No. 22-

IN THE

Supreme Court of the United States

MATTHEW BRACH; JESSE PETRILLA; LACEE BEAULIEU ERICA SEPHTON; KENNETH FLEMING; JOHN ZIEGLER; ALISON WALSH; ROGER HACKETT; CHRISTINE RUIZ; Z.R.; MARIANNA BEMA; ASHLEY RAMIREZ; TIFFANY MITROWKE; ADE ONIBOKUN; AND BRIAN HAWKINS,

Petitioners,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF CALIFORNIA; ROB BONTA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA; TOMAS J. ARAGON, IN HIS OFFICIAL CAPACITY AS THE STATE PUBLIC HEALTH OFFICER AND DEPARTMENT OF PUBLIC HEALTH DIRECTOR; AND TONY THURMOND, IN HIS OFFICIAL CAPACITY AS CALIFORNIA SUPERINTENDENT OF PUBLIC INSTRUCTION AND DIRECTOR OF EDUCATION,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like most states, California has empowered its governor with emergency authority that enables imposition of a swift and wide-reaching response to threats against public health. Throughout the COVID-19 pandemic, California Governor Gavin Newsom wielded—and continues to wield—these emergency powers extensively. He took actions unprecedented in modern times, including imposing "stay-at-home" restrictions and ordering the closure of schools, churches, public beaches, and many businesses.

Citizens in California and across the country have brought scores of legal challenges to state governors' exercise of their emergency powers. But resolution of these lawsuits has been inconsistent, depending on where in the country they were filed.

Specifically, the Circuits are split as to when challenges to such restrictive measures become moot under Article III's case or controversy requirement. Two Circuits have held that a challenge to emergency executive action does not become moot—even if the challenged restrictions have been repealed—so long as the *declaration of emergency* remains in effect. By contrast, the Ninth Circuit held here that a case is moot once the governor rescinds the challenged restrictions, *even though* the emergency declaration remains in effect and the governor could reimpose the restrictions at any time.

The question presented is:

Is a case moot under Article III's case or controversy requirement when the governor rescinds the offending policy after it is challenged in court, but the declaration of emergency remains in place and the governor retains the authority to reinstate the policy?

THE PARTIES

Petitioners are Matthew Brach, Jesse Petrilla, Lacee Beaulieu, Erica Sephton, Kenneth Fleming, John Ziegler, Alison Walsh, Roger Hackett, Christine Ruiz, Z.R., Marianna Bema, Ashley Ramirez, Tiffany Mitrowke, Ade Onibokun, and Brian Hawkins. Petitioners are fourteen parents and one student who were affected by executive action that shut down a majority of schools in California during the course of the COVID-19 pandemic.

Respondents are Gavin Newsom in his official capacity as Governor of California; Xavier Becerra in his official capacity as Attorney General of California, who was initially a defendant in the district court, but was later replaced by his successor, Rob Bonta; Sonia Angell in her official capacity as the State Public Health Officer and Department of Public Health Director, who was initially a defendant in the district court, but was later replaced by her successor, Tomas J. Aragon; and Tony Thurmond, in his official capacity as the California Superintendent of Public Instruction and Director of Education.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows: All the Petitioners are individuals.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Brach v. Newsom, No. 2:20-cv-6472, U.S. District Court for the Central District of California. Judgment entered on Dec. 1, 2020.

Brach v. Newsom, No. 20-56291, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on July 23, 2021.

Brach v. Newsom, No. 20-56291, U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*. Judgment entered on June 15, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the *en banc* judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit *en banc* opinion is reported at 38 F.4th 6 and reproduced at App. A-1a to A-69a. The order granting rehearing *en banc* and vacating the panel opinion is reported at 18 F.4th 1031. The Ninth Circuit panel opinion is reported at 6 F.4th 904 and reproduced at App. B-70a to B-154a. The district court's order granting *sua sponte* summary judgment is reported at 2020 WL 7222103 and reproduced at App. C-155a to C-190a. The district court's denial of a temporary restraining order is reported at 2020 WL 6036764 and reproduced at App. D-191a to D-217a.

JURISDICTION

The Ninth Circuit issued its *en banc* opinion on June 15, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution and the Fourteenth Amendment to the United States Constitution are reproduced at App. E-218a to E-230a; the relevant portions of the California Government Code are reproduced at App. E-218a to E-230a; the relevant

Executive Order by Governor Gavin Newsom is reproduced at App. F-231a to F-237a; and the relevant guidance documents executed by the California Department of Public Health are reproduced at App. G-238a to N-424a.

INTRODUCTION

Throughout the COVID-19 pandemic, state governors across the country took unprecedented action in response to the virus. They issued mandatory quarantine orders and "stay-at-home" requirements. They shut down businesses, beaches, parks, and churches. And perhaps most damaging, they barred schoolhouse doors and prevented tens of millions of children across the country from receiving an in-person education. These school closures were pursued under the auspices of public health and accomplished using the emergency powers granted to the governors by state law. The Constitution often took the back seat.

California's Governor, Gavin Newsom, was one of the early adopters of public-health restrictions. He issued a declaration of emergency on March 4, 2020, and he has yet to rescind that order. Exercising his emergency powers, Governor Newsom imposed some of the most far-reaching restrictions in the country, including closing schools across California for over a year.

Petitioners include parents of school-age children in California who challenged Governor Newsom's school-closure policy because they wanted to send their children to private school in person. Petitioners sought only declaratory relief. Schools in California have since reopened to in-person learning, but the State has made clear that the COVID-19 pandemic has not ended. Governor

Newsom has not rescinded his declaration of emergency, and the State maintains that it may re-institute the school closures at any point it deems necessary.

Over a vigorous dissent, the Ninth Circuit, sitting *en banc*, held that Petitioners' challenge to the school-closure policy is moot because the State has, for now, resumed allowing in-person learning. The Ninth Circuit's decision conflicts with decisions by the First and Seventh Circuits, which have both concluded that challenges to an executive's emergency restrictions are not moot when the declaration of emergency remains in effect. This Circuit split will sow confusion if allowed to stand. The Court should take this opportunity to resolve the dispute.

STATEMENT OF THE CASE

I. Governor Newsom's Shutdown of California Schools

A. The Governor's Emergency Power

Like many states, California gives its governor the authority to proclaim a state of emergency under certain specified conditions. Cal. Gov't Code § 8625; *see also* Cal. Gov't Code § 8658. Under this emergency power, the "Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of the [California Emergency Services Act]." Cal. Gov't Code § 8567. The governor may also "suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency" where the governor determines that doing so will mitigate the emergency. Cal. Gov't Code § 8571.

California law also dictates that the "Governor shall proclaim the termination of the state of emergency at the earliest possible date that conditions warrant." Cal. Gov't Code § 8629.

Governor Newsom declared a state of emergency in response to the COVID-19 pandemic on March 4, 2020, over two and a half years ago. App.75a. The state of emergency remains in effect. App.25a (Paez, J., dissenting).

B. Governor Newsom's Ad Hoc School Closure Requirements

Shortly after declaring a state of emergency in March 2020, Governor Newsom issued multiple Executive Orders that required the people of California "to obey State public health directives." App.231a. *See also* App.75a; ECF 36, p. 16. As a result, the California Department of Public Health began issuing guidance documents that had full force of law. The State Public Health Officer published the Essential Critical Infrastructure Workers list, which shut down entire industries in California, including all schools in the State, public and private, to in-person learning. App.76a; ECF 36, p. 22.

On May 4, 2020, Governor Newsom issued Executive Order N-60-20. In that Order, Governor Newsom ordered that "[a]ll residents are directed to continue to obey State public health directives, as made available at https://covid19.ca.gov/stay-home-except-for-essential-needs/ and elsewhere as the State Public Health Officer may provide" App.233a. That website became the de facto clearinghouse for California law during the pandemic.

By executive order, Governor Newsom created a new form of government whereby State bureaucrats issued guidance documents restricting citizens' liberty, posted the documents on a website, and enforced the restrictions upon citizens across the State. *See South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021); *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289 (2021); *Gish v. Newsom*, 141 S. Ct. 1290 (2021); *Gateway City Church v. Newsom*, 141 S. Ct. 1460 (2021); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021). Through these guidance documents, Governor Newsom shut down businesses (ECF 36, p. 22); shut down beaches, *Muldoon v. Newsom*, 2020 WL 5092911 *1 (C.D. Cal. 2020); restricted religious worship, *Gish*, 141 S. Ct. 1290; and forbade demonstrations on the State capitol grounds, *Givens v. Newsom*, 459 F.Supp.3d 1302, 1308 (E.D. Cal. 2020).

Over the spring and summer of 2020, a pattern developed whereby Governor Newsom would hold a press conference regarding new restrictions that were being imposed, the State would issue guidance documents depriving Californians of their liberties, and citizens would challenge those restrictions in court. Within days, the State would publish new guidance documents that modified the challenged restrictions and then rush into Court and argue that the cases were moot. *See, e.g.*, *Muldoon*, 2020 WL 5092911; *Prof'l Beauty Fed'n of Ca. v. Newsom*, 2020 WL 3056126 (C.D. Cal. 2020); *Calm Ventures LLC v. Newsom*, 2021 WL 5049105 (C.D. Cal. 2021).

Any hope that the ban on in-person learning would be short-lived vanished on July 17, 2020, when Governor Newsom announced a framework to "reopen" schools. *See*

App.192a. The Governor did not issue any official executive order on the topic. Instead, the State Public Health Officer issued guidance documents providing that school districts were allowed to reopen for in-person instruction *only* "if they are located in a local health jurisdiction . . . that has not been on the county monitoring list within the prior 14 days." ECF 9, ¶ 29–30.

Under these guidance documents, students in thirty-seven of California's fifty-eight counties were prohibited from attending in-person classroom instruction. ECF 9, ¶ 34. The classrooms that were closed to in-person instruction remained open for day camps and childcare facilities, App.204a, but children across the State were shut out of schools for the very purpose they exist—for students to learn.

C. Petitioners' Suit and the State's Changing Requirements

On July 21, 2020, four days after Governor Newsom announced the school "reopening" framework, Petitioners—fourteen California parents and one student—filed their complaint challenging the school-closure directive. App.193a; ECF 9. As relevant here, Petitioners sought a declaration that the directive violated parents' right to send their children to in-person private school under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. On August 3, 2020, Petitioners filed an application for a temporary restraining order. App.193a. That same day, the State Public Health Officer again modified the guidance regarding school reopening. App.277a.

On August 21, 2020, Judge Wilson—relying upon *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—denied Petitioner's application for a temporary restraining order. App.195a. A few days later, on August 25, 2020, the State yet again published new guidance documents. ECF 63, p. 5; ECF 54-3, p. 36.

While State officials were shutting down California schools, depriving children of their academic, social, and emotional development, both the U.S. Department of Education and Centers for Disease Control were encouraging schools to remain open. ECF 9, ¶ 37–47. Indeed, Dr. Anthony Fauci recommended schools reopen as early as June 3, 2020. *See* ECF 28-5, ¶ 9. The science overwhelmingly indicated that children are at minimal risk from COVID-19. ECF 9, ¶ 52–79; ECF 28-3, ¶ 21–30; ECF 28-4, ¶ 15–16; ECF 28-5, ¶ 4–7; ECF 28-8, ¶ 5–7; ECF 42-1, ¶ 4–5.

II. The Opinions Below

A. District Court Ruling

On September 1, 2020, two weeks after denying Petitioners' motion for a Temporary Restraining Order, Judge Wilson *sua sponte* scheduled a hearing for summary judgment. App.158a. On December 1, 2020, Judge Wilson issued a *Sua Sponte* Order granting Summary Judgment against Petitioners. App.156a.

As relevant here, Judge Wilson determined that the case was not moot because several Petitioners lived in school districts that were still shut down at the time of his ruling. App.170a–71a. But he dismissed the case because he concluded that Petitioners had not established a claim

under either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. App.172a–81a.

B. Ninth Circuit Three-Judge Panel Opinion

Petitioners appealed Judge Wilson's Summary Judgment Order to the Ninth Circuit. ECF 67. On December 30, 2020, after Petitioners filed their notice of appeal, Governor Newsom and the State Department of Public Health issued the Safe School Plan. App.310a.

On January 14, 2021, State officials *again* modified the guidance to schools on reopening. App.334a.

During the month of March 2021—while Petitioners' appeal was pending before the Ninth Circuit—all counties in California reached the point where schools were permitted to offer in-person education under the then-applicable guidance documents. App.88a. The three-judge panel requested supplemental briefing on mootness before issuing its opinion. App.88a.

Hewing closely to this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Ninth Circuit panel majority determined that the case was not moot. App.91a. (citing 141 S. Ct. 63 (2020) (*per curiam*)). The majority recognized Governor Newsom's "track record of 'moving the goalposts," App.93a (quoting *Tandon*, 141 S. Ct. at 1297), and determined that the "voluntary cessation" and "capable of repetition but evading review" doctrines applied, App.91a.[1]

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1. For ease of reference, Petitioners will refer to the latter of these doctrines as the "capable of repetition" doctrine.

On the merits, as relevant here, the panel majority determined that the State's school-closure policy violated the substantive due process rights of parents who wanted to send their children to in-person private schools under the *Meyer-Pierce* doctrine. App.106a. (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923) and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)). The panel majority thus reversed the district court's entry of summary judgment on Petitioners' due process claim and remanded to the district court to consider Petitioners' equal protection claim in light of the panel's due process holding. App.109a.

C. Ninth Circuit *En Banc* Opinion

The Ninth Circuit granted rehearing *en banc*, and, on June 15, 2022, the *en banc* court ruled that the case was moot, holding that neither the voluntary-cessation doctrine nor the capable-of-repetition doctrine applied. App.20a. In reaching this conclusion, the court relied heavily on a seven-page memo that the State originally published on the California Department of Public Health webpage on July 12, 2021, approximately a year after Petitioners filed suit. App.10a. The *en banc* court observed that the "State did not rescind its school closure orders in response to the litigation." App.13a. (cleaned up). Instead, "the orders expired by their own terms after COVID-19 transmission rates declined and stabilized." *Ibid.*

In dissent, Judge Paez, joined by Judges Berzon, Ikuta, Nelson, and Bress, concluded that the case was not moot because "Governor Newsom operated—and continues to operate—under [the] emergency order." App.25a. Judge Paez would have held that both the voluntary-cessation doctrine and capable-of-repetition

doctrine applied. App.28a, n.9. On the merits, Judge Paez concluded that Petitioners had failed to plead a *Meyer-Pierce* claim. App.29a–35a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Created a Circuit Split

The Ninth Circuit's decision below created a Circuit split. Outside the Ninth Circuit, Circuit Courts have generally held that a challenge to a governor's emergency powers is not moot when the governor has not relinquished those powers. The Ninth Circuit concluded the opposite. Consequently, the Circuits now have different mootness holdings.

Under Article III, Section 2 of the United States Constitution, federal courts may only adjudicate "actual, ongoing controversies." *Honing v. Doe*, 484 U.S. 305, 317 (1988). If events outrun the controversy such that the court can grant no meaningful relief, the case is moot. *See, e.g., Church of Scientology of Ca. v. United States*, 506 U.S. 9, 12 (1992). The burden of demonstrating mootness, however, "is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953).

There are two relevant exceptions to the mootness doctrine: voluntary cessation and capability of repetition. *Friends of the Earth, Inc. v. Laidlaw Envtl Services (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162, 170 (2016). Under the voluntary-cessation doctrine, "a defendant claiming that its voluntary [change in behavior] moots a case bears the formidable burden of showing that it is absolutely clear

the allegedly wrongful behavior could not reasonably be expected to recur." *Laidlaw,* 528 U.S. at 190. The capable-of-repetition doctrine applies when: "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party will be subject to the same action." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990)).

The First and Seventh Circuits have held cases were not moot where governors retained their emergency powers and could reinstate the offending restrictions. *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157–58 (1st Cir. 2021); *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344–45 (7th Cir. 2020), *cert denied,* 141 S. Ct. 1753 (2021). This is consistent with this Court's emergency-docket decision in *Diocese of Brooklyn*, where the Court held that a case was not moot where the governor regularly changed classifications subjecting religious organizations to group-size restrictions. 141 S. Ct. at 68.

In *Bayley's,* the First Circuit considered a challenge to a COVID-19 emergency order issued by the governor of Maine. 985 F.3d at 155. Like this case, the governor of Maine rescinded the offending order after the plaintiffs filed their complaint. *Ibid.* at 156–57. The state argued that the plaintiffs' claims were moot, but the First Circuit disagreed, holding that the state failed to show "that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Ibid.* at 158 (quoting *Laidlaw*, 528 U.S. at 190). The First Circuit observed that the executive action was one "the Governor voluntarily

rescinded and could unilaterally reimpose." *Ibid.* at 157. The First Circuit observed that concluding the case was moot "would run the risk of effectively insulating from judicial review an allegedly overly broad executive emergency response, so long as it is iteratively imposed for only relatively brief periods of time." *Ibid.* at 158.

Similarly, the Seventh Circuit in *Elim Romanian* also held a governor's voluntary recission of a COVID-19 order did not moot a challenge to the order because the governor retained the authority to reimpose the offending restrictions. 962 F.3d at 344–45. There, the governor of Illinois imposed restrictions on in-person religious services. *Ibid.* at 343. The plaintiffs challenged the order as violative of their constitutional rights. *Ibid.* Before the case was heard on appeal, the governor of Illinois rescinded the offending order. *Ibid.* The state argued this mooted the plaintiffs' claims, but the Seventh Circuit disagreed, holding that "it is not 'absolutely clear' that the terms of the [Executive Order] will never be restored." *Ibid* at 345.

The Ninth Circuit's decision here is contrary to the First and Seventh Circuit's application of the mootness doctrine. The Ninth Circuit concluded that the case was moot because "there [was] no reasonable expectation the challenged conduct will recur." App.19a. But the governors of Maine and Illinois also rescinded the challenged orders, and the First and Seventh Circuits concluded that repeal itself was not enough to moot the case because the *emergency declaration* remained in effect and the governor was free to reimpose the challenged restrictions. *Bayley's*, 985 F.3d at 157–58; *Elim Romanian*, 962 F.3d at 344–45. The same is true here. Governor Newsom has

not rescinded his declaration of emergency and could reimpose the restrictions on in-person learning at any time. *See* App.25a (Paez, J., dissenting).

In this case, where Governor Newsom *has not* relinquished his emergency powers, the Ninth Circuit should have followed the courts in *Bayley's* and *Elim Romanian* and concluded this case was not moot. Instead, the Ninth Circuit mistakenly analogized this case to those where the governor relinquished their emergency power. *See* App.20a.[2]

This split among the Circuits highlights ongoing uncertainty over a core function of Article III. Governors across the country have been willing to exercise extraordinary emergency power to address the extraordinary circumstances presented by the coronavirus pandemic. The consequences of such actions are severe and wide reaching, affecting almost all aspects of everyday life. But we do not "cut[] the Constitution loose during a pandemic." *Diocese of Brooklyn*, 141 S. Ct. at 70 (Gorsuch, J., concurring). If states are allowed to sidestep judicial review of their actions through the simple expedient of modifying their practices while a

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2. The First, Third, Fourth and Fifth Circuits have held cases not capable of repetition where the governor had relinquished their emergency powers. *See Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 7 (1st Cir. 2021); *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3rd Cir. 2021), *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 159, 163–64 (4th Cir. 2021); *Spell v. Edwards*, 962 F.3d 175, 179 (5th Cir. 2020). But in this case, where the governor has not relinquished his emergency powers, the Ninth Circuit should have followed the courts in *Bayley's* and *Elim Romanian* and held this case was not moot.

state of emergency is still in effect, there is a threat that the Constitution becomes meaningless. This split in the Circuits on such an important aspect of Article III means part of the country has access to constitutional protections during an emergency while another part does not. The Court should take this opportunity to resolve this dispute and clarify when challenges to emergency actions become moot.

II. The Decision Below Incorrectly Applied the Mootness Doctrine

The Court should grant this Petition because the Ninth Circuit erred in its application of the mootness doctrine. If allowed to stand, the Ninth Circuit's confused application of a core aspect of Article III could serve as a blueprint for government actors to avoid judicial review of their actions.

A. Petitioners' Claims are not Moot

The Ninth Circuit determined this case was moot because "there is no reasonable expectation the challenged conduct will recur." App.19a. This determination was erroneous.

First, the Ninth Circuit's ruling places too much faith in government actors' assurances that they will not violate the law in a time of emergency. Throughout this litigation, the State has vigorously defended its ability to shut down in-person classroom instruction via guidance documents. *See, e.g.,* App.203a. That has not changed. And despite the State's promises that it will not again close schools to in-person instruction, the State can resume its school-

closure policy under the existing emergency order at the mere flick of a pen. Until Governor Newsom rescinds the declaration of emergency, the pandemic still exists in California, and State officers can issue new guidance documents imposing the old restrictions at any time. For this reason, Petitioners "'remain under a constant threat' that government officials will use their power to reinstate the challenged restrictions." *Tandon*, 141 S. Ct. at 1297 (quoting *Diocese of Brooklyn*, 141 S. Ct. at 68).

Second, the Ninth Circuit's ruling frustrates this Court's standard for claims that fall within an exception to mootness. As noted, voluntary cessation requires the government to show it is absolutely clear the allegedly wrongful behavior could not resonably be expected to recur. And this Court has explained that the second prong of the capable-of-repetition doctrine requires only a "reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party." *Federal Election Com'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 463 (2007) (internal citations omitted) (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curium*)). The same controversy is sufficiently likely to recur when a party has a reasonable expectation that it "will again be subjected to the alleged illegality." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (citation omitted).

As Judge Paez persuasively pointed out in his dissent, the majority misinterpreted these standards to be too demanding. *See* App.21a. Judge Paez noted that whether an offending action is reasonably likely to recur "is not an exacting bar," and that this Court "has indicated that it is somewhat less than probable." App.21a–22a (quoting

Honig, 484 U.S. at 318). Judge Paez would have found the school-closure policy was not moot "so long as Governor Newsom retains the specific power to impose similar restrictions." App.27a. That conclusion was correct, and that is exactly where things still stand now.

B. The Ninth Circuit Also Erroneously Found Newsom's Orders Expired by Their Own Terms

The Ninth Circuit also erred by misapprehending what triggered the repeal of the school-closure orders at issue. Specifically, the Ninth Circuit believed that the challenged orders "expired by their own terms," *See* App.13a, and, based on this fact, it concluded the voluntary-cessation doctrine was not implicated, App.13a. (quoting *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3rd Cir. 2021), *cert. denied*, 142 S. Ct. 772; *Spell v. Edwards*, 962 F.3d 175, 178–79 (5th Cir. 2020)). This conclusion has no bearing on the Ninth Circuit's misapplication of the capable-of-repetition doctrine, but it fails even on its own terms.

In *Butler*, an amendment to the Pennsylvania Constitution was enacted that restricted the Governor's authority to enter the same orders. 8 F.4th at 230. In *Spell*, the governor issued a stay-at-home order on April 2, 2020, and extended the order again on April 30, 2020. 962 F.3d at 177–178. On May 14, 2020, the day before the stay-at-home order was slated to expire, the governor announced that he would not be extending the stay-at-home order and allowed the order to expire. *Ibid.*

Here, Governor Newsom repeatedly modified the school-closure orders during the course of this litigation. App.26a (noting that Governor Newsom has used his

emergency powers "to both loosen and tighten restrictions since this lawsuit began") (Paez, J., dissenting). Thus, it is simply wrong to conclude, as the Ninth Circuit did, that the relevant orders "expired by their own terms." App.13a.

Moreover, unlike *Butler*, there has been no constitutional amendment here limiting the governor's emergency power, nor has the California Emergency Services Act been amended or repealed since Governor Newsom issued his emergency declaration in March 2020. And unlike *Spell*, the emergency order there had a set expiration date, something we do not have in this case. Governor Newsom's declaration of emergency does not contain an expiration date and, by law, the only way that order could cease would be by entry of another executive order. Cal. Gov't. Code §§ 8567, 8629.

Unlike other governors, Governor Newsom has never relinquished his emergency powers. If he continues to maintain them, there can be no voluntary cessation, and the offending orders will be capable of repetition. This is especially true considering that Governor Newsom has a habit of "moving the goalposts." *Tandon*, 141 S.Ct. at 1297 (cleaned up). The guidance documents that constantly changed throughout this case are not analogous to a constitutional amendment to remove emergency power (*Butler*) or executive orders that contain built-in expiration dates (*Spell*). Governor Newsom's emergency declaration is still in effect and officers of the State can upload a new guidance document to the State website at any time. The threat to Petitioners remains real, despite the Ninth Circuit's failure to recognize it.

III. Petitioners' Claims are Viable on Remand

The Court should grant this Petition because Petitioners' *Meyer-Pierce* and equal protection claims are viable on remand. While Judge Paez, in his dissenting opinion below, would have concluded the case is not moot, he would have affirmed the district court's grant of summary judgment against Petitioners. App.29a. Judge Paez believed that Petitioners "failed to plead" the claim that the school-closure orders violated their right to send their children to private school in person. App.32a. This conclusion was incorrect.

This Court routinely admonishes that the Federal Rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. City of Shelby, Miss.*, 574 U.S. 10, 11 (2014) (*per curium*) (holding that the complaint need not even cite the statute that gives rise to the claim); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513–15 (2002) (holding that courts cannot create a heightened pleading standard beyond what the Federal Rules require); *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (same). Instead, the Rules require only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Johnson*, 574 U.S. at 11 (quoting Fed. R. Civ. Pro. (8)(a)(2)). When considering this "short and plain statement," this Court has emphasized the distinction between separate *claims* and separate *arguments* supporting a claim. *See Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992). Of course, the plaintiff must plead sufficient factual allegations that, taken as true, demonstrate a plausible entitlement to relief. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But once a plaintiff

does so, the plaintiff "can make any argument in support of that claim" later in the case. *Yee*, 503 U.S. at 534–35; *see also Johnson*, 574 U.S. at 12 (quoting 5 Wright & A. Miller, Federal Practice and Procedure § 1219, (3d ed. 2004) ("The federal rules effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief.").

As the three-judge panel majority below correctly concluded, Petitioners both raised and preserved their *Meyer-Pierce* claim. App.105a. The *en banc* majority did not address this issue, and the *en banc* dissent confused it. Specifically, the *en banc* dissent concluded that Petitioners did not plead a *Meyer-Pierce* claim. *See* App.32a (Paez, J. dissenting).

The complaint contradicts this conclusion. Petitioners include parents of both public and private school children. *See Brach v. Newsom*, No. 20-6472, ECF No. 9 ¶ 7–21. The first cause of action they alleged was for deprivation of fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. *Ibid.* Petitioners asserted this claim on behalf of their children and themselves. *Ibid.* ¶ 110. Indeed, the complaint included twenty pages of non-conclusory factual allegations to support this claim. *Ibid.* ¶ 26–108. As the three-judge panel majority correctly recognized, "as to [the private-school parents], this claim can only be understood as asserting that the State was unconstitutionally interfering with [their] effort to choose the forum that they believed would provide their children with an adequate education." App.106a. It is irrelevant that Petitioners did not specifically label this claim as a "*Meyer-Pierce*" claim in their complaint. The *Meyer-*

Pierce right arises under the Due Process Clause, and, by their due process claim, Petitioners necessarily asserted a claim for violation of the *Meyer-Pierce* right.

If the Court grants this Petition and rules that Petitioners' case is not moot, Petitioners can press forward with their *Meyer-Pierce* and equal protection claims on remand. The Court should grant this Petition to allow Petitioners the opportunity to do just that.

CONCLUSION

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 15, 2022

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-56291

D.C. No. 2:20-cv-06472-SVW-AFM

MATTHEW BRACH, AN INDIVIDUAL; JESSE PETRILLA, AN INDIVIDUAL; LACEE BEAULIEU, AN INDIVIDUAL; ERICA SEPHTON, AN INDIVIDUAL; KENNETH FLEMING, AN INDIVIDUAL; JOHN ZIEGLER, AN INDIVIDUAL; ALISON WALSH, AN INDIVIDUAL; ROGER HACKETT, AN INDIVIDUAL; CHRISTINE RUIZ, AN INDIVIDUAL; Z. R., A MINOR; ADE ONIBOKUN, AN INDIVIDUAL; BRIAN HAWKINS, AN INDIVIDUAL; TIFFANY MITROWKE, AN INDIVIDUAL; MARIANNA BEMA; ASHLEY RAMIREZ, AN INDIVIDUAL,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF CALIFORNIA; ROB BONTA, IN HIS OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF CALIFORNIA; TOMAS ARAGON, IN HIS OFFICIAL CAPACITY AS THE STATE PUBLIC HEALTH OFFICER AND DEPARTMENT OF PUBLIC HEALTH DIRECTOR; TONY THURMOND, IN HIS OFFICIAL CAPACITY AS STATE SUPERINTENDENT OF PUBLIC INSTRUCTION AND DIRECTOR OF EDUCATION,

Defendants-Appellees.

Appendix A

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted En Banc January 24, 2022
Pasadena, California

Filed June 15, 2022

Before: Mary H. Murguia, Chief Judge, and
M. Margaret McKeown, Kim McLane Wardlaw,
Ronald M. Gould, Richard A. Paez, Marsha S. Berzon,
Sandra S. Ikuta, Jacqueline H. Nguyen, Paul J.
Watford, Ryan D. Nelson, and Daniel A. Bress,
Circuit Judges.

Opinion by Judge McKeown;
Dissent by Judge Paez;
Dissent by Judge Berzon

SUMMARY[*]

CIVIL RIGHTS

The en banc court dismissed as moot an appeal from the district court's summary judgment in favor of California Governor Newsom and state officials in an action brought by a group of parents and a student alleging defendants violated federal law when they ordered schools to suspend in-person instruction in 2020 and early 2021, at a time when California was taking its first steps of navigating the Covid-19 pandemic.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The en banc court held that this was a classic case in which, due to intervening events, there was no longer a live controversy necessary for Article III jurisdiction. Nor was there any effective relief that could be granted by the court. The parents had not brought a claim for damages; they sought a declaratory judgment that Governor Newsom's executive orders, to the extent they incorporated guidance on school reopening, were unconstitutional. Relatedly, they sought an injunction against the 2020-21 Reopening Framework. But Governor Newsom has rescinded the challenged executive orders, and the 2020-21 Reopening Framework has been revoked. Schools now operate under the 2021-22 Guidance, which declares that all schools may reopen for in-person learning. And the parents conceded that, since April 2021, there has been no "state-imposed barrier to reopening for in-person instruction." The actual controversy has evaporated. Bottom line: there was no longer any state order for the court to declare unconstitutional or to enjoin.

The en banc court rejected plaintiffs' assertion that the case survived under two exceptions to mootness: the voluntary cessation exception and the capable of repetition yet evading review exception. Neither exception saved their case. The dramatic changes from the early days of the pandemic, including the lifting of all restrictions on in-person learning, fundamentally altered the character of this dispute. The en banc court joined the numerous other circuit courts across the country that have recently dismissed as moot similar challenges to early pandemic restrictions.

Dissenting, Judge Paez, joined by Judges Berzon, Ikuta, R. Nelson and Bress, stated that, mindful of the Supreme Court's clear directives to California on this issue and the fact that Governor Newsom's State of Emergency remains operative, he would hold that this case was not moot and affirm the district court on the merits. This case fit within the "capable of repetition, yet evading review" exception to mootness. The fact remained that the pandemic is not over. Governor Newsom has not relinquished his emergency powers, nor has the California Legislature stripped him of those powers. So long as Governor Newsom retains the specific power to impose similar restrictions, and the pandemic continues, Judge Paez would find this question "capable of repetition."

Because Judge Paez would not find this case moot, he briefly addressed the reasons why he would affirm the district court's grant of summary judgment to the State on the parents' substantive due process and equal protection claims. The parents had not demonstrated that distance learning failed to satisfy any basic educational standard. Judge Paez further stated that the parents failed to plead their claim that the school closure orders violated their right to send their children to private school under *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). Judge Paez would therefore dismiss this portion of the appeal.

Dissenting, Judge Berzon joined Judge Paez's dissent in full. In particular, Judge Berzon agreed that the merits

of the question of whether parents of children who attend private schools (and only those parents) have a right to access an in-person education for their children was waived by the plaintiffs and was not properly before this court. Because the majority of the three-judge panel nonetheless reached the issue and held that parents of children in private school have a substantive due process right to have their children attend in-person classes, including during a medical emergency, Judge Berzon wrote separately to dispel any suggestion that the waived issue could have possible merit were it to be raised in a later case.

OPINION

McKEOWN, Circuit Judge:

Much has changed since the COVID-19 pandemic began. One thing that has stayed the same is that federal courts may not rule on moot or hypothetical questions. Here, a group of parents and one student ask us to pass judgment on whether California state officials violated federal law when they ordered schools to suspend in-person instruction in 2020 and early 2021, at a time when California was taking its first steps navigating the largest public health crisis since the Great Influenza Epidemic of 1918.

Fortunately, the situation in California has changed dramatically with the introduction of vaccines and other measures. The State of California has rescinded its orders, students have been back in the classroom for a

year, and the parties agree there is "currently no longer any state-imposed barrier to reopening for in-person instruction." The parents urge us to decide this case anyway, suggesting that California might, maybe one day, close its schools again. In effect, the parents seek an insurance policy that the schools will never ever close, even in the face of yet another unexpected emergency or contingency. The law does not require California to meet that virtually unattainable goal; our jurisdiction is limited to live controversies and not speculative contingencies. Joining the reasoning of the many other circuits that have recently considered challenges to early COVID-19 related restrictions, we conclude that the mere *possibility* that California might again suspend in-person instruction is too remote to save this case. We dismiss the appeal as moot.

BACKGROUND

A. Factual Background

1. The 2019-2020 School Year

In early March 2020, the World Health Organization declared a global pandemic in response to the novel coronavirus, SARS-CoV-2, responsible for the coronavirus disease 2019 ("COVID-19"). Then-President Donald Trump declared a national emergency and restricted international travel. Governor Gavin Newsom declared a state of emergency within California, and issued Executive Order N-33-20, requiring Californians to "heed the current State public health directives" including the

requirement "to stay home or at their place of residence." Cal. Exec. Order N-33-20 (March 19, 2020). As a result, many public-facing institutions and businesses were closed. Schools closed their physical buildings, but students finished out the remaining few months of the school year with remote instruction.

2. The 2020-2021 School Year

In advance of the new school year, in summer 2020, the California Department of Public Health announced its plans for reopening schools. The "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year" ("2020-21 Reopening Framework") was developed "to support school communities" as they determined "when and how to implement in-person instruction." Under the framework, schools were permitted to permanently reopen once the rate of COVID-19 transmission in their local areas stabilized. Importantly, once a school reopened under the 2020-21 Reopening Framework, it was not required to close again, even if local COVID-19 rates later rose. The 2020-21 Reopening Framework ratchetted in only one direction: toward reopening.[1]

1. The 2020-21 Reopening Framework was refined at various points as to the benchmarks local areas were required to meet before schools were permitted to reopen. Virtually all of these changes (save one example) relaxed the relevant criteria, allowing schools to reopen sooner. Like the original 2020-21 Reopening Framework, each amended version of the framework made clear that no school would be required to close again after reopening.

Fourteen parents and one student (collectively "the parents") filed suit against Governor Newsom and other California officials just four days after the 2020-21 Reopening Framework was announced. They alleged that the State's decision to delay reopening schools until local conditions improved violated a "fundamental right to a basic, minimum education" located in the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also violated various federal civil rights statutes.

By mid-December, the U.S. Food and Drug Administration authorized the first vaccine for the prevention of COVID-19. More vaccines were soon authorized, and doses of the vaccines were gradually made available to the public in late 2020 and early-to-mid 2021. Although not initially authorized for use by children, the vaccine is now available for those as young as five years old.

The introduction of vaccines and California's continued implementation of the 2020-21 Reopening Framework allowed an ever-increasing number of schools to reopen. By spring 2021, all of the parents' schools had been permitted to reopen. The parents acknowledged in an April 26, 2021, court filing that there was "currently no longer any state-imposed barrier to reopening for in-person instruction."

