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Via E-mail

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Re: Tentative Agreement for Spring In-Person Intervention and District's Legal Liabilities

Dear Superintendent Duffy, Dr. Wold, and District Trustees:

We are all lawyers who are committed to supporting the public-school system and write this letter in our personal capacity—as WCCUSD parents—to express our deep concern about the tentative Voluntary Spring In-Person Intervention Plan (the "Plan") between the District and its six labor unions (the "Unions").

We appreciate that the District has been working hard to come up with an implementable plan that will be agreeable to its Unions while serving the critical needs of students. However, the legal infirmities in this tentative Plan are so abundant that the only rational explanation can be that the District has not had the benefit of legal counsel while negotiating the Plan. Thus, we feel compelled to inform you of these issues so that the District can make an informed decision to change course before it ratifies the Plan and faces a rush of litigation. We would much rather see the District's limited resources put towards developing and implementing a legally sound plan than defending an unlawful one.

The following are just a few of the issues that we have identified upon our initial review of the Plan. **Given the myriad issues with the Plan, we urge you to immediately return to the bargaining table with a meditator to negotiate a legally compliant Memorandum of Agreement ("MOU") that (1) enables the District to capture all AB/SB 86 funds (2) incorporates the latest science around 3-foot distancing and cohorts of 14 children, and (3) does not violate the fundamental constitutional rights of the students in this district.**

A. The Plan Fails to Satisfy the District's Duty to Provide In-Person Instruction

The Plan's assertion that "*distance learning shall remain the primary mode of instruction within the current schedule through the end of the regular 2020-2021 school year*" violates state law.

In California there is a constitutional right to free education in public schools. Cal. Const. art. IX, § 5. The default is that this education is to be provided to students in-person and extends beyond mere access to appropriate curriculum but to "practical training and experience – from communicative skills to experience in group activities." The requirement thus includes access to socialization and collaborative work with others to learn the lessons of "justice, fair play, and good citizenship" that come from in-person interactions.[1] Despite in-person education being the default under the law, the state legislature further enacted Senate Bill 98 (SB 98), which establishes the limited parameters by which California schools may fulfill their constitutional duties during the COVID crisis. In short, SB 98 establishes ***only two limited circumstances*** under which a school district can authorize remote learning:

1. On a local educational agency or schoolwide level as a result of an order or guidance from a state public health officer or a local public health officer.[2]

2. For 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.[3]

Simultaneously, the legislature has mandated that school districts offer in-person education. Specifically, Education Code § 434504 (b) states that school districts "***shall*** offer in-person instruction to the ***greatest extent possible***."[4]

In short, a school may utilize distance learning as the means to fulfill its statutory duties (and receive its funding) so long as the state or local public health officer requires the school to be closed. In the absence of a public health closure order, the school may continue to provide remote education ***only*** for medically fragile, at risk individuals, or individuals who

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[1] *Hartzell*, 35 Cal. 3d at 908 (finding that charging fees for educational extracurricular activities violated the free school guarantee to students).

[2] Educ. Code § 43503 (A)

[3] Educ. Code § 43504 (B).

[4] The term "in-person instruction" means "instruction under the immediate **physical** supervision and control of a certificated employee of the local educational agency while engaged in educational activities required of the pupil."

are self-quarantining because of exposure to COVID-19.[5] For the remaining student body, the school is required by law to provide in-person instruction to the ***greatest extent possible***.

That the Plan only allows for cohorts of ten students (state guidance established this number to be 14 students) premised on a distance of six feet between desks when the CDC's new guidance, which California has now adopted, allows for three feet, is illustrative of its failure to provide in-person instruction to the greatest extent possible. Moreover, the District has tacitly admitted that the Plan fails to satisfy its obligation under the Education Code given Superintendent Duffy's statement to the press on Friday that he "[doesn't] think the agreement goes far enough to get more students into schools for more time."[6]

While the California Department of Health framework obligates the school to consult with "labor, parent, and community organizations" before announcing an intent to reopen, California law does not require the school to negotiate with labor unions on whether it can reopen because the law already compels it. Furthermore, the California Education Employees Relations Act ("EERA") limits collective bargaining to "matters relating to wages, hours of employment, and other terms and conditions of employment." Gov. Code § 3543.2(a)(1). But a school district is not obligated to negotiate how a school must reopen because that is already prescribed in law and this law supersedes any labor contract. As the EERA states, "all matters not specifically enumerated are ***reserved to the public school employer*** and may not be subject of meeting and negotiating" and furthermore it plainly states that collective bargaining "shall not supersede other provisions of the Education Code" such as those listed above under SB 98. Even considering "safety conditions of employment", vast scientific evidence demonstrates that returning to schools under the metrics approved by the CDC and California Department of Health are safe. The Plan clearly sets out safety parameters that are much more stringent than those required, or even recommended, by state or federal health experts to reopen.

