**PERSONALIZE**

Dear Educator,

We are launching the See My Smile campaign in our schools in our County! To help you support a parent’s right to choose what is best for his or her own child, and follow all the rules you believe you need to follow, I am providing you with a detailed analysis and response to the August 23, 2021 letter from the California Department of Health (“CDPH”), including a detailed outline of its misapplication of law and facts / data. **I am also providing you a highlighted order dated November 12, 2021 from Judge Freeland that states that CDPH has conceded their guidelines ARE ONLY RECOMMENDATIONS!** At the end of this letter, you will be provided everything you need to comply with the current CDPH guidelines AND respect parental right to choose whether or not to mask and/or test their children. We believe in your heart of hearts you know medical decisions should rest with parents and their child’s physician, not the school or employees with no medical training.

To start, school districts across the state were choosing to implement non-enforcement policies for the 2021-2022 school year, as permitted by CADPH’s previous guidance. In response to this movement towards reason, “the science,” the law, and a parent’s fundamental right to direct the health and care of his or her child, CDPH rolled out a campaign of intimidation cloaked in laws and “data” that are misapplied via its August 23 letter. It is understandable that if you are not a lawyer you would not be aware of the numerous flaws in the CADPH’s August 23 letter, and that you would feel compelled to “follow orders” from the CDPH as if they were laws. They did their best to confuse and mislead, and threaten and intimidate you into believing you have no choice; however, I am here to tell you, you do.

Most notably, on November 12, 2021, a judge made clear that the CDPH guidance relating to the mandates is only that - *guidance.* In fact, the case was in part *dismissed* because this guidance is not mandatory. I have enclosed the order but for ease of reference here is the judge’s ruling from page three of the enclosed order.

**“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. “**

**This means that CDPH, who was the Defendant, has conceded that the guidelines are only recommendations.**

And, most importantly, this extends to masking even though it does not expressly state because there is no law mandating masks. The word mandatory in a guidance does not make it a law. And, without a law, there is no ramification or punishment for letting parents decide whether or not to mask their children. CDPH is very aware of this fact which is why they sent the August 23, 2021 letter in an attempt to manufacture ramifications for a school district choosing to do what is best for their community by allowing parents to choose whether to mask their children or not. The legislature has delegated to school districts the power to decide what is best for their community. School Districts can let parents decide and now they have a Court order to help them do it!

Now back to the August 23, 2021 letter from CDPH to schools. First, CDPH claims that failure to follow mask enforcement “breaches a legal duty to protect students” that carries “significant legal, financial, and other risks.” CDPH purports to make these statements with the intent to “ensure all school leaders are fully aware of their legal obligations.” However, the alleged legal obligations proffered by CDPH and its team of lawyers are simply not accurate. To this end, under the heading of **LEGAL REQUIREMENTS FOR SCHOOLS TO IMPLEMENT UNIVERSAL MASKING,** the letterstates that “schools remain flexible to tailor protocols for enforcing the mask requirement to meet their local circumstances.” This is important and actually an accurate statement of the realities of schools operating during this “pandemic” because what is good for San Francisco or Los Angeles is not necessarily good for Placer County and schools have the right given to them by the legislature to do what they believe is best for their community.

Second, CDPH quotes the *Health and Safety Code*, section 120140 for the proposition that this law authorizes them to “take measures that are necessary to …prevent [the] spread of communicable diseases such as COVID-19.” **CDPH derives its authority to “take measures” from this statute only if there is a *necessity and only if they actually work.*** This means, if challenged in court, the CDPH would have to prove why it is necessary to mask a healthy child who rarely gets COVID-19, rarely spreads COVID-19, has a 99.97% recovery rate if he or she does contract it, *the science shows the masks do not work* anymore thanhand washing and staying home when actually sick. And notably *the people who actually, might arguably need to be protected can – and almost all have – taken measures to protect themselves*.