3. The 2021-2022 School Year

California reached a significant benchmark during the 2021 summer holidays, when Governor Newsom announced that over 50% of Californians had received a full course of COVID-19 vaccination treatments. He issued

Executive Order N-07-21, which formally rescinded the Executive Order issued at the outset of the pandemic. *See* Cal. Exec. Order N-07-21 (June 11, 2021) (rescinding Cal. Exec. Order N-33-20). As a result, "all restrictions on businesses and activities" derived from that earlier executive order were rescinded, including the State Public Health Officer's March 2020 stay-at-home order. *Id.*

The following month, the State issued updated guidance for the upcoming 2021-2022 school year. The "COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year" ("2021-22 Guidance") imposes no restrictions on school reopening, recognizes that "[i]n-person schooling is critical to the mental and physical health and development of our students," and is "designed to keep California K-12 schools open for in-person instruction safely during the COVID-19 pandemic."[2]

B. Procedural Background

The parents filed suit days after the 2020-21 Reopening Framework was announced. Proceedings moved swiftly before the district court, which denied the parents' motion for emergency injunctive relief on August 13, 2020, and granted summary judgment to the State on December 1, 2020. The parents timely appealed, and we granted their unopposed motion to expedite briefing and argument.

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2. Cal. Dep't of Pub. Health, COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year (July 12, 2021), *as amended* April 6, 2022, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx.

After this appeal was briefed, we asked the parties to provide supplemental briefing on whether this case was moot. The parents responded on April 26, 2021, informing the court that their children's schools had been permitted to reopen and there was "no longer any state-imposed barrier to reopening." They insisted, however, that the case remained live under certain exceptions to the mootness doctrine.

On July 12, 2021, the State issued the 2021-22 Guidance, lifting all restrictions on school reopening. Eleven days later, a divided panel of this court held that this case was not moot and reversed the district court in part. *See Brach v. Newsom*, 6 F.4th 904, 921, 934 (9th Cir.), *vacated*, 18 F.4th 1031 (9th Cir. 2021). Rejecting the State's claims of waiver, the panel accepted the parents' new argument on appeal that the Fourteenth Amendment's Due Process Clause guaranteed a fundamental right to in-person education. *See id.* at 917-32. So holding, the panel reversed the district court's ruling on the due process claim, remanded the equal protection claim for further consideration, and affirmed the district court's grant of summary judgment on the remaining claims. *See id.* at 934. We voted to rehear the case en banc. *Brach v. Newsom*, 18 F.4th 1031, 1032 (9th Cir. 2021).

ANALYSIS

The threshold and ultimately only question we resolve is whether this case is moot. The parents filed suit in the early throes of the pandemic. At the time, California was operating under the 2020-21 Reopening Framework,

which allowed schools to permanently reopen once local COVID-19 transmission rates fell below a certain threshold. Unsatisfied with the delay, the parents asked the district court to order an immediate reopening. The district court rejected the request, but the reopening has happened anyway—California's schools have been operating in person for a year—meaning the parents have gotten everything they asked for.

This is a classic case in which, due to intervening events, there is no longer a live controversy necessary for Article III jurisdiction. Nor is there any effective relief that can be granted by the court. The parents have not brought a claim for damages; they sought a declaratory judgment that Governor Newsom's executive orders, to the extent they incorporated guidance on school reopening, were unconstitutional. Relatedly, they sought an injunction against the 2020-21 Reopening Framework, which they labeled the "State Order." But Governor Newsom has rescinded the challenged executive orders, and the 2020-21 Reopening Framework has been revoked. Schools now operate under the 2021-22 Guidance, which declares that all schools may reopen for in-person learning. And the parents concede that, since April 2021, there has been no "state-imposed barrier to reopening for in-person instruction." The actual controversy has evaporated. Bottom line: there is no longer any state order for the court to declare unconstitutional or to enjoin. It could not be clearer that this case is moot. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) ("No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated

the lawsuit, the case is moot if the dispute 'is no longer embedded in any actual controversy about the plaintiffs' particular legal rights.'" (quoting *Alvarez v. Smith*¸ 558 U.S. 87, 93, 130 S. Ct. 576, 175 L. Ed. 2d 447 (2009))).

The parents nonetheless urge us to advise whether California's actions in the early days of the pandemic violated federal law, arguing their case survives under two exceptions to mootness: the voluntary cessation exception and the capable of repetition yet evading review exception. Neither exception saves their case. The dramatic changes from the early days of the pandemic, including the lifting of all restrictions on in-person learning, have fundamentally altered the character of this dispute. We join the numerous other circuit courts across the country that have recently dismissed as moot similar challenges to early pandemic restrictions.[3]

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3. *See Eden, LLC v. Justice*, No. 21-1079, F.4th , 2022 U.S. App. LEXIS 15194, 2022 WL 1790282 (4th Cir. June 2, 2022) (concluding challenge to early pandemic COVID-19 restriction was moot in light of changed circumstances); *Resurrection Sch. v. Hertel*, No. 20-2256, F.4th , 2022 U.S. App. LEXIS 14205, 2022 WL 1656719 (6th Cir. May 25, 2022) (en banc) (same); *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 162-66 (4th Cir. 2021) (same); *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 8-12 (1st Cir. 2021) (same); *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230-31 (3rd Cir. 2021) (same), *cert. denied*, 142 S. Ct. 772, 211 L. Ed. 2d 482 (2022); *Hawse v. Page*, 7 F.4th 685, 692-94 (8th Cir. 2021) (same); *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 448 (2d Cir. 2021) (same). *But see Elim Romanian Pentecostal Church v. Pritzker*, 22 F.4th 701, 702 (7th Cir. 2022) (per curiam).

A. The Voluntary Cessation Exception

The Supreme Court has long held that "a defendant cannot automatically moot a case simply by ending its unlawful conduct once sued." *Already*, 568 U.S. at 91. But this doctrine, which "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior," does not apply here. *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1, 121 S. Ct. 743, 148 L. Ed. 2d 757 (2001). The State did not abandon its policy after suit was filed in July 2020. Rather, the 2020-21 Reopening Framework, which was adopted before the litigation, automatically permitted schools to reopen permanently once their local areas achieved certain COVID-19 benchmarks. The State did not rescind its school closure orders in response to the litigation—the orders "expired by their own terms" after COVID-19 transmission rates declined and stabilized. *County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021) (holding voluntary cessation exception did not apply where challenged COVID-19 restrictions "expired by their own terms" after "more than half of all adults in Pennsylvania were vaccinated"), *cert. denied*, 142 S. Ct. 772, 211 L. Ed. 2d 482 (2022); *accord Spell v. Edwards*, 962 F.3d 175, 178-79 (5th Cir. 2020) (holding voluntary cessation exception did not apply where challenged COVID-19 stay-at-home orders "expired by their own terms").

Even assuming the voluntary cessation exception facially applies, it has no force here because the State has carried its burden of establishing that "the

challenged behavior cannot reasonably be expected to recur." *Already*, 568 U.S. at 96. Although we hold the government to the same burden as private litigants in making this determination, *see Bell v. City of Boise*, 709 F.3d 890, 898-99 & n.13 (9th Cir. 2013), we nonetheless "treat the voluntary cessation of challenged conduct by government officials with more solicitude . . . than similar action by private parties," *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc) (omission in original) (internal quotation marks omitted). This is no bare deference: we probe the record to determine whether the government has met its burden, even as we grant it a presumption of good faith. *See Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014) (identifying several factors for assessing claims of voluntary cessation by government actors).

California has presented a strong case that the current order opening schools is not a temporary move to sidestep the litigation. Most importantly, the State has "unequivocally renounce[d]" the use of school closure orders in the future. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1153 (9th Cir. 2019). The State has consistently worked to reopen schools and Governor Newsom has publicly "reaffirm[ed]" his "commitment to keeping California's schools open for safe, in-person learning."[4] That reaffirmance is no mere statement of

4. Press Release, Off. of Governor Newsom, *Governor Gavin Newsom, Education Leaders Reaffirm Commitment to Keeping California's Schools Open for Safe, In-Person Learning* (Dec. 22, 2021), https://www.gov.ca.gov/2021/12/22/education-leaders-reaffirm-commit ment-to-keeping-californias-schools-open-for-safe-in-person-learning/ (capitalization removed).

aspiration. The 2020-21 Reopening Framework was rescinded and the 2021-22 Guidance is "designed to keep California K-12 schools open for in-person instruction safely during the COVID-19 pandemic." Cal. Dep't of Pub. Health, COVID-19 Public Health Guidance for K-12 Schools in California, *supra* note 2. Consistent with this commitment, no school has been forced to close again after reopening.

Further strengthening California's hand is the fact that its decision to reopen schools is "entrenched" and not "easily abandoned or altered in the future." *Fikre v. FBI*, 904 F.3d 1033, 1037-38 (9th Cir. 2018). Soon after the pandemic began, the California legislature passed an emergency statute allowing California's public school system to move online. Cal. Educ. Code § 43500 *et seq.* (repealed Jan. 1, 2022). Recognizing the extraordinary nature of the pandemic, but looking ahead, the legislature included a sunset provision so this law would automatically expire on June 30, 2021. *Id.* § 43511(b). The legislature also included a clause causing it to self-repeal on January 1, 2022. *Id.* Both of these dates have come and gone and there have been no efforts to reenact the emergency legislation, meaning that California's six million public school students will continue to be offered instruction in-person for the foreseeable future.[5] The "repeal of a statute relied upon to justify otherwise [allegedly] unlawful conduct may be analyzed as an event bearing on a prediction whether an

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5. Although the legislature has taken steps to ensure that in-person education is the norm, it has also authorized schools to offer remote instruction to a limited number of students who do not yet wish to return to the classroom. *See* Cal. Educ. Code § 51745.

attack on the conduct is moot." 13C Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3533.6 (3d ed. 2008). Indeed, the legislature has declared its intent "that local educational agencies offer in-person instruction to the greatest extent possible" going forward, Cal. Educ. Code. § 43520, and has enacted financial penalties for schools that continue to operate remotely, *see id.* § 43521(c).[6]

Tellingly, California maintained in-person instruction throughout the surge of the Omicron COVID-19 variant, even while the State's case count soared well past numbers reached early in the pandemic. *See* Katherine Fung, *Despite Stricter COVID Restrictions, California's Schools Remained Open Amid Mass Closures*, Newsweek (Jan. 10, 2022), https://www.newsweek.com/despite-stricter-covid-restrictions-californias-schools-remained-open-amid-mass closures-1667459. It is thus apparent that, as in other jurisdictions, the "availability of vaccines and other measures to combat the virus have led to a significant change in the relevant circumstances." *Lighthouse Fellowship Church v. Northam*, 20 F.4th 157, 162-64 (4th Cir. 2021) (holding voluntary cessation doctrine did not rescue otherwise moot challenge to early COVID-19 pandemic restriction); *see also County of Butler*, 8 F.4th at 231 (holding challenge to early COVID-19 pandemic restriction was moot in part because "the public health landscape has so fundamentally changed").

6. The dissent dismisses the legislature's efforts to reopen schools as a "red herring." Dissent at 25 n.6. We disagree; the legislature's statutory enactments, policy statements, and structured financial incentives all serve to entrench the State's commitment to reopening schools.

The parents candidly acknowledge that circumstances have changed since July 2020, when they filed their complaint, but suggest that an unexpected reversal in the public health situation could lead the Governor to once again close schools. The dissent echoes this point, arguing this case is not moot so long as pandemic conditions might change and "Governor Newsom retains the specific power to impose similar restrictions." Dissent at 26. But this speculative contingency and the fact "the Governor has the power to issue executive orders cannot itself be enough to skirt mootness, because then no suit against the government would ever be moot." *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 10 (1st Cir. 2021). Reasonable expectation means something more than "a mere physical or theoretical possibility." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982). We acknowledge that the Governor's continuing authority to close schools is a consideration in our analysis, *see Bit Labs*, 11 F.4th at 12, but it is by no means dispositive. As the D.C. Circuit has succinctly explained, "the mere power to reenact a challenged [policy] is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged [policy] likely will be reenacted." *Larsen v. U.S. Navy*, 525 F.3d 1, 4, 381 U.S. App. D.C. 69 (D.C. Cir. 2008) (citation omitted) (alterations in original).[7] It will always be true, in contexts beyond

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7. The dissent bravely attempts to distinguish the flotilla of recent circuit decisions finding similar cases moot, *see supra* note 3 (collecting cases), by emphasizing that here the Governor's authority derives from the California Emergency Services Act ("CESA"), Cal. Gov't Code. § 8550 *et seq.*, which authorizes the Governor to assume

the present case, that unexpected events may prompt the government to adopt extraordinary measures. Given the State's assurances and the changed circumstances surrounding the pandemic, we conclude these fears are too "remote and speculative" to serve as a firm foundation for our jurisdiction. *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985).

The parents fall back on the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam), but the religious restrictions at issue there are hardly comparable. In *Diocese of Brooklyn*, religious organizations challenged New York's COVID-19 restrictions on in-person religious services. These restrictions were "regularly change[d]" by the State, often multiple times in the same week. *Id.* at 68 & n.3. Although the restrictions were temporarily lifted after the case reached the Supreme Court, the case was not moot because the plaintiffs lived under the "constant threat" that the restrictions would be reimposed. *Id.* at 68. By contrast, California's approach to school reopening has been steady and consistent, allowing schools to permanently reopen once their local areas achieved the specified benchmarks. No school has been required to close again after reopening. California officials have not "mov[ed] the goalpost." *Tandon v. Newsom*, 141 S.

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additional powers upon declaring a state of emergency. We attach less weight to the Governor's continuing reliance on the CESA than our dissenting colleagues because the CESA can be invoked at any time without prior authorization or fact finding—even if the Governor renounced these powers today, he could assume them again tomorrow at the stroke of a pen.

Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021) (per curiam) (internal citation omitted). Rather, reopening schools has remained front and center from the beginning, in accord with California's consistent policy.

In sum, the State has carried its burden of establishing there is no reasonable expectation the challenged conduct will recur. California has renounced any intention of closing its schools again, the school closure orders were temporary measures designed to expire by their own terms, and the schools have been operating in-person for a year.

B. The Capable of Repetition Yet Evading Review Exception

The capable of repetition yet evading review "exception is limited to extraordinary cases where '(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.'" *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 854-55 (9th Cir. 1999) (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992)).

Like the parties, we assume that the first condition has been satisfied. We nonetheless conclude that this exception to mootness does not apply because there is no "reasonable expectation" that California will once again close the parents' schools. Our rationale for rejecting this exception mirrors much of our analysis regarding the voluntary cessation exception. *See Armster v. U.S. Dist.*

Ct. for Cent. Dist. of Cal., 806 F.2d 1347, 1360 n.20 (9th Cir. 1986) (noting that the voluntary cessation and the capable of repetition yet evading review exceptions are "analogous"). The challenged orders have long since been rescinded, the State is committed to keeping schools open, and the trajectory of the pandemic has been altered by the introduction of vaccines, including for children, medical evidence of the effect of vaccines, and expanded treatment options. The parents' argument that the pandemic *may* worsen and that the State *may* impose further restrictions is speculative. The test is "reasonable expectation," not ironclad assurance.

* * *

This case is moot and no exception to mootness applies. We dismiss the appeal and remand with instructions for the district court to vacate its judgment and dismiss the complaint. *See Chambers*, 941 F.3d at 1200.

DISMISSED AND REMANDED WITH INSTRUCTIONS.

PAEZ, Circuit Judge, dissenting, with whom BERZON, IKUTA, R. NELSON, and BRESS, Circuit Judges, join:

The courthouse doors ought to stay open during a crisis. Mindful of the Supreme Court's clear directives to California on this issue and the fact that Governor Newsom's State of Emergency remains operative, I would hold that this case is not moot and affirm the district court on the merits.

I.

This case fits within the "capable of repetition, yet evading review" exception to mootness, which applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1998)).

"Reasonable" in this context is not an exacting bar.[1] The Supreme Court has indicated that it is somewhat *less* than probable:

> [W]e have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable . . . Our concern in these cases . . . was whether the controversy was *capable* of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.

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1. As the majority notes, the parties agree that the first condition is satisfied. This accords with the Supreme Court's holding that "a period of two years is too short to complete judicial review of the lawfulness" of an action. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170, 136 S. Ct. 1969, 195 L. Ed. 2d 334 (2016) (citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-16, 31 S. Ct. 279, 55 L. Ed. 310 (1911)).

Honig v. Doe, 484 U.S. 305, 318 n.6, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) (emphasis in original) (internal citations omitted). It certainly does not require "repetition of every 'legally relevant' characteristic." *Wis. Right to Life*, 551 U.S. at 463.

The Supreme Court has repeatedly found pandemic restrictions capable of repetition. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the Court found that a church's challenge to New York's pandemic restrictions was not moot where "[t]he Governor regularly change[d] the classification of particular areas without prior notice" and retained the authority to continue doing so. 141 S. Ct. 63, 68, 208 L. Ed. 2d 206 (2020) (per curiam). Though the Supreme Court did not identify which mootness exception applied, it cited to *Wisconsin Right to Life*'s discussion of the "capable of repetition, yet evading review" exception. *Id.* (citing *Wis. Right to Life*, 551 U.S. at 462). The Supreme Court applied *Roman Catholic Diocese* in *Tandon v. Newsom*, holding that a challenge to California's pandemic restrictions on religious gatherings was not moot because California officials "retain[ed] authority to reinstate" the challenged restrictions "at any time." 141 S. Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021) (per curiam) (citing *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720, 209 L. Ed. 2d 22 (2021) (Statement of Gorsuch, J.) (explaining that case was not moot because California officials have a record of "moving the goalposts")).

The majority points out that other circuits have recently found similar challenges to pandemic restrictions moot.[2]

2. Some of these cases analyzed mootness under the voluntary cessation exception; because the majority cites these cases and

A closer look at those cases is instructive. The First Circuit has noted that one of the crucial factors in determining mootness in this scenario is whether the defendant retains the power to issue similar orders. Thus, the First Circuit found that a challenge to pandemic restrictions was not moot where Maine's governor retained the power to reimpose such restrictions. *Bayley's Campground, Inc. v. Mills*, 985 F.3d 153, 157-58 (1st Cir. 2021). But it found a similar challenge moot when Massachusetts Governor Baker terminated a COVID-19 state of emergency, ending his authority to issue emergency orders. *Bos. Bit Labs, Inc. v. Baker*, 11 F.4th 3, 7 (1st Cir. 2021). There, the First Circuit *specifically reasoned* that the lifting of the state of emergency, among other factors, warranted a different result: "[H]ere (unlike [in *Bayley's*]) the offending order is gone, along with the COVID-19 state of emergency." *Id.* at 11. That court also reasoned that *Roman Catholic Diocese* was not on point, because unlike in that case, "neither the challenged restriction nor the state of emergency is in effect." *Id.* (noting that this constituted a "night-and-day difference[]").

Other circuits have followed this logic. The Fourth Circuit found a pandemic restrictions challenge moot after "the state of emergency in Virginia upon which [the restrictions] were predicated ended. . . . With the termination of the state of emergency, the Governor's power to issue new executive orders involving COVID-19-related restrictions was extinguished." *Lighthouse*

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because the following analysis focuses on the facts underlying those decisions—and on how the facts of California's pandemic restrictions differ—I discuss both.

Fellowship Church v. Northam, 20 F.4th 157, 159, 163-64 (4th Cir. 2021). *See also County of Butler v. Governor of Pa.*, 8 F.4th 226, 230 (3d Cir. 2021), *cert. denied sub nom. Butler County, Pa. v. Wolf*, 142 S. Ct. 772, 211 L. Ed. 2d 482 (2022) (holding that a challenge to pandemic restrictions was moot where health circumstances had changed *and* Pennsylvania Constitution had been amended to restrict Pennsylvania Governor's ability to enter similar orders);[3] *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 344-45 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 1753, 209 L. Ed. 2d 514 (2021) (holding that a challenge to pandemic restrictions was not moot because the new executive order replacing the challenged restrictions included criteria for "replacing the current rules with older ones").[4]

True, not all circuits have considered this factor. In *Hawse v. Page*, the Eight Circuit held that a change in pandemic circumstances mooted a challenge to a county's pandemic restrictions, without discussing whether the county retained the authority to reimpose restrictions. 7 F.4th 685, 692-94 (8th Cir. 2021). *See also Resurrection Sch. v. Hertel*, No. 20-2256, 2022 U.S. App. LEXIS 14205, 2022 WL 1656719, at *1 (6th Cir. May 25, 2022) (en banc)

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3. Plaintiffs in *County of Butler* evidently argued that the state retained the power to issue orders similar to those challenged despite the change in the state's constitution. 8 F.4th at 231. The Third Circuit does not explain how this argument comports with the changes to the Pennsylvania constitution.

4. The Seventh Circuit later dismissed this case on other grounds. *Elim Romanian Pentecostal Church v. Pritzker*, 22 F.4th 701 (7th Cir. 2022).

(same); *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 446 (2d Cir. 2021) (same).

California's Emergency Services Act, passed in 1970, empowers the California governor to proclaim a state of emergency in response to war, disease, natural disaster, or other "condition[] of disaster." Cal. Gov't Code §§ 8625, 8558. Pursuant to this authority, Governor Newsom first declared a state of emergency on March 4, 2020. Under this state of emergency, Governor Newsom ordered California residents to stay at home, carving out an exception for "[w]orkers supporting public and private . . . K-12 schools . . . for the purposes of distance learning, provision of school meals, or care and supervision of minors to support essential workforce." And thus, schools closed. Governor Newsom has not terminated this state of emergency.[5]

Governor Newsom operated—and continues to operate—under this emergency order.[6] It is this exercise of power that the parents challenge. The majority takes

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5. Governor Newsom most recently extended the state of emergency on February 20, 2022. *See* Cal. Exec. Order N-5-22.

6. The majority observes that the California legislature has allowed the law authorizing distance learning in California public schools to expire. This is a red herring. That statute did not become effective until June 29, 2020—long after Governor Newsom closed schools under his emergency powers. Cal. Educ. Code §§ 43500 *et seq.* (effective June 29, 2020 to December 31, 2021). Its expiration, therefore, does not strip Governor Newsom of that power. Rather, the majority's discussion of the statute highlights the fact that Governor Newsom has the power unilaterally to close schools.

some comfort from the fact that "[v]irtually all of [the Governor's] changes [to school reopening plans] (save one example) relaxed the relevant criteria" for reopening. That "one example" is instructive: under the power cited above, Governor Newsom has both loosened *and* tightened restrictions on school closures since this case was filed. As the district court explained, the State replaced its statewide monitoring list with a tier-based system on August 28, 2020. *Brach v. Newsom*, No. 2:20-CV-06472-SVW, 2020 U.S. Dist. LEXIS 232008, 2020 WL 7222103, at *1 (C.D. Cal. Dec. 1, 2020). The State placed counties on the monitoring list—where schools could not reopen—where case rates exceeded 100 per 100,000 people over fourteen days *or* that figure exceeded 25 cases *and* the test positivity rate was above 8%. The tier-based system placed counties in the most restrictive category—where schools could not reopen—when case rates exceeded 7 per 100,000 people per day *or* the test positivity rate exceeded 8%. Thus, a county with 20 cases per 100,000 people per week and a 9% test positivity rate would not have been on the earlier monitoring list, but would have been in Tier 1 under the later guidance. The emergency order grants Governor Newsom the power to act unilaterally in closing schools—power that he has used to both loosen and tighten restrictions since this lawsuit began.

Is this case moot? It does not fit neatly into the fact pattern of any of the cases decided thus far by the Supreme Court. However, I would side with the First, Third, Fourth, and Seventh Circuits—and follow the Supreme Court's guidance—and find that the Governor's continuing authority under his pandemic emergency order is a crucial

factor in this analysis. I would hold that this case is not moot. The fact remains that the pandemic is not over. Governor Newsom has not relinquished his emergency powers, nor has the California Legislature stripped him of those powers. The majority errs in sidestepping this fact. So long as Governor Newsom retains the specific power to impose similar restrictions, and the pandemic continues, I would find this question "capable of repetition."[7]

A brief discussion of the first prong of this test—the duration of the challenged action—underscores this point. Both parties agree that the challenged restrictions were brief enough to evade review. Their duration, therefore, suppors the parents' argument. And yet the majority cites the fact that the restrictions no longer impact the parents as proof that this case *is* moot! In its brief discussion of the "capable of repetition, yet evading review" exception, the majority hangs its hat on the fact that "[t]he challenged orders have long since been rescinded." And so they

7. The majority contends that the continuation of the Governor's emergency order carries little weight because it "can be invoked at any time without prior authorization or fact finding—even if the Governor renounced these powers today, he could assume them again tomorrow at the stroke of a pen." I agree that the theoretical ability to declare a state of emergency that grants an official the power to issue similar restrictions would not necessarily rescue an otherwise moot case. *But see Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (a challenge to repealed, amended, or expired legislation is moot unless "there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it."). I would draw the line in this case at the continuation of *this* emergency order—especially because that action differs from those of officials in other states.

have—which is exactly why this case evades review. To suggest that this is not capable of repetition, yet evading review *because* the orders have already expired subverts the purpose of this doctrine.[8]

The majority accuses the parents of seeking "an insurance policy that the schools will never ever close, even in the face of yet another unexpected emergency or contingency." This exaggerates the parents' claim. I read the parents as seeking judicial review of the contours of the Governor's authority under *this* unprecedented expansion of executive power. Were that power to end, this case would be moot. As it has not, I would hold that the parents' claims are not moot.[9]

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8. Amici take this flawed line of reasoning further. Santa Clara County argues that "if the State were to again bar in-person instruction, it would do so in response to materially different conditions . . . Thus, in the unlikely event that the State does reimpose distance learning, those rules would give rise to a new controversy." First, we cannot disregard the Supreme Court's holding that the "capable of repetition" prong does not require "repetition of every 'legally relevant' characteristic." *Wis. Right to Life*, 551 U.S. at 463. Additionally, Santa Clara County reminds us that this issue is "capable of repetition" because Governor Newsom retains the power to close schools. And further, forcing the parents to bring a new lawsuit every time Governor Newsom exercises that authority to close schools—closures that are, as demonstrated, too brief to be fully litigated—guarantees that this issue will evade review. It is the exact scenario that the "capable of repetition, yet evading review" doctrine was crafted to avoid.

9. For essentially the same reasons that this case is capable of repetition yet evading review, the voluntary cessation doctrine also applies. Under that "stringent" doctrine, the state has the

II.

Because I would find that this case is not moot, I would consider the merits of the parents' claims. I briefly sketch the reasons I would affirm the district court.

The parents have not demonstrated that distance learning fails to satisfy any basic educational standard. For this reason, I would affirm the district court's grant of summary judgment to the State on the parents' substantive due process claim.

Substantive due process forbids the government from infringing on "fundamental" liberty interests. *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). The Supreme Court has, so far, declined to recognize a substantive due process right to a basic minimum education. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution."); *Plyler v. Doe*, 457 U.S. 202, 221, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Public education is not a 'right' granted to individuals by the Constitution.") (citing *Rodriguez*, 411 U.S. at 35); *Papasan v. Allain*, 478 U.S. 265, 285, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)

"heavy burden" to show that it is "absolutely clear that [its] allegedly wrongful behavior could not reasonably be expected to recur." *Native Village of Nuiqsut v. Bureau of Land Mgmt.*, 9 F.4th 1201, 1215 (9th Cir. 2021) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). For the reasons I have already explained, the state has not met this burden.

("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right. . .")).

I would leave for another day the question of whether there exists any constitutional right to a basic minimum education and follow the district court's alternate reasoning that the parents presented neither a "standard for evaluating what should count as a minimally adequate education" nor sufficient record evidence to show that their children are not being educated.[10] Absent a workable standard or a much more substantial record, I would affirm the district court's grant of summary judgment to the State on this claim.[11]

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10. The parents argue that their students experienced technology hurdles, inferior Zoom lessons, and difficulty returning assignments on time, and were denied standardized testing to measure their progress, grades to improve their GPAs, and extracurricular activities to bolster their college applications. Caselaw does not establish that these are constitutionally-required educational components, nor are the parents' declarations sufficiently detailed to establish that the students, as a whole, could not access any minimally adequate education whatsoever.

11. I do not discount the very real hardship students with disabilities faced when attempting distance learning. Plaintiff Christine Ruiz's autistic sons were partially or fully unable to participate in their Zoom classroom meetings and did not receive support services that they require. Plaintiff Ashley Ramirez's autistic son "cannot tolerate distance learning" and "basically shut down." And Plaintiff Brian Hawkins's son with ADHD was not provided with the support services he requires. But the parents abandoned their statutory claims on behalf of disabled students on appeal, choosing instead to devote space to the claims of private school students.

III.

I would affirm the district court's grant of summary judgment to the State on the parents' equal protection claim. As explained above, I would not reach the question of whether there exists a fundamental constitutional right to a basic minimum education, because in any event, the parents here have not shown that their children are being deprived of a minimally adequate education. Thus, no fundamental right was implicated. When an equal protection claim does not implicate a "fundamental" right or discriminate against a suspect class,[12] "it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 457-58, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988). The Supreme Court has held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 67. Because the school-closure order was rationally related to this purpose when enacted, I would hold that it survives the parents' equal protection attack.

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12. Classifications based on the prevalence of COVID, or on the type of educational provider (e.g., public schools vs. summer camps), do not implicate suspect classes. *Cf. Rodriguez*, 411 U.S. at 28 (noting that a class lacks the "traditional indicia" of being a suspect class if "the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

IV.

The parents' opening brief before us asserts that the school closure orders violate the parents' right to send their children to private school under *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) and *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). The State asserts that this argument is waived. In response, the parents contend that their district court briefing preserves a *Meyer-Pierce* argument, and that, in any case, we may exercise our discretion to consider this argument on appeal.

Not so. The parents did not merely fail to raise this argument; they failed to *plead* this *claim*. Their complaint only asserts that the State has violated students'"fundamental right to receive a basic minimum education." While we may consider *arguments* not raised before the district court, *see AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213 (9th Cir. 2020), the parents offer no authority—and I could not find any—to support the idea that we have discretion to consider *claims* not pled in the complaint.

Examining the *Meyer-Pierce* right shows that the parents did not allege a *Meyer-Pierce* claim. *Meyer* struck down a state law barring the teaching of any language other than English to children younger than the ninth grade. 262 U.S. at 397, 400-01. The Supreme Court held that that the Fourteenth Amendment protected as a liberty interest the teacher's "right thus to teach and the right of parents to engage him so to instruct their children." *Id. Pierce*

struck down Oregon's compulsory public education law. 268 U.S. at 534-35. The Supreme Court determined that under *Meyer*, the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" because the liberty interest protected by the Fourteenth Amendment "excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.*

As the above holdings demonstrate, the *Meyer-Pierce* right is a right asserted *by parents*. *See also, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 233, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (describing *Pierce* as "a charter of the rights of parents"); *cf. Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944) (noting in passing that "children's rights to receive teaching in languages other than the nation's common tongue were guarded [in *Meyer*] against the state's encroachment"). On the other hand, the right to a "basic, minimum education" is a right asserted by *children*, or by parents *on behalf of children*. *Plyler*, 457 U.S. at 221 ("Public education is not a 'right' granted *to individuals* by the Constitution") (emphasis added) (citing *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35). While the Supreme Court has found that parents have standing to challenge the education their children receive, it has never formulated this as a *parental* right to a certain education. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (stating that parents who challenged Seattle's race-based school admissions scheme asserted injury "on behalf of their children").

The complaint does not allege any violation of a *parental* right. And in their briefing before the district court, the parents repeatedly disavowed any parental-rights claim. In their supplemental briefing on standing ordered by that court, the parents argued that they could assert claims "on behalf of their children." In their summary judgment briefing, the parents summarized their argument, in its entirety, as follows: "Because Plaintiffs have presented overwhelming evidence showing that the orders violate *their children's constitutional and statutory rights*, the Court should decline to grant summary judgment to Defendants . . ." In the same brief, the parents summarized their aim as "seek[ing] to vindicate their children's constitutional rights to due process and equal protection," "by contrast" to caselaw in which a parent sought to "vindicate *her own* asserted interest" in the child's education. The parents could not have been more clear: they did not bring this case to vindicate parental rights. And because the *Meyer-Pierce* right is a parental right, not a right asserted by a child or a parent on behalf of a child, I would find that the parents failed to raise a *Meyer-Pierce* claim and dismiss this portion of the appeal.

Underscoring this conclusion is the fact that in the district court the parents did not distinguish between the due process rights of public school and private school children, but rather treated them collectively. That is, they alleged the violation of an alleged due process right to a basic minimum education that applied to all students, whether in public or private school. Tellingly, when the parents cited the *Meyer-Pierce* line of cases in

their district court briefing, they did so only in passing. Indeed, at one point the parents specifically stated that "Defendants mischaracterize Plaintiffs as advocating for a 'fundamental right to in-person school.' Plaintiffs' actual argument is that 'the Fourteenth Amendment of the United States Constitution [] protects Californians' fundamental right to a basic minimum education,' and that the Order infringes that right because distance learning has proved woefully inadequate." Under all these circumstances, Plaintiffs clearly did not preserve a separate claim under *Meyer* and *Pierce*.

IV.

Because I would hold that this case is not moot and affirm the district court on the merits, I respectfully dissent.

BERZON, Circuit Judge, dissenting:

I join Judge Paez's dissent in full. In particular, I agree that the merits of the question whether parents of children who attend private schools (and only those parents) have a right to access an in-person education for their children was waived by the Plaintiffs and is not properly before this Court. Paez Dissent at 31-33.

The majority of the three-judge panel nonetheless reached the issue and, relying principally on *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.

Ct. 571, 69 L. Ed. 1070 (1925), held that parents of children in private school have a substantive due process right to have their children attend in-person classes, including during a medical emergency. *See Brach v. Newsom*, 6 F.4th 904, 927-33 (9th Cir. 2021), *vacated*, 18 F.4th 1031 (9th Cir. 2021). I write separately to dispel any suggestion that the waived issue could have possible merit were it to be raised in a later case.

Meyer struck down a Nebraska statute forbidding the teaching of any language other than English before ninth grade as violating the right of a German language instructor "to teach and the right of parents to engage him so to instruct their children." 262 U.S. at 396-97, 400, 403. By completely prohibiting a substantive topic of instruction—foreign languages—the statute "interfere[d] with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own." *Id.* at 401. Two years later, *Pierce* struck down an Oregon law requiring parents to send their children to public schools. 268 U.S. at 529-31. The Court held that the statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control," reasoning that the law's "inevitable practical result . . . would be destruction of appellees' primary schools, and perhaps all other private primary schools" in the state and that the state did not have the power "to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 534-35.

The holdings of *Meyer* and *Pierce* were limited to protecting two rights: the right of parents to choose private rather than public school and the right of those private schools to teach subject matter above and beyond whatever basic curriculum the state may prescribe. To that degree, parents have the right "to control the education of their own," *Meyer*, 262 U.S. at 401, and "to direct the upbringing and education" of their children, *Pierce*, 268 U.S. at 534-35. But the two cases' limited holdings had nothing to do with the state's power otherwise to regulate the conditions under which schools provide that knowledge, let alone the state's power to enforce generally applicable public health laws.

To the contrary, *Meyer* and *Pierce* explicitly preserved the state's broad powers to adopt regulations concerning school attendance and "the public welfare." *Pierce*, 268 U.S. at 534. *Meyer* reserved the "power of the state to compel attendance at some school and to make *reasonable* regulations for *all* schools, including a requirement that they shall give instructions in English." 262 U.S. at 402 (emphasis added). Likewise, *Pierce* emphasized that states retained the power "*reasonably* to regulate all schools," including "to inspect, supervise and examine them" and "to require that all children of proper age attend some school." 268 U.S. at 534 (emphasis added).

Since *Meyer* and *Pierce*, the Supreme Court has repeatedly confirmed this limited understanding of the *Meyer-Pierce* right. *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), reaffirmed "the power of a State, having a high responsibility for

education of its citizens, to impose reasonable regulations for the control and duration of basic education," *id.* at 213. Likewise, *Norwood v. Harrison*, 413 U.S. 455, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973), stressed "the limited scope of *Pierce*," which "held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools," *id.* at 461 (quoting *Yoder*, 406 U.S. at 239 (White, J., concurring)). And *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), emphasized that "*Meyer* and its progeny" protected only the private "schools' right to operate," "the right of parents to send their children to a particular private school rather than a public school," and the right to direct (at least to some degree) "the subject matter which is taught at any private school," *id.* at 177. Echoing *Meyer* and *Pierce*, *Runyon* observed that the "Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation." *Id.* at 178.