As the California Supreme Court noted in a ruling on a case involving this very school District, given 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

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[5] Contra Costa County entered the red tier on March 14. The County's local public health officer has stated that "elementary and secondary schools can reopen for in-person learning without submitting a safety plan to Contra Costa Health Services." And under the state's guidance, Contra Costa County has been cleared for its schools to "reopen fully for in person instruction." *See* California Blueprint for a Safer Economy, *available at* https://covid19.ca.gov/safer-economy (last visited 3/21/21).

[6] *See* Ali Tadayan @ EdSource Ali, March 19 tweet quoting Superintendent Duffy.

an equal basis...." *Butt v. State of Cal*. (1992) 4 Cal. 4th 669, 680. Accordingly, the District's failure to make in-person instruction available to *all* of its students, while surrounding Districts, including those with similar student populations, have done so, further demonstrates that the District's failure to comply with the law deprives its students of its constitutional right to free education. *See id, at* 703–04 (acknowledging that the RUSD's "financial inability to complete the final six weeks of its 1990–1991 school term threatened to deprive District students of their California constitutional right to basic educational equality with other public school students in this State.")[7]

B. The Plan's Attempt to Capture AB/SB 86 Funding Will Likely Fail, Resulting in the School Losing Millions in Funding

The Plan states that "AB86 funding . . . is necessary" for its implementation. However, it is apparent that the Plan will fail to qualify for much of the funding. A total of $2 billion in "In-Person Instruction Grants" have been made available to schools with an expected $9 million dollars to be available to WCCUSD.[8] To qualify for the funds, the District must plan to reopen by April 15th for *all* students in K-6 and at least one grade in middle school and one in high-school.[9] The school District would surrender 100% of these funds under the proposed Plan given that no in-person instruction would be offered to all students in any grade.

Although there is an additional $4.6 billion in Expanded Learning Opportunities Grants made available through AB/SB 86, and the District estimates $20 million could come to the school, the Plan's unnecessary limitations on how many students can access the program, the voluntary nature of participation by teachers and staff, and omission of the large population of students "eligible for free or reduced-price meals," will preclude the District from accessing some, if not all, of this funding. The District's estimate that it could receive $20 million is premised on nearly all students accessing the programs funded by the grants. In WCCUSD, the supermajority of those students fall under the category of "eligible for free or reduced-price meals (the school estimates that this is 65 percent of the student body)."[10]

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[7]The RUSD has since become the WCCUSD.

[8] WCCUSD, COVID-19 and Schools Legislative and Health Context, available at https://simbli.eboardsolutions.com/Meetings/Attachment.aspx?S=36030499&AID=104871&MID=5928 at Slide 5.

[9] Legislative bill analysis of AB 86, *available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220AB86#.

[10] Ali Tadayon & Sydney Johnson, California Schools Build Local Wireless Networks to

Yet, the Plan does not prioritize these students with limited income backgrounds for a return to in-person education, nor does it guarantee that any portion of these students, let alone all of these students, can access the programs offered in the Plan. Further, given that the Plan is premised on volunteerism, there is no way of knowing how many students can participate if the school employee population is subject to change. Thus, the prediction that the District will receive any money from this program, let alone the $20 million cited, will not come true under the Plan.

C. The Plan as Drafted Puts the District's Federal Funding at Risk and Violates the 14th Amendment

We appreciate that the District and Unions sought to promote equity—a value shared by the authors of this letter—when including African American students among those given first priority to return to campus, along with several other race-neutral categories of students. We recognize that the long legacy of anti-Black racism in housing, lending, education and other institutions in this country have lasting impacts today and that special supports and benefits targeted specifically to Black communities can be necessary to truly achieve equity.

Unfortunately, the law creates enormous hurdles for public institutions wishing to provide such targeted support. By singling out one race in the definition of "high need students", the District is at risk of losing Federal funding and worse yet would open the District up to serious liability under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the U.S. Constitution. Title VI of the Civil Rights Act of 1964 protects people from discrimination based on race, color or national origin in programs or activities that receive Federal financial assistance. Title VI states that:

> *No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*

School districts that receive Federal funds must operate in a non-discriminatory manner and program such as academic programs, student treatment and services, counseling and guidance, recreation, physical education, and athletics cannot include a racial preference or exclude students from participating based on their race, if the program affects those who are intended to benefit from the Federal funds.

Bridge Digital Divide, EdSource (Jan. 4, 2021), *available at* https://edsource.org/2021/california-schools-build-community-wireless-networks-to-bridge-digital-divide/645919.

