

February 15, 2021

Brent Stephens, Superintendent
Ty Alper, Board President
Berkeley Unified School District
2020 Bonar Street
Berkeley, CA 94702
Via email: brentstephens@berkeley.net and tyalper@berkeley.net

Re: Legal Duty to Reopen Schools

Dear Superintendent Stephens and President Alper:

Thank you for your efforts to shepherd the Berkeley Unified School District during these difficult times. We are a group of lawyers who are parents of students enrolled in the District. As you have acknowledged, Berkeley's children are suffering adverse academic, social, developmental, and mental health effects from the extended failure to reopen our schools.

We write because the District appears to be operating under misunderstandings about its legal duty to provide in-person instruction. These misunderstandings stem from the District's misreading of legal requirements and public health guidance regarding social distancing, and its fear that the teachers' union may file grievances or walkout if required to return to work. As will be further explained below, because the public health closures have been rescinded for grades TK-6, neither social distancing guidance nor fear of union action provides a legal basis to keep schools closed. To the contrary, the District is legally obligated to *open those grades immediately for five days per week in-person instruction*. Indeed, the California Education Code, the state Constitution, the District's own written policies, and even its existing contracts with teachers are uniformly in agreement on this point.

You admitted at the February 11 Town Hall that under the most recent California Department of Public Health guidance, the District need only make a "good faith" attempt to provide six feet of distance between students and teachers. That guidance, as well as the pronouncements from Cal/OSHA and the CDC, expressly permit operations even if less distance is available. Fortunately, our elementary school classrooms are large enough to permit sufficient distancing. Your own Elementary School Reopening Readiness Dashboard has long shown that compliance with this spacing guidance has already been completed.

The union has no legal right to bargain about whether it will comply with state law, District policy, and its own contract requiring in-person five-day work, now that the public health agencies have lifted the closure orders. The union's rights are constrained by the laws under which the District operates. Just as the union could not demand to negotiate whether its members must teach students of different ethnicities or genders, it cannot demand to negotiate when schools will be open for in-person education.

The “hybrid” model you propose to slowly ramp up for grades TK-6 is insufficient as a practical matter, and even more burdensome for some families than distance learning. But more important for the purpose of this letter, it is inadequate *legally*. Continuing on the present course opens the District to substantial liability. We urge you to change course.

State-Law Duty to Offer Classroom-Based Instruction

SB 98 and the District’s Learning Continuity Attendance Plan

To ensure the continuity of education during the COVID-19 pandemic, California enacted Senate Bill 98 (“SB 98”) in June 2020. Senate Bill 98 amended and added various provisions to the California Education Code to clarify the obligations of Local Education Agencies (LEAs), such as the District, during the pandemic.

Under SB 98, remote learning may be offered in two circumstances: “(A) 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;” or “(B) 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.” Cal. Ed. Code § 43503(a)(2). Except where those conditions are met, “[a] local educational agency *shall* offer in-person instruction *to the greatest extent possible*.” *Id.* § 43504(b) (emphasis added).

SB 98 also required each LEA to adopt, no later than September 30, 2020, a “Learning Continuity and Attendance Plan” (“LCAP”) via a public process including notice and hearing. Cal. Ed. Code § 43509(b). The District held several School Board meetings and adopted its plan on September 16, 2020, in which it declared that “**Our district’s top priority for learning is to return to a standard school model, with all students in class five days per week. When the standard school model is not permissible by Departments of Public Health, the Hybrid Model mode of instruction will be prioritized over distance learning.**” (Emphasis added).¹ This plan commits the District, as state law requires, to reopen schools in person for the standard school model of five-day-per-week instruction, as soon as public health agencies permit it. Superintendent Stephens reaffirmed in his email of February 9 that “**The District’s position is that students should return to campus and in-person learning as soon as public health officials determine that it is safe to do so.**” (Emphasis in original).

The District is violating its duty to offer in-person instruction “to the greatest extent possible,” Cal. Ed. Code § 43504(b), as well as the requirements of its own LCAP adopted under section 43509. While public health officers initially required schools to close for in-person instruction, neither state nor local public health officials currently require remote

¹<https://www.berkeleyschools.net/wp-content/uploads/2020/09/BUSD-LCP-Final-2020.pdf>

learning in Berkeley for grades TK-6. Nor can the District show that every student in the District is medically fragile, at-risk, or self-quarantining.