California's suspension of in-person education during the COVID-19 pandemic falls well outside this "limited scope" of the *Meyer-Pierce* right. *Id.* at 177. Consistent with *Pierce*, California's public health measures permitted private schools to continue "to exist and to operate," *Norwood*, 413 U.S. at 462, and in no way caused the "destruction" of private education, *Pierce*, 268 U.S. at 534. Nor did California's actions affect *what* private schools may teach; those schools have remained "free to inculcate

whatever values and standards they deem desirable." *Runyon*, 427 U.S. at 177.

That states enjoy wide latitude to safeguard public health and welfare is underscored by the Supreme Court's decision in *Prince v. Massachusetts*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944). *Prince* concerned a challenge to a Massachusetts law restricting child labor brought by a Jehovah's Witness who had assigned her niece, over whom she had legal custody, to sell religious literature on the street. *Id.* at 159-63. The girl's guardian asserted, along with a First Amendment free exercise right, "a claim of parental right as secured by the due process clause of the" Fourteenth Amendment. *Id.* at 164 (citing *Meyer*, 262 U.S. 390). Although *Prince* recognized both "the parent's authority to provide religious" education, *id.* at 166 (citing *Pierce*, 268 U.S. 510), and that "the custody, care and nurture of the child reside first in the parents," *id.*, the Court explained that "the family itself is not beyond regulation in the public interest," *id.* Accordingly, *Prince* observed that "the state as *parens patriae* may restrict the parent's control" "to guard the general interest in youth's well being" and that the parental rights recognized in *Meyer* and *Pierce* did "not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67. And the Court endorsed the state's "wide range of power for limiting parental freedom and authority in things affecting the child's welfare." *Id.* at 167; *see also Yoder*, 406 U.S. at 230 (recognizing the state's power to regulate to prevent "harm to the physical or mental health of the child or to the public safety, peace, order, or welfare"). California's school closures during a once-in-a-century pandemic fall

well within that "wide range of power" to protect public health.

Additionally, that technology has only recently enabled distance learning does not prove that there is a constitutionally protected right to in-person instruction, as the panel opinion posited. *Brach*, 6 F.4th at 929. In this regard, the panel opinion's reliance on "historical practice and tradition," *id.*, makes little sense in light of its simultaneous *rejection* of any parental right to in-person education for public school students. To be sure, our cases recognize that, once parents have chosen public school, "they do not have a fundamental right generally to direct *how* a public school teaches their child." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1206 (9th Cir. 2005) (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395 (6th Cir. 2005)). But the panel opinion did not contend (nor could it) that the historical fact of in-person instruction applied only to private schools. It would therefore be strange to conclude, as the panel opinion did, that students attending public schools have no fundamental right to education *at all*, *Brach*, 6 F.4th at 922-24, yet historical practice dictates that students attending private schools have a fundamental, substantive-due-process based right to *in-person* education, in particular.

In short, even if Plaintiffs had brought a *Meyer-Pierce* claim in this case, which Judge Paez's dissent explains they did not do, Paez Dissent at 31-33, I would conclude that California's school closures challenged here did not violate the important but limited fundamental rights protected by those cases.

Appendix A

State of California—Health and Human Services Agency
California Department of Public Health

Tomás J. Aragón, M.D., Dr.P.H.
State Public Health Officer & Director

GAVIN NEWSOM
Governor

April 6, 2022

TO: All Californians

SUBJECT: COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year

Related Materials: Group-Tracing Approach to Students Exposed to COVID-19 in K-12 Setting | 2021-2022 K-12 Schools Guidance Q&A | CDPH Guidance for the Use of Face Coverings | K-12 Schools Testing Framework 2021-2022 (PDF) | Safe Schools for All Hub | American Academy of Pediatrics COVID-19 Guidance for Safe Schools | More Languages

Updates effective as of April 6, 2022:

- Section 7 (regarding exposure management) has been updated. Sections 8-9 have been retired.

The following guidance is designed to keep California K-12 schools open for in-person instruction safely during the

COVID-19 pandemic, consistent with the current scientific evidence. The foundational principles are ensuring access to safe and full in-person instruction for all students and keeping equity at the core of all efforts described below. In-person schooling is critical to the mental and physical health and development of our students.

COVID-19 has impacted children in both direct and indirect ways, and California's response to conditions in schools has adapted to the dynamic challenges of the pandemic, based on humility and the evolving scientific understanding of the virus. To-date during the 2021-22 school year, the state has weathered two COVID-19 surges while prioritizing the safety of students and staff and in-person instruction. Hospitalizations for COVID-19 (including pediatric hospitalizations) and disruptions to in-person learning, although never inconsequential, have been substantially lower in California than in comparable states. As the most recent surge wanes and we collectively move forward, the next phase of mitigation in schools focuses on long-term prevention and our collective responsibility to preserve safe in-person schooling.

SARS-CoV-2, the virus that causes COVID-19, is transmitted primarily by inhalation of respiratory aerosols. To mitigate in-school transmission, a multi-layered strategy continues to be important, including but not limited to getting vaccinated, wearing a mask, staying home when sick, isolating if positive, getting tested, and optimizing indoor air quality.

COVID-19 vaccination for all eligible people in California, including teachers, staff, students, and all eligible

individuals sharing homes with members of our K-12 populations is crucial to protecting our communities. More information on how to how to promote vaccine access and uptake is available on the California Safe Schools Hub and Vaccinate All 58 - Let's Get to Immunity.

On February 28, 2022, California announced that, based on a review of epidemiologic indicators and modeling projections, the universal indoor mask mandate in K-12 school settings would transition to a strong recommendation after March 11, 2022.

Source: 2/28/22 CalHHS Press Conference

Masks remain one of the most simple and effective safety mitigation layers to prevent transmission of SARS CoV-2. High quality masks, particularly those with good fit and filtration, offer protection to the wearer and optimal source control to reduce transmission to others. To best protect students and staff against COVID-19, CDPH currently strongly recommends continuing to mask indoors in school settings.

CDPH will continue to assess conditions on an ongoing basis to determine if updates to K-12 school guidance are needed, with consideration of the indicators and factors noted below, as well as transmission patterns, global surveillance, variant characteristics, disease severity, available effective therapeutics, modeling projections, impacts to the health system, vaccination efficacy and coverage, and other indicators.

General Considerations:

The guidance below is designed to help K-12 schools continue to formulate and implement plans for safe, successful, and full in-person instruction during the 2021-22 school year. It applies recommendations provided by the Centers for Disease Control and Prevention (CDC) and the American Academy of Pediatrics (AAP) to the California context. The guidance is effective immediately, unless otherwise stated, and will continue to be reviewed regularly by the California Department of Public Health (CDPH). Additional guidance, including additional requirements, may be issued by local public health officials, local educational agencies, and/or other authorities.

This guidance includes mandatory requirements, in addition to recommendations and resources to inform decision-making. Implementation requires training and support for staff and adequate consideration of student and family needs.

When applying this guidance, consideration should be given to the direct school population and the

surrounding community. Factors include: (1) community level indicators of COVID-19 and their trajectory; (2) COVID-19 vaccination coverage in the community and among students, teachers, and staff; (3) local COVID-19 outbreaks or transmission patterns; (4) indoor air quality at relevant facilities; (5) availability and accessibility of resources, including masks and tests; (6) ability to provide therapeutics in a timely and equitable manner as they become available; (7) equity considerations, including populations disproportionately impacted by and exposed to COVID-19; (8) local demographics, including serving specialized populations of individuals at high risk of severe disease and immunocompromised populations; and (9) community input, including from students, families, and staff.

In workplaces, employers are subject to the Cal/OSHA COVID-19 Emergency Temporary Standards (ETS) or in some workplaces the Cal/OSHA Aerosol Transmissible Diseases Standard, and should consult those regulations for additional applicable requirements.

Safety Measures for K-12 Schools

1. Masks

    a. No person can be prevented from wearing a mask as a condition of participation in an activity or entry into a school, unless wearing a mask would pose a safety hazard (e.g., watersports).

    b. CDPH strongly recommends that all persons (e.g., students and staff) wear masks in K-12

indoor settings, with consideration of exemptions per CDPH face mask guidance.

c. Persons exempted from wearing a face covering due to a medical condition are strongly recommended to wear a non-restrictive alternative, such as a face shield with a drape on the bottom edge, as long as their condition permits it.

d. Schools must develop and implement local protocols to provide masks to students who inadvertently fail to bring a face covering to school and desire to use one.

e. Public schools should be aware of the requirements in AB 130 (Chapter 44 of the Statutes of 2021) to offer independent study programs for the 2021-22 school year.

f. In situations where use of masks is challenging due to pedagogical or developmental reasons, (e.g., communicating or assisting young children or those with special needs), a face shield with a drape (per CDPH guidelines) (PDF) may be considered instead of a mask while in the classroom.

2. Physical distancing

   a. CDPH recommends focusing on the other mitigation strategies provided in this guidance

instead of implementing minimum physical distancing requirements for routine classroom instruction.

3. Ventilation recommendations:

   a. For indoor spaces, indoor air quality should be optimized, which can be done by following CDPH Guidance on Ventilation of Indoor Environments and Ventilation and Filtration to Reduce Long-Range Airborne Transmission of COVID-19 and Other Respiratory Infections: Considerations for Reopened Schools (PDF), produced by the CDPH Air Quality Section.

4. Recommendations for staying home when sick and getting tested:

   a. Follow the strategy for Staying Home when Sick and Getting Tested from the CDC.

   b. Get tested for COVID-19 when symptoms are consistent with COVID-19.

   c. Advise staff members and students with symptoms of COVID-19 infection not to return for in-person instruction until they have met the following criteria:

      i. At least 24 hours have passed since resolution of fever without the use of fever-reducing medications; AND

ii. Other symptoms are improving; AND

iii. They have a negative test for SARS-CoV-2, OR a healthcare provider has provided documentation that the symptoms are typical of their underlying chronic condition (e.g., allergies or asthma) OR a healthcare provider has confirmed an alternative named diagnosis (e.g., Streptococcal pharyngitis, Coxsackie virus), OR at least 10 days have passed since symptom onset.

iv. If the student or staff member tests positive for SARS-CoV-2, follow the guidance for isolation in Section #10 below.

5. Screening testing recommendations:

a. CDPH has a robust State- and Federally-funded school testing program and subject matter experts available to support school decision making, including free testing resources to support screening testing programs (software, test kits, shipping, testing, etc.).

i. Resources for schools interested in testing include: California's Testing Task Force K-12 Schools Testing Program, K-12 school-based COVID-19 testing strategies (PDF) and Updated Testing Guidance; The Safe Schools for All state technical assistance (TA) portal; and the CDC K-12 School Guidance screening

testing considerations (in Section 1.4 and Appendix 2) that are specific to the school setting.

6. Case investigation and reporting:

   a. Per AB 86 (2021) and California Code Title 17, section 2500, schools are required to report COVID-19 cases to the local public health department.

   b. Schools or LEAs should have a COVID-19 liaison to assist the local health department with activities related to COVID-19.

7. Recommendations for Students exposed to COVID-19:

   Schools may consider permitting asymptomatic exposed students, regardless of their COVID-19 vaccination status or location of exposure, to continue to take part in all aspects of K-12 schooling, including sports and extracurricular activities, unless they develop symptoms or test positive for COVID-19. It is strongly recommended that exposed students wear a well-fitting mask indoors around others for at least 10 days following the date of last exposure, if not already doing so.

   a. Exposed students, regardless of COVID-19 vaccination status, should get tested for COVID-19 with at least one diagnostic test (e.g., an FDA-authorized antigen diagnostic test, PCR

diagnostic test, or pooled PCR test) obtained within 3-5 days after last exposure, unless they had COVID-19 within the last 90 days.

i. Exposed students who had COVID-19 within the last 90 days do not need to be tested after exposure but should monitor for symptoms. If symptoms develop, they should isolate and get tested with an antigen test.

ii. If the exposed student has symptoms consistent with COVID-19, they should stay home, get tested and follow the guidance in Section #4 above.

iii. If the exposed student tests positive for COVID-19, follow the guidance for isolation in Section #10 below.

b. Follow the Group Tracing Guidance for notification recommendations for exposures that occur in a school setting.

Sections 8-9 have been retired.

10. Isolation recommendations

a. Everyone who is infected with COVID-19, regardless of vaccination status, previous infection or lack of symptoms, follow the recommendations listed in Table 1 (Isolation) of the CDPH Guidance on Isolation and Quarantine for the General Public.

11. Hand hygiene recommendations

    a. Teach and reinforce washing hands, avoiding contact with one's eyes, nose, and mouth, and covering coughs and sneezes among students and staff.

    b. Promote hand washing throughout the day, especially before and after eating, after using the toilet, and after handling garbage or removing gloves.

    c. Ensure adequate supplies to support healthy hygiene behaviors, including soap, tissues, no-touch trashcans, face coverings, and hand sanitizers with at least 60 percent ethyl alcohol for staff and children who can safely use hand sanitizer.

12. Cleaning recommendations

    a. In general, routine cleaning is usually enough to sufficiently remove potential virus that may be on surfaces. Disinfecting (using disinfectants on the U.S. Environmental Protection Agency COVID-19 list) removes any remaining germs on surfaces, which further reduces any risk of spreading infection.

    b. For more information on cleaning a facility regularly, when to clean more frequently or disinfect, cleaning a facility when someone is

sick, safe storage of cleaning and disinfecting products, and considerations for protecting workers who clean facilities, see Cleaning and Disinfecting Your Facility.

c. If a facility has had a sick person with COVID-19 within the last 24 hours, clean AND disinfect the spaces occupied by that person during that time.

d. Drinking fountains may be open and used by students and staff. Routine cleaning is recommended.

13. Food service recommendations

a. Maximize physical distance as much as possible while eating (especially indoors). Using additional spaces outside of the cafeteria for mealtime seating such as classrooms or the gymnasium can help facilitate distancing. Arrange for eating outdoors as much as feasible.

b. Per routine practice, surfaces that come in contact with food should be washed, rinsed, and sanitized before and after meals.

c. There is no need to limit food service approaches to single use items and packaged meals.

14. Vaccination verification considerations

a. To inform implementation of prevention strategies that vary by vaccination status (testing, contact

tracing efforts, and quarantine and isolation practices), refer to the CDPH vaccine verification recommendations.

15. COVID-19 Safety Planning Transparency Recommendations

    a. In order to build trust in the school community and support in-person instruction, it is a best practice to provide transparency to the school community regarding the school's safety plans. At a minimum, it is recommended that all local educational agencies (LEAs) post a safety plan that communicates the safety measures in place for 2021-22, on the LEA's website and at schools and disseminate the plan to families.

Note: With the approval of the federal American Rescue Plan, each local educational agency receiving Elementary and Secondary School Emergency Relief (ARP ESSER) funds is required to adopt a Safe Return to In-Person Instruction and Continuity of Services Plan and review it at least every six months for possible revisions. The plan must describe how the local educational agency will maintain the health and safety of students, educators and other staff. Reference the Elementary and Secondary School Relief Fund (ESSER III) Safe Return to In-Person Instruction Local Educational Agency Plan Template (PDF).

16. School-Based Extracurricular Activities

The requirements and recommendations in this guidance apply to all extracurricular activities that are operated or supervised by schools, and all activities that occur on a school site, whether or not they occur during school hours, including, but not limited to, sports, band, chorus, and clubs.

Indoor mask use remains an effective layer in protecting against COVID-19 infection and transmission, including during sports, music, and related activities, especially activities with increased exertion and/or voice projection, or prolonged close face-face contact. Accordingly:

- Masks are strongly recommended indoors at all times for teachers, referees, officials, coaches, and other support staff.

- Masks are strongly recommended indoors for all spectators and observers.

- Masks are strongly recommended indoors at all times when participants are not actively practicing, conditioning, competing, or performing. Masks are also strongly recommended indoors while on the sidelines, in team meetings, and within locker rooms and weight rooms.

- When actively practicing, conditioning, performing, or competing indoors, masks are

strongly recommended by participants even during heavy exertion, as practicable. Individuals using instruments indoors that cannot be played with a mask (e.g., wind instruments) are strongly recommended to use bell coverings and maintain a minimum of 3 feet of physical distancing between participants. If masks are not worn (or bell covers are not used) due to heavy exertion, it is strongly recommended that individuals undergo screening testing at least once weekly, unless they had COVID-19 in the past 90 days. An FDA-authorized antigen test, PCR test, or pooled PCR test is acceptable for evaluation of an individual's COVID-19 status.

Additional considerations or other populations

1. Recommendations for students with disabilities or other health care needs

    a. When implementing this guidance, schools should carefully consider how to address the legal requirements related to provision of a free appropriate public education and requirements to reasonably accommodate disabilities, which continue to apply.

    b. For additional recommendations for students with disabilities or other health care needs, refer to guidance provided by the CDC, AAP, and the Healthy Kids Collaborative.

2. Visitor recommendations

    a. Schools should review their rules for visitors and family engagement activities.

    b. Schools should limit nonessential visitors, volunteers, and activities involving external groups or organizations with people who are not fully vaccinated.

    c. Schools should not limit access for direct service providers, but can ensure compliance with school visitor polices.

    d. Schools should continue to emphasize the importance of staying home when sick. Anyone, including visitors, who have symptoms of infectious illness, such as influenza or COVID-19, should stay home and seek testing and care.

3. Boarding schools may operate residential components under the following guidance:

    a. Strongly recommend policies and practices to ensure that all eligible students, faculty and staff have ample opportunity to get vaccinated.

    b. Strongly recommend that unvaccinated students and staff be offered regular COVID-19 screening testing.

    c. Consider students living in multi-student rooms as a "household cohort." Household cohort

members, regardless of vaccination status, do not need to wear masks when they are together without non-household cohort members nearby. If different "household cohorts" are using shared indoor space when together during the day or night, continue to strongly recommend mask use, and healthy hygiene behaviors for everyone.

The non-residential components of boarding schools (e.g., in-person instruction for day students) are governed by the guidelines as other K-12 schools, as noted in this document.

Childcare settings and providers remain subject to separate guidance.

Originally published on July 12, 2021

California Department of Public Health
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Department Website (cdph.ca.gov)

Education Leaders Reaffirm Commitment to Keeping California's Schools Open for Safe, In-Person Learning

Published: Dec 22, 2021

SACRAMENTO — Governor Gavin Newsom today issued the following joint statement by leading education organizations, including the California State Parent Teacher Association; California Teachers Association; California Federation of Teachers; California School Employees Association; SEIU California; Association of California School Administrators; California County Superintendents Educational Services Association; California School Boards Association; and California Charter Schools Association:

"Across California, school communities — students, parents, teachers, staff, administrators and board members together — have worked tirelessly to keep schools both safe and in-person. California schools have been open because of, not despite of, our priority on safety. As we approach the new year, we reaffirm our shared commitment to one another, to our parents and to our students: to keep each other safe and to keep our classrooms open."

While California educates over 12% of the nation's students, the state accounts for only 0.3% of school closures nationwide in the 2021-22 school year, according to the independent site Burbio.

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www.newsweek.com /despite-stricter-covid-restrictions-californias-schools-remained-open-amid-mass-closures-1667459

Despite Stricter COVID Restrictions, California's Schools Remained Open Amid Mass Closures

Katherine Fung : : 1/10/2022

News California Coronavirus School Students

While thousands of schools shuttered last week in response to the latest Omicron wave, California saw relatively few closures in the same time period despite having stricter restrictions than other states.

In a weekly update from one of the co-founders of Burbio, which is tracking K-12 school openings this academic year, Dennis Roche noted that California had very few closures over the last few weeks.

Roche told *Newsweek* that the state has actually kept schools open at one of the highest rates in the country so far this academic year.

Last week, school closures on a national level reached their highest total—a trend driven by rising COVID-19 cases, staffing shortages and the Chicago Public Schools work action.

Although last week began with 1,591 closures, Burbio's tracker identified 5,409 school disruptions by Friday. Closures were particularly concentrated in the Northeast, Mid-Atlantic and Midwest.

One of the reason why schools in California have remained largely unaffected by the mass closures could be a new

law passed by the State Legislature in June—a time when the state was seeing a decline in infections.

Under the law, superintendents are required to consult with both the California Department of Education and their local county office of education before closing their districts. They would also need to file a plan for how schools would provide instruction for students missing time on campus.

Districts that want to be funded during a closure must show that the disruptions are driven by teacher shortages and not student absences.

Many schools in California remained open last week as thousands others on the East Coast shuttered. Above, cheerleaders from South El Monte High School walk past the first school buses of a new all-electric fleet for the El Monte Unified High School District on August 18, 2021, in El Monte, California. Frederic J. Brown/AFP

While Governor Gavin Newsom has been known to implement tight COVID-19 restrictions—including universal face masking for indoor settings and vaccine mandates for health care workers and students—he has also pushed to keep classrooms across the state open.

Ahead of the winter break, Newsom said, "California schools have been open because of, not despite of, our priority on safety. As we approach the new year, we reaffirm our shared commitment to one another, to our parents and to our students: to keep each other safe and to keep our classrooms open."

But even efforts from the state's top officials have failed to keep every student in California on school campuses.

With the rise in infections, some districts have had to make the decision to close schools.

Last week, the West Contra Costa School District announced it would close its 54 schools last Friday and this Monday "to relieve a little pressure and allow more time for those in our community who are sick to recover."

The district called it a "very challenging week" for their school communities and officials noted "we're seeing a lot more staff absences than usual due to the virus, and we also have an increased number of students testing positive for COVID-19 as we return from winter break."

Beginning Monday, school staff will be required to wear KN-95 masks.

The district will also open three new testing sites for the school communities and distribute 15,000 in-home testing kits to students before they return on Tuesday.

Update 10/01/21 12:07 p.m. ET This story was updated with comments from Roche.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:

  > A material point of fact or law was overlooked in the decision;

  > A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or

  > An apparent conflict with another decision of the Court was not addressed in the opinion.

- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

  > Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or

> The proceeding involves a question of exceptional importance; or

> The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).

- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).

- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.

- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).

- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.

- The petition must be accompanied by a copy of the panel's decision being challenged.

- A response, when ordered by the Court, shall comply with the same length limitations as the petition.

- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or response must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*

- You may file a petition electronically via the appellate ECF system. No paper copies are

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 23, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20-56291
D.C. No. 2:20-cv-06472-SVW-AFM.

MATTHEW BRACH, an individual; JESSE PETRILLA, an individual; LACEE BEAULIEU, an individual; ERICA SEPHTON, an individual; KENNETH FLEMING, an individual; JOHN ZIEGLER, an individual; ALISON WALSH, an individual; ROGER HACKETT, an individual; CHRISTINE RUIZ, an individual; Z.R., a minor; ADEBUKOLA ONIBOKUM, an individual; BRIAN HAWKINS, an individual; TIFFANY MITROWKE, an individual; MARIANNE BEMA, an individual; ASHLEY RAMIREZ, an individual,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; ROBERT A. BONTA, in his official capacity as the Attorney General of California; TOMÁS J ARAGÓN, in his official capacity as the State Public Health Officer of California and Director of the California Department of Public Health; TONY THURMOND, in his official capacity as State Superintendent of Public Instruction of California and Director of Education of California,

Defendants-Appellees.

Appendix B

March 2, 2021, Argued and Submitted,
Pasadena, California
July 23, 2021, Filed

Appeal from the United States District Court for the
Central District of California.
Stephen V. Wilson, District Judge, Presiding.

Before: Eugene E. Siler,* Andrew D. Hurwitz, and
Daniel P. Collins, Circuit Judges. Opinion by Judge
Collins; Dissent by Judge Hurwitz.

OPINION

COLLINS, Circuit Judge:

Plaintiffs, 14 parents and one student, appeal from the district court's grant of summary judgment dismissing their federal constitutional challenges to the State of California's extended prohibition on in-person schooling during the Covid-19 ("Covid") pandemic. We conclude that, despite recent changes to the State's Covid-related regulations, this case is not moot. As to the merits, we hold that the district court properly rejected the substantive due process claims of those Plaintiffs who challenge California's decision to temporarily provide *public* education in an almost exclusively online format. Both the Supreme Court and this court have repeatedly declined

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* The Honorable Eugene E. Siler, Jr., United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

to recognize a federal constitutional right to have the State affirmatively provide an education in any particular manner, and Plaintiffs have not made a sufficient showing that we can or should recognize such a right in this case.

We reach a different conclusion, however, as to the State's interference in the in-person provision of *private* education to the children of five of the Plaintiffs in this case. California's forced closure of their private schools implicates a right that has long been considered fundamental under the applicable caselaw—the right of parents to control their children's education and to choose their children's educational forum. Because California's ban on in-person schooling abridges a fundamental liberty of these five Plaintiffs that is protected by the Due Process Clause, that prohibition can be upheld only if it withstands strict scrutiny. Given the State closure order's lack of narrow tailoring, we cannot say that, as a matter of law, it survives such scrutiny. We therefore reverse the district court's grant of summary judgment as to these five Plaintiffs and remand for further proceedings.

As for Plaintiffs' claims under the Equal Protection Clause of the Fourteenth Amendment, we conclude that the public-school Plaintiffs have failed to make a sufficient showing of a violation of the Equal Protection Clause. The challenged distinctions that the State has drawn between public schools and other facilities are subject only to rational-basis scrutiny, and these distinctions readily survive that lenient review. As to the private-school Plaintiffs, we vacate the district court's judgment rejecting their Equal Protection claims and remand for

further consideration in light of the conclusion that the State's actions implicate a fundamental right of those Plaintiffs.

I

This case involves a challenge to various orders that California has issued concerning the operation of schools and other facilities during the current Covid pandemic. The Defendants are various officials of the State of California, whom we refer to collectively as "California" or "the State." Among the Plaintiffs are 10 parents of current California public-school students and one public-school student (collectively, the "public-school Plaintiffs").[1] Also included among the Plaintiffs are five

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1. Three of the Plaintiffs (Kenneth Fleming, Tiffany Mitrowke, and Ashley Ramirez) alleged in the operative complaint that their children attended public school but then failed to mention that detail in their declarations. The State has not contested that their children attend public schools, however, and so the point is properly taken as undisputed for purposes of summary judgment. One parent (Lacee Beaulieu) has one child in public school and one child in private school. Two Plaintiffs (Marianne Bema and Brian Hawkins) do not state, either in their declarations or in the complaint, which types of school their children attend. Given this failure of proof, there is no basis in the record to exclude them from the group of Plaintiffs whose claims fail on the merits—*viz.*, the public-school Plaintiffs. Accordingly, they are properly classified as public-school Plaintiffs for purposes of this appeal. One Plaintiff (Alison Walsh) previously had her children enrolled in public school but switched them to private school in the fall of 2020. Because, however, she did not state that she planned to switch them back to public school if the challenged orders were lifted, and because the

parents (collectively, the "private-school Plaintiffs") who seek to send their children to private school for in-person instruction. The various Plaintiffs contend that, as applied to their schools, California's prohibition on in-person learning "effectively preclud[ed] children from receiving a basic minimum education" and violated their fundamental rights under the Due Process Clause of the Fourteenth Amendment. Plaintiffs also allege that California's school-closure mandate violated the Equal Protection Clause by "arbitrarily treat[ing] Plaintiffs' children (and other minors attending public and private schools) differently from those in nearby school districts; from those in childcare; and from those attending summer camps, even though all such children and their families are similarly situated." Plaintiffs sought a declaratory judgment, injunctive relief, and other "appropriate and just" relief for the alleged violation of their constitutional rights.

On appeal from the district court's summary judgment against them, Plaintiffs ask us to reverse and remand with instructions to grant summary judgment in their favor. In reviewing the factual and procedural background concerning Plaintiffs' claims, we begin by describing the legal framework of the relevant restrictions that California has placed on the operation of public and private schools, and we then summarize the specific factual context of Plaintiffs' claims.

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only relief sought in the complaint is prospective, she is properly classified as only a private-school Plaintiff. By contrast, because Plaintiff Jesse Petrilla has averred that he will switch his current private-school children back to public school upon reopening, he is appropriately deemed to be only a public-school plaintiff.

A

As cases of Covid began to rise in early 2020, government officials across the country began to issue orders seeking to control the spread of the virus. In framing its de jure restrictions, California adopted a comprehensive approach. On March 19, 2020, the Governor issued Executive Order N-33-20, which directed all California residents "to immediately heed the current State public health directives," including the requirement "to stay home or at their place of residence *except* as needed to maintain continuity of operations of the federal critical infrastructure sectors." *See* Cal. Exec. Order N-33-20 (Mar. 19, 2020) (emphasis added).[2] Under this order, which remained in effect until June 11, 2021, the default rule was that California residents were prohibited "from leaving their homes for any reason, except to the extent that an *exception* to that order granted *back* the freedom to conduct particular activities or to travel back and forth to such activities." *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 944 (9th Cir. 2020) (Collins, J., dissenting). Accordingly, the ability to operate schools (or anything else) turned on what sort of permission State officials granted back either in the form of rules governing "critical infrastructure sectors" or some other exception to the stay-at-home order.

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2. Previously, the Governor had declared a state of emergency on March 4, 2020, and he issued an executive order on March 12 ordering that "[a]ll residents are to heed any orders and guidance of state and local public health officials." Cal. Exec Order N-25-20 (Mar. 12, 2020).

Shortly thereafter, on March 22, 2020, the California State Public Health Officer issued a list of designated "essential" workers who were allowed to leave their homes to support specified critical infrastructure sectors. That list expressly included workers teaching at "public and private . . . K-12 schools," but *only* for "distance learning." Although many schools had already independently decided to close by that time, the effect of these orders was to impose a new State mandate that schools remain limited to "distance learning."

On May 4, 2020, the Governor issued Executive Order N-60-20, which reiterated the obligation to "continue to obey State public health directives," which "have ordered all California residents [to] stay home except for essential needs, as defined in State public health directives." Cal. Exec. Order N-60-20 (May 4, 2020). This order addressed the State's issuance of a planned four-stage "Roadmap" for reopening, which defined "Stage 1" as the then-existing largely closed state of affairs. The order stated that, in implementing such a phased reopening, the State Public Health Officer could establish "criteria and procedures" to allow local health officers "to establish and implement public health measures less restrictive" than the State-imposed measures. *Id.* The order further stated that no aspect of the order, including the State Public Health Officer's "establishment or implementation of such criteria or procedures," would be subject to California's "Administrative Procedure Act [('APA')], Government Code section 11340 et seq." *Id.* The order also declared that nothing in these "criteria and procedures" governing local health officers "shall limit the authority of the State Public

Health Officer to take any action she deems necessary to protect public health in the face of the threat posed by COVID-19." *Id.*

In a follow-on May 7, 2020 order, the State Public Health Officer stated that she would "progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications." *See* Cal. State Public Health Officer Order of May 7, 2020. This order further provided that, "[t]o the extent that such sectors are re-opened, Californians may leave their homes to work at, patronize, or otherwise engage with those businesses, establishments, or activities," provided that, "at all times," they must "practice physical distancing, minimize their time outside of the home, and wash their hands frequently." *Id.* The order reiterated that, apart from any such designated exceptions, the March 19 stay-at-home order "otherwise remains in full effect." *Id.*

The initial Roadmap had suggested that in-person school instruction might be designated as an activity authorized at "Stage 2." However, the State reversed course on its overall reopening plan in mid-July. On July 13, 2020, the State Public Health Officer issued an order generally closing a variety of services (such as bars, indoor dining, movie theaters, and museums) statewide and closing other activities (such as gyms, places of worship, hair salons, and malls) in those counties that appeared on the State's "County Monitoring List" for more than three days.[3] *See* Cal. State Public Health Officer Order of July

3. A county was placed on the County Monitoring List if it failed to meet the State's benchmarks on various measures, such as

13, 2020. On July 17, 2020, the California Department of Public Health ("CDPH") issued a "Reopening In-Person Learning Framework for K-12 Schools" for the 2020-2021 school year (hereinafter the "Framework"). Consistent with the authority granted in the Governor's May 4 order, this Framework established "criteria" under which "local health jurisdiction[s]" could deviate from the otherwise applicable statewide ban on in-person learning.

Under the Framework's criteria, a school generally could reopen for in-person instruction only if the school's local health jurisdiction had *not* been on the County Monitoring List for the preceding 14 days. If the local health jurisdiction was on the County Monitoring List over that 14-day period, then the school was required to "conduct distance learning only." After consultation with the CDPH, a local health officer could grant a waiver from these criteria, but only in the case of "elementary schools" and only if the relevant school official requested it. As the CDPH later explained, this waiver policy was justified due to the "lower risk of child-to-child or child-to-adult transmission in children under age 12," and the "particularly low" "risk of infection and serious illness in elementary school children." Once a school reopened, it was required to follow certain protocols, but it was *not* required to close again simply because its local health jurisdiction might *later* be placed on the County Monitoring List. Nonetheless, the Framework set forth guidelines for when closure of an individual school was "recommended." The Framework also specified that, "if 25% or more of

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the rate of new infections per 100,000 residents, the test positivity rate, and the rate at which hospitalizations were increasing.

schools in a district have closed due to COVID-19 within 14 days," then the relevant "superintendent should close [the] school district."

On August 3, 2020, the CDPH issued detailed guidance for conducting any authorized in-person operations in "Schools and School-Based Programs."[4] The guidance covered such matters as face coverings, social distancing, hand washing, disinfection, and ventilation. On the same day, the CDPH issued an additional memorandum concerning elementary-school waiver requests, and this document stated that the CDPH recommended against waivers for elementary schools in counties with 14-day case rates of more than 200 cases per 100,000 people.

Later that same month, the CDPH issued guidance allowing a "specified subset of children and youth" to meet in "controlled, supervised, and indoor environments," but only in small "cohorts" of no more than 14 children, and with no more than two supervising adults. Such cohorts could meet at a school even if that school was otherwise *not* authorized to conduct in-person instruction. Simultaneously, the CDPH issued a further document that was "intended to supplement" this cohort guidance. That document clarified that the guidance was *not* intended "to allow for in person instruction of

4. Although the Q&A document accompanying this Guidance characterized it as a binding "public health directive," the extent to which *each* of the various statements in this document constituted a binding legal prescription is not always clear, because many of them were couched in terms of what "should" be done rather than what "must" be done.

all students," but was instead intended "to establish minimum parameters for providing specialized services, targeted services and support for students" whose schools are closed. Accordingly, the document confirmed, only "[i]n-person *targeted, specialized* support and services in stable cohorts is [sic] permissible" (emphasis added). In describing what "qualifies as a specialized and targeted support services [sic]," the document states that this will be determined by "local educational agencies," but that the phrase "include[s] . . . occupational therapy services, speech and language services, and other medical services, behavioral services, educational support services as part of a targeted intervention strategy or assessments, such as those related to English learner status, individualized educational programs and other required assessments."

On August 28, 2020, the Acting State Public Health Officer issued an order announcing an "updated framework for reopening," which eventually became known as the "Blueprint for a Safer Economy." *See* Cal. State Public Health Officer Order of Aug. 28, 2020. Under this new system, California used specified metrics to assign each county to one of four tiers, ranging from Tier 1 (indicating "Widespread" community transmission) to Tier 4 ("Minimal" transmission). This August 28 order superseded the prior July 13 order that relied on the "County Monitoring List." *Id.* Under the new order, "Tier 1" replaced the County Monitoring List, although the criteria ultimately developed for being assigned to that tier differed from those that would have placed a county on the monitoring list. *Id.* Under the "County Monitoring List" system, a county was placed on the list if either

(1) its 14-day case rate was over 100 per 100,000 people; or (2) *both* (i) its 14-day case rate was over 25 per 100,000 and (ii) its 7-day testing positivity rate was over 8 percent. Under the tier system, a county would be assigned to Tier 1 if either (1) its 7-day case rate was over 7 per 100,000 *or* (2) its 7-day test positivity rate was over 8 percent.

In subsequent guidance, the CDPH reiterated that the July 17, 2020 school reopening "Framework" remained in effect, except that any reference to the "County Monitoring List" now referred to "Tier 1" counties. Accordingly, "[s]chools in counties within Tier 1 [we]re not permitted to reopen for in-person instruction," except pursuant to the waiver process for certain elementary school grades. Once a county fell out of Tier 1 for 14 days, then schools were "eligible for reopening at least some in-person instruction" in accordance with the applicable protocols. The CDPH also reaffirmed that, once a school reopened, it was not required to close again even if its county "move[d] back to Tier 1."