In most school districts – which are ALL open – there are not enough facts to support a finding of “necessity,” rendering this bold assertion of authority to do whatever they want illusory. Rather, for example, as of September 7, 2021, 466 people out of 3.2 million Orange County residents are hospitalized with COVID-19, with only 128 are in the intensive care unit.[[1]](#footnote-1) Similarly, the County’s average daily case rate per 100,000 residents dropped from 18.6 on August 31, 2021, to 16 on September 7, 2021, while the testing positivity rate fell from 6.8% to 5.4%, and the county’s Health Equity Quartile rate, which measures the impact of the pandemic on disadvantaged communities, dropped from 7.3% to 5.8%[[2]](#footnote-2)

Further, well-settled caselaw says very clearly that “while health authorities possess power to place under quarantine restrictions persons who they have *reasonable cause* *to believe are inflicted with infectious or contagious diseases*, personal restraint can *only* be imposed where, *under the facts* as brought within the knowledge of the health authorities, ***reasonable ground exists to support the belief that the person is afflicted.*** *In re Application of Arata* (Cal. App. Apr. 29, 1921), 52 Cal. App. 380, 198 P. 814, 1921 Cal. App. LEXIS 256. **In short, masking of healthy children is not necessary or even legal.**

CDPH tries to circumvent these requirements and justify implementation of masking healthy children by claiming that masking healthy children is an “important and science based strategy,” per the CDC. However, **there is no peer reviewed double blind study ever produced by the CDC or proponents of masking healthy children establishing this**. Conversely, numerous other studies show the oppositehttps://www.aier.org/article/masking-children-tragic-unscientific-and-damaging/

Regardless, for our purposes, this does not matter. The decision is **not** up to you. ***It is up to the student’s pediatrician and parent(s).*** Whether or not masks work or actually do serious damage to healthy children is irrelevant even if the PCR tests that are measuring tests have been found to have a 90% false positivity rate.

Third, the CDPH raises the issue and posits that heavy “legal and financial risks” posed by failing to implement a mask policy could occur. However, the law cited for this threat is also taken out of context in order to create fear in educators. CDPH cites *C.A. v. William S. Hart Union High Sch. Dist*. (2012) 53 Cal. 4th 861, 869 and takes one sentence out of the whole ruling to stand for the proposition that the school district and its employees have a “heightened duty of care.” What CDPH fails to mention is that this case was about the negligence by the district of hiring a *sex offender,* not masking healthy children. A closer reading of *C.A. v. William S. Hart* stands for the proposition that educators have only a duty of **a reasonable person in same or similar circumstances,** not a “heightened” one:

“**While school districts and their employees have never been considered insurers of the physical safety of students**, school authorities have a duty to supervise at all times the conduct of the children on the school grounds and to enforce those rules and regulations necessary to their protection. The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care which a person of ordinary prudence, charged with comparable duties, would exercise under the same circumstances. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision. Under Gov. Code, § 815.2, subd. (a), a school district is vicariously liable for injuries proximately caused by such negligence. *C.A. v. William S. Hart Union High School Dist*., 53 Cal. 4th 861, 862.

There is no “legal duty” that is “heightened” as CDPH erroneously proffers.

Fourth, CDPH tries to convince educators that if a staff member contracts COVID when a child was not wearing a mask, “financial liability would be substantial.” This is the not only illogical, but legally untenable because it neglects the fact that anyone who sues a school district – staff or parent – has to prove *causation* and would likely never be able to do so. Staff and students get sick from other children from the flu, colds, and a host of other illnesses since the dawn of time *both inside and out of school*. Think back – would you ever be able to prove exactly where that case of the flu or the cold came from or who gave it to you? How do you know it wasn’t from the Starbucks you stopped at on the way into school? That’s the problem of causation. Any lawsuit brought is doomed to fail from the start if challenged in court just like the necessity basis required under the Health and Safety Code.

Fifth, the threat to ‘certified individuals’ of losing their licenses is likewise a veiled baseless threat. CDPH cites Education Code, section 44421 for the proposition that a credentialled individual could suffer consequences from the teacher credentialling body for “disobeying the law;” however, this is too broad. Just like you cannot expel or suspend a child unless you can prove a clear and present danger per Cal Ed Codes, sections 48213, 48900, each which expressly contemplate drugs or violence not smiling healthy faces, Education Code, section 44421 did not contemplate a teacher or principal being disciplined for a child not wearing mask. The entire masking “requirement,” which comes from *guidance* that is not a law passed by the Legislature, only exists today due to the state of emergency that even Governor Newsom, himself, declared in June was completely unnecessary. CDPH has never once actually proven that masking children is necessary or effective and, again, there is no current law mandating masking healthy children. So, the claim that there is a *legal duty* “to implement masking requirement and knowingly exposing students to preventable harm” that could give rise to liability to a school official is just legally incorrect and misleading. Moreover, a commission or teacher credentialling would actually only “admonish, reprove, revoke or suspend” for refusing to obey actual laws, and the only law we can see teachers being penalized for is violation of Education Code, section 49005.8(3) which prohibits using a physical restraint technique that obstructs a pupil’s airway, or for prohibiting children from coming to school in person for willful disobedience. It is also a violation of the Business and Professions Code in section 2052 for teachers or administrators to give medical advice. Those acts should be concerning as they actually could subject you to credentialing discipline not masking healthy kids and potentially criminal penalties.

