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VIA EMAIL ONLY (board@sandi.net; ljackson@sandi.net)

Members of Board of Education
Dr. Lamont Jackson, Interim Superintendent
San Diego Unified School District
4100 Normal Street, Room 2231
San Diego, CA 92103

Re: Consideration of COVID-19 Vaccination Mandate

Dear Board Members and Dr. Jackson:

We represent Let Them Choose, a movement that includes parents of San Diego Unified School District (“SDUSD”) students. Let Them Choose is an initiative from the Let Them Breathe community of over 20,000 parents. Let Them Breathe has been advocating for mask choice since the start of 2021 and has filed a lawsuit to end the California student mask mandate. Let Them Breathe stands for choice. The Let Them Choose initiative aims to protect families’ rights to make personal medical decisions and students’ right to an in-person education.

Let Them Choose is extremely concerned about SDUSD’s potential imposition of a COVID-19 vaccination mandate for its students. Let Them Choose strongly believes the decision whether to vaccinate a child for COVID-19 should be made solely by the child’s parents, after consultation with the child’s doctor, not by an individual school or school district. Let Them Choose is disturbed that SDUSD is even considering whether to discriminate against its current students based solely on their COVID-19 vaccination status.

We understand Los Angeles Unified School District (“LAUSD”) recently approved a COVID-19 vaccination mandate for all students ages 12 and up. LAUSD’s mandate unlawfully requires all children 12 years and older to be fully vaccinated by January 10, 2022, unless they have a medical or other exemption. We further understand that the SDUSD Board of Education will consider whether to issue a similar mandate for its students at its September 28, 2021 board meeting.

SDUSD Lacks Legal Authority to Mandate the COVID-19 Vaccine for Students

Individual school boards, including SDUSD’s board, lack legal authority to mandate the COVID-19 vaccine for students. Pursuant to Title 17, Section 6025 of the California Code of

Regulations, a school “shall unconditionally admit or allow continued attendance” to any child, provided the school has received documentation that the child has been immunized in accordance with sections 6065 and 6060, a permanent medical exemption in accordance with section 6051, or a personal beliefs exemption in accordance with Health and Safety Code section 120335.

An individual public school district or charter school board does not have discretion to condition the admission of its students upon a requirement that the students receive specific additional vaccinations beyond those that are already required under state law. Health and Safety Code section 120335 provides a list of ten specifically enumerated childhood illnesses for which a child must be vaccinated as a condition for admission to any school in California, unless the child has a medical exemption. Those illnesses are identified in subdivision (b), as follows: (1) Diphtheria; (2) Hepatitis B; (3) Haemophilus influenzae type b; (4) Measles; (5) Mumps; (6) Pertussis (whooping cough); (7) Poliomyelitis; (8) Rubella; (9) Tetanus; and (10) Varicella (chickenpox). (Health & Safety Code § 120335(b).) Notably, this list does *not* include the COVID-19 vaccination. Thus, once a student demonstrates that they have received these ten vaccines (or they provide a valid medical exemption) SDUSD *must* allow that student to attend school, in person.

While paragraph 11, subdivision (b) of Section 120335 provides for an expansion of the statutorily enumerated vaccination requirements through the addition of “any other disease deemed appropriate” by the California Department of Public Health (“CDPH”), it does not authorize individual school boards, such as SDUSD’s Board of Education, to add other vaccination requirements.

Moreover, and importantly, even if CDPH ultimately decides to require students to receive a COVID-19 vaccination in order to attend school, California law expressly limits its authority to mandate additional vaccinations for schoolchildren without also providing an opportunity to opt out based on personal beliefs, as follows: “[A]ny immunizations deemed appropriate by the department pursuant to paragraph (11) of subdivision (a) of Section 120325 or paragraph (11) of subdivision (b) of Section 120335, may be mandated before a pupil’s first admission to any private or public elementary or secondary school [...] *only if exemptions are allowed for both medical reasons and personal beliefs.*” (Health & Safety Code § 120338, italics added.) Thus, even if CDPH were to eventually require the COVID-19 vaccination for all age-eligible schoolchildren, including SDUSD students, SDUSD will also be required to permit children and their families to opt out of the COVID-19 vaccination requirement by submitting a medical or personal belief exemption.¹

¹ This is in stark contrast to LAUSD’s grossly misleading and inaccurate interpretation of California law as stated in its Frequently Asked Questions portion of its website, as follows: “State law does not recognize religious or personal belief exemptions for student immunizations.”