After the district court granted summary judgment in this case, the CDPH revised its school reopening framework on January 14, 2021. Under the State's updated "Reopening In-Person Instruction Framework" (hereinafter the "Revised Framework"),[5] elementary

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5. The State's unopposed motions for judicial notice are hereby granted. As the State's initial request for judicial notice explains, intervening revisions to California's various orders supersede some of the provisions that Plaintiffs sought to enjoin and are to that extent necessarily relevant to this appeal from the denial of Plaintiffs' claims for declaratory and injunctive relief.

schools in Tier 1 could open for in-person instruction if the county's adjusted case rate remained below 25 cases per 100,000 people per day for at least five consecutive days. In connection with this loosening of the elementary-school closure rules, the Revised Framework terminated the preexisting waiver process (although previously granted waivers remain valid). This Revised Framework was further updated on March 20, 2021 to allow schools to reopen for in-person instruction for all grades K-12 if the adjusted weekly county case rate fell below 25 per 100,000 population per day.[6] Schools had at least three weeks to reopen, even if the county adjusted case rate subsequently surpassed 25 per 100,000 per day. If a school did not reopen within the three-week eligibility window and the case rates once again rose above the reopening threshold, the school was presumably not permitted to reopen for in-person instruction.

We likewise take judicial notice of the State's more recent orders making further relevant modifications. To the extent that some of the items attached to the State's most recent motion might not otherwise be subject to judicial notice, we consider those items in light of Plaintiffs' lack of objection, but only for the limited purpose for which they were offered (namely, to address the issue of mootness). Because Plaintiffs' opposed motion requests judicial notice of press releases and public statements, rather than operative orders and guidance, we deny that motion.

6. The Revised Framework was later updated but remained the same in the material respects discussed here. *See* Revised Framework (June 4, 2021), https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19-K12-Schools-InPerson-Instruction.aspx#In-Person%20School%20Reopening.

In addition, Assembly Bill 86 was enacted into law on March 5, 2021, and it imposed several requirements in connection with the provision of in-person instruction. *See* 2021 Cal. Stat. ch. 10 (A.B. 86). In particular, the law requires that, at least five days before providing in-person instruction for grades 1 to 12, any local educational agency or private school must "post a completed COVID-19 safety plan on its internet website home page." *See* Cal. Educ. Code § 32091(b)(1). If a public school is in a county in Tier 1, then its safety plan must also be submitted to the CDPH and the relevant local health agency five days before reopening. *Id.* § 32091(b)(2). In Tier 1 counties, a public school may not provide in-person instruction until it resolves any deficiencies in its safety plan identified by CDPH or the relevant local health agency. *Id.*

On June 11, 2021, the Governor issued Executive Order N-07-21, which formally revoked both Executive Order N-33-20 (the stay-at-home order) and Executive Order N-60-20 (the order on which the State's Blueprint framework of restrictions was based). *See* Cal. Exec. Order N-07-21 (June 11, 2021). As a result, "all restrictions on businesses and activities deriving from that framework, including all aspects of the Blueprint for a Safer Economy," were rescinded. *Id.* The new order, however, expressly preserves the State Public Health Officer's authority to issue Covid-related directives and to do so without regard to the restrictions of California's APA.[7]

7. To the extent that the dissent suggests that the State has eliminated the obligation to obey orders of the State Public Health Officer, *see* Dissent at 5, that is wrong. Executive Order N-07-21's recitals specifically reaffirm that, under the existing provisions of

Id. Contemporaneously with the issuance of this new executive order, the State Public Health Officer issued an order, effective June 15, 2021, preserving a limited set of statewide restrictions, including guidance concerning face coverings and provisions governing so-called "Mega Events." *See* Cal. State Public Health Officer Order of June 11, 2021.[8] Notably, this order specifically preserved "the current COVID-19 Public Health Guidance for K-12 Schools in California, the current COVID-19 Public Health Guidance for Child Care Programs and Providers, and the portions of the current K-12 Schools guidance that have been made explicitly applicable to day camps and other supervised youth activities." *Id.* That Guidance for K-12 schools, in turn, specifically stated that the "Blueprint for a Safer Economy continues to inform the school reopening process." *See* Revised Framework (June 4, 2021). Thus, while all other industries and sectors were no longer governed by the Blueprint, the school reopening process continued to be "based on Tiers, defined using the [county case rate], the 7-day average of daily COVID-19 cases per 100,000 population, and the test positivity in a county." *Id.*

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the California Health and Safety Code and other laws, the State Public Health Officer is "empowered to issue *mandatory* public health directives to protect the public health in response to a contagious disease," and the order then continues to expressly exempt "any Orders, guidance, or directives of the State Public Health Officer relating to COVID-19" from the provisions of California's APA. *See* Cal. Exec. Order N-07-21 (emphasis added).

8. https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Beyond-Blueprint.aspx. *See also* Beyond the Blueprint for Industry and Business Sectors, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Beyond-Blueprint-Framework.aspx.

On July 12, 2021, the CDPH issued guidance for the upcoming 2021-2022 school year that adopts a new framework that emphasizes masking and other measures, with the stated aim of maximizing opportunities for in-person instruction. *See* CDPH, *COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year.*[9] The guidance states that its requirements and recommendations are "designed," based on the "current scientific evidence about COVID-19," "to enable all schools to offer and provide full in-person instruction." Although the guidance states that CDPH's objective is to enable in-person instruction to continue "even if pandemic dynamics shift," the guidance does not expressly foreclose the possibility that school closures could be required in the future. *Id.* Indeed, the guidance reaffirms its provisional nature by stating that it "will be reviewed regularly by the [CDPH]," which "will continue to assess conditions on an ongoing basis." *Id.*

B

On July 21, 2020, Plaintiffs filed suit against California requesting declaratory and injunction relief. Plaintiffs subsequently sought a temporary restraining order ("TRO"), which the district court denied. Shortly thereafter, the district court requested briefing on whether it should grant summary judgment *sua sponte*. In opposing summary judgment, Plaintiffs relied largely on the factual presentation they had made in connection

9. https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/K-12-Guidance-2021-22-School-Year.aspx.

with their earlier-filed TRO and preliminary injunction motions. Those submissions included declarations from each of the adult Plaintiffs, and these declarations constitute the primary record evidence concerning the individual Plaintiffs' respective factual situations.

The declarations submitted by the public-school Plaintiffs assert that their children have been harmed by distance learning. For example, Matthew Brach describes detrimental academic and social impacts on his two children. He further asserts that his school district had taken steps "to be able to safely reopen" the schools that his children attend. These steps included purchasing personal protective equipment, handwashing stations, and individual water filling stations, as well as implementing a mitigation strategy comprising, *inter alia*, staggered arrival times, a lunchtime "grab/go" model, and mask requirements.

The private-school Plaintiffs submitted similar declarations, alleging that their children have suffered emotionally or academically as a result of California's distance-learning mandates. One of these parents, Roger Hackett, has a sixth-grade son who attends Oaks Christian School in Los Angeles County. Hackett alleges that Oaks Christian would have provided in-person instruction but could not do so due to the State's orders. Consequently, his son has received only "remote learning," which in Hackett's view "does NOT come close to replacing actual in-school, in-person teaching and learning." Hackett attested that he would immediately send his son back to school for in-person instruction upon reopening.

After receiving briefing, the district court granted summary judgment to California on December 1, 2020. This expedited appeal followed. "We review de novo the district court's grant of summary judgment." *Oswalt v. Resolute Indus., Inc.*, 642 F.3d 856, 859 (9th Cir. 2011). "[V]iewing the evidence in the light most favorable to the nonmoving party," we must determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

II

Before turning to the merits of Plaintiffs' claims, we first address the threshold issue of whether their claims are moot.[10] After oral argument on March 2, 2021,

10. On appeal, California has not contested the Plaintiffs' Article III standing to bring this suit, and in our view, properly so. Although a few of the declarations presented by Plaintiffs are somewhat barebones, they nonetheless provide a reasonable basis for concluding that their schools' closures were not voluntary but were instead fairly traceable to the State's prohibition on in-person instruction. The declarations therefore likewise confirm that injunctive and declaratory relief would redress Plaintiffs' injuries by ensuring that those schools can provide in-person instruction. That is sufficient to establish the elements of Article III standing. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (To establish standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."). At the very least, Plaintiffs Brach's and Hackett's declarations amply establish standing by specifically averring that their children's

the counties in which Plaintiffs' schools operate were reclassified so that they no longer fell within Tier 1. The State reclassified Santa Clara County to Tier 2 on March 2; Los Angeles and Orange Counties on March 9; and San Diego, Riverside, and Ventura Counties on March 16. [11] In light of these post-argument developments, we requested and received supplemental briefs from the parties as to whether this matter was now moot. *See St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537, 98 S. Ct. 2923, 57 L. Ed. 2d 932 (1978) (because mootness "implicates our jurisdiction," court has an obligation to raise it *sua sponte*); *see also Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1086 (9th Cir. 2011) ("[A]n actual, ongoing controversy [must] exist at all stages of federal court proceedings.").

The supplemental materials submitted by the State in support of mootness indicate that several of the public-school Plaintiffs' schools opened for in-person instruction before the end of the 2020-2021 school year. Those materials do not affirmatively show that any of the private schools had similarly reopened before the end of the 2020-2021 school year, but the district court

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schools were preparing to open for in-person instruction in fall 2020 but were thwarted by the State's orders.

11. *See* CDPH, *California Blueprint Data Archive*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CaliforniaBlueprintDataCharts.aspx. A new tier status "goes into effect the Wednesday following each weekly tier assignment announcement on Tuesdays." *See* CDPH, *Blueprint for a Safer Economy*, https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID19CountyMonitoringOverview.aspx.

record already indicates that Erica Sephton's child's school reopened pursuant to a school-specific waiver in the fall of 2020. Although the evidence it cites is somewhat unclear, the State represents that Oaks Christian School, which Hackett's child attends, reopened before the end of the 2020-2021 school year. At the very least, once their counties were given their new tier assignments, all of Plaintiffs' schools became eligible to reopen under the State's Revised Framework.[12] Under that framework, any schools that actually reopened would not need to close again even if the school's county returned to Tier 1. And, as noted earlier, the State recently released new guidance for the 2021-2022 school year that does not rely on the tier system or school closures.

Our analysis of mootness in this case is framed by the Supreme Court's recent decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020). There, the Court rejected a comparable claim of mootness in connection with the plaintiffs' challenge to New York's system of Covid restrictions,

12. The dissent notes that a special law regulating the provision of "distance learning" in public school during the 2020-2021 school year became inoperative, by its terms, on June 30, 2021. *See* Cal. Educ. Code §§ 43503, 43511. *See* Dissent at 6 n.3. To the extent that the dissent thereby insinuates that the lapsing of this statute would somehow *prevent* a reclosure of schools under the same executive authorities that Defendants invoked, there is no support for that suggestion. Indeed, the dissent overlooks the fact that in March 2020, well before that now-lapsed law took effect, schools in California were already limited to distance learning under those executive authorities. *See supra* at 6-7.

which used an analogous "zone" system to impose capacity limits for religious services. Similar to California's tier-based system for counties, New York's system classified geographic areas *within* counties or cities into zones based on a combination of pre-set thresholds and other criteria. In New York's case, the thresholds for each respective zone were based on the "7-day rolling average positivity rate" as well as the rate of "new daily cases per 100,000 residents on [a] 7-day average."[13] At the time they first sought relief, the New York plaintiffs' relevant facilities were in either "red" zones, in which "no more than 10 persons may attend each religious service," or in "orange" zones, in which "attendance is capped at 25." 141 S. Ct. at 66. By the time the matter reached the Supreme Court, however, the State had "reclassified the areas in question from orange to yellow, and this change mean[t] that the applicants [could] hold services at 50% of their maximum occupancy." *Id.* at 68. The Court declined to treat the matter as moot, citing cases involving the voluntary cessation doctrine, *see id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)), and the rule governing disputes that are capable of repetition but evading review, *see id.* (citing *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462, 127 S. Ct. 2652, 168 L. Ed. 2d 329 (2007)). As the Court explained, the plaintiffs remained under a threat that the areas would be reclassified, and in the event that that happened, the plaintiffs would likely not be able to secure relief from the

13. *See New York "Micro-Cluster" Strategy* (Oct. 21, 2020), https://www.governor.ny.gov/sites/default/files/atoms/files/MicroCluster_Metrics_10.21.20_FINAL.pdf.

Court before experiencing irreparable harm. *Id.* Under these circumstances, the plaintiffs should not have to "bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68-69.

We conclude that the same two doctrines invoked in *Diocese of Brooklyn* also apply here and confirm that this case is not moot.[14]

A

To the extent that the State has now removed its prior *per se* school-closure order, that is a result of the State's voluntary conduct in repeatedly changing the framework of restrictions. The general rule is that a "voluntary cessation of allegedly illegal conduct does not deprive the [court] of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v.*

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14. The dissent suggests that *Diocese of Brooklyn* may not have relied on the voluntary cessation doctrine at all, because (according to the dissent) the Court focused its discussion on the rule governing disputes that are capable of repetition yet evading review. *See* Dissent at 9 n.4. That is wrong. On the page of *Friends of the Earth* that *Diocese of Brooklyn* cites, the Court discussed and relied upon *only* the doctrine of voluntary cessation. *See* 528 U.S. at 189 ("The only conceivable basis for a finding of mootness in this case is [Defendant's] voluntary conduct."). *Friends of the Earth* does not even mention the capable-of-repetition-but-evading-review doctrine until several pages later, and then *only* for the limited purpose of explaining why a mootness inquiry is distinct from an Article III standing inquiry. *Id.* at 190-91. *Diocese of Brooklyn* thus squarely relied on the voluntary cessation doctrine.

W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894, 97 L. Ed. 1303 (1953). To establish mootness in such circumstances, the defendants bear the "heavy" burden of demonstrating that "'there is no reasonable expectation that the wrong will be repeated.'" *Id.* at 633 (citation omitted); *see also Friends of the Earth*, 528 U.S. at 189 ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." (simplified)). California has failed to carry that heavy burden here.

California argues that the voluntary cessation doctrine does not apply at all, because, in its view, the case became moot when the relevant counties were reclassified into lower tiers, and that reclassification, according to the State, is attributable to changes in underlying Covid infection rates, rather than to any changes in California's directives. This argument is foreclosed by *Diocese of Brooklyn*. There, the Supreme Court applied the voluntary cessation doctrine, even though the change in the applicable restrictions was due to reclassifications *within* the zone system established by the New York Governor's executive order, rather than to the adoption of a new system. *See* 141 S. Ct. at 68-69. The Court recognized that New York's then-current matrix of Covid-related restrictions could hardly be treated as if it were an independently determined system that limited the Governor's discretion and ensured that the challenged restrictions would never be reinstated. The Court thus necessarily rejected the very same argument that California presses here.

Because the voluntary session doctrine applies in this case, the question is whether the State has carried its "formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190 (emphasis added). California has failed to do so. The State's supplemental brief insists that it is "entirely speculative" whether Defendants would ever choose to reinstate a school-closure order, and the dissent contends that this comment shows that the State has "disclaimed any such intention." *See* Dissent at 10. On the contrary, the State's coy assertion that it is "speculative" whether it might close schools again merely underscores the State's refusal even to say that it *will not* do so.

Moreover, as the Supreme Court explained in rejecting California's most recent—and comparable—mootness argument, a challenge to state restrictions is not moot when "officials with a track record of 'moving the goalposts' retain authority to reinstate those heightened restrictions at any time." *Tandon v. Newsom*, 141 S. Ct. 1294, 1297, 209 L. Ed. 2d 355 (2021) (quoting *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720, 209 L. Ed. 2d 22 (2021) (Gorsuch, J., statement)). So too, here, nearly the entire edifice of California's oft-changing Covid-related restrictions is the product of Defendants' own unilateral decrees, which have rested on a comparable retention of unbridled emergency authority to promulgate whatever detailed restrictions Defendants think will best serve the public health and the public interest at any given moment.

Thus, during the course of this litigation, Defendants have previously tightened Covid-related school restrictions as they have deemed warranted, most notably when they replaced the "County Monitoring List" with a stricter set of criteria that made it easier for counties to fall under the State's school-closure mandate. *See supra* at 11-12. More recently, they loosened the relevant criteria, thereby facilitating an earlier escape from that restriction by some counties' schools. *See supra* at 13-14. In doing so, Defendants at first notably refrained from abolishing the revised school reopening framework despite the State's decision to exempt all other industry and retail sectors from the restrictions imposed under the "Blueprint for a Safer Economy." *See supra* at 14-16. Although the CDPH has now released a new framework for the 2021-2022 school year that does not include reliance upon school closures, the Governor and the State Public Health Officer still retain the authority to alter the rules at a moment's notice should changing circumstances, in their view, warrant new restrictions. *See Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1230 n.1 (9th Cir. 2020) (revocation of challenged directive did not moot plaintiffs' claims because "Governor Sisolak could restore the Directive's restrictions just as easily as he replaced them, or impose even more severe restrictions"). And they have reserved the authority to do so without having to comply with any particular procedural restraints: as noted earlier, *see* supra at 14-15, the Governor's most recent executive order continues to waive the requirements of California's APA for any Covid-related CDPH restrictions. The zig-zag course of California's various Covid-related restrictions confirms that the current easing is attributable to

Defendants' voluntary conduct and does not render the case moot. *See*, *e.g.* , *Kikimura v. Turner*, 28 F.3d 592, 597 (7th Cir. 1994) (no mootness of constitutional claim seeking injunctive and declaratory relief where public official's policies had "ebbed and flowed throughout the course of the litigation").

Accordingly, if the CDPH became concerned that case rates are increasing, that the pace of immunization has slowed, and that new variants pose a threat, it has the authority to swiftly revise the relevant restrictions and reimpose school closures, even for reopened schools, in specified areas. The dissent entirely discounts this possibility, *see* Dissent at 10-12, but it provides no justification for its certainty. There is no basis for contending that current case rates are low enough, by themselves, to eliminate any reasonable possibility of a future school-closure order. Indeed, recent case rates in some areas have begun to edge back up towards levels that, under earlier iterations of Defendants' restrictions, would have landed a county in Tier 1 and would have triggered an order to keep schools closed. For example, Defendants at one point used a low 7-day average daily case rate of 7 cases per 100,000 as a benchmark for keeping schools closed, *see supra* at 12, and Los Angeles County's 7-day average daily case rate has exceeded that number ever since July 9, 2021,[15] as the new "Delta" variant of Covid has begun to spread.

15. *Tracking COVID-19 in California*, https://covid19.ca.gov/state-dashboard/#location-los_angeles.

The dissent claims that, even if Covid rates "rise, perhaps even precipitously," it is already clear that the State will never again impose distance-learning requirements. *See* Dissent at 10-11. This unsupported speculation ignores the State's heavy burden. Although the State's *current* policy does not rely on school closures and expresses a strong preference for in-person instruction, the question is whether the State has shown that it is "absolutely clear" that "the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190. Indeed, as the dissent itself notes, a prior surge last summer caused the State to reverse course and abandon its *previous* school reopening plans. *See* Dissent at 3 n.1. Given the State's "track record of 'moving the goalposts'"; its retention of broad "authority to reinstate those heightened restrictions at any time"; and its failure to expressly foreswear ever using school closures again, *Tandon*, 141 S. Ct. at 1297 (citation omitted), we cannot say that the State has carried its "formidable burden" under the voluntary cessation doctrine, *Friends of the Earth*, 528 U.S. at 190.

B

For related reasons, the restrictions at issue here also fall squarely into the category of official acts that are "capable of repetition, yet evading review." *Southern Pac. Terminal Co. v. Interstate Com. Comm'n*, 219 U.S. 498, 515, 31 S. Ct. 279, 55 L. Ed. 310 (1911); *see also Wisconsin Right to Life*, 551 U.S. at 462. Were we to treat this case as moot, the case would have evaded review despite the Plaintiffs' best efforts to expedite it, and a future case

would likely suffer the same fate. Plaintiffs here have moved with dispatch throughout this litigation, and yet it took seven months from the filing of their First Amended Complaint in July 2020 for the matter to be presented to this court for decision on the merits. And even that pace was achieved only because Plaintiffs sought expedited treatment in this court and successfully resisted the State's efforts to prolong the briefing schedule and to defer the oral argument. Were California again to enforce a distance-learning mandate on Plaintiffs' schools, by the time a future case challenging the new mandate could receive complete judicial review, which includes Supreme Court review, the State would likely have again changed its restrictions before that process could be completed. Effective relief likely could not be provided in the event of any recurrence, which makes this a paradigmatic case for applying the doctrine of "capable of repetition, yet evading review." *See Alaska Ctr. for the Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855-56 (9th Cir. 1999) (two-year permit could be reviewed despite expiration because two years were not enough to guarantee "complete judicial review, which includes Supreme Court review under our precedent").

Here, too, the dissent fails to apply the correct legal standard. It misreads *Diocese of Brooklyn* to say that the capable-of-repetition-yet-evading-review doctrine would apply here only if Plaintiffs "remain[ed] under a '*constant threat*' that the challenged restrictions will be reimposed." *See* Dissent at 14 (quoting 141 S. Ct. at 68) (emphasis added). But *Diocese of Brooklyn* did not change the long-settled standard, which is whether there is a "reasonable expectation" that the same controversy will

recur. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 136 S. Ct. 1969, 1976, 195 L. Ed. 2d 334 (2016); *Honig v. Doe*, 484 U.S. 305, 318 n.6, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("[W]e have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable."); *see also Ackley v. Western Conf. of Teamsters*, 958 F.2d 1463, 1469 (9th Cir. 1992) (noting that it is "the defendant, not the plaintiff, who must demonstrate that the alleged wrong will not recur"). There was clearly such a reasonable possibility of reoccurrence in *Diocese of Brooklyn*, given the "constant threat" the plaintiffs in that case faced. 141 S. Ct. at 68. But in finding that circumstance *sufficient* to trigger the doctrine, the Court did not hold that a finding of a "constant threat" was now *necessary* to invoke the doctrine. And for substantially the same reasons set forth earlier, we conclude that California has failed to carry its burden to show that there is no "reasonable expectation" this dispute will recur. *Kingdomware Techs.*, 136 S. Ct. at 1976.

* * *

We therefore conclude that under both the voluntary cessation doctrine and the rule concerning disputes that are "capable of repetition, yet evading review," neither the public-school nor private-school Plaintiffs' claims are moot.

III

Having concluded that the case is not moot, we turn first to the merits of Plaintiffs' due process claims. In doing so, we consider separately the distinct substantive due process claims of the *public*-school Plaintiffs and those of the *private*-school Plaintiffs. We conclude that the district court correctly granted summary judgment dismissing the former claims, but it erred in dismissing the latter.

A

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Supreme Court has interpreted this guarantee "to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993). The public-school Plaintiffs contend that one of the substantive protections conferred by the Due Process Clause is an "affirmative right to public-school education" that meets a "basic minimum" level of instruction. This contention fails, because the Supreme Court has repeatedly declined to "accept[] the proposition that education is a 'fundamental right,'" *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988), and we have likewise stated that

there is "no enforceable federal constitutional right to a public education," *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 880 (9th Cir. 2011) (en banc) (citation omitted), *overruled on other grounds in Albino v. Baca*, 747 F.3d 1162, 1171 (9th Cir. 2014) (en banc).

The Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973), is particularly instructive. There, the Court addressed a claim that the "Texas system of financing public education" violated the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 4-6. In assessing what level of scrutiny was applicable to the distinctions drawn by that system, the Court considered and expressly rejected the plaintiffs' claim that strict scrutiny must be applied because "the State's system impermissibly interferes with the exercise of a 'fundamental' right," *viz.*, the asserted fundamental right to an education. *Id.* at 29; *see also id.* at 35-39.

The Court noted that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution," and it concluded that there was also no "basis for saying it is implicitly so protected." *Id.* at 35. In reaching that conclusion, the Court emphasized that the asserted right to have the state *affirmatively provide* an education was "significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights," inasmuch as those prior cases all "involved legislation which 'deprived,' 'infringed,' or 'interfered' with the *free exercise* of some

such fundamental personal right or liberty." *Id.* at 37-38 (emphasis added) (citations omitted). The Court rejected the plaintiffs' contention that "education is distinguishable from other services and benefits provided by the State," assertedly due to its importance in exercising other rights, such as "First Amendment freedoms" and the "right to vote." *Id.* at 35. As the Court explained, the plaintiffs' argument had no logical stopping point, because in terms of its contribution to the ability to exercise such other rights, education could not be meaningfully distinguished from other asserted rights-to-benefits that the Court had steadfastly declined to recognize, such a right to "the basics of decent food and shelter." *Id.* at 37 (citing *Lindsey v. Normet*, 405 U.S. 56, 73-74, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972); *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970)). There was thus a "critical distinction," the Court concluded, between "'*denying* fundamental rights'" and failing to do enough to provide a benefit that would facilitate the exercise of fundamental rights. *Id.* at 38-39 (citation omitted). Further underscoring this distinction, the Court cited in contrast its prior cases invalidating state laws that interfered with the fundamental right of parents to choose their own *private* educational forum for their children. *Id.* at 39 n.82 (citing *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925)).

Subsequent Supreme Court decisions have similarly reaffirmed that "[p]ublic education is not a 'right' granted to individuals by the Constitution." *Plyler v. Doe*, 457 U.S. 202, 221, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (quoting

Rodriguez, 411 U.S. at 35); *see also Kadrmas*, 487 U.S. at 458; *Papasan v. Allain*, 478 U.S. 265, 284, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). We have likewise declined to recognize the existence of a "federal constitutional right to a public education." *Payne*, 653 F.3d at 880 (citing *Plyler*, 457 U.S. at 221); *see also Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1026 (9th Cir. 1978) ("[E]ducation, although an important interest, is not guaranteed by the Constitution" and "is not a fundamental right.").

Plaintiffs nonetheless point to language in *Rodriguez* and *Plyler* that they contend supports the view that a failure to provide a *minimum* education would violate substantive due process rights. *See Rodriguez*, 411 U.S. at 25 n.60 (noting that the question before the Court would have been different had Texas "absolutely precluded" a class of persons "from receiving an education"); *id.* at 37 (concluding that the record did not support the view that the Texas "system fails to provide each child with an opportunity to acquire the basic minimal skills" needed to exercise other rights); *Plyler*, 457 U.S. at 223 (noting that the statute at issue deprived a "discrete class of children"—those unlawfully present in the U.S.—of a "basic education"); *cf. Papasan*, 478 U.S. at 285 ("As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the question[] whether a minimally adequate education is a fundamental right."). They point in particular to *Plyler*'s holding that, although education is not a fundamental right, the denial of a "basic education" to "a discrete class of children not accountable for their disabling status" requires a heightened level of

constitutional scrutiny. 457 U.S. at 223-24.[16] But given the Supreme Court's admonition that the courts must "'exercise the utmost care whenever we are asked to break new ground'" in the field of substantive due process, *see Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) (citation omitted), and the Court's express refusal to extend *Plyler*'s "holding beyond the unique circumstances that provoked its unique confluence of theories and rationales," *Kadrmas*, 487 U.S. at 459 (simplified), we have no license to recognize such a novel right here.

Moreover, even if there were grounds to recognize such a right in an appropriate case, Plaintiffs have failed to show that this is such a case. In this regard, Plaintiffs seem to have lost sight of the fact that this case was not brought as a class action. Accordingly, to establish a violation of their asserted constitutional right to a basic minimum education, Plaintiffs had the burden to present sufficient evidence to establish that *their* children (or Plaintiff Z.R. himself, in the case of the one student Plaintiff) were not actually receiving a basic minimum education. On this score, Plaintiffs' barebones declarations are inadequate to create a triable issue of fact. Nearly

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16. In *United States v. Harding*, 971 F.2d 410 (9th Cir. 1992), we referred to this holding in *Plyler* as recognizing a "quasi-fundamental" right to "access to public education." *Id.* at 412 n.1. *Harding* was a case about the constitutionality of crack cocaine sentencing laws and had nothing whatsoever to do with public education or with denying benefits to aliens unlawfully present in the United States. Its passing description of *Plyler* therefore adds nothing to *Plyler* itself and is, in any event, dicta.

all of Plaintiffs' declarations on this point are conclusory and lack sufficient factual detail to establish that the difficulties of the distance-learning method have caused or will cause their children to be deprived of a basic minimum education. The only possible exceptions are the declarations of those Plaintiffs who assert that their children are no longer receiving their "individualized education programs" and are not receiving the "free appropriate public education" that is guaranteed to them under the federal Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* But in our en banc decision in *Payne*, we held that a claim for a denial of a free appropriate public education—including the failure to provide the assistance needed to learn basic skills such as reading—"can arise *only* under the IDEA because there is no other federal cause of action for such a claim." 653 F.3d at 880 (emphasis added). In reaching that conclusion, we specifically cited *Plyler* for the proposition that there is "no enforceable federal constitutional right to a public education." *Id.* Thus, to the extent that the public-school Plaintiffs' claimed constitutional right to a basic minimum education is not wholly unsupported as a factual matter, it is squarely barred by our decision in *Payne*.[17]

The public-school Plaintiffs have thus failed to show that they have been deprived of a fundamental right that is recognized under the Supreme Court's or this court's caselaw. Consequently, in reviewing their substantive due

17. Although the Plaintiffs who alleged a denial of a "free appropriate public education" had asserted a claim under the IDEA in the district court, that claim has been abandoned on appeal.

process challenge to the provision of public education via distance learning, we ask only whether the State's actions "bear[] a rational relation to a legitimate government objective." *Kadrmas*, 487 U.S. at 461-62. California's actions readily satisfy that deferential standard. Abating the Covid pandemic is not only a legitimate state interest, but a compelling one, *Diocese of Brooklyn*, 141 S. Ct. at 67, and California has provided an ample basis for concluding that, as a matter of law, its refusal to allow in-person public school instruction is rationally related to furthering that interest. We therefore affirm the district court's grant of summary judgment to California with respect to the claims of the public-school Plaintiffs.

B

As explained above, the primary reason that the claims of the public-school Plaintiffs fail is that the case authority from the Supreme Court and this court has declined to recognize a federal substantive due process right to the provision of a public education. But the claims of the *private*-school Plaintiffs do not stand on the same footing, and the district court erred in dismissing these claims on summary judgment.

1

Plaintiffs' opening brief on appeal squarely raises the argument that California's school-closure policies violate the fundamental right of several Plaintiffs to educate their children at in-person, *private* schools, thus divesting them of the "choice of the educational forum itself." *Fields v.*

Palmdale Sch. Dist., 427 F.3d 1197, 1207 (9th Cir. 2005); *see also Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390. "This right is commonly referred to as the *Meyer-Pierce* right." *Fields*, 427 F.3d at 1204. However, the State argues that this contention was not sufficiently raised and preserved in the district court. We disagree.

In Plaintiffs' operative complaint, Plaintiffs generally alleged that their "Substantive Due Process" rights under the Fourteenth Amendment had been violated by the school-closure orders, which "effectively preclud[ed] [their] children from receiving a basic minimum education." Plaintiffs' claims must be understood against the backdrop of the relevant caselaw, which (as explained earlier) draws a sharp distinction between the alleged fundamental right to the *provision* of a basic minimum public education and the *Meyer-Pierce* right to be free of government *interference* in the choice of a private educational forum. *See supra* at 32-33. Thus, as applied to the private-school Plaintiffs, the complaint's substantive due process claim cannot reasonably be understood as alleging that the State had failed in its obligation to *provide* "a basic minimum education," because those Plaintiffs were not asking the State to provide one. Rather, as to these Plaintiffs, this claim can only be understood as asserting that the State was unconstitutionally interfering with these Plaintiffs' effort to choose the forum that they believed would provide their children with an adequate education. These Plaintiffs' claims thus *necessarily* rested on the *Meyer-Pierce* fundamental right of parents to choose their children's educational forum. That is especially true given that the allegations of a complaint must be generously

construed in the light most favorable to the plaintiff. *See Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).[18]

The two distinct threads of Plaintiffs' claim were also reflected in their district court papers seeking a TRO and an order to show cause why a preliminary injunction should not issue. For example, their reply memorandum in support of that motion argued both that "[s]tate-provided education" was a fundamental right and that the parental right "'to control the education of their' children" that was recognized in "*Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)," was "at least a 'quasi-fundamental right.'" Of course, the *private*-school Plaintiffs were not asserting that their children were being deprived of a "state-provided education," but only that the State was interfering with these Plaintiffs' right to control the education of their children at the private forum of their choice. Plaintiffs' opening memorandum in support of that same motion likewise emphasized the State's interference with *both* "State-provided or-permitted education." Once again, because the private-school Plaintiffs were clearly not complaining about the lack of a "State-provided" education, their claims can only be understood as asserting the *Meyer-Pierce* right.[19]

18. It is thus "neither logically nor actually the case" that the private-school Plaintiffs *must* be understood as *only* asserting an (inapplicable) claim that the State was failing to provide them with a basic minimum education. *See* Dissent at 18.

19. The dissent argues that Plaintiffs' reply memorandum affirmatively disavowed any reliance on the *Meyer-Pierce* right, because that reply at one point disputed the State's effort to characterize Plaintiffs' position as resting on a "fundamental

After the district court denied Plaintiffs' motion for a TRO and instead requested briefing on whether it should grant summary judgment *sua sponte*, Plaintiffs' opposition again emphasized both the State's failure to provide an education and its affirmative *interference with* children obtaining the education their parents had chosen for them. In response to the district court's observation, in its TRO-denial order, that states have broad discretion as to the manner in which *public* education is provided, Plaintiffs argued both that this comment rested on too narrow a view of state-provided benefits and that, in all events, the State may not act so as to affirmatively "*deprive* children of the right to a minimum education altogether" (emphasis added). In support of this point, Plaintiffs cited *Fields v. Palmdale School District*, 427 F.3d 1197, in which we held that the *Meyer-Pierce* right generally does not give parents the authority "to interfere with a *public* school's decision as to how it will provide information to its students," but instead gives them the right "to be free from *state interference* with their choice of the educational forum itself." *Id.* at 1206-07 (emphasis added). Yet again, Plaintiffs' papers objected both to the State's failure to provide an adequate education (an argument that applied only to the public-school Plaintiffs)

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right to in-person school." *See* Dissent at 17. The quoted comment, however, was directed at the State's argument that *Rodriguez* made clear that States have wide discretion in deciding how to *provide* education, and it clarified that Plaintiffs were not claiming that the Fourteenth Amendment *prohibited* States from providing an adequate basic minimum education through distance learning. That is not, as the dissent would have it, an abjuration of the *Meyer-Pierce* right.

and the State's affirmative interference with the provision of education (an argument that also applied to the private-school Plaintiffs). The State's suggestion that these papers should instead be construed as having *sub silentio* jettisoned the claims of the five private-school Plaintiffs is untenable.

The State is therefore wrong in suggesting that the more detailed *Meyer-Pierce* argument that is contained in Plaintiffs' appellate opening brief should have been presented in that form in the district court and that, by not doing so, Plaintiffs forfeited this entire point. As just explained, the *private*-school Plaintiffs unquestionably presented below the *claim* that the State's closure of their private schools violated their Fourteenth Amendment right to choose the educational forum that would best provide an adequate education for their children. Indeed, these Plaintiffs *cannot* reasonably be construed as having presented a claim about the provision of *public*-school education. Having presented their private-school-closure claim below, Plaintiffs "can make any argument in support of that claim [on appeal]; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *see also United States v. Pallares-Galan*, 359 F.3d 1088, 1094-95 (9th Cir. 2004) (defendant properly raised new argument on appeal to support his underlying claim below). The State's forfeiture contention takes an unrealistically narrow view of the permissible scope of appellate argument. "An argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more

time pressured environment of the trial court, and there is nothing wrong with that." *Puerta v. United States*, 121 F.3d 1338, 1341-42 (9th Cir. 1997). That principle applies with special force here, in which the district court conducted expedited proceedings that resulted in a *sua sponte* grant of summary judgment before the State even answered the complaint. *Cf. Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) (cautioning against the use of *sua sponte* summary judgment at the preliminary injunction stage, when the merits might not yet have been "fully ventilated").

In all events, even if Plaintiffs' *Meyer-Pierce* argument were otherwise forfeited, this is a paradigmatic case for exercising our discretion to consider arguments raised for the first time on appeal. *See El Paso City v. America West Airlines, Inc.* (*In re America West Airlines, Inc.*), 217 F.3d 1161, 1165 (9th Cir. 2000); *see also AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213-14 (9th Cir. 2020). Whether summary judgment was properly granted against the private-school Plaintiffs on the record before the district court raises a question of law that we review de novo, and we therefore have discretion to consider a new argument as to why that court erred as a matter of law. *See America West*, 217 F.3d at 1165. That the *Meyer-Pierce* issue in this case is a straightforward question of law, together with the importance of the issue, weighs in favor of considering the arguments that have been squarely raised on appeal. *See, e.g., Countrywide Home Loans, Inc. v. Lehua Hoopai* (*In re Hoopai*), 581 F.3d 1090, 1096 (9th Cir. 2009). We would thus exercise discretion to consider the private-school Plaintiffs' claims even if we had concluded that their claims had been forfeited.