Public Health Pronouncements

On January 14 of this year, pursuant to authority granted by statute and the California governor, the California Department of Public Health adopted the COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-2021 School Year (“CDPH Framework”).² That document provides that “Schools serving students in grades K-6 may not reopen for in-person instruction in counties with adjusted C[ase] R[ates] above 25 cases per 100,000 population per day. They may post and submit a [Covid-19 Safety Plan (“CSP”)], but they are not permitted to resume in-person instruction *until the adjusted CR has been less than 25 per 100,000 population per day for at least 5 consecutive days.*” (Emphasis added). Under the CDPH Framework, **“Schools serving grades K-6 not already open, may reopen for in-person instruction if the LEA completes and posts a CSP to its website homepage and submits the CSP to their L[ocal] H[ealth] D[e]partment and the State Safe Schools for All Team and does not receive notification of a finding that the CSP is deficient within 7 business days of submission.”** The January 25, 2021 Order of the Health Officer of the City of Berkeley, which governs the District, provides that “TK-12 schools ***must comply*** with the requirements of the Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California.”³

The adjusted case rate is now below 25 cases per 100,000 in Alameda County (as of February 12, 2021, this rate was 18.1 in Alameda County and has been declining for several weeks). On February 1, pursuant to the CDPH Framework, the District posted and submitted its CSP to reopen in a hybrid model, in which it certified the dates of its consultations with unions, parents and community groups.⁴ Not only did the public health authorities not make a “notification of a finding that the CSP is deficient,” but, as Vice Mayor Lori Droste wrote in an email to all Berkeley residents on February 10, **“[O]ur public health official and City of Berkeley COVID-19 team have determined that TK-6 schools are able to open safely as of this week.”**

At the Town Hall, Superintendent Stephens identified two obstacles to reopening: (1) the 6-foot social distancing guidelines, and (2) the lack of “agreement” from labor unions about working conditions, which could lead to grievances or work stoppages. Neither provides

²https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Consolidated_Schools_Guidance.pdf

³https://www.cityofberkeley.info/uploadedFiles/Health_Human_Services/Public_Health/covid19/COB-health-order-n21-01-covid19-risk-reduction.pdf

⁴<https://www.berkeleyschools.net/wp-content/uploads/2021/01/BUSD-School-Reopening-Plan-for-Alameda-County-01.05.21.pdf>; <https://www.berkeleyschools.net/wp-content/uploads/2021/02/BUSD-Attachment-to-CDPH-COVID-19-School-Guidance-Checklist-02.01.21.pdf>

any basis to violate the clear statutory requirement, embodied in the District's own LCAP, to reopen elementary schools in full now that the closure order has been rescinded. It appears that on these issues, the District has made two legal errors which have led to serious delays. First, it incorrectly assumed that the only way to comply with social distancing guidelines in elementary schools was to limit attendance with a "hybrid" model where only some students would be present. Then, because the "hybrid" model would change the teachers' work duties, it incorrectly assumed that it had to bargain with the union about the "thresholds" for reopening in the hybrid model, giving the union an effective veto power. Both assumptions are legally and factually wrong, as are the conclusions that the District drew from them.

Social Distancing Guidelines

As an initial matter, there is no requirement that students be six feet apart, and even if there were, the District could comply without limiting elementary attendance via a hybrid model. The CDPH Framework only requires, as Superintendent Stephens acknowledged, a "good faith effort" to achieve six feet of distance. Its minimum requirement is that "Under no circumstances should distance between student chairs be less than 4 feet." Short-term interactions are also excepted, if students and teachers are masked. An LEA must make an effort to "consider all outdoor/indoor space options and hybrid learning models." But "considering" those models does not mean "adopting" them, when they fail to meet other requirements of state law. The hybrid models you outlined recently demonstrate the problem. The District's months-long efforts to develop these proposals demonstrate it has made the good faith-effort to meet the suggested social distance of six feet. But one model offers students only four hours per week of instruction in person and continued distance learning on other days. This amounts to less than a single instructional day in person. The other model is no better, offering students two days on campus for close to full-time but nothing at all on any other days of the week. This paltry amount of in-person instruction does not satisfy students' right to a public education. If it is not possible to maintain six feet of separation in Berkeley's classrooms, then the District must only adhere instead to the minimum of four feet separation.