The Benefits COVID-19 Vaccination Do Not Outweigh the Potential Harms for All Students

A COVID-19 vaccination mandate is unnecessary for SDUSD students. Healthy children are not generally at risk of hospitalization or death from a COVID-19 infection. Of the 66,000 COVID-19 deaths in California since January 2020, there have been 33 deaths among children under 18, lower than the typical death rate among children during average flu seasons over a similar time period. The estimated infection fatality rate for children ages 0-17 is 0.00002%.² Put another way, children have a one in a million risk of dying from COVID-19. Moreover, a recent review found that the mortality risk for children without serious pre-existing conditions is effectively zero.³ The COVID-19 School Dashboard developed by Brown University tracks over 5,000 schools, 4 million students, and 1.3 million staff, and has consistently found student and staff infection rates of 0.1% to 0.2% since it began publishing in September 2020. Regardless, parents who wish to provide their child with extra protection from COVID-19 already have the opportunity to get their child vaccinated. A mandate for all students does not broaden such an opportunity.

Currently, there are no FDA approved COVID-19 vaccines for children ages 0 to 15. The Pfizer-BioNTech (“Pfizer”) product has only received Emergency Use Authorization (“EUA”) from the Food and Drug Administration (“FDA”) for children ages 12 to 15, meaning the product is still undergoing safety and efficacy trials for that age group. While the FDA recently issued its approval for the use of Pfizer’s Comirnaty vaccine, such approval is only applicable for use in individuals ages 16 and up. Thus, as applied to its students that are between the ages of 12 to 15, SDUSD is considering a mandate that would require children to be inoculated with a vaccine that has not yet received FDA approval. Such a mandate would be reckless and exposes SDUSD and its board members to serious potential liability.

The risks associated with the Pfizer vaccine are not innocuous, especially for children. Indeed, according to the FDA, the Pfizer vaccine has been demonstrated to increase risks of myocarditis and pericarditis (i.e., heart inflammation), with some cases requiring intensive care support.⁴ The observed risk is highest in males 12 through 17 years of age.⁵ A recent study analyzing VAERS data underscores this risk, finding that the risk of hospitalization due to vaccine induced

² <https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html>

³ <https://www.medpagetoday.com/opinion/marty-makary/93029>

⁴ See “Fact Sheet for Health Care Providers Administering Vaccine,” last updated August 23, 2021, at <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-COVID-19/comirnaty-and-pfizer-biontech-COVID-19-vaccine>

⁵ <https://www.fda.gov/vaccines-blood-biologics/qa-comirnaty-COVID-19-vaccine-mrna>

myocarditis is higher than the risk of hospitalization due to COVID-19 for boys ages 12-17.⁶ Thus, a mandate would be especially risky for SDUSD's students that fall within this age group.

If SDUSD students under the age of 16 are injured as a result of the COVID-19 vaccine, they and their families will have no legal recourse against either Pfizer or the U.S. Government because the vaccine is currently authorized only for emergency use, which authorization provides blanket immunity to Pfizer and the FDA. While children over 16 who are injured as a result of the vaccine may have legal recourse against Pfizer, those who get vaccinated only because SDUSD requires them to do so could also pursue legal action against SDUSD and its individual board members. While we have not reviewed SDUSD's policy language, we suspect SDUSD's Directors and Officers liability insurance carrier may not indemnify individual board members for damages arising out of such for a decision because the board would be acting beyond the scope of its authority.

The Right to Informed Consent Should Not Be Ignored

A competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment. (*Cruzan v. Dir., Mo. Dep't of Health* (1990) 497 U.S. 261, 278.) California courts have long held that the right to refuse medical treatment is a constitutionally guaranteed right that must not be abridged. (*Bartling v. Superior Court* (1984) 163 Cal.App.3d 186, 195.) The imposition of a vaccine mandate infringes upon this right. "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." (*Washington v. Harper* (1990) 494 U.S. 210, 229.)