2

We therefore turn to the merits of the private-school Plaintiffs' contention that California's prohibition on in-person instruction violates their fundamental rights under the Due Process Clause of the Fourteenth Amendment, as recognized in *Meyer-Pierce*. We conclude that the district court erred in dismissing the claims of these Plaintiffs on summary judgment.

a

As we have previously observed, the Supreme Court has long held that "the right of parents to make decisions concerning the care, custody, and control of their children is a fundamental liberty interest protected by the Due Process Clause," and that this right includes "the right of parents to be free from state interference with their choice of the educational forum itself." *Fields*, 427 F.3d at 1204, 1207; *see also Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (plurality) (noting that the Court had repeatedly "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children," including "the right 'to direct the upbringing and education of children under their control'" (quoting *Pierce*, 268 U.S. at 534-35)). Thus, even as the Court has "'always been reluctant to expand the concept of substantive due process,'" it has repeatedly reaffirmed its recognition, in *Meyer* and *Pierce*, of a "fundamental right[]" to "direct the education and upbringing of one's children." *Glucksberg*, 521 U.S. at 720 (citation omitted); *see also Troxel*, 530 U.S. at 65 (plurality)

(describing the *Meyer-Pierce* right as "perhaps the oldest of the fundamental liberty interests recognized" by the Court); *id.* at 80 (Thomas, J., concurring in judgment) (agreeing that, under *Pierce*, "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them").

The State does not dispute that *Meyer* and *Pierce* recognized a fundamental right of parents concerning the education of their children. Nonetheless, noting that *Pierce* invalidated an Oregon statute that forbade parents from sending their minor children to any school other than a public school, *see Pierce*, 268 U.S. at 530, California insists that the right recognized in *Pierce* consists *only* of the "right to decide *where* to send their children to school." Because California has not "prevent[ed] the Parents-Appellants from enrolling their children in private schools," the State argues, it has not in any respect infringed the *Meyer-Pierce* right. Rather, the State asserts that all it has done is to alter the "mode of instruction" that must be followed at *both* public and private schools, and it contends that *Meyer* and *Pierce* do not limit its ability to adopt such universal rules. These arguments fail.

The State's narrow reading of the *Meyer-Pierce* right and the State's purported carve-out for generally applicable regulations of all schools are both refuted by *Meyer* itself. There, the Supreme Court confronted a generally applicable Nebraska statute stating that "'[n]o person, individually or as a teacher, shall, *in any private, denominational, parochial or public school*, teach any

subject to any person in any language other than the English language.'" 262 U.S. at 397 (emphasis added) (citation omitted). The only exception under the statute was that foreign languages "'may be taught as languages,'" but only after the eighth grade. *Id.* (citation omitted). The Nebraska statute thus had *both* features that California says are enough to evade any constitutional scrutiny: it did not interfere with the decision to enroll in a private school, and it imposed a restriction that was generally applicable to both private and public schools. Nonetheless, the Supreme Court struck down the Nebraska statute, concluding that it impermissibly "attempted materially to interfere . . . with the power of parents to control the education of their own." *Id.* at 401.[20]

The State's definition of the right is thus unquestionably too narrow. But the Supreme Court has also cautioned against an overbroad reading of the *Meyer-Pierce* right. *See Runyon v. McCrary*, 427 U.S. 160, 177, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976) (stating that *Pierce* "lent 'no

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20. For similar reasons, the dissent is wrong in relying on a strawman argument that the private-school Plaintiffs supposedly are asserting a fundamental right to be exempt from generally applicable regulations. *See* Dissent at 24-25. They instead assert a fundamental right to choose *in-person* private instruction, and the question is whether that right exists and, if so, what standard of scrutiny applies to a regulation that wholly deprives them of that right. Plaintiffs in this case have *not* challenged any of the State's many other Covid-related restrictions beyond the prohibition on in-person instruction (such as health and safety protocols within classrooms). And we are not presented here with a directive that generally regulates schools in a manner that preserves the core of the *Meyer-Pierce* right. *See also infra* note 23.

support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society'" (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 239, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) (White, J., concurring))); *see also Norwood v. Harrison*, 413 U.S. 455, 461, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973) (emphasizing the "limited scope of *Pierce*"). In discerning the contours of that right, and whether California's restrictions implicate it, we must be guided by the Supreme Court's insistence on a "'careful description' of the asserted fundamental liberty interest," *Glucksberg*, 521 U.S. at 721 (citation omitted), which ordinarily "must be defined in a most circumscribed manner, with central reference to specific historical practices," *Obergefell v. Hodges*, 576 U.S. 644, 671, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015). Here, a consideration of historical practice and tradition confirms that California has deprived the private-school Plaintiffs of a core aspect of the *Meyer-Pierce* right.

As historically understood, the *Meyer-Pierce* right necessarily embraced a right to choose *in-person* private-school instruction, because—as the State conceded at oral argument—such instruction was until recently the *only* feasible means of providing education to children. Thus, prior to the advent of the internet and associated technology, it would never have been imagined that the *Meyer-Pierce* right did *not* include the right to choose in-person private instruction. We are aware of no authority, for example, suggesting that *Meyer-Pierce* only protected the right of parents to choose correspondence schools for

their children. The technological advances of recent years raise the possibility that the *Meyer-Pierce* right might conceivably be deemed to have *expanded* to cover the ability to choose such additional modes of learning, just as the First Amendment right to speak in letters and in newspapers extends to emails and blogs.[21] But the fact that instruction can now also occur online provides no basis for concluding that the traditional, long-understood core of the right—the right to choose a private school offering in-person instruction—has now somehow been *removed* from that right. That would make no more sense than suggesting that the rise of the internet means that the right to free speech and a free press no longer includes the right to speak to a live audience or to publish in a physical newspaper. Put simply, the fact that technology now makes it possible to have a different type of learning does not mean that the right to choose long-established traditional forms of education has disappeared.

Precedent further confirms the common-sense notion that the *Meyer-Pierce* right includes the right to choose traditional in-person instruction at a private school. In *Fields*, we described the *Meyer-Pierce* right as "the right of parents to be free from state interference with their choice of the educational forum itself." *Fields*, 427 F.3d at 1207. It is hard to imagine a more direct interference with the "choice of the educational *forum* itself" than a prohibition upon in-person instruction in that chosen

21. No such question is presented here, because the private-school Plaintiffs all prefer in-person instruction. We therefore express no view as to whether a State could insist, over a parent's objection, that a child *not* attend an online school.

forum. And in *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926), we expressly noted that the *Meyer-Pierce* right protected in-person instruction in the course of addressing whether that right was infringed by the Territory of Hawaii's onerous regulation of foreign-language schools. *Id.* at 713-14. In describing the contours of that right, we quoted Justice Harlan's dissenting opinion in *Berea College v. Kentucky*, 211 U.S. 45, 29 S. Ct. 33, 53 L. Ed. 81 (1908), which emphasized the physically congregative aspect of private-school education:

> If pupils, of whatever race—certainly, if they be citizens—choose with the consent of their parents or voluntarily *to sit together in a private institution of learning while receiving instruction* which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their *coming together*, or *being together* temporarily[,] for such an innocent purpose.

Tokushige, 11 F.2d at 713-14 (emphasis added) (quoting *Berea College*, 211 U.S. at 68 (Harlan, J., dissenting)).[22] We then concluded that, under *Meyer*, Hawaii's burdensome restrictions on private foreign-language schools

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22. Justice Harlan's dissenting opinion in *Berea College* concluded that Kentucky's prohibition on interracial private schools violated "the rights of liberty and property guaranteed by the Fourteenth Amendment." 211 U.S. at 67. His view that such a statute is unconstitutional was, of course, vindicated by *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and its progeny.

impermissibly interfered with "the right of a parent to educate his own child in his own way," and with the students' "right to be taught" in such schools. *Id.* at 714. *Tokushige* thus confirms that, as traditionally understood, the *Meyer-Pierce* right includes the right to select a private school at which the students will "com[e] together," "be[] together temporarily," and "sit together in a private institution of learning while receiving instruction." *Id.* at 713-14.

Here, of course, the State insists that, due to the pandemic, physical congregation of students can be dangerous, but that point goes to the question of whether the State's restrictions are *justified* under the appropriate level of scrutiny. It provides no basis for suggesting that the underlying *Meyer-Pierce* right does not even include the ability to choose in-person private-school instruction. It may be that the current once-in-a-century conditions present unique dangers that justify a limit on such in-person instruction, but such contingent circumstances do not establish that, for purposes of defining the *Meyer-Pierce* right, physical congregation of students involves "instruction which" is "*in its nature* harmful or dangerous to the public" and is therefore altogether outside of that right. *Tokushige*, 11 F.2d at 713-14 (emphasis added). The traditional and long-established nature of in-person private schooling refutes any such categorical suggestion.[23]

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23. Nor is there any other basis for concluding that the particular choices the private-school Plaintiffs have made for their children are otherwise categorically outside the *Meyer-Pierce* right. The State has not suggested, for example, that the particular schools at issue here fail to provide a substantive educational

That the *Meyer-Pierce* right encompasses parents' choice to send their children to in-person schools is further confirmed by the reasoning in *Pierce*, *Meyer*, and their progeny. In emphasizing the importance of parental control over the educational forum for their children, *Pierce* underscored the "right of parents to choose schools where their children will receive appropriate mental and religious training." 268 U.S. at 532; *see also Yoder*, 406 U.S. at 211 (emphasizing the importance of parents' ability to ensure that their children are not "away from their community, physically and emotionally, during the crucial and formative adolescent period of life"). As the declarations in this case amply illustrate, the private-school Plaintiffs here are all strongly of the view that distance learning is inimical to the "appropriate mental . . . training" that Plaintiffs want for their children, *Pierce*, 268 U.S. at 532, and that it deprives Plaintiffs' children of the physical and emotional connections they need during the formative years of their childhood, *see Yoder*, 406 U.S. at 211. There can be no serious question that the restrictions at issue here thus "materially . . . interfere . . . with the power of parents to control the education of their own." *Meyer*, 262 U.S. at 401.

Accordingly, we conclude that the private-school Plaintiffs have established that the State's prohibition on in-person instruction deprives them of a core right that is constitutionally protected under *Meyer* and *Pierce*. The only remaining question is whether that deprivation

program meeting appropriate standards of rigor and breadth. *Yoder*, 406 U.S. at 213 (noting that States may "impose reasonable regulations for the control and duration of basic education").

is adequately justified under the appropriate level of scrutiny.

b

Meyer and *Pierce* were decided at a time in which the Supreme Court had not yet articulated the various levels of scrutiny that are familiar to us today. Moreover, the Supreme Court has yet to definitively decide what standard of review applies to infringements of the *Meyer-Pierce* right. *See, e.g., Doe v. Heck*, 327 F.3d 492, 519 (7th Cir. 2003). But the Court has repeatedly characterized the *Meyer-Pierce* right as being "fundamental," *Glucksberg*, 521 U.S. at 720; *see also Troxel*, 530 U.S. at 65 (plurality); *id.* at 80 (Thomas, J., concurring in judgment), and we have held that "[g]overnmental actions that infringe upon a fundamental right receive strict scrutiny," *Fields*, 427 F.3d at 1208. At least where, as here, the challenged restriction wholly deprives the private-school Plaintiffs of a central and longstanding aspect of the *Meyer-Pierce* right, *see supra* at 47-50, the appropriate level of scrutiny therefore must be strict scrutiny.[24]

To satisfy strict scrutiny, California must show that its infringement of the private-school Plaintiffs' rights is "narrowly tailored" to advance a "compelling" state

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24. As noted earlier, Plaintiffs have not purported to assert a right to choose an educational forum that departs from traditional academic and pedagogical standards, *see supra* note 23; we therefore express no view as to whether the *Meyer-Pierce* right would protect such a choice, nor do we address what standard of review would govern state regulation of educational quality.

interest. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). "Stemming the spread of COVID-19 is unquestionably a compelling interest." *Diocese of Brooklyn*, 141 S. Ct. at 67. The only question, therefore, is whether the State has shown that its broad prohibition of in-person education satisfies the narrow-tailoring requirement as a matter of law. It has not.

In *Diocese of Brooklyn*, the Supreme Court held that attendance caps of 10 and 25 people at indoor religious services in areas that were classified as having a high prevalence of Covid were not narrowly tailored. 141 S. Ct. at 67. As the Court explained, such caps were "more restrictive than any COVID—related regulations" that the Court had upheld; they were "much tighter than those adopted by many other jurisdictions hard-hit by the pandemic"; and they were "far more severe than has been shown to be required to prevent the spread of the virus" at the relevant facilities. *Id.* The same points are applicable here. By prohibiting in-person instruction at the relevant Plaintiffs' schools, California effectively imposed an attendance cap of *zero*, which is much more restrictive than the numerical caps struck down by the Supreme Court for religious services in *Diocese of Brooklyn*.[25] That

25. The State points to its cohort guidance, suggesting that this guidance would allow any school to operate so long as it organizes itself into small cohorts of 14 children and 2 adults. But that contention is contradicted by the CDPH's own August 25, 2020 supplement to the cohort guidance, which stated that the guidance did not "allow for in person instruction for all students" and that the guidance only permitted "[i]n-person *targeted,*

alone confirms that California's prohibition on in-person instruction is not sufficiently tailored.

Moreover, Plaintiffs presented undisputed evidence that California's broad and lengthy closure of schools was more severe than what many other jurisdictions have done, thereby further negating any suggestion that California adopted the least restrictive means of accomplishing its compelling interest. And Plaintiffs presented evidence that California had failed to narrowly tailor its response inasmuch as it stubbornly adhered to an overbroad school-closure order even as evidence mounted that Covid's effects exhibit a significant age gradient, falling much more harshly on the elderly and having little impact, statistically speaking, on children. As the district court noted, Plaintiffs presented "a veritable library of declarations from physicians, academics, and public health commentators" who underscored this key deficiency in California's stated "basis for in-person learning restrictions." California's only response to that evidence was to fall back on two relatively brief expert declarations from a CDPH official (and doctor) who did not deny the indisputable age differential in Covid impacts, but who nonetheless defended the broad school-closure ban on the grounds that, given the mechanics of Covid transmission, "[i]t is possible that in the school setting,

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specialized support and services," such as "occupational therapy services, speech and language services, and other medical services, behavioral services, educational support services as part of a targeted intervention strategy or assessments, such as those related to English learner status, individualized educational programs and other required assessments" (emphasis added).

as in other settings, asymptomatic transmission may occur." The State's expert did not identify any evidence indicating that children in a school setting would present greater risks of transmission than some of the other activities that the State had authorized, such as operating grocery stores, factories, daycare centers, and shopping malls. While the district court concluded that the State's response was sufficient for rational-basis purposes, the same cannot be said under strict scrutiny. On this record, the State's concerns about transmission would justify a potential range of more narrowly drawn prophylactic measures *within* schools to mitigate such risks; it cannot justify wholesale closure. *See Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 482 (6th Cir. 2020) (holding that plaintiffs would likely succeed on the merits of their First Amendment challenge to the closure of religious schools because an Ohio county's shutdown of every school in the county, while allowing gyms, tanning salons, office buildings, and a large casino to remain open, does not survive strict scrutiny). And broad measures that fail to take proper account of relevant differences between the school-age population and others are, by definition, not narrowly tailored.

As with its rigidly overbroad approach to religious services, California once again failed to "explain why it cannot address its legitimate concerns with rules short of a total ban." *South Bay*, 141 S. Ct. at 718 (Gorsuch, J., statement).[26] We certainly cannot say that, as a matter of

26. Five justices joined this section of Justice Gorsuch's statement. Justices Thomas and Alito joined it in full, and Justices Kavanaugh and Barrett expressly "agree[d] with Justice Gorsuch's

law, California's "drastic measure" of closing the private-school Plaintiffs' schools for nearly a year survives strict scrutiny. *Diocese of Brooklyn*, 141 S. Ct. at 68.

IV

Finally, we turn to the private-school and public-school Plaintiffs' claims under the Equal Protection Clause. As to the private-school Plaintiffs, we vacate the district court's judgment rejecting their Equal Protection claims and remand for further consideration in light of the conclusion that the State's actions implicate a fundamental right of those Plaintiffs. We affirm, however, the district court's rejection of the public-school Plaintiffs' claims under the Equal Protection Clause.

The public-school Plaintiffs argue that the State's challenged orders "arbitrarily treat[] Plaintiffs' children . . . differently from those in nearby school districts; from those in childcare; and from those attending summer camps, even though all such children and their families are similarly situated." Classifications that do not implicate suspect classifications or fundamental constitutional rights "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S. Ct. 2096,

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statement" except for a separate portion not cited here. *See* 141 S. Ct. at 717 (Barrett, J., concurring). The Court's decision pointedly rejected this court's contrary reasoning and result in that case. *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021).

124 L. Ed. 2d 211 (1993). Because there is no fundamental right to a state-provided basic minimum public education, *see supra* at 31-37, the rational basis test applies here except to the extent that the State's orders could be said to rest on an invidious distinction that would trigger heightened scrutiny. No such distinction is present here. Without more, classifications based on the prevalence of Covid in a particular locality, such as a county, do not implicate a suspect classification. Nor does a distinction between public schools on the one hand and camps and childcare centers on the other. Consequently, the public-school Plaintiffs' equal protection claim must be analyzed under the rational basis test.

The State's classification based on whether a public school is located in a locality with a high incidence of Covid infection is plainly rationally related to the State's legitimate and compelling interest in preventing Covid-related disease and death. And the State's classification between public schools and other facilities such as camps and childcare centers permissibly and rationally chooses to address an important problem in an "incremental" fashion. *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085-86 (9th Cir. 2015); *see also Beach Commc'ns*, 508 U.S. at 316.

V

Because the State's evidentiary showing was insufficient to establish, as a matter of law, that its school-closure order was narrowly tailored as applied to the

five private-school Plaintiffs,[27] we reverse the district court's grant of summary judgment to the State on those Plaintiffs' substantive due process claim, and we remand for further proceedings.[28] We remand also for the district court to consider the private-school Plaintiffs' challenge under the Equal Protection clause in light of our conclusion that the State's actions implicate a fundamental right of those Plaintiffs. We otherwise affirm the district court's grant of summary judgment.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

27. The five private-school Plaintiffs are Roger Hackett, Alison Walsh, Erica Sephton, Lacee Beaulieu, and Adebukola Onibokum. As noted earlier, Beaulieu also has another child in public school. *See supra* note 1. As to her claims involving that child, Beaulieu is a public-school Plaintiff and her claims were properly rejected by the district court.

28. We have not been presented with any question concerning the validity of any state-imposed protocols for operating a reopened school, and we express no view on any such question.

HURWITZ, Circuit Judge, dissenting:

When Plaintiffs filed their operative amended complaint on July 29, 2020, California was dealing with widespread transmission of the deadly COVID-19 virus. The State had devised a series of measures—including suspension of in-person instruction at schools—to slow that transmission. Plaintiffs sought declaratory relief and an injunction against the orders restricting in-person instruction.

But things have changed since the complaint was filed. The State has made substantial progress in battling the pandemic, largely because of the introduction of effective and widely available vaccines. Given that progress, the challenged orders no longer prevent any of Plaintiffs' schools from providing in-person instruction. Indeed, even if case rates rise, no reopened school would be required to close by the challenged orders, and the State has recently issued guidelines for full in-person education for the coming school year.

Despite this drastically changed legal landscape, the majority refuses to recognize that the case before us is moot. But the majority's mootness analysis, while incorrect, does little damage on its own. What is far more troubling is the majority's treatment of the private-school Plaintiffs' constitutional claims. In finding that Plaintiffs have pleaded a substantive due process violation, the majority relies on an argument never raised below. And in addressing that forfeited argument, the majority casts aside governing law, reimagining the scope of Supreme

Court precedent and applying strict scrutiny to the challenged state health directives.

I respectfully dissent.

I

The essential starting point in this case is the history and substance of the State's COVID-19 orders.

A

On March 4, 2020, Governor Gavin Newsom declared a State of Emergency to address the emerging COVID-19 pandemic. COVID-19 is a highly contagious virus that spreads from person to person mainly through respiratory droplets produced when an infected person—even an asymptomatic one—speaks, coughs, or sneezes. People with COVID-19 have reported a wide range of symptoms, with many suffering death or long-term health complications. At the time of the Governor's declaration, there was no widely effective treatment for the virus and no vaccine.

On March 19, 2020, Governor Newsom issued Executive Order N-33-20, requiring California residents to "immediately heed the current State public health directives." Cal. Exec. Order N-33-20 (Mar. 19, 2020); *see also* Cal. Exec. Order N-60-20 (May 4, 2020). Among those directives was one from the State Public Health Officer ordering residents "to stay home or at their place of residence except as needed to maintain continuity of

operations of the federal critical infrastructure sectors." School workers were allowed to leave home only to provide distance learning, and schools were closed for in-person instruction.[1]

On July 17, 2020, the Department of Public Health issued its "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020- 2021 School Year" (the "Framework"). The Framework explained that "closures to in-person instruction were part of a broader set of recommendations intended to reduce" COVID-19 transmission. It allowed schools to reopen if located in a county that had "not been on the county monitoring list within the prior 14 days." A county was placed on the monitoring list if (1) its 14-day COVID-19 case rate was over 100 per 100,000 people; or (2) both (i) its 14-day case rate was over 25 per 100,000 people and (ii) its 7-day testing positivity rate was over 8 percent. There were two notable exceptions to the school-closure order: (1) recognizing the lower risks to younger children, elementary schools in listed counties could obtain waivers to conduct in-person learning; and (2) affected schools were allowed to provide in-person instruction in small cohorts, pursuant to guidelines. Once reopened, a school was not required to close even if its county returned to the monitoring list.

On August 28, 2020, the State adopted a modified framework for reopening across all sectors (the

1. The State planned to reopen schools by mid-summer 2020 but was required to abandon that plan after a "significant increase in the spread of COVID-19."

"Blueprint"). The Blueprint noted that although "[c]ommunity spread of infection remains a significant concern across the state," the State intended "to gradually reopen businesses and activities while reducing the risk of increased community spread." The Blueprint provided "revised criteria for loosening and tightening restrictions on activities" based on the prevalence of COVID-19 in the relevant county and an activity's calculated risk level. The Blueprint assigned each county to a tier, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), reflecting the transmission risk of COVID-19 based on county caseloads and test positivity rates. A county was assigned to Tier 1 if either (1) its 7-day case rate was over 7 per 100,000 people or (2) its 7-day test positivity rate was over 8 percent. Schools were allowed to reopen on criteria equivalent to those in the Framework (with Tier 1 substituted for the county monitoring list). Reopened schools were again not required to close even if their counties returned to Tier 1.

B

On December 30, 2020, while this appeal was pending, Governor Newsom announced the "Safe Schools for All" plan. "Informed by growing evidence of the decreased risks and increased benefits of in-person instruction," especially for younger students, the Plan intended to "create safe learning environments for students and safe workplaces for educators," and to "ensure schools have the resources necessary to successfully implement key safety precautions and mitigation measures." The proposal was substantively like the State's prior guidance; it prioritized returning young children and those with special needs

to schools, but recognized ongoing risks associated with reopening and did not lift the restrictions on in-person instruction.

On January 14, 2021, the Department issued a revised "COVID-19 and Reopening In-Person Instruction Framework" (the "Revised Framework"). It allowed elementary schools in Tier 1 counties to open for in-person classes if the county's adjusted daily COVID-19 case rate was under 25 cases per 100,000 people for five consecutive days. The Revised Framework was later amended to allow reopening for all grades K-12 on the same metric. Each county where Plaintiffs' children or the student-Plaintiff attend school had exited Tier 1 by the second week of April 2021. So, there was "no longer any state-imposed barrier to reopening for in-person instruction" applicable to any of the Plaintiffs.

On June 11, 2021, the Governor formally revoked the stay-at-home order (Executive Order N-33-20) and the order directing residents to heed State public health directives on which the Blueprint framework relied (Executive Order N-60-20). *See* Cal. Exec. Order N-07-21 (June 11, 2021). The Governor acknowledged that "the effective actions of Californians over the past fifteen months have successfully curbed the spread of COVID-19, resulting in dramatically lower disease prevalence and death, in the State." "[A]s of June 9, 2021, 54.3% of eligible Californians have received a full course of COVID-19 vaccination, raising the level of overall immunity in the

State."[2] The Governor's order preserved the State Public Health Officer's authority to issue COVID-19-related directives.

The State Public Health Officer soon thereafter issued an order recognizing that California "is prepared to enter a new phase" and has "made significant progress in vaccinating individuals and reducing community transmission." Cal. State Public Health Officer Order of June 11, 2021. The Officer recognized that "[t]he COVID- 19 vaccines are effective in preventing infection, disease, and spread." The Officer noted that the State "must remain vigilant against variants of the disease especially given high levels of transmission in other parts of the world and due to the possibility of vaccine escape." So, the Officer required that all individuals continue to follow the "COVID-19 Public Health Guidance for K-12 Schools in California," which allowed schools to reopen on criteria equivalent to the Revised Framework, and again provided that reopened schools need not close even if case rates rise.[3]

On July 12, 2021, the State Public Health Officer issued its "COVID-19 Public Health Guidance for K-12 Schools in California, 2021-22 School Year." "The foundational

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2. As of July 21, 2021, 61.5% of Californians were fully vaccinated, and another 9.2% were partially vaccinated. *Vaccination Progress Data*, CAL. FOR ALL, https://covid19.ca.gov/vaccination-progress-data/ (last accessed July 7, 2021).

3. The law allowing school districts to offer distance learning expired on June 30, 2021. *See* Cal. Educ. Code § 43503(a).

principle of this guidance is that all students must have access to safe and full in-person instruction and to as much instructional time as possible." The guidance noted that, in California:

> [T]he surest path to safe and full in-person instruction at the outset of the school year, as well as minimizing missed school days in an ongoing basis, is a strong emphasis on the following: vaccination for all eligible individuals to get COVID-19 rates down throughout the community; universal masking in schools, which enables no minimum physical distancing, allowing all students access to full in-person learning, and more targeted quarantine practices, keeping students in school; and access to a robust COVID-19 testing program as an available additional safety layer.

"This guidance is designed to enable all schools to offer and provide full in-person instruction to all students . . . even if pandemic dynamics shift throughout the school year, affected by vaccination rates and the potential emergence of viral variants."

II

The majority's first error is concluding that this case is not moot.

A

"When an intervening circumstance at any point during litigation eliminates the case or controversy required by Article III, the action can no longer proceed and must be dismissed as moot." *Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (cleaned up); *see also Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 797-98 (9th Cir. 1999) (noting that an actual controversy must exist "at all stages of review"). This occurs where a plaintiff "no longer has any present interest affected by the [challenged] policy." *Weinstein v. Bradford*, 423 U.S. 147, 148-49, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975).

That is precisely what occurred here. Plaintiffs seek only declaratory and injunctive relief precluding the State from preventing schools from providing in-person instruction. But they concede that there is "no longer any state-imposed barrier to reopening for in-person instruction" applicable to the schools attended by Plaintiffs' children or the student-Plaintiff. Under the challenged orders, these schools can fully reopen and need not close again even if case rates rise. Indeed, Plaintiffs do not contest the State's assertion that all of the schools and districts identified by their papers "have 'opened' for in-person instruction."

B

The majority does not dispute that no relevant school is either under a closure order or can be placed in one under the challenged orders. However, it holds that this

case falls within two familiar exceptions to the mootness doctrine: (1) a defendant cannot moot an action through voluntary cessation of the challenged activity, *see Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013); and (2) the issues raised are capable of repetition yet evading review, *see Turner v. Rogers*, 564 U.S. 431, 439, 131 S. Ct. 2507, 180 L. Ed. 2d 452 (2011). Majority Opinion ("Op.") at 22. Neither conclusion withstands analysis.

1

It is basic that "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 174, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000). But that doctrine does not apply here. The State's purportedly unlawful conduct was enforcing a policy providing that schools may reopen and not be required to reclose if certain benchmarks are met. The State did not "cease[] that conduct at all." *See Pierce*, 965 F.3d at 1090. Rather, it consistently adhered to that policy; the relevant schools just all met those benchmarks. *See id.* In other words, the gamesmanship concerns that animate the voluntary cessation doctrine are not present in this case. *See Already, LLC*, 568 U.S. at 91; *see also Rosemere Neighborhood Ass'n v. U.S. Env't Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (noting that the doctrine applies where a party ceased "illegal activity in response to pending litigation").[4]

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4. The majority's assertion that *Diocese of Brooklyn* "necessarily" rejected this argument, Op. at 23-24, reads too

Even if the voluntary cessation doctrine facially applied, the case would nonetheless still be moot if the State showed it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Rosebrock v. Mathis*, 745 F.3d 963, 971-72 (9th Cir. 2014) (cleaned up). The issue is not whether the State conceivably *could* again order schools to close. Rather, we must consider whether the State has shown that it cannot "*reasonably* be expected" to do so. *Id.* at 971 (emphasis added). The answer to that question is "yes."

My conclusion does not rest on the premise that COVID-19 case rates will not again rise, perhaps even precipitously. Indeed, given the virulence of new variants and the continued reluctance of some to be vaccinated, a rise in case rates is sadly a real possibility. But the issue before us is not whether there will be a future public health crisis. The issue is whether the conduct challenged here, a school-closure order, is "reasonably" likely to be imposed on Plaintiffs' schools in response to that potential crisis. And on that point, the record is compelling.

The challenged orders pose absolutely no barrier to in-person instruction at Plaintiffs' schools. Plaintiffs' counties are no longer subject to the challenged orders for a simple reason—case rates have dropped dramatically. And even if case rates rise to a level that might have

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much into the Court's silence. The Court did not specify which of the two doctrines addressed by Plaintiffs applied and, in any event, focused its discussion largely on the notion that, given the timing of religious services, a future dispute might evade review. *See* 141 S. Ct. at 68-69.

triggered closures under earlier iterations of the State's guidance, *see* Op. at 27, this would not require a reopened school to close.

The essential premise of the majority opinion is therefore that there is a reasonable chance that, sometime in the future, the State will impose new and more severe restrictions than those in the challenged orders. The State, however, has disclaimed any such intention. Its actions are in accord with its words. The State's guidance for the coming school year provides for reopening schools with full in-person instruction. Moreover, the State had made clear that "even if pandemic dynamics shift throughout the school year," it does not intend to rely on broad closures, but instead on more targeted measures that would allow children to remain in school. *Id.* The very "foundational principle" of its guidance is to ensure in-person instruction. *Id.*

The majority rejects all this as a "coy assertion" because the State has in the past changed its regulations and retains the ultimate legal authority to modify its regulations. Op. at 24. But if the bare authority to enact new and different rules is alone enough to avoid mootness, no dispute against a government could be moot. *Cf., e.g., Trump v. Int'l Refugee Assistance*, 138 S. Ct. 353, 199 L. Ed. 2d 203 (2017). Indeed, although the State has changed certain aspects of the regulations, it has not strayed from the principle that reopened schools need not close again even if case rates rise. The majority fails to accord this consistency, combined with the State's representations as to its plans for the coming school year, the requisite

deference. *See Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) (collecting cases holding that governments receive particular deference in this analysis).

On the record before us, the State has plainly met its burden of demonstrating that the challenged conduct—closure of the Plaintiffs' schools—is not reasonably likely to recur. And a suit challenging the current plan, or some hypothetical future plan requiring vaccination or masking rather than school closures, would pose very different issues than those the majority gratuitously undertakes to decide. *See Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 140 L. Ed. 2d 406 (1998) ("A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.") (cleaned up).

2

Disputes are "capable of repetition, yet evading review" if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982) (cleaned up). As with voluntary cessation, for this doctrine to apply, there must be a "reasonable expectation or a demonstrated probability," not just a theoretical possibility, that the same controversy will recur. *Id.* (cleaned up).

I agree with the majority that Plaintiffs here moved with dispatch but were nonetheless unable to secure final appellate review before mootness occurred. *See Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 855-56 (9th Cir. 1999). But, for the reasons explained above, I part ways with the conclusion that it is reasonable to expect this issue will recur. The State has consistently provided that once schools reopen—as all of the relevant schools can—they need not close again even if case rates rise. And given the presence of vaccines, their demonstrated utility in reducing the spread of COVID-19, and the State's guidance for the coming school year, I cannot conclude that its response in the event new restrictions are necessary will be to impose even more severe restrictions than the challenged orders.

3

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 208 L. Ed. 2d 206 (2020) (per curiam), upon which the majority relies, does not compel a contrary conclusion. To be sure, the facts of that case have some superficial similarity to this one. Religious institutions challenged New York's system of COVID-19 restrictions, which used a multi-tiered "zone" system to impose capacity limits for religious services. *Id.* at 65-66. Although the zones containing the plaintiff institutions had been reclassified and no longer imposed the challenged restrictions, the Court—citing but not discussing cases that involve both the voluntary cessation and "capable of repetition" doctrines—declined to find the dispute moot. *Id.* at 68.

But *Diocese of Brooklyn* is critically different than this case. When the Court heard the case, the religious institutions "remain[ed] under a constant threat that the area in question will be reclassified." *Id.* Indeed, New York "regularly" changed the classification of particular areas without prior notice, with eight recent changes within a period of little over a month. *Id.* Given the frequency of changes and the brief time available to seek relief before religious services in a given week, the Court found "no reason why [the plaintiffs] should bear the risk of suffering further irreparable harm in the event of another reclassification." *Id.* at 68-69.

California's relatively steady and infrequent changes to its reopening plans are a far cry from the New York regulations that changed several times a week. And there is no risk of "irreparable harm"—Plaintiffs' schools can reopen (and, to the extent the schools are identified, have already done so) and need not close even if case rates rise again. Plaintiffs, in short, simply do not remain under a "constant threat" that the challenged restrictions will be reimposed. In contrast to this case, New York did not dispute that the plaintiffs faced irreparable harm and it was "likely" the relevant zones would be reclassified. *See id.* at 74 (Kavanaugh, J., concurring). Here, under the orders challenged by Plaintiffs, there is no chance that the schools at issue will be prevented from opening to in-person instruction.

III

The majority's mootness analysis, although in my view incorrect, does little damage on its own. What makes its opinion truly problematic is the conclusion that the challenged orders violate the substantive Due Process Clause as applied to parents of children who attend private schools under the "*Meyer-Pierce*" doctrine. *See Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925). In arriving at that conclusion, the majority routinely sets aside governing precedent, beginning with the basic principle that "an appellate court will not consider issues not properly raised before the district court." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

A

The majority's forfeiture analysis begins with an incorrect premise: that whether Plaintiffs actually raised their claim below "must be understood against the backdrop of the relevant caselaw." Op. at 38. We of course consider relevant caselaw when analyzing the *merits* of a claim. But whether a claim was properly raised before the district court is a record-based inquiry that turns on what Plaintiffs *actually said*, not what they might have said. The record makes plain that plaintiffs raised no *Meyer-Pierce* argument below.

I begin with a review of Plaintiffs' carefully drafted complaint. The complaint does not "generally allege[]" the

denial of Due Process *rights*. Op. at 38. Rather, it explicitly and repeatedly asserts a violation of but one purported Due Process right—a right to a basic minimum education:

- "Plaintiffs and their children *have a fundamental right to a basic, minimum education*. Defendants have deprived Plaintiffs and their children *of this right* in violation of the Fourteenth Amendment to the U.S. Constitution, by effectively precluding children from receiving a basic minimum education[.]" (emphasis added).

- "Defendants lack any compelling, or even rational, interest for burdening Plaintiffs' children of their *fundamental right to a basic minimum education*." (emphasis added).

- "In Defendants' rush to enact these new restrictions, they have placed special interests ahead of the wellbeing of the children, and children's *fundamental right to receive a basic minimum education*." (emphasis added).

- "[T]he Court should not hesitate to ensure that Plaintiffs' fundamental rights *in securing a basic minimum education* for their children are preserved and protected from Defendants' arbitrary actions." (emphasis added).

The complaint nowhere differentiates between public- and private-school children with respect to the Due Process claim, nor does it assert that California has abridged

or interfered with the right of parents to select their children's educational forum.