Even if you do not agree with our analysis so far, again, this is not about *you* making a decision. ***This is about respecting a parent’s rights and that they know what is best for their children***. By way of example, the CDPH tries to convince you masks do no harm with a claim the famous JAMA article often used to substantiate just one of the harms of masking children was RETRACTED.[[3]](#footnote-3) The author of this article squarely disagrees and contends it was solid leaving many to comet to the conclusion that the “retraction” was due to other motives. Again, even if you disagree, do you want to be the one that damages the child’s hippocampus by causing oxidative stress which is the basis for degenerative disease?[[4]](#footnote-4)

Do you want to be the one that forced the five year old in Watsonville to wear a mask that ultimately caused an ear infection that has him mostly deaf? Talk about a liability and exposure in the future. Or the Oregon track runner who collapsed just short of the finish line, or basketball player who had to be resuscitated while masked during practice? Can you just visualize the class action commercial advertisements?

The CDPH makes a statement that you as an educator personally knows is false. It states there is no evidence that masks have an “adverse mental impact.” How would you feel if that was said to a parent whose child committed suicide due to this so called “health” protocol?

Sixth, CDPH throws out Health and Safety Code, section 120175, and Education Code, section 49403 for the proposition that school officials could be subject to fines for refusing to adhere to the “mandatory masking directive”. Neither of those statutes authorize fines. Further, Section 120175 has that pesky word “necessary,” again, which requires a factual basis for masking healthy children. Education Code, section 49403 is not even applicable, as it requires schools to cooperate with health officers *regarding immunizations consented to by parents* and says nothing about fining school personnel for masking healthy children against their parent’s wishes.

Finally, CDPH ends this desperate effort to intimidate schools by attempting to argue against the claim that mandatory masking violates parental and personal choice. I think even making this statement speaks volumes as to the credibility of the CDPH at this point. This is further highlighted by the fact that the cases are wholly inapplicable. *Vernonia School District 47J v. Acton* (1995) 515 U.S. 646 is a 1995 case that involved drug testing and the need to deter drug use, not masking *healthy children. Abeel v. Clark* 1890) 84 Cal. 226 is a very old case whereby a law was challenged for equal protection grounds. It has nothing to do with whether or not mandatory masking of healthy children is a personal freedom that can be limited. Similarly, *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 993, 994 is about SB 277 gutting and removing medical and religious exemptions, not limiting personal choice of a parent to mask or not to mask their healthy child. Interestingly, all of these cases turned on the student’s fundamental, Constitutional right – and the public school’s *obligation* to provide – a free education.

The solution to all of this is in the attached policy. It is from a school that is successfully simply encouraging and recommending masks while ultimately letting parents choose. At the end of the day, when you have exhausted your enforcement encouragement, which has been carefully documented along the way, and the parent is offered independent study and they decline – as is their right – the school must respect the parents’ choice with the understanding that there is no *legal* way to exclude a child from school whose parent decides they will not be masked.

Sincerely,

YOUR NAME

1. COVID-19 Case Counts and Testing Figures, <https://occovid19.ochealthinfo.com/coronavirus-in-oc> [as of September 7, 2021]. [↑](#footnote-ref-1)
2. Monterey County’s COVID-19 Metrics: https://www.co.monterey.ca.us/government/departments-a-h/health/diseases/2019-novel-coronavirus-covid-19/2019-novel-coronavirus-2019-ncov-local-data-10219 [↑](#footnote-ref-2)
3. <https://justthenews.com/nation/science/jamas-retraction-paper-masks-harming-children-was-political-lead-author-says> [↑](#footnote-ref-3)
4. <https://healthpolicy.usc.edu/article/mandatory-masking-of-school-children-is-a-bad-idea/> [↑](#footnote-ref-4)