A mandate also interferes with an individual's federally recognized right to provide informed consent before proceeding with any medical procedure. A school imposed mandate turns COVID-19 vaccination into a coercive act, free of consent, because students who do not consent to vaccination for COVID-19 will have no option but to disenroll from SDUSD or enroll in an inferior online school that deprives them of an opportunity to receive in-person instruction. While some students may choose to attend online school or to enroll in independent study, California law is clear that a child cannot be forced into independent study; a family's selection of independent study for their child must be voluntarily and a family has an option to discontinue independent study at any time. (Educ. Code § 51747, et seq.)

A Vaccination Mandate Discriminates Against Students Who Have Recovered from COVID-19

According to CDPH, since 2020, at least 516,017 Californians aged 5 to 17 have been infected with and recovered from COVID-19. Vaccine mandates unfairly discriminate and effectively punish (through exclusion) these individuals.

⁶ SARS-CoV-2 mRNA Vaccination-Associated Myocarditis in Children Ages 12-17: A Stratified National Database Analysis, Tracy Beth Høeg, Allison Krug, Josh Stevenson, John Mandrola, medRxiv 2021.08.30.21262866; doi: <https://doi.org/10.1101/2021.08.30.21262866>.

Numerous recent studies support the conclusion that people who have recovered from COVID-19 may have more durable and long-lasting immunity to COVID-19 than individuals with vaccine induced immunity. A recent study of residents of Vo, Italy, showed that 98.8% of people infected with Covid-19 in early 2020 continued to show detectable levels of antibodies nine months after they recovered from the initial infection. An NIH-funded study published in *Cell Reports Medicine* found that the immune response of 254 COVID-19 survivors remained durable and strong over a period of 250 days after infection, supporting a finding that the body's T- and B-cells provide a sustained defense to reinfection. Finally, a recent Israeli study found that a vaccinated person is 92.8% protected from infection while an unvaccinated person who recovered from COVID-19 is 94.8% protected from re-infection. A recent study of Israeli healthcare workers demonstrated that individuals who have recovered from COVID-19 have up to 13 times greater immunity than those who are fully vaccinated and have never been infected with COVID-19.⁷ Thus, natural immunity is not inferior to vaccine induced immunity and should not be treated as such. A mandate would unfairly exclude many SDUSD students who have recovered from COVID-19 and have not been vaccinated and yet have immunity that is equal to or superior to that provided by a vaccine.

A COVID-19 Vaccination Mandate Would Infringe Upon SDUSD's Students' Fundamental Right to Bodily Integrity

“[I]t is well established that, as a general matter, minors as well as adults are ‘persons’ under the Constitution who are entitled to the protection provided by our constitutional rights.” (*Am. Acad. of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 334; *In re Roger S.* (1977) 19 Cal.3d 921, 927; see also *In re Scott K.* (1979) 24 Cal.3d 395.) Thus, SDUSD's students are entitled to fundamental rights, including the right of privacy, as provided by the California Constitution.

The right of privacy “guarantees to the individual the freedom to choose to reject, or refuse to consent to, intrusions of his bodily integrity.” (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 531-532.) “There is no dispute the right to bodily integrity is a fundamental right which limits the traditional police powers of the state in the context of public health measures under the federal and state Constitutions.” (*Coshov v. City of Escondido* (2005) 132 Cal.App.4th 687, 709.) While a state agency may exercise its police power to protect public health, it must do so only after establishing there is no alternative means to meet its objective. However, and importantly, SDUSD's board lacks authority to require a vaccination that has not been mandated by the California legislature or CDPH and is not required as a condition of attendance at other public schools throughout the state.

A COVID-19 Vaccination Mandate Would Also Infringe Upon SDUSD's Students' Fundamental Right to Education

The California Constitution guarantees a right to a free public education. Under the Fourteenth Amendment of the United States Constitution, “[no] State shall . . . deprive any person of life,

⁷ <https://www.science.org/content/article/having-sars-cov-2-once-confers-much-greater-immunity-vaccine-vaccination-remains-vital>

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const., amend. XIV.) “The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises.” (*Plyler v. Doe* (1982) 457 U.S. 202, 216.) Thus, courts treat as “presumptively invidious those classifications that disadvantage a ‘suspect class,’ or that impinge upon the exercise of a ‘fundamental right.’ With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” (*Id.* at 216-217.)