Plaintiffs' district court briefing is no different. Their briefs allege a single due process violation predicated on a claimed right to a basic minimum education. In claiming that their briefing raised a *Meyer-Pierce* claim, Plaintiffs identify only a citation to *Meyer* in a portion of a brief arguing for the right to a basic minimum education. A review of the full context of that citation demonstrates that it did not raise a separate *Meyer-Pierce* claim:

A. The Order Violates the Fourteenth Amendment Because it Infringes Fundamental Rights and Is Not Narrowly Tailored to Advance the Government's Interest in Combatting the Spread of COVID-19

> **Education is a Fundamental Right**. State-provided education is "deeply rooted in this Nation's history and tradition" and is "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). Any infringement of the right to basic minimum education—or discrimination that deprives certain groups of that right—is thus subject to a "heightened level of scrutiny." *United States v. Harding*, 971 F.2d 410, 412. n.1 (9th Cir. 1992).
>
> And while Defendants contend that "no court has recognized a fundamental right to a basic education" (Resp. 14), *Plyler* and *Rodriguez*

demonstrate that any infringement on the right to basic minimum education must be met with at least heightened scrutiny. *Plyler v. Doe*, 457 U.S. 202, 221, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36-37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973). Moreover, the "identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution." *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 2598, 192 L. Ed. 2d 609 (2016).

In all events, education is at least a "quasi-fundamental right" under settled precedent. *Harding*, 971 F.2d at 412 n.1. Courts have long held that pupils have a "right to be taught," *Farrington v. Tokushige*, 11 F.2d 710, 714 (9th Cir. 1926), *aff'd*, 273 U.S. 284, 47 S. Ct. 406, 71 L. Ed. 646 (1927), **and that parents have a right "to control the education of their" children. *Meyer v. Nebraska*, 262 U.S. 390, 401, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)**. The very concept of "liberty," "[w]ithout doubt, [ ] denotes . . . the right of the individual . . . to acquire useful knowledge." *Id.* at 399. Any burden on the right to education thus raises heightened scrutiny. *See* Carmen Green, *Educational Empowerment: A Child's Right to Attend Public School*, 103 Geo. L. J. 1089, 1127-28 (the test utilized in *Meyer* is "most similar to today's intermediate standard of review").

(second emphasis added). Not convinced? Take Plaintiffs' word for it:

> Defendants mischaracterize Plaintiffs as advocating for a "fundamental right to in-person school." Resp. 17. Plaintiffs' actual argument is that "the Fourteenth Amendment of the United States Constitution [ ] protects Californians' fundamental right to a basic minimum education," TRO at 2, and that the Order infringes that right because distance learning has proved woefully inadequate. *See id.* 7-9.

Indeed, despite the district court's invitation for supplemental filings when it was considering whether to grant summary judgment, Plaintiffs did not present any distinct argument that a *Meyer-Pierce* right was being asserted, again merely citing these cases in passing. When the court granted summary judgment without mentioning a *Meyer-Pierce* claim, Plaintiffs did not request reconsideration. *See Young v. Hawaii*, 992 F.3d 765, 779–80 (9th Cir. 2021) (en banc). And Plaintiffs candidly conceded at oral argument that they cannot and do not fault the district court for not addressing that claim.

However charitably read, Plaintiffs' filings below simply did not offer the argument that the school closure orders infringed the parents' substantive Due Process right to control their children's upbringing. The only argument raised by Plaintiffs' quite able counsel was that *all* children—those attending public and private schools

alike—were being denied a right to a basic minimum education.

Unhappy with the record, the majority creatively reimagines Plaintiffs' district court filings, concluding that because some of the children had opted out of a state-provided education, they "necessarily" raised a *Meyer-Pierce* claim. Op. at 38-42. That is neither logically nor actually the case. The complaint and briefing assert only that the State was preventing Plaintiffs' children—both those who attended public school and those who did not—from receiving a constitutionally sufficient level of education. The private-school Plaintiffs would plainly have benefited from succeeding on that claim: the COVID-19 restrictions would have been lifted in the schools in which their children were enrolled. The fact that Plaintiffs asserted a broad losing argument below doesn't mean that they implicitly preserved a different one.

B

Perhaps recognizing that the *Meyer-Pierce* argument was never raised below, the majority alternatively concludes that we should exercise our discretion to hear it. But, although we can forgive forfeiture under certain circumstances, *see AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1213-14 (9th Cir. 2020), there is a fundamental reason not to do so here. The "cardinal principle of judicial restraint" is that "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc. v. Drug Enf't Admin.*, 362 F.3d 786, 799, 360 U.S. App. D.C. 344 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment). That principle applies in force here.

We might exercise our discretion to reach this forfeited issue if it would impact Plaintiffs' ability to attend school today or tomorrow. But it will not. Their schools can reopen and need not close again even if case rates rise. I might also understand the need to forgive forfeiture if this were a recurring question. But it is not. The restrictions here were the product of exceptional circumstances, and, largely for the reasons detailed above, are unlikely to recur. The majority's ruling is therefore tantamount to an advisory opinion. And because the issue decided is one of constitutional importance, we should leave it for another day.

IV

Having ignored all stop signs, the majority speeds on to the merits of the *Meyer-Pierce* claims. That is its biggest mistake. The majority errs in both (1) finding that the narrow *Meyer-Pierce* right protects a parent's choice of a particular mode of education and (2) concluding that any law impacting the *Meyer-Pierce* right is subject to strict scrutiny.

A

Because the majority's analysis of the *Meyer-Pierce* claims rests largely on out-of-context quotations from Supreme Court decisions, it is useful to begin with a review of what the relevant cases actually hold.

Meyer involved a teacher's challenge to his conviction under state law for unlawfully teaching German to children at a parochial school. 262 U.S. at 396-97. In

reversing that conviction, the Court explained that the Fourteenth Amendment "liberty" interest included parents' rights to "bring up children," including "the right of parents to engage [Meyer] so to instruct their children." *Id.* at 400. The Court, however, stressed that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned." *Id.* at 402.

Pierce considered a challenge by an Oregon corporation that operated private schools to a law requiring attendance of all students at public schools. 268 U.S. at 531-32. The Court reiterated that "[n]o question is raised concerning the power of the state reasonably to regulate all schools" or "to inspect, supervise and examine them, their teachers and pupils." *Id.* at 534. But the Court found that the Oregon law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Because children are not "merely" creatures of the state, "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." *Id.* at 535.

Wisconsin v. Yoder considered a challenge by three Amish parents to convictions for refusing to send their children to public school in violation of state law. 406 U.S. 205, 207-09, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Although affirming the Wisconsin Supreme Court's reversal of the convictions, the Court once again emphasized that "[t]here is no doubt as to the power of a State, having a

high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213.

Runyon v. McCrary considered whether 42 U.S.C. § 1981 was constitutional as applied to schools with a history of discriminatory admissions. 427 U.S. 160, 168-69, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976). In answering the question "yes," the Court rejected the notion that the *Meyer-Pierce* right was implicated, reading those cases and their progeny narrowly:

> [T]he present application of § 1981 infringes no parental right recognized in *Meyer*, *Pierce*, *Yoder*, or *Norwood*. No challenge is made to the petitioner schools' right to operate or the right of parents to send their children to a particular private school rather than a public school. Nor do these cases involve a challenge to the subject matter which is taught at any private school. Thus, the [schools] remain presumptively free to inculcate whatever values and standards they deem desirable. *Meyer* and its progeny entitle them to no more.

Id. at 177. The Court later reiterated this narrow reading and again emphasized that the right does not prevent states from reasonably regulating schools:

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a

> constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation. Indeed, the Court in *Pierce* expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils . . . ."

Id. at 178.

Fields v. Palmdale School District, 427 F.3d 1197 (9th Cir. 2005), re-affirms these well-established principles. The plaintiffs sued a school district for teaching sexual topics, asserting their right to control their children's upbringing. *Id.* at 1204-05. We recognized the *Meyer-Pierce* right to direct one's child's upbringing but emphasized that it is "not without limitations." *Id.* at 1204. We affirmed the holdings, repeated in each of the above cases, that the State may subject this right to "reasonable regulation." *See id.* Indeed, we further held that "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Id.* at 1206. In short, we stressed that "what *Meyer-Pierce* establishes is the right of parents to be free from state interference with their choice of the educational forum itself, a choice that ordinarily determines the type of education one's child will receive." *Id.* at 1207.

B

The majority nonetheless reads the *Meyer-Pierce* right as protecting a parent's right to choose a specific *mode* of education. But, as one of our colleagues has aptly noted, *Meyer* and *Pierce* were products of "complex forces." Jay S. Bybee, *Substantive Due Process and Free Exercise of Religion: Meyer, Pierce and the Origins of Wisconsin v. Yoder*, 25 Cap. U. L. Rev. 887, 891 (1996). The Supreme Court has instructed us to read those decisions narrowly, explaining that *Meyer* protects a parent's right to choose a child's curriculum, and that *Pierce* protects a parent's right to choose a school for the child. *Runyon*, 427 U.S. at 176-77; *see also Norwood v. Harrison*, 413 U.S. 455, 461, 93 S. Ct. 2804, 37 L. Ed. 2d 723 (1973) (stressing "the limited scope of *Pierce*"); *see also, e.g., Ohio Ass'n of Indep. Sch. v. Goff*, 92 F.3d 419 (6th Cir. 1996) ("The Supreme Court has held that parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction."). Neither right is at stake here: Plaintiffs freely chose the private school of their choice and do not complain about state interference in the substance of what those schools teach.

The majority justifies its expansion of the *Meyer-Pierce* right by claiming that it must "necessarily" have included a right to select in-person education. *See* Op. at 47. But the Supreme Court has told us the contours of the right, and they do not encompass a given mode of instruction. Their reliance on isolated language in prior decisions fares no better. To be sure, in *Fields*, we

explained that the *Meyer-Pierce* right protects the "choice of the educational forum." Op. at 48 (quoting *Fields*, 427 F.3d at 1207). But that statement simply reaffirmed the principle that parents were free to choose the school their children will attend, and did not even indirectly suggest that the mode of delivery of instruction was a matter of constitutional magnitude. The same applies to our prior quoting of Justice Harlan's dissent in *Berea College v. Kentucky*, 211 U.S. 45, 29 S. Ct. 33, 53 L. Ed. 81 (1908), in *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926), for the following proposition:

> If pupils, of whatever race . . . choose with the consent of their parents or voluntarily to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether federal or state, can legally forbid their coming together, or being together temporarily for such an innocent purpose.

See Op. at 48-49 (quoting *Tokushige*, 11 F.2d at 713-14). The decision plainly involves the decision to operate a private school, not whether that school is then subject to generally applicable non-discriminatory health regulations.

In rejecting the public-school Plaintiffs' claims, the majority ironically notes the Supreme Court's admonition that we "exercise the utmost care whenever we are asked to break new ground" in the field of substantive due process, *see Glucksberg*, 521 U.S. at 720 (cleaned up), and

its narrow reading of its own cases on which the plaintiffs relied, *see Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 459, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988), to support the conclusion that "we have no license to recognize such a novel right here," Op. at 35. But it then goes on to recognize precisely such a novel right.

C

Even assuming the *Meyer-Pierce* right protects in some fashion a parent's right to select in-person education during a pandemic, the majority errs in concluding that all laws impacting that interest must survive strict scrutiny. The Supreme Court has repeatedly emphasized that the *Meyer-Pierce* right remains subject to "reasonable" state regulation. *Meyer*, 262 U.S. at 403; *Pierce*, 268 U.S. at 534-35; *Yoder*, 406 U.S. at 215; *Runyon*, 427 U.S. at 178. We have said the same. *Fields*, 427 F.3d at 1204-05; *Hooks v. Clark Cnty. Sch. Dist.*, 228 F.3d 1036, 1042 (9th Cir. 2000). Applying strict scrutiny whenever a *Meyer-Pierce* interest is at stake vitiates this controlling precedent. If every regulation touching on a *Meyer-Pierce* interest must survive that heightened review, a host of "reasonable" regulations would not survive, as there might be a less drastic means of achieving the state's purpose.

In finding that strict scrutiny applies, the majority again elevates isolated language of opinions over their actual holdings. That the Supreme Court has described the right as "fundamental" does not allow us to disregard its repeated injunctions that the right remains subject to "reasonable regulation." Indeed, even when presented

with an opportunity to broadly apply strict scrutiny to laws infringing the *Meyer-Pierce* right, only one justice indicated that he would do so. *See Troxel v. Granville*, 530 U.S. 57, 80, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) (Thomas, J., concurring); *see also, e.g., Ohio Ass'n*, 92 F.3d at 423 ("[N]o federal court has similarly suggested that wholly secular limitations on private school education implicate a fundamental right warranting strict scrutiny.").

The correct question to ask in reviewing the challenged orders is simply whether they are "reasonable." That they are is a point the majority does not—and cannot—dispute; indeed, it implicitly accepts that conclusion in rejecting the claims of the public-school Plaintiffs. *See* Op. at 57. We must be particularly deferential in the context of the COVID-19 pandemic, as we "are not public health experts and . . . should respect the judgment of those with special expertise" in this area. *Diocese of Brooklyn*, 141 S. Ct. at 68 (2020). California imposed the challenged orders to protect its citizens from a pandemic. Relying on established scientific consensus about how the virus spreads, California temporarily restricted in-person schooling alongside a host of other activities. These restrictions have now largely been lifted as the threat of the pandemic has waned. The challenged orders can thus hardly be said to be unreasonable, and, as a result, should be upheld.

V

I respectfully but emphatically dissent.[5]

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5. Although I would not reach the claims of the public-school Plaintiffs, I agree with the majority that they fail on the merits. But here, too, the majority overreaches. It is not necessary to resolve this case to hold that there is no right to a minimum level of education, an issue the Supreme Court has left open. *See* Op. at 31-35; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Papasan v. Allain*, 478 U.S. 265, 285, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (noting that as "*Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right"). Rather, it is enough to conclude that the district court correctly granted summary judgment to the State Defendants because any supposed right to a minimum level of education had not been denied simply because instruction was temporarily being provided remotely.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED DECEMBER 1, 2020

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

2:20-cv-06472-SVW-AFM

MATTHEW BRACH *et al.*

v.

GAVIN NEWSOM *et al.*

December 1, 2020, Decided
December 1, 2020, Filed

STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES - GENERAL

Proceedings: ORDER GRANTING SUA SPONTE SUMMARY JUDGMENT FOR DEFENDANTS

I. Introduction

On August 21, 2020, this Court denied Plaintiffs' application for a temporary restraining order to enjoin enforcement of California's school reopening framework. Dkt. 51. On September 1, 2020, the Court notified the parties that it was inclined to grant summary judgment

sua sponte, outlined the basis for summary judgment, and invited supplemental briefing from the parties. Dkt. 60. On September 15, 2020, Plaintiffs submitted a brief in opposition to *sua sponte* summary judgment. Dkt. 61. On September 25, 2020, Defendants filed a brief in support of *sua sponte* summary judgment. Dkt. 63. For the reasons articulated below, the Court GRANTS *sua sponte* summary judgment for Defendants.

II. Factual and Procedural Background

The Court set forth the facts giving rise to this suit in detail in its prior Order, which need not be repeated here. Dkt. 51, at 1-3. The Court briefly describes two developments since its prior Order.

a. Tier Framework

First, on August 28, 2020, the State reformulated its reopening framework, replacing the statewide monitoring list with a tier-based system ("Tier Framework"). *See generally* Supplemental Request for Judicial Notice ("Supp. RJN"), Dkt. 63-1, Ex. ZZ. The Tier Framework is similar to the previous framework in that it assigns counties to a particular tier based on "indicators of disease burden including case rates per capita and percent of positive covid-19 tests and proportion of testing and other covid-19 response efforts addressing the most impacted populations within a county." *Id.* at ZZ.2. A county's tier assignment determines the stringency of restrictions applicable in the county. *Id.* The criteria for tier assignment under the current framework do differ

from those used in the prior reopening framework in that hospitalization rates are no longer considered. *Compare id. with* Dkt. 36, Ex.S.

The consequences for education of assignment to Tier 1, the most restrictive tier, are the same as the consequences of assignment to the statewide monitoring list under the prior framework. As the California Department of Public Health explains on its website, "[s]chools may reopen—for in-person instruction based on equivalent criteria to the July 17th School Re-Opening Framework previously announced. That framework remains in effect except that Tier 1 is substituted for the previous County Data Monitoring List (which has equivalent case rate criteria to Tier 1)." Supp. RJN, Ex. AAA.4. Schools are not required to close again if a county moves back to Tier 1. *Id.*

A county is placed in Tier 1 if its case rate excluding prison cases exceeds 7 per 100,000 or its testing positivity rate exceeds 8%. *Id.*, Ex. AAA.2. The case rate used to determine tier assignment is adjusted to reflect differential testing volume across counties. *Id.*, Ex. AAA.2-3.

To advance to a less restrictive tier, a county must be in the current tier for at least three weeks, meet criteria for the next less restrictive tier for two weeks, and meet health equity measures. *Id.*, Ex. AAA.3.

Under the Tier Framework, schools were permitted to re-open in Santa Clara, San Diego, and Orange Counties beginning in late September 2020. *Id.*, Exs. CCC, DDD, EEE.

b. Relaxation of Some In-Person Learning Restrictions

Second, on September 4, 2020, the California Department of Public Health issued guidance permitting "necessary in-person child supervision and limited instruction, targeted support services, and facilitation of distance learning in small group environments for a specified subset of children and youth." *Id.*, Ex. FFF.1; *see also* Ex. GGG. The Tier Framework expressly permits schools that are not otherwise authorized to re-open to provide "structured, in person supervision and services to students under the Guidance for Small Cohorts/Groups of Children and Youth." *Id.*, Ex. AAA.4.

III. Sua Sponte Summary Judgment

a. Plaintiffs' Opposition to Sua Sponte Summary Judgment

As a threshold matter, the Court addresses the procedural propriety of a *sua sponte* summary judgment. As the Court explained in its September 1 Order, "[a]fter giving notice and a reasonable time to respond, the court may ... consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3); *see Norse v. City of Santa Cruz*, 629 F.3d 966, 971 (9th Cir. 2010) (en banc) ("District courts unquestionably possess the power to enter summary judgment sua sponte, even on the eve of trial.").

Beyond their arguments on the merits, Plaintiffs object to a *sua sponte* summary judgment. Plaintiffs cite two cases for proposition that summary judgment should generally not be granted at the preliminary injunction stage because the issues are unlikely to be fully developed. However, in both cases, district courts were reversed for failing to provide notice and an opportunity to respond. *See Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) ("[T]he district court, by not offering plaintiffs notice of its intent to convert the preliminary injunction motion into basis for grant of summary judgment, deprived plaintiffs of the opportunity to submit additional evidence and argument on the merits of their equal protection claim."); *Pugh v. Goord*, 345 F.3d 121, 124-25 (2d Cir. 2003) (reversing sua sponte grant of summary judgment after denying motion for preliminary injunction without notice and opportunity to respond). Here, by contrast, the Court gave plaintiff an opportunity to submit additional briefing, additional evidence, and to point to any disputed questions of fact that would preclude judgment as a matter of law. Dkt. 60.

Plaintiffs also argue that they should be given an opportunity to take discovery. However, they have failed to comply with the procedural requirements of Rule 56(d). To grant a continuance of a summary judgment motion on the ground that a party cannot present facts necessary to resist summary judgment, "[t]he requesting party must show: (1) that it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home and Fin. Ctr., Inc. v. Federal Home Loan Mortg. Corp.*, 525 F.3d 822,

827 (9th Cir. 2008) (citation omitted). "Failure to comply with these requirements 'is a proper ground for denying discovery and proceeding to summary judgment.'" *Id.* (citation omitted). Plaintiffs have failed to provide an affidavit and failed to articulate any facts that they would use to resist summary judgment if discovery were permitted. While this procedural failing is alone sufficient to deny a continuance to take discovery, the Court will set forth in its analysis of Plaintiffs' claims below why additional facts would not preclude summary judgment.

IV. Legal Standard[1]

1. The Court previously relied on *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), and applied a presumption of constitutionality to the state framework. Dkt. 51, at 4-5. This use of *Jacobson* has recently been criticized. *See, e.g., Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608, 207 L. Ed. 2d 1129 (2020) (Alito, J., dissenting from denial of application for injunctive relief) ("[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic."); *Cty. of Butler v. Wolf*, 486 F. Supp. 3d 883, 2020 U.S. Dist. LEXIS 167544, 2020 WL 5510690, at *6 (W.D. Pa. 2020). *Jacobson* at the very least recognizes that the "latitude" of public health officials in a pandemic "must be especially broad." *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613, 207 L. Ed. 2d 154 (2020) (Roberts, J., concurring in denial of application for injunctive relief). Such deference is more appropriate to the discretionary inquiries of a court evaluating equitable relief. Because the Court makes a merits determination on a motion for summary judgment, the Court does not rely on *Jacobson* in this Order.

Summary judgment should be granted where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the factual record that] demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (“When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.”).

A material fact for purposes of summary judgment is one that “might affect the outcome of the suit” under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A genuine issue of material fact exists where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* Although a court must draw all inferences in the non-movant’s favor, *id.* at 255, when the non-moving party’s version of the facts is “blatantly contradicted by the record, so that no reasonable jury could believe it, [the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct.

1769, 167 L. Ed. 2d 686 (2007).

V. Application

a. Article III Case or Controversy

i. Standing

To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (citations omitted).

The Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013). "When ... a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* ... causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). In this circumstance, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (citations omitted).

"Causation exists where the alleged injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Namisnak v. Uber Techs.*, 971 F.3d 1088, 1092 (9th Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). However, "[c]ausation can be established 'even if there are multiple links in the chain,' ... as long as the chain is not 'hypothetical or tenuous.'" *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020) (citations omitted). A theory of standing may satisfy the causation requirement if it "relies ... on the predictable effect of Government action on the decisions of third parties." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566, 204 L. Ed. 2d 978 (2019) (citations omitted).

"To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana*, 947 F.3d at 1170. However, "[p]laintiffs need not demonstrate that there is a 'guarantee' that their injuries will be redressed by a favorable decision." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). Redressability is not defeated when "the defendant's actions produce injury through their 'determinative or coercive effect upon the action of someone else.'" *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 749 (9th Cir. 2020) (quoting *Bennett v. Spear*, 520 U.S. 154, 169, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997)). The redressability analysis is "focused on ... the predictable effect of an order granting the relief [Plaintiffs] seek[]." *Id.* at 750. "The plaintiffs'

burden is 'relatively modest.'" *Renee*, 686 F.3d at 1013 (quoting *Bennett*, 520 U.S. at 171)). "Plaintiffs need only show that there would be a 'change in a legal status,' and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464, 122 S. Ct. 2191, 153 L. Ed. 2d 453 (2002)).

Because Plaintiffs are parents and students challenging a statewide framework affecting third parties (namely, counties, public school districts, and private schools), the Court directed the parties to address whether Plaintiffs have Article III standing. Dkt. 48. After reviewing the parties' supplemental briefing, the Court now concludes that at least one Plaintiff has Article III standing as to each claim. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1024 (9th Cir. 2020) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006)) ("[A] 'plaintiff must demonstrate standing for each claim he seeks to press.'")); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (citation omitted) ("Plaintiffs seek injunctive relief, not damages, and '[a]s a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.'").[2]

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2. The primary Article III standing issues are with causation and redressability. Defendants briefly argue that parents lack standing to bring claims asserting educational injuries suffered by their children. Dkt. 54, at 2-3. That argument is inconsistent with caselaw holding that parents asserting similar educational injuries had standing. *See Parents Involved in Cmty. Sch. v.*

Plaintiffs have demonstrated a "direct chain of causation" between statewide in-person learning restrictions and school closures. *Skyline Wesleyan Church*, 968 F.3d at 748. There is admissible evidence in the record that one school district was engaged in extensive preparations to reopen for in-person learning in the 2019-20 school year. Plaintiff Matthew Brach, a "Governing Board Member" of the Palos Verdes Unified School District (PVUSD) provides an affidavit describing these preparations. *See* Declaration of Matthew Brach, Dkt. 28-23 ¶¶ 2, 6, 10-17. The district purchased personal protective equipment and developed a mitigation strategy including staggered arrival times, masking requirements, a "grab/go" lunch plan, and a specialized protocol for high touch areas. *Id.* ¶ 12.[3] Additionally, several Plaintiffs submitted declarations indicating that their private schools and school districts began remote learning in the 2019-20 school year after statewide restrictions were put in effect. *See, e.g.*, Supplemental Declaration of Roger

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Seattle Sch. Dist. No. 1, 551 U.S. 701, 718-19, 127 S. Ct. 2738, 168 L. Ed. 2d 508 (2007) (association of parents had standing to challenge race-based public school assignments); *see also Renee*, 623 at 797 (parents, along with other plaintiffs, had standing to challenge federal regulation affecting the education of their children) ; *D.K. v. Huntington Beach Union High Sch. Dist.*, 428 F. Supp. 2d 1088, 1091-92 (C.D. Cal. 2006) (citation omitted) (parents had standing to bring IDEA claims).

3. Defendants object to this and other declarations as hearsay. Dkt. 54, at 5 n.4. While some portions of these affidavits may be inadmissible, the cited portions of Brach's declaration are nonassertive conduct personally observed in Brach's work as a Board Member of PVUSD. Fed. R. Evid. 801(a), (c).

Hackett, Dkt. 55-7; Supplemental Declaration of Christine Ruiz, Dkt. 55-8; Supplemental Declaration of Marianne Bema, Dkt. 61-3.

Defendants identify some school districts that opted for remote learning independent of statewide restrictions — namely, Los Angeles Unified School District, San Diego Unified School District, San Francisco Unified School District, Oakland Unified School District, Santa Ana Unified School District, and Long Beach Unified School District. *See* Declaration of Darin L. Wessel, Dkt. 54-3, Exs. TT, UU, VV. However, this list does not include several public school districts and private schools attended by Plaintiffs' children, such as PVUSD, *see* Brach Decl., Oaks Christian School, *see* Supplemental Declaration of Roger Hackett, Dkt. 55-7, Los Primeros School of Sciences and Arts in Ventura County, *see* Supplemental Declaration of John Ziegler, Dkt. 55-6, Santa Monica Malibu Unified School District *see*, Bema Suppl. Decl., Saugus Union Unified School District; *see* Ruiz Suppl. Decl., or any schools in Riverside County, *see* Declaration of Brian Hawkins, Dkt. 28-36.[4]

Furthermore, the causation element does not require that the Defendant's action be the "very last step in the chain of causation" where Plaintiffs' injury is "produced by determinative or coercive effect upon the action of someone else," *Bennett v. Spear*, 520 U.S. at 169, as demonstrated by several recent Ninth Circuit cases,

4. This list does not include any schools at issue in Defendant's mootness argument discussed below.

see Skyline Wesleyan Church, 968 F.3d at 748-49 (state defendant's policy, which prevented third-party insurer from offering plan with abortion exclusion to plaintiff, was causally connected to plaintiff's alleged Free Exercise injury); *Renee*, 623 F.3d at 798 (federal regulations had causal connection to California regulations regarding teacher qualifications that allegedly caused educational injuries to children); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121-22 (9th Cir. 2009) (pharmacists had standing to sue state officials over policy making it likely pharmacies would terminate or refuse to hire them because of their religious or moral objections to birth control). While there are "multiple links in the chain" connecting school district and private school closures to statewide restrictions, that link is not "hypothetical or tenuous." *Juliana*, 947 F.3d at 1169.

A similar analysis shows that Plaintiffs' alleged injuries would be redressable by an injunction prohibiting enforcement of statewide in-person learning restrictions. An injury may be redressable by an injunction against a higher-level government official even if alleviating the injury still requires action within the discretion of a third party. *See Bennett*, 520 U.S. at 168-69 (invalidation of scientific opinion redressed injuries dependent on action by separate agency which "retains ultimate responsibility for determining whether and how a proposed action shall go forward"); *Renee*, 623 F.3d at 798 (enjoining federal regulation "significantly increases the likelihood that California will take steps" to improve teacher qualifications in certain schools even though California retained "great flexibility" to do so); *Stormans, Inc.*,

586 F.3d at 1122 (injunction against state would improve prospects of conscientious objector pharmacists to be employed by third-party pharmacies). The question is not whether it is certain or guaranteed that the third party would take steps to alleviate the injury; rather, plaintiffs "need only show that there would be a 'change in legal status,' and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Renee*, 623 F.3d at 797-98 (quoting *Evans*, 536 U.S. at 464).

Here, it is at least the "predictable effect" of an injunction that some schools would reopen for in-person learning, including a school attended by one of Plaintiffs' children bringing each set of claims. *See Skyline Wesleyan Church*, 968 F.3d at 750 (injury redressable by injunction of state policy where it was "the predictable effect ... that at least one insurer would be willing to sell [plaintiff] a plan that accords with its religious beliefs"). This predictable effect is evident not only from the preparations described above at PVUSD geared towards reopening during the pandemic but also from the fact that the schools had operated in person until statewide public health restrictions were imposed. *See id.* (finding "strong evidence" supporting redressability that insurers had offered plans consistent with plaintiff's religious commitments before implementation of state policies).[5]

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5. Defendants note that several counties have been removed from Tier 1 or received waivers for elementary education since Plaintiffs' complaint was filed. Dkt. 63, at 5 n.1. If presented in admissible form, evidence that schools in those counties moved to

Defendants argue that, under Cal. Health & Saf. Code § 120175, public health officers could impose similar restrictions on a countywide level if state restrictions are enjoined. Dkt. 54, at 4-5. While it is true that causation and redressability are more difficult to establish when standing depends on the exercise of discretionary power by intermediaries, *see Clapper*, 568 U.S. at 412, that is not the position of county health officers. Defendants have not argued that county health officers would have to exercise discretion to approve in-person schooling if statewide restrictions are lifted. Instead, Defendants only argue that county health officers *could* impose new restrictions. Without evidence that such restrictions are likely, however, such speculation does not undermine causation or redressability. *See Renee*, 623 F.3d at 799 (rejecting as speculation argument that California would independently adopt regulations consistent with enjoined federal regulations to allow less qualified teachers in public schools). If the possibility of local restrictions were sufficient to defeat standing, federal and state laws could never be enjoined where local governments had the power to impose similar restrictions.

Because the causal link between Plaintiffs' asserted injuries and statewide restrictions is not hypothetical or tenuous, *see Juliana*, 947 F.3d at 1169, and the reopening of some of Plaintiffs' schools is the predictable effect of an injunction, *see Skyline Wesleyan Church*, 968 F.3d at

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in-person learning would be persuasive evidence supporting this predictable effect. However, because no such admissible evidence was presented, the Court does not rely on reopening of other schools in its standing analysis.

750, Plaintiffs have established Article III standing at this stage.

ii. Mootness

"When an 'intervening circumstance ... at any point during litigation' eliminates the case or controversy required by Article III, 'the action can no longer proceed and must be dismissed as moot.'" *Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (quoting *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 136 S.Ct. 663, 669, 193 L. Ed. 2d 571 (2016)). Defendants make two arguments that some or all of Plaintiffs' claims have been rendered moot by post-complaint developments.

First, Defendants argue that claims are mooted for plaintiffs living in San Diego County, Orange County, or Santa Clara County, which have been removed from Tier 1, because schools in those counties are now free to resume in-person instruction. Supp. RJN, Exs. CCC, DDD, EEE. If these plaintiffs are not currently participating in in-person education, that would be attributable to independent decisions of parents, schools, school districts, or counties. However, the mooting of some claims does not moot the entire case if there is at least one Plaintiff who remains injured. *See Townley*, 722 F.3d at 1133 (citation omitted) ("Plaintiffs seek injunctive relief, not damages, and '[a]s a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.'"). Several Plaintiffs attend school in Los Angeles County, Ventura County, and Riverside County. Dkt. 9 ¶¶ 7-21. The case is not moot as to

those Plaintiffs who are still attending schools in counties subject to statewide restrictions on in-person learning.

Second, Defendants argue that Plaintiffs' claims are mooted by state guidance permitting in-person services in stable cohorts of no more than 16 individuals. Wessel Decl., Exs. XX-YY. Students with disabilities who need specialized services and targeted support are prioritized under this guidance. *Id.*, Ex. YY.3. While this guidance removes an absolute prohibition on in-person learning in Tier 1 counties, it still imposes limits on in-person learning. Plaintiff Bema's autistic children were still engaged in remote learning even after this cohort guidance went into effect. Bema Suppl. Decl. ¶ 19.[6] There is no evidence that any other Plaintiffs in Tier 1 counties have resumed in-person learning as a result of the new cohort guidance. Therefore, notwithstanding this minor exception, the Tier Framework continues to limit Plaintiffs' opportunities for in-person learning.

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6. Most of Bema's supplemental declaration consists of quoting or paraphrasing emails she received from various education officials regarding implementation of the cohort guidance. *See generally* Bema Suppl. Decl. Because Bema's own testimony is being used to prove the contents of writings, namely emails from school officials, and Plaintiffs have not produced those emails or explained why they couldn't be produced, these statements would be barred under the best evidence rule. *See Medina v. Multaler, Inc.*, 2007 U.S. Dist. LEXIS 102352, 2007 WL 5124009 (C.D. Cal. 2007). However, her statement that her children remain in online education after the cohort guidance went into effect comes from her own observations rather than any writing and is not barred by the best evidence rule.

b. Substantive Due Process

In its prior Order, the Court explained in detail its conclusion that Plaintiffs were unlikely to succeed on the merits of their substantive due process claim. In its brief opposing summary judgment, Plaintiffs attempt to respond to the Court's earlier concerns with additional historical citations and arguments. *See generally* Dkt. 61. None of these new submissions undermine the rationale of the Court's Order, and the Court therefore concludes that summary judgment is appropriate in favor of Defendants on the substantive Due Process claim.

Plaintiffs have not established that the Due Process Clause of the Fourteenth Amendment contains a fundamental right to basic education. Presented with the opportunity, the Supreme Court has declined to recognize such a right. *See Plyler v. Doe*, 457 U.S. 202, 221, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) (citation omitted) ("Public education is not a 'right' granted to individuals by the Constitution."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973) ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

Plaintiffs present no case law that would support a fundamental right to minimum education. Plaintiffs repeatedly cite *dicta* from a footnote in *United States v. Harding*, 971 F.2d 410 (1992), which rejected an Equal Protection challenge to sentencing disparities between

crack and powder cocaine. *Harding* neither discusses substantive due process principles nor education, and therefore has no instructive value in this case. While at least relevant to the question, *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982), did not recognize a fundamental right to education. In *Plyler*, the Supreme Court held instead that the Equal Protection Clause prohibited excluding undocumented children from public schools. 457 U.S. at 230. In doing so, however, the Supreme Court reaffirmed that "[p]ublic education is not a 'right' granted to individuals by the Constitution," *id.* at 221 (quoting *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973)), much less a right to education of a certain quality or format, *see id.* at 223 ("[A] state need not justify by compelling necessity every variation in the manner in which education is provided to its population." (quoting *Rodriguez*, 411 U.S. at 28-39)).

As the Court explained in its prior Order, the structure of substantive due process doctrine — with its focus on protecting liberty and autonomy — suggests that no fundamental right to basic education exists. First, substantive due process "refers to certain actions that the government may not engage in" and "[g]enerally speaking ... protects an individual's fundamental rights to liberty and bodily autonomy." *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016) (citations and quotation marks omitted). Plaintiffs ask this Court to recognize a right that would not prevent government interference but require a government service of a certain quality. Plaintiffs cite *Obergefell v. Hodges*, 576 U.S. 644, 135 S. Ct. 2584, 192

L. Ed. 2d 609 (2015), for the proposition that an individual may have a fundamental right to a government benefit because same-sex marriages can only be recognized through state action. However, the Supreme Court in *Obergefell* explained the right to same-sex marriage as a component of the fundamental liberty recognized by the Due Process Clause. 576 U.S. at 665 ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."). While the Due Process Clause does recognize "the right of parents to be free from state interference with their choice of the educational forum itself," the Ninth Circuit has declined to extend that liberty interest to parents seeking to control the content or format of public education. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). The Ninth Circuit has rejected a substantive due process challenge to a public school's questioning of children about sexual topics, and in so doing affirmed this broader principle: "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Id.* at 1206 (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005)).

