Before Trial § 9:531 (2012)).

For all the reasons discussed above, San Francisco has a strong likelihood of prevailing on the merits of its claims. But, under these principles, even if the merits were less clear, injunctive relief would still be appropriate here. There is, at the very least, "some possibility" that San Francisco will prevail on the merits, and the harm from denying an injunction and allowing the School District to continue to flout the law is severe. In its opening papers, San Francisco detailed the extreme mental and physical health consequences to children and families, as well as the financial and resource harms to the City, resulting from the School District's failure to provide the required in-person instruction. Mot. 16-20. The School District offers no response at all in its brief. It does not—because it cannot—deny that the harms set forth in San Francisco's papers are significant. Nor does it deny that these harms far outweigh any possible harm to the District from fulfilling its constitutional and statutory obligations. In fact, the School District offers no argument—much less evidence—that it will be harmed at all. In these circumstances, the "rule countenancing an injunction when there is 'some possibility' of ultimate success is decisive," and an injunction should be granted. *AFT Local 2121*, 2014 WL 280530, at *8.

CONCLUSION

San Francisco's motion for a preliminary injunction should be granted.

/ / /

/ / /

Dated: March 12, 2021

DENNIS J. HERRERA
City Attorney
RONALD P. FLYNN
JESSE C. SMITH
YVONNE R. MERÉ
TARA M. STEELEY
SARA J. EISENBERG
MATTHEW D. GOLDBERG

By: */s/ Sara J. Eisenberg*
SARA J. EISENBERG

Attorneys for Petitioner
CITY AND COUNTY OF SAN FRANCISCO