

January 15, 2021

Via U.S. Mail and E-mail

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Re: Yuba City Unified School District Planned February 1, 2021 Hybrid In-Person Instruction Reopening for Grades 6-12

Dear Superintendent Osumi, Board President Riley, Vice President Takhar and Members of the Yuba City Unified School District Governing Board of Trustees:

This office represents Yuba City Teachers Association, CTA/NEA (“YCTA”) and I write in response to the Governing Board of Trustees’ (“Board”) January 12, 2021 decision to begin hybrid in-person instruction for Grades 6-12 on February 1, 2021. As evidenced by comments made by Board Members and District Administrators,¹ Yuba City Unified School District (“District”) is well aware that its decision

¹ During the January 12, 2021 Board Meeting, Board Member Nicolo Orozco stated his opposition to the Board’s decision to reopen was based, in part, on “not [being] comfortable voting against the advice of legal counsel [and] against the advice of the public health officer.” During the January 12, 2021 Board Meeting, Assistant Superintendent of Human Resources Michael Reed stated “On the secondary side, 6-12, we are still in negotiations as to how to return back in a hybrid model 6 through 12. One of the hang

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is prohibited by California Department of Public Health (“CDPH”) guidelines. As the Board’s actions have demonstrated that the District is intent on ignoring the advice of legal counsel, its professional education staff (both administrators and the certificated staff represented by YCTA), and the expert advice of the Bi-County Public Health Officer, please consider this letter YCTA’s demand that the District cease and desist from its plan to begin in-person instruction for Grades 6-12 on February 1, 2021 and its intention to violate CDPH guidelines.

At the outset, let us be clear that no one, least of all YCTA and the dedicated educational professionals it represents, believes that distance learning is an ideal educational model. It clearly is not. However, we cannot ignore the fact that we are in the midst of a deadly pandemic that has already taken the lives of nearly half a million of Americans, including over thirty thousand Californians – seventy-five of whom were part of the Sutter County community. Countless more have been hospitalized with serious complications, and many continue to live with the debilitating effects of this virulent disease long after their discharge from the hospital. This is an emergency, and emergencies call for emergency responses. And that is precisely what distance learning is: an appropriate response to an unprecedented public health crisis that balances the urgent need to ensure continued student learning with the equally urgent need to protect the lives and health of the District’s students, teachers, and staff—and all of their families and loved ones.

These concerns are even more acute now. As noted by Bi-County Public Health Officer Dr. Phuong Luu, and relied on by Superintendent Osumi in her recommendations to maintain distance learning: “Test positivity rates in [Sutter and Yuba Counties] are among the worst in the State: Sutter at 23.7% . . . According to State figures, Sutter County has an average of 86.6 new cases per 100,000 people.” Letter from Bi-County Public Health Officer Dr. Phuong Luu, December 23, 2020. As of January 14, 2021, Sutter County has an average of 54.2 new COVID-19 positive cases per day per 100,000 people and an 18.5% test positivity rate. To understand the severity of these figures, CDPH places a county in “Widespread” Purple Tier 1 when it has an adjusted case of >7 positive cases for every 100,000 people in the county and a positivity rate of $>8\%$ of all tests taken in the county. Blueprint for a Safer Economy, available at <https://covid19.ca.gov/safer-economy/>. Sutter County’s community spread places it at *eight (8) times the threshold for the Widespread Purple Tier 1 for new cases and more than double the threshold for test positivity* since December 2020. What’s more, the Board’s decision wholly ignores projections of a continued surge in cases as a result of holiday season gatherings with wishful thinking. The reality is that until vaccine distribution is ubiquitous, the danger of illness and death will persist. Contrary to President Riley’s callous remarks, the advice of the Bi-County Public Health Officer, in comparison to other local public health officers, is not “just like getting a diagnosis from the Doctor, [where] one will say you’ll be fine in three weeks and the other one says you’re going to die.” That expert advice is based on the specific circumstances impacting the Sutter County community.

Resuming in-person education under such circumstances is more than just gravely ill-advised. It is also in direct violation of governing CDPH guidelines. These legal rules prohibit the District from generally reopening its schools while Sutter County remains in the Purple Tier, as the County is now and will assuredly remain by the first week of February. The Blueprint for a Safer Economy provides “Schools in

up[s] that’s been there is that under the Purple Tier we are not to return back 6-12 for face-to-face learning so again we would need to know is the Board directing us to put a model together in the purple tier then we will do that because that is what the Board is directing us to do but I do think you should hear from legal counsel what problems would entail opening up in purple tier for 6-12.”

the Widespread (purple) tier aren't permitted to reopen for in-person instruction . . ." The District would not be legally permitted to reopen schools serving Grades 6-12 for in-person instruction until Sutter County had spent at least two weeks in the "Substantial" Red Tier. See, e.g., Aug. 3, 2020 CDPH School Guidance FAQs ("... a county must be in Red Tier (equivalent of being off the County Monitoring List) for 14 days for schools in that county to be eligible to reopen for in-person instruction."), available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Schools-FAQ.aspx> (CDPH August 3, 2020 Guidance.)