Even if the Court did recognize a fundamental right to basic education, the Court would be left without criteria to apply to the facts of this case. Plaintiffs present absolutely no standard for evaluating what should count as a minimally adequate education. When *Plyler* invalidated the exclusion of a population from public education on Equal Protection grounds, it spoke

of harms such as illiteracy, inability to participate in political institutions, and limited economic opportunities. 457 U.S. at 221. Plaintiffs' argument about a fundamental right to minimum education invokes these same purposes of public education. Dkt. 28-1, at 15-16; Dkt. 61, at 10-14. Yet Plaintiffs do not even argue that their children face any of these risks as a consequence of several months of remote education. Dkt. 28-1, at 3-9, 16-18.

Without a viable legal theory or any argument that additional evidence would support their theory on its own terms, the additional discovery Plaintiffs seek — from "school administrators, teachers, and special education counselors" — would not alter the Court's conclusion.

Therefore, the Court grants summary judgment for Defendants on the Due Process claim.

c. Equal Protection

The Court explained in detail in its prior Order why Plaintiffs were unlikely to succeed on the merits of their Equal Protection claim. The Court has now reviewed Plaintiffs' additional submissions, *see* Dkt. 55, at 12; Dkt. 61, at 19-21, and the Court concludes that summary judgment on the Equal Protection claim is appropriate in favor of Defendants.

Because the Court has rejected Plaintiffs' argument that there is a fundamental right to basic education, rational basis review applies to their Equal Protection claim. *See United States v. Padilla-Diaz*, 862 F.3d 856,

862 (9th Cir. 2017) ("Classifications that do not implicate fundamental rights or a suspect class are permissible so long as they are 'rationally related to a legitimate state interest.'" (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985))).

"Under rational basis review, a classification is valid 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *FCC v. Beach Communications*, 508 U.S. 307, 313, 113 S. Ct. 2096, 124 L. Ed. 2d 21 (1993))). "This inquiry is not a 'license for courts to judge the wisdom, fairness, or logic of legislative choices'; if we find a 'plausible reason[] for [California's] action, our inquiry is at an end." *Fowler Packing Company, Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (quoting *Beach Commc'ns*, 508 U.S. at 313-14). Differential treatment may still be upheld under rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data." *United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) (quoting *Beach Commc'ns*, 508 U.S. at 315). "[A] legislative classification must be upheld [under rational basis review] 'so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Angelotti Chiropractic, Inc.*, 791 F.3d at 1085 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S. Ct. 2326, 120 L. Ed. 2d 1 (1992)).

"Under rational-basis review, '[t]he burden falls on the party seeking to disprove the rationality of the relationship between the classification and the purpose.'" *Navarro*, 800 F.3d at 1113 (citation omitted).

Plaintiffs do not dispute that curbing the spread of COVID-19 is a legitimate state interest. *See* Dkt. 28-1, at 19-20; Dkt. 61, at 17-21. Nor could they. "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." *South Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

Defendants have set forth plausible policy reasons for limiting in-person learning in Tier 1 counties with higher rates of confirmed COVID-19 cases and higher positivity rates. *See* Supp. RJN, Ex. ZZ (explaining Tier Framework). In counties with higher numbers in these categories, "the risks and impacts of disease transmission are even greater." Request for Judicial Notice ("RJN"), Dkt. 36, Ex. H.2. In these counties, where there are "higher levels of community spread," there is also an "increase [in] the likelihood of infection among individuals at high risk of serious outcomes from COVID-19, including those with underlying health conditions who might live or otherwise interact with an infected individual." *Id.*, Ex. I.3. California has restricted a variety of activities in Tier 1 counties that are deemed higher-risk, particularly those involving "indoor operations," because "the odds of an infected person transmitting the virus are dramatically higher compared to an open-air environment." *Id.*; *see also id.*, Ex. I.

Defendants have also offered plausible reasons that these higher-level public health principles should apply to schools. This is explained in two declarations submitted by Dr. James Watt, Chief of the Division of Communicable Diseases at the California Department of Public Health. *See* Dkt. 35-1 ("Watt Decl."), 54-1 ("Watt Supp. Decl."). Dr. Watt explains that, "[i]n schools, adults intermingle with children, and transmission may happen between adults, between children, from adults to children, or from children to adults." Watt Decl. ¶ 26. "By gathering in large groups, and in close proximity to others, individuals put themselves and others at increased risk of transmission, which could be expected to increase the spread of COVID-19 in their communities and in any other communities they visit." *Id.* This spread could fan out into different parts of the state, jeopardizing the hard work to contain COVID-19 that is going on in many communities and placing a further strain on hospitals and other resources across the state." *Id.* "In-person classroom instruction thus creates increased public risk of COVID-19 transmission until localities have attained sufficient testing, tracking, hospital capacity, and infection rates that indicate epidemiological stability and an ability to treat outbreaks if they occur." *Id.* ¶ 29. The "movement and mixing" associated with in-person instruction "would introduce substantial new risks of transmission of COVID-19. *Id.* ¶ 37.

These explanations indicate that Defendants have a plausible policy goal for restricting in-person schooling in counties with greater community spread of COVID-19. In counties with greater community spread, in-person schooling poses a high risk of infecting individuals at

school and those whom students, teachers, and staff may encounter in the community, which could jeopardize other preventive measures, strain health care and public health resources, and lead to severe illness or death. Because there is a 'plausible reason[] for [California's] action, [the Court's] inquiry is at an end." *Fowler Packing Co.*, 844 F.3d at 815 (quoting *Beach Commc'ns*, 508 U.S. at 313-14).

Plaintiffs have assembled a veritable library of declarations from physicians, academics, and public health commentators who disagree with the scientific or policy basis for in-person learning restrictions. *See, e.g.*, Dkt. 61-2 (Declaration of Sean Kaufman); Dkt. 28-3 (Declaration of Dr. Jayanta Bhattacharya), Dkt. 28-4 (Declaration of Dr. Scott Atlas), Dkt. 28-5 (Declaration of Dr. James-Lyons-Weiler). These scientific and policy disagreements take several different forms, including skepticism that PCR tests accurately measure infectiousness, Dkt. 61, at 20, insistence that hospitalizations are a more reliable indicator of community spread than case numbers, *id.* at 21, and a belief that children "are not at risk of being sickened or killed by COVID-19," Dkt. 28-1, at 19.

The Court need not address each of these scientific and policy objections in detail. As the Court noted in its prior Order, the Equal Protection Clause simply does not require that government classifications be supported by scientific consensus — or even the most reliable scientific evidence. Dkt. 51, at 10. "[R]ational-basis review allows for decisions 'based on rational speculation unsupported by evidence or empirical data.'" *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns*, 508 U.S. at 315). Even if

a firmer basis were required than the public documents and declarations cited above to show that "the legislative facts ... rationally may have been considered to be true by the governmental decisionmaker," *Angelotti Chriopractic, Inc.*, 791 F.3d at 1085 (quoting *Nordlinger*, 505 U.S. at 11), Dr. Watt's declarations refer to examples, epidemiological data, and scientific studies that would give Defendants such a basis. *See* Watt Decl. ¶¶ 18, 25, 38; Watt Suppl. Decl. ¶¶ 3-7. Mere disagreement with Defendants' plausible scientific and policy premises does not satisfy Plaintiffs' "burden to negative every conceivable basis which might support" in-person learning restrictions. *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns*, 508 U.S. at 315) (citation and quotation marks omitted).

Defendants argue that they should be permitted to depose Dr. Watt regarding his scientific opinions and obtain documents and communications on which Defendants relied to formulate in-person learning restrictions. Dkt. 61, at 5. This request once again misunderstands the highly deferential inquiry under rational basis review. Because the Court concludes that the Tier Framework, and its consequences for in-person learning, are rationally related to the purpose of mitigating the spread of COVID-19, Plaintiffs cannot succeed on this claim "regardless of what facts plaintiffs might prove during the course of litigation." *Angelotti Chiropractic, Inc.*, 791 F.3d at 1087. "A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315).

Therefore, the Court grants summary judgment for Defendants on the Equal Protection claim.[7]

d. Title VI of the Civil Rights Act of 1964

Plaintiffs conceded in their reply brief in support of their application for a temporary restraining order that their Title VI claim "is currently foreclosed" by adverse precedent. Dkt. 40, at 9. Plaintiffs made no effort to rescue this claim in their opposition to summary judgment. *See generally* Dkt. 61. Therefore, the Court deems this claim abandoned and grants summary judgment in favor of Defendants. *See Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) ("[A] plaintiff has 'abandoned ... claims by not raising them in opposition to ... summary judgment.'" (quoting *Jenkins v. Cty. Of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005))).

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7. The Court does not rule out that Defendants could be entitled to dismissal of the Equal Protection claim for failure to state a claim. Equal Protection claims can be properly resolved by a motion to dismiss because a government's asserted rationale will often be codified in judicially noticeable legislative findings or history or an administrative record. *See, e.g., Angelotti Chiropractic, Inc.*, 791 F.3d at 1087-88. However, the judicially noticeable documents supporting in-person learning restrictions here are more generic, and do not describe in detail the application of general public health principles to the context of K-12 schools. *See* Dkt. 63, at 10-14. The Court therefore considers it prudent to take into account the declarations of Dr. Watt which provide detail about risks posed in the K-12 school context. As the Court explained in its September 1 Order, the Court decided to resolve this case on summary judgment instead of on a motion to dismiss on this basis. Dkt. 60.

e. IDEA

The Court explained in its prior Order that Plaintiffs were unlikely to succeed on the merits of their IDEA claim because they failed to exhaust administrative remedies. Dkt. 51, at 11-14. The Court has reviewed Defendants' additional submissions, *see* Dkt. 55, at 9-12; Dkt. 61, at 22-24, and the Court now concludes that summary judgment is appropriate in favor of Defendants on the IDEA claim.

The IDEA provides federal funds to states in exchange for "furnish[ing] a 'free appropriate public education' — more concisely known as a FAPE — to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748, 197 L. Ed. 2d 46 (2017). The IDEA's mechanism for providing disabled children with a FAPE is an "individualized education program" ("IEP"), which is "[c]rafted by ... a group of school officials, teachers, and parents ... to meet all of the child's 'educational needs.'" *Id.* at 749 (internal citations omitted). "Because parents and school representatives sometimes cannot agree on such issues, the IDEA establishes formal procedures for resolving disputes." *Id.* "There must be an opportunity for mediation, an impartial due process hearing, and an appeals process." *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1099 (9th Cir. 2019) (citing 20 U.S.C. § 1415(e)-(g)). The California Department of Education uses California's Office of Administrative Hearings (OAH) to provide these remedies. *Id.* (citing Cal. Educ. Code § 56504.5(a)).

"[A] parent unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court." *Fry*, 137 S. Ct. at 748 (citing 20 U.S.C. § 1415(i)(2)(A)). "Judicial review under the IDEA is ordinarily only available after the plaintiff exhausts administrative remedies." *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 680-81 (9th Cir. 1997) (citation omitted). In California, administrative remedies are exhausted when a plaintiff obtains a final decision from OAH. *See Paul G.*, 933 F.3d at 1099.

Plaintiffs do not dispute that they have not exhausted administrative remedies under the IDEA. Instead, Plaintiffs argue that they are excused from compliance with the exhaustion requirement by the exceptions to the exhaustion requirement recognized in the Ninth Circuit. *See* Dkt. 9 ¶¶ 136-42; Dkt. 40, at 9-10; Dkt. 55, at 6-12; Dkt. 61, at 21-25.

In *Hoeft v. Tucson Unified Sch. Dist.*, the Ninth Circuit held that exhaustion under the IDEA was not required where "(1) it would be futile to use the due process procedures...; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)." 967 F.2d 1298, 1303 (9th Cir. 1992). "The party alleging futility or inadequacy of IDEA procedures bears the burden of proof." *Doe*, 111 F.3d at 681 (citing *Hoeft*, 967 F.2d at 1303).

"In determining whether these exceptions apply, our inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme." *Hoeft*, 967 F.2d at 1302-03. "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id.* at 1303.

Plaintiffs first argue that exhaustion would be futile because a hearing officer would lack authority to grant the relief they seek — an injunction against the enforcement of statewide restrictions on in-person learning. Plaintiffs' primary argument is that *Hoeft*, which first articulated the exceptions, quoted legislative history to the effect that exhaustion should be excused when "the hearing officer lacks authority to grant the relief sought." 967 F.2d at 1304 (quoting H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). However, "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631, 200 L. Ed. 2d 889 (2018). More importantly, the Ninth Circuit has consistently held that administrative procedures are not futile simply because they cannot afford the precise relief that IDEA plaintiffs might envision. *See Paul G.*, 933 F.3d at 1102 (rejecting argument that exhaustion would have been futile because hearing officer could not order state to provide requested relief); *Doe*, 111 F.3d at

683 ("That the class might not get ... injunctive relief" by pursuing administrative remedies "is not decisive."). Rather, the question is "whether the administrative process is adequately equipped to address and resolve the issues presented" in the sense that "the administrative process has the potential for producing the very result plaintiffs seek, namely, statutory compliance." *Hoeft*, 967 F.2d at 1309.

Here, a hearing officer could provide compensatory education or additional services. *See Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006). OAH can also order compliance with procedural requirements under the IDEA. Cal. Educ. Code § 56505(f)(4). It would therefore not be futile for a parent seeking to remedy denial of a FAPE to pursue these remedies, because they could ensure that Plaintiffs' children receive a FAPE or remedies for a past denial. *See generally Martinez et al. v. Newsom et al.*, No. 5:20-cv-01796-SVW-AFM, Dkt. 103, at 5-8 (C.D. Cal. Nov. 24, 2020).

Plaintiffs next argue that they are excused from the exhaustion requirement because they are seeking systemic relief. Systemic claims are excused from the exhaustion requirement because "the nature of the claim renders those procedures futile (the nature of the state's administrative process is being challenged in an across-the-board manner — e.g., the very process of bringing due process complaints is inadequate) and no adequate relief can be obtained by pursuing administrative remedies (the remedy sought is outside the agency's ability to grant — e.g., restructuring the state process for IDEA due

process appeals)." *S.B. v. Cal. Dep't of Educ.*, 327 F. Supp. 3d 1218, 1249 (E.D. Cal. 2018). "[A] claim is 'systemic' if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act." *Doe*, 111 F.3d at 682.

Plaintiffs do not raise any objections to the IDEA dispute resolution procedures in California or propose any restructuring of the education system. Rather, they essentially seek relief for seven children with special needs from a statewide policy that affects every disabled student differently and that local school districts have some discretion to implement. *See* Supp. RJN, Exs. FFF, GGG (describing cohort guidance); *Doe*, 111 F.3d at 682-83 (claim was not systemic when it sought IDEA implementation in one facility). While the policy Plaintiffs challenge is applicable statewide, their purported right to relief under the IDEA is based on an individual denial of a FAPE, a determination which must be made by a state hearing officer. *See Paul G.*, 933 F.3d at 1102 (Plaintiff was required to obtain a determination that he was denied a FAPE through the administrative process before bringing suit to require the state to provide an in-state residential facility).

The Court's determination is bolstered by the teaching of *Hoeft* — that the ultimate question in deciding whether exhaustion is required is "whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme."

Hoeft, 967 F.2d at 1302-03. IDEA's exhaustion requirement embodies a policy choice that favors "full exploration of technical educational issues" and "further[] development of a complete factual record" by the agency before federal courts intervene. *Id.* at 1303. Here, Plaintiffs' declarations leave the Court with little factual detail about their individual needs, the services they are receiving online, and why a FAPE is only possible in their case with in-person services. *See generally* Declaration of Ashley Ramirez, Dkt. 28-33; Declaration of Brian Hawkins, Dkt. 28-36; Ruiz Decl.; Bema Supp. Decl.; Declaration of Marianne Bema, Dkt. 28-32. Likewise, the record contains no case-specific expert analysis necessary for the Court to evaluate these issues. Finally, this Court is hopeful that the cooperative, individually tailored decision-making envisioned by the IDEA will better serve students than the blunt instrument of an injunction from a federal court. The general purposes of exhaustion — adequate fact development, expert decision-making, and a preference for cooperative solutions — thus weigh against excusing Plaintiffs' failure to exhaust in the circumstances of this case.

Whether exhaustion is required is a question of law. *C.C. by and through Ciriacks v. Cypress Sch. District*, 2010 WL 11603053, at *2 (C.D. Cal. 2010). Because the Court has concluded that Plaintiffs were required to exhaust administrative remedies under the IDEA, summary judgment is appropriate in favor of Defendants on their IDEA Act claim.

f. ADA/Rehabilitation Act

The Court explained in its prior Order that its conclusion that Plaintiffs' IDEA claims were unexhausted made it unlikely that Plaintiffs could succeed on their ADA and Rehabilitation Act claims. Dkt. 51, at 11-14. The Court has reviewed Defendants' additional submissions, *see* Dkt. 55, at 6-9; Dkt. 61, at 21-22, and the Court now concludes that summary judgment is appropriate in favor of Defendants on Plaintiffs' ADA and Rehabilitation Act claims.

Under 20 U.S.C. § 1415(l), "before the filing of a civil action under [the ADA and Rehabilitation Act] seeking relief that is also available [under the IDEA], the procedures [applicable to IDEA claims] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." Whether the ADA and Rehabilitation Act claims are exhausted depends on whether the gravamen of the complaint seeks relief for denial of a FAPE. *See Fry*, 137 S. Ct. at 752; *Paul G.*, 933 F.3d at 1100 ("The crucial issue is therefore whether the relief sought would be available under the IDEA.").

Here, Plaintiffs' ADA and Rehabilitation Act claims do seek relief for denial of a FAPE. The Supreme Court in *Fry* recommended that courts approach this inquiry with two considerations in mind — whether plaintiffs could have brought the same claim against another non-educational facility, and whether a non-student could bring the same claim against the school. 137 S. Ct. at 756. Both considerations support this conclusion.

"[W]hen the answer [to those questions] is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so." *Fry*, 137 S. Ct. at 756.

First, Plaintiffs could not have brought the same claim if Defendants' alleged conduct occurred at a public facility that was *not* a school. Plaintiffs essentially allege that in-person learning restrictions prevent schools from providing the services necessary for an adequate education for disabled students. Such a claim would make no sense with respect to a public theater or library because those facilities do not provide education. Second, an adult employee or visitor could not assert such a claim against the school because they are not owed an education. These considerations suggest that Plaintiffs' complaint is about inadequate education for disabled students rather than equal access to public facilities.

Plaintiffs argue that their ADA and Rehabilitation Act claims do not seek relief for denial of a FAPE because they "seek reasonable accommodations to permit them to receive instruction on the same terms as non-disabled students." Dkt. 55, at 7. Whether Plaintiffs can articulate their claims in the language of anti-discrimination statutes is irrelevant. The three statutes have "some overlap in coverage." *Fry*, 137 S. Ct. at 756. "The use (or non-use) of particular labels and terms is not what matters." *Id.* at 755. Because Plaintiffs' claim is that their special education services have not been adequately provided during distance learning, the gravamen of their complaint seeks remedies for the denial of a FAPE.

Therefore, the Court concludes that summary judgment is appropriate in favor of Defendants on their ADA and Rehabilitation Act claims.

VI. Conclusion

For the foregoing reasons, the Court GRANTS summary judgment *sua sponte* in favor of Defendants.

IT IS SO ORDERED.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, FILED AUGUST 21, 2020

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

2:20-cv-06472-SVW-AFM

MATTHEW BRACH *et al.*

v.

GAVIN NEWSOM *et al.*

August 21, 2020, Decided
August 21, 2020, Filed

STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE.

CIVIL MINUTES - GENERAL

Proceedings: ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER [28]

I. Introduction

Plaintiffs filed an Application for a Temporary Restraining Order ("TRO") on August 3, 2020, against numerous state officials, seeking to enjoin the enforcement of California's school reopening framework, which

prohibits in-person education in counties on a statewide COVID-19 monitoring list. Dkt. 28. For the reasons articulated below, Plaintiffs' Application for a TRO is DENIED.

II. Factual and Procedural Background

On July 17, 2020, the California Department of Public Health (CDPH) issued its "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year" (hereafter "Framework for K-12 Schools" or "Framework"). Dkt. 36, Ex. J.1.[1] The Framework provided that "[s]chools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has *not* been on the county monitoring list within the prior 14 days." *Id.* The Framework also set up a waiver process, which allows local health officers to grant waivers to elementary schools seeking to reopen for in-person instruction. *Id.* n.2. CDPH explained that the waiver process would be limited to elementary schools

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1. Defendants request that this Court take judicial notice of numerous exhibits filed in connection with their Opposition. Dkt. 36. Plaintiffs filed a motion opposing judicial notice. Dkt. 41. To the extent Defendants seek judicial notice of the government's policies and their stated rationale, these facts are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting Fed. R. Evid. 201(b)). The Court therefore GRANTS Defendants' Request for Judicial Notice for this purpose as to each of the exhibits cited in this Order.

because “there appears to be lower risk of child-to-child or child-to-adult transmission in children under age 12.” Dkt. 36, Ex. M.1.

Counties are added to the statewide monitoring list, and thus subject to the Framework, based on the local prevalence of COVID-19 cases and local strain on health care capacity. Dkt. 36, Ex. S. CDPH has imposed extensive restrictions on virtually all activities outside the home in counties on the monitoring list. Dkt. 36 H.2-4. CDPH explained that more aggressive measures were required for counties on the monitoring list because “the risks and impacts of disease transmission are even greater.” *Id.* The monitoring list is continually updated, and the oldest data considered is a county’s average daily reported cases per 100,000 over the past 14 days. Dkt. 36, Ex. S.

Plaintiffs are fourteen parents of California students and one minor. Dkt. 9, at 5-10. Some of the students attend public school, and some attend private school. *Id.* The students live and attend school in numerous counties and school districts across California. *Id.* At least four parents have children with disabilities, and the minor also has a disability. *Id.* at 36. The students range in age from kindergarten to twelfth grade. *Id.* at 5-10.

On July 21, 2020, Plaintiffs filed a Complaint against numerous state officials (“Defendants”) seeking to enjoin enforcement of the Framework. Dkt. 1. Plaintiffs filed an Amended Complaint on July 29, 2020. Dkt. 9. Plaintiffs’ Amended Complaint asserts that restrictions on in-person education under the Framework violate (1) Substantive

Due Process, (2) the Equal Protection Clause, (3) Title VI of the Civil Rights Act of 1964, (4) the Individuals with Disabilities Education Act ("IDEA"), (5) Title II of the Americans with Disabilities Act ("ADA"), and (6) Section 504 of the Rehabilitation Act of 1973. *Id.* Plaintiffs have not brought this case as a class action. *See* Dkt. 1, 9.

On August 3, 2020, Plaintiffs filed their Application for a TRO. Dkt. 28. On August 9, 2020, Defendants filed their Memorandum in Opposition. Dkt. 35. On August 12, 2020, Plaintiffs filed a Reply. Dkt. 40. On August 13, this Court issued a text-only entry denying Plaintiffs' Application for a TRO. Dkt. 47. This Order explains the Court's decision.[2]

III. Legal Standard

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing may be held on the propriety of a preliminary injunction. *See Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); *see Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2011).

2. Since the Court reached a decision on Plaintiffs' Application for a TRO, it has *sua sponte* raised whether Plaintiffs have Article III standing given the limited information before the Court about the reopening plans of counties, school districts, and private schools if the Framework is enjoined. Dkt. 48. The Court has ordered supplemental briefing on this issue. *Id.*

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit employs the "serious questions" test, which states "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "A preliminary injunction is an 'extraordinary and drastic remedy.' It should never be awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 690 (2008) (citation omitted). The propriety of a temporary restraining order hinges on a significant threat of irreparable injury, *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999), that must be imminent in nature, *Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir. 1988).

IV. Analysis

a. *Application of Jacobson*

In addressing suits seeking injunctive relief against local government action in response to the COVID-19 crisis, district courts, appellate courts, and the Supreme Court have looked to *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *See, e.g.*, *Prof'l Beauty Fed'n of California v. Newsom*, No. 2:20-CV-04275-RGK-

AS, 2020 WL 3056126, at *5 (C.D. Cal. June 8, 2020); *Gish v. Newsom*, No. 2:20-CV-755-JGB-KKX, 2020 WL 1979970, at *4 (C.D. Cal. Apr. 23, 2020); *In re Abbott*, 956 F.3d 696, 704 (5th Cir. 2020); *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 3249062, at *5 (7th Cir. June 16, 2020); *S. Bay United Pentecostal Church v Newsom*, 140 S. Ct. 1613 (2020) (Roberts, CJ., concurring in denial of application for injunctive relief).

In *Jacobson*, the Supreme Court considered the constitutionality of a compulsory vaccination law enacted during a smallpox epidemic. 197 U.S. at 12-13. The plaintiff refused to be vaccinated and was fined $5. The Supreme Court rejected his constitutional challenge, reasoning that "the court would usurp the functions of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." *Id.* at 28.

The Court then described the scope of judicial authority to review emergency measures such as the vaccination mandate narrowly, explaining that "[i]f there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can *only* be when ... a statute purporting to have been enacted to protect the public health ... *has no real or substantial relation to those objects*, or is, beyond all question, *a plain, palpable invasion of rights secured by the fundamental law*[.]" *Id.* at 31 (emphasis added). Accordingly, this Court concludes that unless (1) the measure has no real or substantial relation to public health, or (2) the measure is

"beyond all question, a plain, palpable invasion of rights secured by the fundamental law," the Court should apply an especially strong presumption of constitutionality to the County's Order. *Id.; see also Prof'l Beauty Fed'n*, 2020 WL 3056126, at *5 (applying a similar test under *Jacobson*).

The Court finds that California's Framework for K-12 Schools is entitled to a presumption of constitutionality under *Jacobson*. First, the Framework has a "substantial relation" to preventing the spread of COVID-19. CDPH explained that restrictions on in-person learning were imposed as "part of a broader set of recommendations intended to reduce transmission of SARS-CoV-2, the virus that causes COVID-19." Dkt. 36, Ex. J.1. Moreover, Dr. James Watt, CDPH's Chief of the Division of Communicable Diseases, states that the "movement and mixing" associated with reopening schools for in-person instruction "would introduce substantial new risks of transmission of COVID-19." Watt Decl., Dkt. 35-1. Second, as explained below, California's Framework for K-12 Schools does not constitute "a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31. The Court therefore finds that at this juncture, in the context of the current public health crisis, *Jacobson* requires the Court to apply a presumption of constitutionality to the Framework for K-12 Schools.

b. *Application of the Winter Factors*

A temporary restraining order is "an extraordinary remedy that may only be awarded upon a clear showing the plaintiff is entitled to such relief." *Winter*, 555 U.S.

at 22. Under *Winter*, a plaintiff "must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) a preliminary injunction is in the public interest." *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (applying *Winter*, 555 U.S. at 29).

1. Likelihood of Success on the Merits

The Ninth Circuit considers the likelihood of success on the merits "the most important *Winter* factor; if a movant fails to meet this threshold inquiry, the court need not consider the other factors." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (internal citations and quotation marks omitted). However, even if likelihood of success is not established, "[a] preliminary injunction may also be appropriate if a movant raises 'serious questions going to the merits' and the 'balance of hardships . . . tips sharply towards' it, as long as the second and third *Winter* factors are satisfied." *Id.* (quoting *Cottrell*, 632 F.3d at 1134-35).

i. Substantive Due Process

Plaintiffs first argue that the Framework for K-12 Education violates a fundamental right to a "basic education" protected by the Due Process Clause of the Fourteenth Amendment. Dkt. 28-1, at 14-16. Plaintiffs acknowledge that the Supreme Court has not recognized such a right, and they do not cite to other cases recognizing such a right or even suggesting that such a right should

be recognized. *Id.* Instead, Plaintiffs cite to a single law review article that describes state constitutional requirements to establish public schools at the time the Fourteenth Amendment was ratified, *see* Dkt. 28-1, at 15 (citing Steven G. Calabresi & Michael W. Perl, *Originalism and* Brown v. Board of Ed., 2014 Mich. St. L. Rev. 429), and describe the importance of reading and writing in civic life, *see id.* at 15-16.

This Court concludes that Plaintiffs are unlikely to succeed on the merits of their substantive due process claim. Several Supreme Court cases addressing Equal Protection Clause challenges to state educational systems have expressly withheld support for the position that there is a constitutionally protected right to public education. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) ("Nor have we accepted the proposition that education is a 'fundamental right' ... which would trigger strict scrutiny when government interferes with an individual's access to it."); *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (internal citation omitted) ("Public education is not a 'right' granted to individuals by the Constitution."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive."); *cf. Papasian v. Allain*, 478 U.S. 265, 284 (1986) ("[T]his Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right.").

Moreover, even if Plaintiffs' substantive due process argument could be considered with fresh eyes, this Court would have serious doubts about recognizing a basic minimum education as a fundamental right under two settled legal principles. First, previously recognized substantive due process rights generally protect individuals from government action deemed overly intrusive. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (same-sex sexual relations); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (abortion), *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception). Substantive due process "refers to certain actions that the government may not engage in" and "[g]enerally speaking ... protects an individual's fundamental rights to liberty and bodily autonomy." *C.R. v. Eugene School Dist. 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016) (omitting citations and quotation marks). These fundamental individual rights include "the right of parents to be free from state interference with their choice of the educational forum itself." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). For example, the right to privately educate one's child is constitutionally protected. *See generally Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, "once parents make the choice as to which school their children will attend, their fundamental right to control the education of their children is, at the least, substantially diminished." *Fields*, 427 F.3d at 1206. By contrast to rights against government interference ordinarily associated with substantive due process, Plaintiffs' substantive due process claim would place an affirmative obligation on the government to educate their children—and to educate them in a particular way.

Second, the manner of providing public education is "generally committed to the control of state and local authorities." *Id.* Plaintiffs' proposed constitutional right would at least unsettle "local autonomy" in public education, which the Supreme Court has described as "a vital national tradition." *Missouri v. Jenkins*, 515 U.S. 70, 99 (1995) (citation omitted); *see also Horne v. Flores*, 557 U.S. 433, 448 (2009) (internal citations omitted) (noting that federal courts should exercise restraint in imposing injunctions "involv[ing] areas of core state responsibility, such as public education"). Given that Plaintiffs are arguing that "the right to a basic education is 'deeply rooted in this Nation's history and tradition,'" Dkt. 28-1, at 15, a countervailing tradition of local autonomy raises significant doubts about the viability of Plaintiffs' theory.

In the alternative, Plaintiffs argue that the Supreme Court recognized public education as a "quasi-fundamental" right in *Plyler v. Doe*, 457 U.S. 202 (1982). This Court does not find *Plyler* instructive. In *Plyler*, the Supreme Court held that it violated the Equal Protection Clause to exclude undocumented children from public schools. *Id.* at 230. *Plyler* does recognize that public education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." *Id.* at 221. But it does not offer any criteria for assessing the quality of public education that the government has already undertaken to provide. *See id.* at 223 ("[A] State need not justify by compelling necessity every variation in the manner in which education is provided to its population."). Plaintiffs here challenge the quality of the education that they anticipate their children will receive through remote learning. They do not allege that the government

has entirely excluded them from public education on a permanent basis. *See generally* Dkt. 9. A temporary period of slowed educational progress poses important concerns, but those concerns are categorically different from the effects of lifetime exclusion. *See Plyler*, 457 U.S. at 223 (describing effects as "deny[ing] [undocumented children] the ability to live within the structure of our civil institutions, and foreclos[ing] any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

Therefore, this Court concludes that Plaintiffs are unlikely to succeed on the merits of their substantive due process claim.

ii. Equal Protection

Plaintiffs next argue that the Framework violates the Equal Protection Clause in two ways: (1) by distinguishing counties on the state monitoring list from those that are not, and (2) by distinguishing K-12 schools from daycares and camps. Since the Court does not recognize a fundamental right to minimum education, Plaintiffs concede that these distinctions are only subject to rational basis review. Dkt. 28-1, at 19; Dkt. 40, at 7 n.4.

"Classifications that do not implicate fundamental rights or a suspect class are permissible so long as they are 'rationally related to a legitimate state interest.'" *United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). "Under rational basis

review, a classification is valid 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993))). "This inquiry is not a 'license for courts to judge the wisdom, fairness, or logic of legislative choices'; if we find a 'plausible reason[] for [California's] action, our inquiry is at an end." *Fowler Packing Company, Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (quoting *Beach Commc'ns*, 508 U.S. at 313-14). Differential treatment may still be upheld under rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data." *United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) (quoting *Beach Commc'ns*, 508 U.S. at 315). "Under rational-basis review, '[t]he burden falls on the party seeking to disprove the rationality of the relationship between the classification and the purpose.'" *Id.* at 1113 (internal citation omitted).

Plaintiffs do not appear to dispute that curbing the spread of COVID-19 is a legitimate state interest. *See* Dkt. 28-1, at 19-20.

Defendants have put forth plausible reasons for restricting in-person instruction only in counties on the state's monitoring list. CDPH includes counties on its monitoring list based on case rate, testing positivity rate, hospitalizations, and hospital capacity. Dkt. 36, Ex. S.1-2. In counties with higher numbers in these categories, "the risks and impacts of disease transmission are even greater." *Id.*, Ex. H.2. Dr. Watt states in his declaration that "in schools, adults intermingle with children, and

transmission may happen between adults, between children, from adults to children or from children to adults." Watt Decl., Dkt. 35-1, at 7. Indoor activities of the sort that typically happen in K-12 schools, such as "speaking, chanting, shouting, and singing in close proximity to others," pose a particularly serious risk of transmission. *Id.* Sustained interactions of the sort that would occur in schools also pose a greater risk of transmission than shorter interactions. *Id.* at 7-8. "In-person classroom instruction thus creates increased public risk of COVID-19 transmission until localities have attained sufficient testing, tracking, hospital capacity, and infection rates that indicate epidemiological stability and an ability to treat outbreaks if they occur." *Id.* This justification easily clears the low bar of rational basis review.

Defendants have likewise put forth plausible reasons for distinguishing daycares and camps from K-12 schools. Camps involve smaller group sizes and their activities can be conducted outside and with more social distancing than in K-12 schools. *Id.* at 6. Daycares are mandated to have significantly lower adult-to-child ratios than schools typically have. Dkt. 35, at 19-20. This allows for smaller group sizes, and thus reduces the risk of transmission. *Id.*at 20; *see also* Watt Decl., Dkt. 35-1, at 6 ("The risk increases commensurately with the size of the group."). The Court concludes this asserted differential risk is a rational basis for distinguishing between K-12 schools and daycare facilities.

Plaintiffs have two basic arguments for resisting these conclusions. Both arguments are based on a disagreement with Defendants over the level of risk created by reopening K-12 schools for in-person instruction. Both arguments lack merit.

First, Plaintiffs suggest that distinguishing among school districts based on public health conditions in the surrounding community is illogical because the risk that children will become ill or transmit the virus is minimal irrespective of geography. Dkt. 28-1, at 19. Assuming this point *arguendo*, Defendants have articulated a rational basis for restricting in-person instruction independent of the risk of illness to or transmission by children. Transmission could occur among teachers and staff. Watt Decl., Dkt. 35-1, at 5. Spread occurring at school could in turn "fan out into different parts of the state, jeopardizing the hard work to contain COVID-19 that is going on in many communities and placing a further strain on hospitals and other resources across the state." *Id.* at 7-8. Thus, even if it was utterly irrational for Defendants to act on the belief that gatherings of children alone posed a risk of transmitting disease, restrictions on in-person learning in the state's worst-affected counties is rationally related to the distinct goals of protecting teachers, staff, and the broader community.

Second, Plaintiffs offer numerous declarations from physicians and researchers to prove that the risk of COVID-19 transmission among children is negligible. *See, e.g.* , Dkt. 28-3 (Declaration of Dr. Jayanta Bhattacharya), 28-4 (Declaration of Dr. Scott Atlas), 28-5 (Declaration

of Dr. James-Lyons-Weiler). This assertion does not go unrebutted. Dr. Watt describes instances of severe disease among children, *see* Watt Decl., Dkt. 35-1, at 5, and "limited data suggest[ing] children, particularly older children, may spread COVID-19," *id.* at 7. More fundamentally, the scientific opinions of Plaintiffs' experts have little bearing on the question before this Court. The Equal Protection Clause simply does not require that government classifications be supported by scientific consensus — or even the most reliable scientific evidence. "[R]ational-basis review allows for decisions 'based on rational speculation unsupported by evidence or empirical data.'" *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns*, 508 U.S. at 315). Plaintiffs here have not met their "burden to negative every conceivable basis which might support" the Framework. *Id.* (internal citation and quotation marks omitted).