The CDPH Framework includes a "Covid-19 School Guidance Checklist" that makes clear that the District may reopen even without maintaining six-foot distance in classrooms; it requires each LEA to state the minimum social distance it will guarantee and "If this is less than 6 feet, please explain why it is not possible to maintain a minimum of at least 6 feet." The District's February 1 CSP answered that question as follows: "We will always work to obtain 6 feet or more of physical distance when possible. If in the event this can't be met, it would be due to physical and size constraints in the room. In this instance other risk mitigation strategies will be implemented." As noted above, neither the local nor state public health authorities noted any deficiency in this response within the seven-day comment period. The Cal/OSHA Model Covid-19 Prevention Program Guidelines similarly instruct employers to state that "*Where possible*, we ensure at least six feet of physical distancing at all times in our

workplace.... Individuals will be kept as far apart as possible when there are situations where six feet of physical distancing cannot be achieved.” (Emphasis added).⁵

The District can comply with all these guidelines (and indeed, with a six-foot “rule” if one existed) even with full reopening. We are blessed with elementary school classrooms that are more than big enough to hold the number of students expected to return. Our elementary school classrooms are typically around 960 square feet (1350 square feet in kindergarten).⁶ Our average class sizes are between 20-22 for grades TK-4 and 25-26 for grades 5-6.⁷ Even if *all* children return to in-person education, there is sufficient space: a 900-square foot room can hold 30 people with six feet of distance between each of them. Thus, the need for social distancing does not justify use of the hybrid model or the failure to reopen in full.

Union Grievances

Second, the union has no right to bargain about whether the District fulfills its legal obligation to return to in-person education. It is true that the CDPH Framework obligates an LEA to “consult with labor, parent, and community organizations” before announcing an intent to reopen. But the District has been engaged in “consultations” for more than a year, as it certified in its February 1 CSP. Superintendent Stephens was fundamentally mistaken when he wrote in his February 9 email that “California law requires that public school districts negotiate with our labor partners *with respect to the thresholds for reopening schools*, even if public health guidelines state that it is safe to reopen.” The union cannot protest about doing the job its members agreed to do: teach in person. While a hybrid model might create new teacher duties not anticipated by the existing CBA, a return to the traditional school model does not. There may be a small number of new terms and conditions of employment related to the return to in-person schooling about which the District must negotiate in good faith (e.g., the teachers’ obligation to wear masks, or to ensure that children wash hands after recess), but these must be undertaken *within the framework of the District’s legal obligations to reopen now*, not as a basis to *avoid or delay* reopening.

California’s Education Employees Relations Act (“EERA”), which Superintendent Stephens cited at the Town Hall as a risk if the District moves forward with reopening, does not change the analysis. The EERA limits what collective bargaining may encompass to “matters relating to wages, hours of employment, and other terms and conditions of employment.” Gov. Code § 3543.2(a)(1). The EERA does not include “thresholds for reopening schools.” Pursuant to Government Code section 3542(a)(2), “All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating.”

⁵https://www.dir.ca.gov/dosh/dosh_publications/ CPP.doc

⁶https://www.berkeleyschools.net/wp-content/uploads/2016/06/160615_BUSD-Presentation-1.pdf?718535

⁷<https://www.berkeleyschools.net/wp-content/uploads/2019/11/2019-Class-Size-Report-Appendix-A.pdf>

The EERA also makes clear that collective bargaining “shall not supersede other provisions of the Education Code,” such as those in SB 98 discussed above.

The union, like the District (and like all who live and work in Berkeley) is subject to the dictates of the Berkeley Health Officer, which as noted above, stated that schools “must comply” with the CDPH Framework. It is that order, adopted under California Health and Safety Code sections 101475 and 120295, which provides the thresholds for reopening under California law, not the unsupported and unscientific standards being pushed by union leadership. Section 16.2.2 of the collective bargaining agreement also limits the union’s rights to create its own “safety” standards, providing that “When the Safety Committee [made up of union and District representatives] determines that due to infectious diseases...a student poses *undue danger* to his/her teachers, other students, or staff within a school, the Safety Committee shall recommend procedures to exclude said student from classes, *consistent with legal requirements.*” (Emphasis added).⁸ Certainly the District is not permitted to ignore its duties to provide in-person education based on the *possibility* or *threat* of unjustified union action.

Constitutional Right to Education

The District’s current conduct not only violates the District’s own policies and state law, but infringes upon students’ constitutional right to a free public school education. The state constitution requires a “system of common schools” that are “kept up and supported” such that students may learn and receive the “diffusion of knowledge and intelligence being essential to the preservation of the[ir] rights and liberties.” Cal. Const. art. IX, §§ 1, 5. “The advantage or benefit thereby vouchsafed to each child, of *attending a public school* is, therefore, one derived and secured to it under the highest sanction of positive law.” *Ward v. Flood*, 48 Cal. 36, 50 (1874) (emphasis added). This fundamental right is not limited to academic subjects, but instead extends to “the practical training and experience – from communicative skills *to experience in group activities* – necessary for full participation in the ‘uninhibited, robust, and wide-open’ debate that is central to our democracy.” *Hartzell v. Connell*, 35 Cal. 3d 899, 908 (1984) (emphasis added) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