In addition, the U.S. Department of Education Office for Civil Rights affirmed in recent guidance[11] that race is not an acceptable criterion for prioritizing students for return to in-person instruction.

Question 1:

As school districts phase in the use of physical facilities and in-person instruction as a part of their reopening plans, may they prioritize students' return to in-person instruction based on their race, color, or national origin?

Answer:

No. A reopening plan—or any school policy—that prioritizes, otherwise gives preference to, or limits programs, supports or services to students based on their race, color, or national origin— regardless of how that plan is formulated—would likely violate Title VI of the Civil Rights of 1964.[12] Under U.S. Supreme Court precedent, any classification based on race is presumptively invalid unless the classification satisfies strict scrutiny.[13] This means that such classifications are constitutional only if they are narrowly tailored to further a compelling governmental interest that has been recognized by the U.S. Supreme Court.[14] As part of the narrow tailoring requirement, school districts bear the "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."[15]

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[11] USDOE, Department of Civil Rights, Questions and Answers for K-12 Public Schools in the Current COVID-19 Environment (Sept. 28, 2020), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-covid-20200928.pdf

[12] *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (discrimination that violates Equal Protection Clause of Fourteenth Amendment committed by institution that accepts federal funds also constitutes violation of Title VI).

[13] *See Shaw v. Reno*, 509 U.S. 630, 643-44 (1993) (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979)); *Gratz*, 539 U.S. at 270.

[14] *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720–22 (2007) (noting that in evaluating the use of racial classifications in the school context, the Court has recognized two interests that qualify as compelling: "remedying the effects of past intentional discrimination" and "diversity in higher education").

[15] *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 312 (2013); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (city's use of race was not narrowly tailored

While the Plan notes that African American students "have historically been the lowest performing student group in the District," this is not enough to withstand strict scrutiny. The Plan does not purport to remedy any past intentional discrimination by the District under *Parents Involved in Community Schools*. Nor does the Plan show that the District considered race-neutral alternatives in accordance with *Fisher* and *City of Richmond*. We urge the District to seek legal guidance and/or assistance from the Office of Civil Rights to ensure that its reopening plan does not jeopardize its Federal funding or run afoul of these constitutional requirements.

D. <u>Mandatory Asymptomatic Testing of Students</u>

While we understand why the District and the Unions agreed to include asymptomatic testing as part of the Plan, the fact that the Plan requires "mandatory asymptomatic" testing of students without regard to public health guidance as to what is required for safety at the current level of community spread is problematic. Although the California Coronavirus COVID-19 Testing Task Force "School Testing Cadence" provides that asymptomatic testing of students may be appropriate while the County is in the Red Tier, asymptomatic testing is not indicated once a County enters the Orange tier.

Further, although CDC guidance generally supports the testing of students in K-12 schools, it also makes clear that testing should be offered to students on a ***voluntary*** basis and states unequivocally that "it is unethical and illegal to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested." *See* https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-testing.html (last visited 3/20/21).

If the District were to require students to undergo mandatory testing as a condition of being on campus (to participate in an academic cohort or to receive IEP services), it could face any number of claims. *See, e.g., In re William G* (1985) 40 Cal. 3d 550, 563 (acknowledging that a student always has the highest privacy interest in his or her own person). Public health officials have set the standards as to what is required to protect the school community against the spread of COVID-19, and those science and evidence-based standards should not be subject to negotiation, particularly when stricter standards risk legal liability.

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because "there [did] not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting") (citing *U.S. v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including . . . the efficacy of alternative remedies . . . ")).

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In addition to putting the educational needs of the 29,000 students first, you each have a fiduciary duty to protect the legal and financial interests of the District. The fallout of the District's massive bankruptcy in the 1990-1991 school year, including the fact that a grand jury concluded the then school board was ultimately responsible for the District's financial collapse, should serve as a stark reminder, particularly to the Trustees, of your obligation to make fact-based and legally-sound decisions.

Given the foregoing, we urge you to immediately consult with counsel, obtain a mediator, and resume negotiations for a legally compliant MOU (incorporating the 3 foot, 14 children cohort guidance, and in-person instruction to the greatest extent possible) to actually enable the District to capture critical AB/SB 86 funds. Finally, while we are hopeful that the District will act accordingly, please be advised that if this Plan is implemented there are numerous parents who stand ready to seek formal legal representation to protect the fundamental rights of their children. If you wish to relay any responses, please contact Ernesto Falcon who has distributed this letter to you, as he has agreed to serve as the attorney parent point of contact for the lawyer parent community in WCCUSD.

Sincerely yours,

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WCC Safe Open Schools

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