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Coastal Property Rights, Land Use & Litigation

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POSTED TO THE LET THEM BREATHE WEBSITE (<https://www.letthembreathe.net/>)

Re: Enforcement of K-12 Mask Mandate

To All K-12 Students, Parents, Educators, Administrators, School Board Members and Concerned Citizens:

As counsel for Let Them Breathe, we are writing this open letter to explain a recent ruling issued in the matter of *Let Them Breathe v. Newsom*, San Diego Super. Ct., Case No. 37-2021-00031385-CU-WM-NC. Let Them Breathe and Reopen California Schools filed this lawsuit against the state to challenge the legality of the CDPH mask mandate in K-12 schools throughout California. The lawsuit also challenged the legality of the CDPH COVID-19 quarantine and testing recommendations for K-12 schools.

On November 12, 2021, a San Diego Superior Court judge issued an Order in favor of the defendants in this case. While we are disappointed with the outcome, the Order does provide some clarity in regard to the state's official position and the scope of CDPH's mask mandate and COVID-19 quarantine and testing recommendations for K-12 schools.

First, the Order confirms that the portions of CDPH guidance applicable to COVID-19 quarantine and testing protocols are *recommendations only*, not mandates, as follows:

“When the issue of recommendation versus mandate was addressed at the hearing, Plaintiffs requested that, to the extent that the Defendants are conceding that the testing strategies and the quarantine protocols are recommendations, the Court issue an order clarifying that the testing strategies and quarantine protocols were recommendations that school districts were free to disregard. In response to the Court’s effort to confirm Defendants’ position, Defendants’ counsel reiterated the Defendants’ position that the testing strategies and quarantine protocols are recommendations only. This, coupled with the plain language of the Guidance, further resolves the issue for the Court that the testing strategies and the quarantine protocols are recommendations, not mandates.”
(Order at Fn. 3.)

Thus, schools are not *required* to follow the CDPH protocols for quarantining healthy students who are identified as having been exposed at school to individuals who test positive for COVID-19. Additionally, the state does not require schools to provide or perform routine COVID-19 testing of students. Because this challenged CDPH guidance is only a recommendation, boards and administrators need not implement it in their schools. However, our clients do find the quarantining and routine testing of healthy students unreasonable and problematic because it causes healthy students to miss multiple days of in-person education and does not provide any proven community benefit. Schools that implement broad quarantine and testing protocols – such as those recommended by the state, or worse – may be subjecting themselves to liability for unnecessarily and unreasonably excluding healthy students from school for prolonged periods of time.

Second, the Order confirms the state's position that all individuals are required to wear a mask or face covering while indoors at a K-12 school in California. However, enforcement of the state's mask mandate is left up to each school. Nothing in the CDPH guidance requires schools to exclude students who refuse to wear a mask. As the state confirmed to the court, "nothing in the challenged mask guidance purports to direct or authorize schools to force students into this independent study program." (Defendants' Memorandum of Points & Authorities in Support of Demurrer, at 15:14-16.)

Finally, the state confirmed that its guidance reiterates the requirement that school districts provide all students with the option to enroll in independent study for the 2021-22 academic year. However, California law could not be clearer that enrollment in any such program must be voluntary: "independent study is an *optional educational alternative* in which *no pupil may be required to participate.*" (Educ. Code, § 51747, subd. (f)(8) [emphasis added].) Thus, enrollment can occur only if there is a "pupil-parent-educator conference" to determine whether enrollment in independent study is in the best interest of the child (Educ. Code, § 51747, subd. (h)(2)) and "a signed written agreement for independent study from the pupil, or the pupil's parent or legal guardian if the pupil is less than 18 years of age" (Educ. Code, § 51747, subd. (f)(9)(F)).

Additionally, and importantly, a child enrolled in an independent study program always retains the option to return to his or her regular classroom for in-person instruction. The school is required to "*transition pupils whose families wish to return to in-person instruction* from independent study *expeditiously*, and, in no case, later than five instructional days." (Educ. Code, § 51747, subd. (f) [emphasis added].)

Even though this recent Order makes clear that schools are not required to remove students from campus and deprive them of in person learning opportunities, we continue to receive disturbing reports that some state, county, and school district actors are employing scare tactics, aggressive enforcement policies, and misinformation to achieve compliance with CDPH's K-12 mask mandate. Please allow this correspondence to serve as a reminder that school officials may be placing their own district at risk of liability when they implement such unreasonable and extreme measures to enforce the state mask mandate among students.

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If you would like assistance in protecting the rights of schoolchildren and fighting back against government overreach, please visit Let Them Breathe at <https://www.letthembreathe.net/>.

Very truly yours,

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