A deprivation of the right to education is subject to judicial “strict scrutiny.” *Butt v. State*, 4 Cal.4th 668, 685-86 (1992). Strict scrutiny means that the government must have a *compelling interest* in pursuing its policy, and that the policy is *necessary* to effectuate that interest. *Serrano v. Priest*, 5 Cal. 3d 584, 597 (1971). The District will not be able to satisfy strict scrutiny with regard to its decision not to immediately reopen grades TK-6 for full in-person instruction. Avoiding the *possibility* of a union grievance is not a “compelling” interest, particularly when the grievance would be inconsistent with the union’s own contract and the Education Code sections that govern the District’s responsibilities. Nor could the decision be said to be “necessary” to protect public safety, when no public health guideline strictly requires

⁸<https://www.berkeleyschools.net/wp-content/uploads/2017/08/BFT-CBA-201719-COMplete-v9.pdf> The 2017-19 contract terms were readopted for 2019-21.

six feet of social distancing, and when in any event elementary classrooms are large enough to provide sufficient distancing for all students who would return. In *Butt*, the California Supreme Court found a Richmond School District's six-week school closure to violate our Constitution, because it caused a real and appreciable impact on the fundamental right to an education and adversely affected students in Richmond in comparison to those in other districts. That was true even though the closure was not motivated by any intent to discriminate, and even though it affected school children of all races and socioeconomic statuses within Richmond. 4 Cal. 4th at 685-86.

The facts here are strikingly similar, if not more compelling. Other districts throughout the state have returned to in-class education, including several districts in the Bay Area. And within the City of Berkeley, private schools are fully open, even though public and private schools are subject to the same public health ordinances. In a presentation on January 20 of this year, Superintendent Stephens acknowledged that "The data still indicates that the distance learning over the course of the pandemic is having a real effect on the learning of African American students. The single most important element of supporting our families, including our Black families, is getting our schools back open. This [distance learning] is not working well and in a supportive manner for Black students."⁹ In these circumstances, we believe that the continued failure to reopen grades TK-6 in full will be deemed to violate the state constitution. *See also* Cal. Const. art. I, § 7; art. IV, § 16 (equal protection clause).

We acknowledge that once the schools reopen for in-person instruction, as is legally required, the District will need to make other policy decisions. Teachers whose health issues make them unable to return in person might be reassigned to provide homeschooling or distance-learning resources to families that decide not to have their students attend in person. The District might also decide to use livestreaming or other tools, as has been successful in many other school systems, so that those at home can join with those physically in the classroom. But what the District may not do is rely on the desires of some families or teachers or union leaders to stay home, to deprive other students of their right to an in-person education.

Parenting is not done from a distance. We live with kids and see up close the toll remote learning is having on their academic skills and emotional well being. Public health officials and California law mandate an immediate return to school, and Berkeley's kids need to go back to school.

The District must therefore come into compliance with state law and its own written LCAP and contracts. It must immediately refile a new CSP, in which it gives notice of its intent to immediately reopen grades TK-6 in full, and of its further intent to reopen other grades as soon as public health orders permit it to do so. And it must proceed with such reopening unless the public health authorities provide a notice of deficiency within seven days thereafter.

⁹<https://www.dailycal.org/2021/02/04/berkeley-school-district-attempts-to-support-black-students-as-pandemic-continues/>

Brent Stephens
Ty Alper
February 15, 2021
Page 8

We look forward to discussing these issues with you as soon as possible.

Sincerely yours,

Lisa Frydman (Ruth Acty Elementary and King Middle)

Marnie Ganotis (Ruth Acty Elementary)

Adam Gutride (Emerson Elementary)

Rob Schwartz (Berkeley Arts Magnet)

George Torgun (Malcolm X Elementary)

Julian Waldo (Ruth Acty Elementary)

cc: Berkeley Mayor Jesse Arreguin (via email: jarreguin@cityofberkeley.info)
Berkeley Vice Mayor Lori Droste (via email: ldroste@cityofberkeley.info)
Berkeley City Attorney Farimah Brown (via email: fbrown@cityofberkeley.info)
BUSD Board Vice President Ka'Dijah Brown (via email: kadijahbrown@berkeley.net)
BUSD Board Clerk Julie Sinai (via email: juliesinai@berkeley.net)
BUSD Board Director Laura Babitt (via email: laurababitt@berkeley.net)
BUSD Board Director Ana Vasudeo (via email: anavasudeo@berkeley.net)
BUSD Board Student Director Miles Miller, (via email: milesmiller@students.berkeley.net)
BUSD Board Student Director Ajeliya Phyunal (via email: ajeliyaphnuyal@students.berkeley.net)