Be advised that despite the use of the word "guidance" in connection with these policies, the CDPH's rules are **mandatory**, and the Board has acted in breach of its fiduciary duty by directing the District to violate the law. Since March 2020, Governor Gavin Newsom has issued several Executive Orders requiring all Californians to heed and follow public health directives. See Executive Order N-25-20 ("All residents are to heed any orders and guidance of state and local public health officials . . . to control the spread of COVID-19"); Executive Order N-33-20 ("To preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability, all residents are directed to immediately heed the current State public health directives, which I ordered the Department of Public Health to develop for the current statewide status of COVID-19."); Executive Order N-60-20 ("All residents are directed to continue to obey State public health directives, as made available at <https://covid19.ca.gov/stay-homeexcept-for-essential-needs/> and elsewhere as the State Public Health Officer may provide."). Under the California Emergency Services Act, Government Code section 8567, these Executive Orders "have the force and effect of law" and are treated as statutes during a state of emergency. Consistent with the role in prescribing rules for implementing the Governor's Executive Order, the CDPH issued the rules that make up the "Blueprint for a Safer Economy," the tier framework and the restrictions associated with each tier.

In fact, guidance issued on January 14, 2021 makes clear these rules carry the force of law. CDPH's newest guidance expressly provides: "This guidance is a public health directive that applies to all public and private schools operating in California. Under operative executive order and provisions of the California Health and Safety Code, school must comply with orders and guidance issued by the California Department of Public Health and relevant local health departments (LHDs) to limit the spread of COVID-19 and protect public health." COVID 19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-2021 School Year, CDPH, January 14, 2021, pp. 3-4 ("January 14, 2021 CDPH Schools Guidance").² This newly issued and applicable mandatory guidance reiterates:

[I]f only some students were being served in-person in a school in a county in the Red Tier or lower (e.g., only students with disabilities) and all students in at least one grade did not have the option to return in-person as described above, the school has not "opened" or "reopened." In such circumstances, if the school is located in a county that shifts to the Purple Tier, the school may continue serving the students in-person as it did while in the Red Tier, but it may **not** bring additional students back for in-person instruction and services, unless it adheres to the Cohort Guidance for the students newly brought back in-person. . . .

² Available at:

https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Consolidated_Schools_Guidance.pdf

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January 14, 2021 CDPH Schools Guidance, p. 6 (emphasis included). New Purple Tier rules make even clearer that “Schools may not reopen for grades 7-12 if the county is in Purple Tier.” *Id.* at 8. Grade 6 may not reopen for in-person instruction for counties where the adjusted county case rate is above 25 cases per 100,000 people per day. *Id.* As indicated by the figures above, Sutter County’s current rate is far from meeting even this criterion. Furthermore, the new guidance also creates a plethora of new safety requirements, several of which have foreseeable negotiable effects that must be completed prior to implementation of any in-person instruction for Grades 6-12.

The Board’s decision would also leave the District vulnerable to liability should any member of its staff contract COVID-19 at the worksite or within the scope of their employment. The workers’ compensation bargain, in which the employer assumes liability for injury or death arising out of and in the course of employment without regard to fault and compensation, in exchange for limitations on the amount of liability, does not encompass conduct that contravenes a fundamental public policy or exceeds the risks inherent in the employment relationship. *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal. App. 4th 338, 366. Because the Board’s decision violates the Governor’s Executive Orders and the CDPH guidelines, it contravenes public policy and staff impacted by COVID-19 as a result of the Board’s decision will be able to institute civil actions whose monetary remedies will not be limited by the Workers Compensation Act.

Lastly, YCTA understands that the District began hybrid in-person instruction for Grades JK-5 while Sutter County was temporarily in the Red Tier, returned to Distance Learning for those grades in December 2020, and now plans to resume hybrid in-person instruction for those grades/sites on January 19, 2021. Given the January 14, 2021 CDPH Schools Guidance requirement that all schools comply with orders and guidance from local health departments, the District’s refusal to adhere to Dr. Luu’s December 24, 2020 letter strongly recommending that distance learning continue at minimum until Spring 2021 constitutes an additional violation of CDPH’s school reopening rules.

We hope that upon due consideration the District will recognize that its planned move to hybrid in-person instruction for Grades 6-12 on February 1, 2021, must be reconsidered. It is not only the wrong step at the wrong time, but also prohibited by governing CDPH guidelines. As is made clear in the State’s COVID-19 guidelines, that step must wait until Sutter County has been in the Red Tier for at least fourteen days. We hope that this public health emergency ends soon and that the County is removed from the Purple Tier such that the District may once again consider a general resumption of in-person instruction. But we are not there yet— and will certainly not be there by February 1, 2021.

Please let us have the District’s written confirmation, not later than the close of business on Wednesday, January 20, 2021, that the District will not proceed with its scheduled move to in-person instruction for Grades 6-12 on February 1, 2021. Please be advised that Yuba City Teachers Association reserves all rights in this respect and will not hesitate to exercise the same.

Sincerely,



Bryan Lopez, CTA Staff Counsel

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CC: Dina Luetgens, President, Yuba City Teachers Association, CTA/NEA (via E-mail only)
Kelly Kohtz, CTA Staff Representative (via E-mail only)
Dr. Phuong Luu, Bi-County Public Health Officer, Yuba County and Sutter County (via U.S.
Mail and E-mail)