“A person may not be ... denied equal protection of the laws.” (Cal. Const., art. I, § 7, subd. (a).) The California Constitution thus prohibits the government from making a law, rule, or regulation that restricts the freedom of one group while not restricting the freedom of other similarly situated groups unless there is a rational basis connected to a legitimate governmental interest sufficient to justify the disparate treatment. Where “the disparate treatment has a real and appreciable impact on a fundamental right or interest,” strict scrutiny applies. (*Butt v. State of California* (1992) 4 Cal.4th 674, 685-686.)

A child’s right to public education is one such fundamental right or interest: “In view of the importance of education to society and to the individual child, the opportunity to receive the schooling furnished by the state must be made available to all on an equal basis.” (*Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880.) It is “well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts.” (*Butt, supra*, 4 Cal.4th at 685; see also Cal. Const., art. IX, § 5.) A COVID-19 vaccination mandate for SDUSD students would deprive children whose parents are not comfortable inoculating their child with a very recently approved or EUA-only (for children under 15) vaccine aimed at preventing an illness that is rarely dangerous for children, of equal access to education—and would thus be subject to strict scrutiny. SDUSD cannot possibly meet its burden of showing that a vaccine mandate for children – which is actually for the benefit of adults – that will ultimately bar some children from school, is reasonable or necessary when healthy children are not at high risk of serious illness and all adults (who are disproportionately at a much higher risk of serious illness from COVID-19) who work with children can get vaccinated to protect themselves.

SDUSD Cannot Justify the Burden of a COVID-19 Mandate to Support Such a Blatant and Serious Infringement of its Students’ Fundamental Rights

“When receipt of a public benefit is conditioned upon the waiver of a constitutional right, the government bears a heavy burden of demonstrating the practical necessity for the limitation.” (*Bagley v. Washington Township Hospital Dist.* (1966) 65 Cal.2d 499, 505.) In order to impose a COVID-19 vaccination requirement for its students, SDUSD would need to establish that: “(1) the condition reasonably relates to the purposes of the legislation which confers the benefit; (2) the value accruing to the public from imposition of the condition manifestly outweighs any resulting impairment of the constitutional right; and (3) there are no available alternative means that could maintain the integrity of the benefits program without severely restricting a

constitutional right.” (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 213.) SDUSD cannot meet this burden.

First, SDUSD cannot establish that a COVID-19 vaccination requirement reasonably relates to a student’s constitutional right to a free public education. While a mandate would likely increase the percentage of SDUSD students who are vaccinated for COVID-19, it is unreasonable to require families to inoculate their children for COVID-19 in order to attend SDUSD.

Second, the value of a COVID-19 vaccination mandate for SDUSD students is of little public benefit because children are rarely hospitalized and rarely die from a COVID-19 infection. Children are also less likely to spread COVID-19. Importantly, all children and adults ages 12 and up have an opportunity to get a COVID-19 vaccination if they and their families choose, and they are even able to obtain a vaccination at one of the many clinics on SDUSD school campuses.

Third, there are available alternative means for SDUSD to continue to provide its students with an in-person education without requiring all students to be receive a COVID-19 vaccine. Many SDUSD students have been back in school since April 2021, while nearly all SDUSD students recently returned to a full-time, in-person schedule, and the district has only identified one COVID-19 “outbreak” involving a few students out of approximately 99,000 students in SDUSD’s schools. Thus, a vaccination mandate is not necessary for students to continue to safely attend school.

Demand to SDUSD

On behalf of parents of SDUSD students, Let Them Choose respectfully demands that SDUSD decline to approve a COVID-19 vaccination requirement for its students. If SDUSD approves such a mandate, Let Them Choose will consider all available options, including a lawsuit to seek an injunction against SDUSD, preventing it from implementing a COVID-19 vaccine mandate and excluding students who choose to remain unvaccinated.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP



Arie L. Spangler

cc: Lee M. Andelin
Clients