The Court therefore concludes that Plaintiffs are unlikely to succeed on the merits of their Equal Protection claim.

iii. Title VI of the Civil Rights Act of 1964

Plaintiffs concede in their Reply brief that their Title VI claim "is currently foreclosed" by adverse precedent. Dkt. 40, at 9. Therefore, this Court has no difficulty concluding that Plaintiffs are unlikely to succeed on the merits of their Title VI claim.

iv. IDEA

Four of the Plaintiffs are parents of children with disabilities, and the minor Plaintiff, Z.R., also has disabilities. Dkt. 9. They assert that the Framework's restriction on in-person learning violates their rights under the IDEA.

The IDEA provides federal funds to states in exchange for "furnish[ing] a 'free appropriate public education' — more concisely known as a FAPE — to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). The IDEA's mechanism for providing disabled children with a FAPE is an "individualized education program" ("IEP"), which is "[c]rafted by ... a group of school officials, teachers, and parents ... to meet all of the child's 'educational needs.'" *Id.* at 749 (internal citations omitted).

Defendants argue that Plaintiffs' IDEA claim must fail because they have not exhausted their administrative remedies as required by 20 U.S.C. § 1415(i)(2)(A), §1415(l). Dkt. 35, at 22. Plaintiffs do not allege that they have exhausted administrative remedies. *See generally id.*; Dkt. 40, at 9-10. Instead, Plaintiffs argue that they fall within an exception to the IDEA exhaustion requirement. In *Hoeft v. Tucson Unified Sch. Dist.*, 867 F.2d 1298 (9th Cir. 1992), the 9th Circuit held that exhaustion under the IDEA was not required where "(1) it would be futile to use the due process procedures...; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief

can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)." 867 F.2d at 1303. "The party alleging futility or inadequacy of IDEA procedures bears the burden of proof." *Doe v. Arizona Dept. of Educ.*, 111 F.3d 678, 681 (9th Cir. 1997) (citing *Hoeft*, 867 F.2d at 1303).

"In determining whether these exceptions apply, our inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme." *Hoeft*, 967 F.2d at 1302-03. "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id.* at 1303.

The parties' briefing on exceptions to the exhaustion requirement is limited to one footnote in Defendants' Opposition, Dkt. 35, at 22 n.10, and a paragraph in Plaintiffs' Reply, Dkt. 40, at 10. The Court has accordingly ordered the parties to provide supplemental briefing. Dkt. 48. However, the Court has determined at this stage that Plaintiffs' failure to exhaust is unlikely to be excused.

The Court does not find that exhaustion would be futile or inadequate. Plaintiffs argue that exhaustion is not required because the Department of Education "has

no authority to override the Governor's Order." Dkt. 40, at 10. That argument appears inconsistent with 9th Circuit precedent. In *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096 (9th Cir. 2019), a California student wanted a residential placement in California even though California had no qualifying facility. 933 F.3d at 1098-99. The plaintiff pursued an administrative process against both the state and his school district. *Id.* The hearing officer dismissed the state, concluding that the state could not be ordered to build a new facility. *Id.* Plaintiff then settled with the school district. *Id.* The 9th Circuit held that the plaintiff's failure to exhaust was not excused even though the hearing officer could not award him the particular relief he wanted — in-state residential placement — because "he ha[d] no IEP that requires ... in-state placement." *Id.* at 1100, 1102. Similarly, Plaintiffs here should not be excused from obtaining through the administrative process an IEP that specifies in-person learning is required under the circumstances just because a hearing officer lacks the authority to enjoin the Framework for K-12 Schools. *See also Doe*, 111 F.3d at 683 (holding even in the context of a class action that it was "not decisive" that "the class might not get class-based or injunctive relief").

Plaintiffs are unlikely to succeed in arguing that they are entitled to an exception because the violations they seek to remedy are systemic. Dkt. 40, at 10. Exhaustion cannot be evaded just by "[l]abeling the Department's failure ... to meet its responsibilities to all children with special education needs 'systemic.'" *Doe*, 111 F.3d at 683. Rather, Plaintiffs must show that the alleged violation

"implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act." *Id.* at 682. A plaintiff alleging a systemic violation is not entitled to an exception if "it involves only a substantive claim having to do with limited components of a program, and if the administrative process is capable of correcting the problem." *Id.* The Court notes that Plaintiffs have not filed a class action, and thus can only properly seek a FAPE for their individual children. The Court is not satisfied at this stage that the administrative process is incapable of identifying feasible solutions in light of a particular child's needs. *See id.* at 683 (rejecting argument that systemwide nature of relief sought excused exhaustion where "a district court might have to resolve a number of factual issues within the [agency's] expertise").

The Court also finds at this stage that Plaintiffs are unlikely to be entitled to the exception for policies or practices of general applicability that are contrary to law. While the Framework is undoubtedly a policy of general applicability, this exception applies to challenges to the facial validity of a policy. *See Hoeft*, 967 F.2d at 1305 (explaining that this exception applies "when only questions of law are involved in determining the validity of a policy"); *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205, 1213 (9th Cir. 2004) (excusing exhaustion under this exception where "the validity of a policy is purely a matter of law"). Here, numerous factual questions—including detailed analysis of a child's particular impairments and ability to interact

with technology—are required to determine whether Plaintiffs' children and Z.R. can receive a FAPE remotely. The Court thus doubts at this stage that Plaintiffs are entitled to the exception for policies or practices of general applicability.

The Court has considered the "general purposes of exhaustion." *Hoeft*, 967 F.2d at 1302-03. IDEA's exhaustion requirement embodies a policy choice that favors "full exploration of technical educational issues" and "further[] development of a complete factual record" by the agency before federal courts should intervene. *Hoeft*, 967 F.2d at 1303; *see also Paul G.*, 933 F.3d at 1102 ("A principal purpose of requiring administrative exhaustion ... is to ensure the agency has had an opportunity to rule on a claim before a plaintiff goes to court."). Here, Plaintiffs' declarations leave the Court without the factual details or case-specific expert analysis necessary to adjudicate Plaintiffs' IDEA claims. Moreover, this Court is hopeful that decisionmakers with subject-matter expertise would be in a better position than this Court to evaluate the challenges of online learning and the specific needs of Plaintiffs' children and Z.R. The general purposes of exhaustion thus weigh against excusing Plaintiffs' failure to exhaust.

At this stage, the Court finds that Plaintiffs are unlikely to be excused from satisfying the IDEA exhaustion requirement. Therefore, the Court concludes that Plaintiffs are unlikely to succeed on the merits of their IDEA claim.

v. ADA/Rehabilitation Act

The Court's conclusion that failure to exhaust will likely defeat Plaintiffs' IDEA claims also makes it likely that failure to exhaust will defeat Plaintiffs' ADA and Rehabilitation Act claims. Under 20 U.S.C. § 1415(l), "before the filing of a civil action under [the ADA and Rehabilitation Act] seeking relief that is also available [under the IDEA], the procedures [applicable to IDEA claims] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." Whether the ADA and Rehabilitation Act claims here are exhausted depends on whether the gravamen of Plaintiffs' complaint seeks relief for denial of a FAPE. *See Fry*, 137 S. Ct. at 752; *Paul G.*, 933 F.3d at 1100 ("The crucial issue is therefore whether the relief sought would be available under the IDEA.").

Plaintiffs' ADA and Rehabilitation Act claims seek relief for denial of a FAPE. Plaintiffs could not have brought the same claim if Defendants' alleged conduct occurred at a public facility that was *not* a school because Plaintiffs essentially allege that the Framework prevents schools from providing the services necessary for an adequate education. Such a claim would make no sense with respect to a public theater or library because those facilities do not provide education. Moreover, an adult employee or visitor could not assert such a claim against the school because they are not owed an education. "[W]hen the answer [to those questions] is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so." *Fry*, 137 S. Ct. at 756.

Plaintiffs argue that their ADA and Rehabilitation Act claims are not subject to IDEA exhaustion because they allege discrimination on the basis of disability. Dkt 40, at 10. "Section 1415(l)," however, "is not merely a pleading hurdle." *Id.* at 755. The gravamen of the complaint is what counts. *Id.* at 752.

Therefore, the Court concludes that Plaintiffs are unlikely to succeed on the merits of their ADA and Rehabilitation Act claims.[3]

2. Likelihood of Irreparable Harm

"A preliminary injunction may issue only upon a showing that 'irreparable injury is *likely* in the absence of an injunction.'" *VidAngel*, 869 F.3d at 865 (quoting *Winter*, 555 U.S. at 22). The Court recognizes the impact that the Framework for K-12 Education will have on Plaintiffs' children and Z.R. However, the Court is not convinced at this stage that Plaintiffs have met their burden to show that irreparable harm will likely result if an injunction is denied. *See Winter*, 555 U.S. at 22 ("Our frequently reiterated standard requires *plaintiffs* to demonstrate that irreparable injury is likely in the absence of an injunction.") (italics added).

Plaintiffs have not shown that it is likely that schools will be closed for in-person learning for long enough to cause irreparable damage. Plaintiffs have not directed

3. It is unnecessary to address the parties' disagreement about whether these claims can be brought under 42 U.S.C. § 1983.

this Court to evidence in the record demonstrating that the public health situation in counties on the monitoring list is unlikely to improve soon enough to allow for in-person learning under the Framework before learning losses become irreparable. *See generally* Dkt. 28-1, at 24 (addressing likelihood of irreparable harm); Dkt. 40, at 10-11 (same). Likewise, Plaintiffs have not addressed the likelihood that elementary school children will be able to attend school in-person very soon under the waiver process provided by the Framework. *Id.; see also* Dkt. 36, Ex. J.1 n.2.

Plaintiffs have brought this case as individuals rather than as representatives of a class of parents statewide. *See generally* Dkt. 9. That limits the ability of Plaintiffs to claim harms that may be suffered by other parents' children as their own. Considering this case concerns individual children, Plaintiffs' failure to provide expert assessments of the effects of remote education on their own children—as opposed to generalized predictions—stands as a serious deficiency in their proof. *See, e.g.*, Hamilton Decl., Dkt. 28-9 ("socialization is a critical part of a child's education" and "[m]any are bored by spending hours in front of a screen"); McDonald Decl., Dkt. 28-8 (relating anecdotal reports such as "see[ing] a substantial increase in illness among existing pediatric patients in my clinical practice, all of whom have been confined at home for over three months"). Moreover, Plaintiffs strongly emphasize harms such as "abuse, depression, and hunger." Dkt. 28-1, at 24. Plaintiffs' experts, however, have not examined Plaintiffs' children and found them likely to suffer from these harms. *See generally* Dkt. 28.

The Court notes that Plaintiffs do not seriously engage with the steps Defendants have taken to mitigate the effects of its restrictions on in-person instruction. *See* Dkt. 40, at 11 (dismissing some state mitigation plans as "throw[ing] money at the problem"). For example, Defendants have provided exhibits describing newly enacted California laws addressing the impact of distance learning on IDEA compliance and new education appropriations targeted to mitigating learning loss. *See* Dkt. 36, Ex. II-JJ. In the absence of evidence or argument that these measures will be ineffective, the Court considers them to weigh against a finding that Plaintiffs are likely to suffer irreparable harm.

Finally, while Plaintiffs argue that deprivation of constitutional rights itself constitutes irreparable harm, the Court has concluded they are unlikely to be able to establish a violation of any constitutional right. *See supra* Part IV.b.1.i.-ii. Thus, any such presumption is inapplicable to this case.

The Court is not satisfied that Plaintiffs have met their burden to show a likelihood of irreparable harm at this stage of the proceedings.

3. Balance of the Equities/Public Interest

"Finally, the court must 'pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *VidAngel*, 869 F.3d at 867 (citing *Winter*, 555 U.S. at 24). "When the government is a party, the [balance of equities and public interest] factors

merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (internal citation omitted).

The Court concludes that the public interest weighs against granting a TRO. Plaintiffs are only 14 parents and one child in a state of 40 million residents. The decision to reopen schools affects countless others, including teachers and staff, as well as all who could conceivably suffer serious illness or death as a result of a school-based outbreak. Moreover, the evidence in the record does not clearly establish how long remote learning should be expected to last and how much time would have to pass before educational and developmental losses become irreversible—if at all.

On the other side, Defendants have developed their Framework for K-12 Education as part of a comprehensive strategy to address an ongoing public health emergency. *See generally* Watt Decl., Dkt. 35-1. As the Supreme Court recently reaffirmed, the state's "latitude" to address this severe public health crisis "must be especially broad." *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613 (internal citation and quotation marks omitted); *see also id.* ("Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'") (quoting *Jacobson v. Massachusetts*, 197 U.S. at 38). Defendants' restrictions on in-person learning are designed to be temporary and limited to regions where COVID-19 poses the greatest risks.

At this stage in the proceedings, the uncertainties surrounding the course of the virus—and the duration and quality of remote learning—are too great to conclude that the public interest favors upending the state's plan to address this ongoing public health crisis. Accordingly, the balance of equities and public interest factors do not favor granting a TRO.

c. Balancing the *Winter* Factors

Considering the *Winter* factors together, the Court finds that a TRO is not warranted. Plaintiffs failed to show a likelihood of success on their constitutional and statutory claims. Plaintiffs likewise failed to meet their burden to show a likelihood of irreparable harm. Finally, the balance of equities and public interest do not favor a TRO. On balance, the Court thus concludes that the *Winter* factors weigh against granting a TRO.

V. Conclusion

For the reasons articulated above, the Court DENIES Plaintiffs' Application for a Temporary Restraining Order.

APPENDIX E — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S.C.A. Const. Art. III § 2, cl. 1

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Appendix E

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATiON; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. [Representatives—Power to reduce apportionment.] Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. [Disqualification to hold office.] No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Sec. 4. [Public debt not to be questioned—Debts of the Confederacy and claims not to be paid.] The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Sec. 5. [Power to enforce amendment.] The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Appendix E

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Appendix E

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law. The jurisdiction in civil and criminal matters conferred on the district and circuit courts [district courts] by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees. In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981–1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of

1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees. In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes [42 USCS §§ 1981 or 1981a], the court, in its discretion, may include expert fees as part of the attorney's fee.

Appendix E

Cal. Gov. Code § 8558

§ 8558 Conditions or degrees of emergency; "state of war emergency," "state of emergency," and "local emergency" defined

Three conditions or degrees of emergency are established by this chapter:

(a) "State of war emergency" means the condition that exists immediately, with or without a proclamation thereof by the Governor, whenever this state or nation is attacked by an enemy of the United States, or upon receipt by the state of a warning from the federal government indicating that an enemy attack is probable or imminent.

(b) "State of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy or conditions causing a "state of war emergency," which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires

extraordinary measures beyond the authority vested in the California Public Utilities Commission.

(c)(1) "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by conditions such as air pollution, fire, flood, storm, epidemic, riot, drought, cyberterrorism, sudden and severe energy shortage, deenergization event, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than conditions resulting from a labor controversy, which are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage or deenergization event that requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.

(2) A local emergency proclaimed as the result of a deenergization event does not trigger the electric utility obligations set forth in Public Utilities Commission Decision 19-07-015 or its successor decisions as related to deenergization events. A local emergency proclaimed as the result of a deenergization event does not alter the electric utilities' Public Utilities Commission-approved cost-recovery mechanisms for their own costs associated with deenergization events.

Appendix E

Cal. Gov. Code § 8567

§ 8567. Orders and regulations

(a) The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. The orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing the orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof.

(b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, the orders and regulations shall be of no further force or effect.

(c) All orders and regulations relating to the use of funds pursuant to Article 16 (commencing with Section 8645) shall be prepared in advance of any commitment or expenditure of the funds. Other orders and regulations needed to carry out the provisions of this chapter shall, whenever practicable, be prepared in advance of a state of war emergency or state of emergency.

(d) All orders and regulations made in advance of a state of war emergency or state of emergency shall be in

writing, shall be exempt from Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. As soon thereafter as possible they shall be filed in the office of the Secretary of State and with the county clerk of each county.

Cal. Gov. Code § 8571

§ 8571. Suspension of statutes, rules and regulations

During a state of war emergency or a state of emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, including subdivision (d) of Section 1253 of the Unemployment Insurance Code, where the Governor determines and declares that strict compliance with any statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.

Cal. Gov. Code § 8625

§ 8625. Proclamation by Governor; grounds

The Governor is hereby empowered to proclaim a state of emergency in an area affected or likely to be affected thereby when:

(a) He finds that circumstances described in subdivision (b) of Section 8558 exist; and either

(b) He is requested to do so (1) in the case of a city by the mayor or chief executive, (2) in the case of a county by the chairman of the board of supervisors or the county administrative officer; or

(c) He finds that local authority is inadequate to cope with the emergency.

Appendix E

Cal. Gov. Code § 8629

§ 8629. Termination of state of emergency; proclamation

The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end.

APPENDIX F — EXECUTIVE ORDER OF THE STATE OF CALIFORNIA

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER N-60-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS on March 19, 2020, I issued Executive Order N-33-20, which directed all California residents to immediately heed current State public health directives; and

WHEREAS State public health directives, available at https://covid 19.ca.gov /stay-home-except-for-essential-needs/, have ordered all California residents stay home except for essential needs, as defined in State public health directives; and

WHEREAS COVID-19 continues to menace public health throughout California; and

WHEREAS the extent to which COVID-1 9 menaces public health throughout California is expected to continue to evolve, and may vary from place to place within the State; and

WHEREAS California law promotes the preservation of public health by providing for local health officers—

appointed by county boards of supervisors and other local authorities—in addition to providing for statewide authority by a State Public Health Officer; and

WHEREAS these local health officers, working in consultation with county boards of supervisors and other local authorities, are well positioned to understand the local needs of their communities; and

WHEREAS local governments are encouraged to coordinate with federally recognized California tribes located within or immediately adjacent to the external geographical boundaries of such local government jurisdiction; and

WHEREAS the global COVID-19 pandemic threatens the entire State, and coordination between state and local public health officials is therefore, and will continue to be, necessary to curb the spread of COVID-19 throughout the State; and

WHEREAS State public health officials have worked, and will continue to work, in consultation with their federal, state, and tribal government partners; and

WHEREAS the State Public Health Officer has articulated a four-stage framework—which includes provisions for the reopening of lower-risk businesses and spaces ("Stage Two"), to be followed by the reopening of higher-risk businesses and spaces ("Stage Three")—to allow Californians to gradually resume various activities while continuing to preserve public health in the face of COVID-19; and

WHEREAS the threat posed by COVID-19 is dynamic and ever-changing, and the State's response to COVID-19 (including implementation of the four-stage framework) should likewise retain the ability to be dynamic and flexible; and

WHEREAS to preserve this flexibility, and under the provisions of Government Code section 8571, I find that strict compliance with the Administrative Procedure Act, Government Code section 11340 et seq., would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571, 8627, and 8665; and also in accordance with the authority vested in the State Public Health Officer by the laws of the State of California, including but not limited to Health and Safety Code sections 120125, 120130, 120135, 120140, 120145, 120150, 120175, and 131080; do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

1) All residents are directed to continue to obey State public health directives, as made available at https://covid19.ca.gov/stay-home-except-for-essential-needs/ and elsewhere as the State Public Health Officer may provide.

2) As the State moves to allow reopening of lower-risk businesses and spaces ("Stage Two"), and then to allow reopening of higher-risk businesses and spaces ("Stage Three"), the State Public Health Officer is directed to establish criteria and procedures—as set forth in this Paragraph 2—to determine whether and how particular local jurisdictions may implement public health measures that depart from the statewide directives of the State Public Health Officer.

   In particular, the State Public Health Officer is directed to establish criteria to determine whether and how, in light of the extent to which the public health is menaced by COVID-19 from place to place within the State, local health officers may (during the relevant stages of reopening) issue directives to establish and implement public health measures that depart from the statewide directives of the State Public Health Officer.

   In particular, the State Public Health Officer is directed to establish criteria to determine whether and how, in light of the extent to which the public health is menaced by COVID-19 from place to place within the State, local health officers may (during the relevant stages of reopening) issue directives to establish and implement public health measures less restrictive than any public health measures implemented on a statewide basis pursuant to the statewide directives of the State Public Health Officer.

The State Public Health Officer is further directed to establish procedures through which local health officers may (during the relevant stages of reopening) certify that, if their respective jurisdictions are subject to proposed public health measures (which they shall specify to the extent such specifications may be required by the State Public Health Officer) that are less restrictive than public health measures implemented on a statewide basis pursuant to the statewide directives of the State Public Health Officer, the public health will not be menaced. The State Public Health Officer shall additionally establish procedures to permit, in a manner consistent with public health and safety, local health officers who submit such certifications to establish and implement such less restrictive public health measures within their respective jurisdictions.

The State Public Health Officer may, from time to time and as she deems necessary to respond to the dynamic threat posed by COVID-19, revise the criteria and procedures set forth in this Paragraph 2. Nothing related to the establishment or implementation of such criteria or procedures, or any other aspect of this Order, shall be subject to the Administrative Procedure Act, Government Code section 11340 et seq. Nothing in this Paragraph 2 shall limit the authority of the State Public Health Officer to take any action she deems necessary to protect

public health in the face of the threat posed by COVID-19, including (but not limited to) any necessary revision to the four-stage framework previously articulated by the State Public Health Officer.

3) Nothing in this Order shall be construed to limit the existing authority of local health officers to establish and implement public health measures within their respective jurisdictions that are more restrictive than, or that otherwise exist in addition to, the public health measures imposed on a statewide basis pursuant to the statewide directives of the State Public Health Officer.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 4th day of May 2020.

/s/ ______________________
GAVIN NEWSOM
Governor of California

Attest:

____
ALEX PADILLA
Secretary of State

APPENDIX G — STATE OF CALIFORNIA SCHOOL GUIDANCE

STATE OF CALIFORNIA—
HEALTH AND HUMAN SERVICES AGENCY
CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH

SONIA Y. ANGELL, MD, MPH
State Public Health Officer & Director

GAVIN NEWSOM
Governor

COVID-19 and Reopening In-Person Learning
Framework for K-12 Schools in California,
2020-2021 School Year
July 17, 2020

Overview

California schools have been closed for in-person instruction since mid-March 2020 due to the COVID-19 pandemic. School closures to in-person instruction were part of a broader set of recommendations intended to reduce transmission of SARS-CoV-2, the virus that causes COVID-19. CDPH developed the following framework to support school communities as they decide when and how to implement in-person instruction for the 2020-2021 school year. New evidence and data about COVID-19 transmission, including variations by age, and the effectiveness of disease control and mitigation strategies continues to emerge regularly. Recommendations

regarding in-person school reopening and closure should be based on the available evidence as well state and local disease trends.

The CA School Sector Specific Guidelines, and the Centers for Disease Control and Prevention CDC have published additional guidance on school re-entry.

In-Person Re-Opening Criteria

Schools and school districts may reopen for in-person instruction at any time if they are located in a local health jurisdiction (LHJ) that has *not* been on the county[1] monitoring list within the prior 14 days.

If the LHJ has been on the monitoring list within the last 14 days, the school must conduct distance learning only, until their LHJ has been off the monitoring list for at least 14 days.[2]

1. School districts in LHJs that are cities are considered to be included as part of the county if the county is on the monitoring list.

2. A waiver of this criteria may be granted by the local health officer for elementary schools to open for in-person instruction. A waiver may only be granted if one is requested by the superintendent (or equivalent for charter or private schools), in consultation with labor, parent and community organizations. Local health officers must review local community epidemiological data, consider other public health interventions, and consult with CDPH when considering a waiver request.

Appendix G

Guidance Once Re-Opened to In-Person Instruction

How should schools think about testing?

Once schools are re-opened to at least some in-person instruction, it is recommended that surveillance testing be implemented based on the local disease trends. If epidemiological data indicates concern for increasing community transmission, schools should increase testing of staff to detect potential cases as *lab testing capacity allows.*

Who should be tested and how often?

School staff are essential workers, and staff includes teachers, paraprofessionals, cafeteria workers, janitors, bus drivers, or any other school employee that may have contact with students or other staff. School districts and schools shall test staff periodically, as testing capacity permits and as practicable. Examples of recommended frequency include testing all staff over 2 months, where 25% of staff are tested every 2 weeks, or 50% every month to rotate testing of all staff over time.

What if a school or school district reopens to in-person instruction, but the county is later placed on the county monitoring list?

Schools should begin testing staff, or increase frequency of staff testing but are not required to close.

Appendix G

What measures should be taken when a student, teacher or staff member has symptoms, is a contact of someone infected, or is diagnosed with COVID-19?

	Student or Staff with:	**Action**	**Communica-tion**
1.	COVID-19 Symptoms (e.g., fever, cough, loss of taste or smell, difficulty breathing) Symptom Screening: Per CA School Sector Specific Guidelines	• Send home • Recommend testing (If positive, see #3, if negative, see #4) • School/classroom remain open	• No Action needed
2.	Close contact (†) with a confirmed COVID-19 case	• Send home • Quarantine for 14 days from last exposure • Recommend testing (but will not shorten 14-day quarantine) • School/classroom remain open	• Consider school community notification of a known contact

3.	Confirmed COVID-19 case infection	• Notify the local public health department • Isolate case and exclude from school for 10 days from symptom onset or test date • Identify contacts (†), quarantine & exclude exposed contacts (likely entire cohort (††)) for 14 days after the last date the case was present at school while infectious • Recommend testing of contacts, prioritize symptomatic contacts (but will not shorten 14-day quarantine) • Disinfection and cleaning of classroom and primary spaces where case spent significant time • School remains open	School community notification of a known case

4.	Tests negative after symptoms	• May return to school 3 days after symptoms resolve • School/classroom remain open	• Consider school community notification if prior awareness of testing

(†) A contact is defined as a person who is <6 feet from a case for >15 minutes. In some school situations, it may be difficult to determine whether individuals have met this criterion and an entire cohort, classroom, or other group may need to be considered exposed, particularly if people have spent time together indoors.

(††) A cohort is a stable group with fixed membership that stays together for all courses and activities (e.g., lunch, recess, etc.) and avoids contact with other persons or cohorts.

Guidance on School Closure

What are the criteria for closing a school?

Individual school closure is recommended based on the number of cases, the percentage of the teacher/students/staff that are positive for COVID-19, and following consultation with the Local Health Officer. Individual school closure may be appropriate when there are multiple cases in multiple cohorts at a school or when at least 5 percent of the total number of teachers/student/staff are cases within a 14-day period, depending on the size and physical layout of the school.

The Local Health Officer may also determine school closure is warranted for other reasons, including results from public health investigation or other local epidemiological data.

If a school is closed for in-person learning, when may it reopen?

Schools may typically reopen after 14 days and the following have occurred:

- Cleaning and disinfection
- Public health investigation
- Consultation with the local public health department

What are the criteria for closing a school district?

A superintendent should close a school district if 25% or more of schools in a district have closed due to COVID-19 within 14 days, and in consultation with the local public health department.

If a school district is closed, when may it reopen?

Districts may typically reopen after 14 days, in consultation with the local public health department.

Appendix G

State Resources for Case, Contact & Outbreak Investigations

California is committed to supporting local health departments with resources and other technical assistance regarding school case, contact, and outbreak investigations.

APPENDIX H — COVID-19 INDUSTRY GUIDANCE: SCHOOLS AND SCHOOLS-BASED PROGRAMS

Release date: **July 17, 2020**

All guidance should be implemented only with county health officer approval following their review of local epidemiological data including cases per 100,000 population, rate of test positivity, and local preparedness to support a health care surge, vulnerable populations, contact tracing, and testing.

OVERVIEW

Communities across the state are preparing for the forthcoming school year. To assist with that planning process, the following guidelines and considerations are intended to help school and community leaders plan and prepare to resume in-person instruction.

This guidance is interim and subject to updates. These guidelines and considerations are based on the best available public health data at this time, international best practices currently employed, and the practical realities of managing school operations; as new data and practices emerge. Additionally, the guidelines and considerations do not reflect the full scope of issues that school communities will need to address, which range from day-to-day site-based logistics to the social and emotional well-being of students and staff.

California public schools (traditional and charter), private schools (including nonpublic nonsectarian schools), school districts, and county offices of education, herein referred to as schools, will determine the most appropriate instructional model, taking into account the needs of their students and staff, and their available infrastructure. This guidance is not intended to prevent a school from adopting a distance learning, hybrid, or mixed-delivery instructional model to ensure safety. Schools are not required to seek out or receive approval from a state or local public health officer prior to adopting a distance-learning model.

Implementation of this guidance will depend on local public health conditions, including those listed here. Communities meeting those criteria, such as lower incidence of COVID-19 and adequate preparedness, may implement the guidance described below as part of a phased reopening. All decisions about following this guidance should be made in collaboration with local health officials and other authorities.

Implementation of this guidance should be tailored for each setting, including adequate consideration of instructional programs operating at each school site and the needs of students and families. School leaders should engage relevant stakeholders—including families, staff and labor partners in the school community—to formulate and implement plans that consider the following:

- **Student, Family and Staff Population:** Who are the student, family and staff populations who

will be impacted by or can serve as partners in implementing any of the following measures?

- **Ability to Implement or Adhere to Measures:** Do staff, students and families have the tools, information, resources and ability to successfully adhere to or implement the new measures?

- **Negative or Unintended Consequences:** Are there any negative or unintended consequences to staff, students or families of implementing the measures and how can those consequences be mitigated?

This guidance is not intended to revoke or repeal any worker rights, either statutory, regulatory or collectively bargained, and is not exhaustive, as it does not include county health orders, nor is it a substitute for any existing safety and health-related regulatory requirements such as those of Cal/OSHA. Stay current on changes to public health guidance and state/local orders, as the COVID-19 situation continues.

1. General Measures

- Establish and continue communication with local and State authorities to determine current disease levels and control measures in your community. For example:

    - o Review and refer to, if applicable, the relevant county variance documentation. Documentation can be found here.

- o Consult with your county health officer, or designated staff, who are best positioned to monitor and provide advice on local conditions. A directory can be found here.

- o Collaborate with other schools and school partners in your region, including the county office of education.

- o Regularly review updated guidance from state agencies, including the California Department of Public Health and California Department of Education.

- Establish a written, worksite-specific COVID-19 prevention plan at every facility, perform a comprehensive risk assessment of all work areas and work tasks, and designate a person at each school to implement the plan.

  - o Identify contact information for the local health department where the school is located for communicating information about COVID-19 outbreaks among students or staff.

  - o Incorporate the CDPH Guidance for the Use of Face Coverings, into the School Site Specific Plan that includes a policy for handling exemptions.

  - o Train and communicate with workers and worker representatives on the plan. Make the

written plan available and accessible to workers and worker representatives.

- o Regularly evaluate the workplace for compliance with the plan and document and correct deficiencies identified.

- o Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection. Update the plan as needed to prevent further cases.

- o Implement the necessary processes and protocols when a workplace has an outbreak, in accordance with CDPH guidelines.

- o Identify individuals who have been in close contact (within six feet for 15 minutes or more) of an infected person and take steps to isolate COVID-19 positive person(s) and close contacts. See Section 10 for more detail.

- o Adhere to these guidelines. Failure to do so could result in workplace illnesses that may cause classrooms or the entire school to be temporarily closed or limited.

- Evaluate whether and to what extent external community organizations can safely utilize the site and campus resources. Ensure external community organizations that use the facilities also follow this guidance.

- Develop a plan for the possibility of repeated closures of classes, groups or entire facilities when persons associated with the facility or in the community become ill with COVID-19. *See* Section 10 below.

- Develop a plan to further support students with access and functional needs who may be at increased risk of becoming infected or having unrecognized illness due to COVID-19. For example, review existing student health plans to identify students who may need additional accommodations, develop a process for engaging families for potentially unknown concerns that may need to be accommodated or identify additional preparations for classroom and non-classroom environments as needed. Groups who might be at increased risk of becoming infected or having unrecognized illness include the following:

    - o Individuals who have limited mobility or require prolonged and close contact with others, such as direct support providers and family members;

    - o Individuals who have trouble understanding information or practicing preventive measures, such as hand washing and physical distancing; and

    - o Individuals who may not be able to communicate symptoms of illness.

- Schools should review the CDPH Guidance for the Use of Face Coverings and any applicable local

health department guidance and incorporate face-covering use for students and workers into their COVID-19 prevention plan. Some flexibility may be needed for younger children consistent with child development recommendations. See Section 3 for more information.

2. Promote Healthy Hygiene Practices

- Teach and reinforce *washing hands*, avoiding *contact with one's eyes, nose, and mouth*, and *covering coughs and sneezes* among students and staff.

    - o Teach students and remind staff to use tissue to wipe their nose and to cough/sneeze inside a tissue or their elbow.

    - o Students and staff should wash their hands frequently throughout the day, including before and after eating; after coughing or sneezing; after classes where they handle shared items, such as outside recreation, art, or shop; and before and after using the restroom.

    - o Students and staff should wash their hands for 20 seconds with soap, rubbing thoroughly after application. Soap products marketed as "antimicrobial" are not necessary or recommended.

- o Staff should model and practice handwashing. For example, for lower grade levels, use bathroom time as an opportunity to reinforce healthy habits and monitor proper handwashing.

- o Students and staff should use fragrance-free hand sanitizer when handwashing is not practicable. Sanitizer must be rubbed into hands until completely dry. Note: frequent handwashing is more effective than the use of hand sanitizers.

- o Ethyl alcohol-based hand sanitizers are preferred and should be used when there is the potential of unsupervised use by children.

▪ Isopropyl hand sanitizers are more toxic when ingested or absorbed in skin.

▪ Do not use hand sanitizers that may *contain methanol* which can be hazardous when ingested or absorbed.

- o Children under age 9 should only use hand sanitizer under adult supervision. Call Poison Control if consumed: 1-800-222-1222.

• Consider portable handwashing stations throughout a site and near classrooms to minimize movement and congregations in bathrooms to the extent practicable.

- Develop routines enabling students and staff to regularly wash their hands at staggered intervals.

- Ensure adequate supplies to support healthy hygiene behaviors, including soap, tissues, no-touch trashcans, face coverings, and hand sanitizers with at least 60 percent ethyl alcohol for staff and children who can safely use hand sanitizer.

- Information contained in the CDPH Guidance for the Use of Face Coverings should be provided to staff and families, which discusses the circumstances in which face coverings must be worn and the exemptions, as well as any policies, work rules, and practices the employer has adopted to ensure the use of face coverings.

- Employers must provide and ensure staff use face coverings in accordance with CDPH guidelines and all required protective equipment.

- The California Governor's Office of Emergency Services (CalOES) and the Department of Public Health (CDPH) are and will be working to support procurement and distribution of face coverings and personal protective equipment. Additional information can be found here.

- Strongly recommend that all students and staff be immunized each autumn against influenza unless contraindicated by personal medical conditions, to help:

- o Protect the school community

- o Reduce demands on health care facilities

- o Decrease illnesses that cannot be readily distinguished from COVID-19 and would therefore trigger extensive measures from the school and public health authorities.

- Nothing in this guidance should be interpreted as restricting access to appropriate educational services.

3. Face Coverings

Face coverings must be used in accordance with CDPH guidelines unless a person is exempt as explained in the guidelines, particularly in indoor environments, on school buses, and areas where physical distancing alone is not sufficient to prevent disease transmission.

- Teach and reinforce use of *face coverings*, or in limited instances, face shields.

- Students and staff should be frequently reminded not to touch the face covering and to *wash their hands* frequently.

- Information should be provided to all staff and families in the school community on *proper use, removal, and washing of cloth face coverings*.

- Training should also include policies on how people who are exempted from wearing a face covering will be addressed.

STUDENTS

Age	Face Covering Requirement
Under 2 years old	**No**
2 years old – 2nd grade	**Strongly encouraged****
3rd grade – High School	**Yes, unless exempt**

**Face coverings are strongly encouraged for young children between two years old and second grade, if they can be worn properly. A face shield is an acceptable alternative for children in this cohort who cannot wear them properly.

- Persons younger than two years old, anyone who has trouble breathing, anyone who is unconscious or incapacitated, and anyone who is otherwise unable to remove the face covering without assistance are exempt from wearing a face covering.

- A cloth face covering or face shield should be removed for meals, snacks, naptime, or outdoor recreation, or when it needs to be replaced. When a cloth face covering is temporarily removed, it should be placed in a clean paper bag (marked with the student's name and date) until it needs to be put on again.

- In order to comply with this guidance, schools must exclude students from campus if they are not exempt from wearing a face covering under CDPH guidelines and refuse to wear one provided by the school. Schools should develop protocols to provide a face covering to students who inadvertently fail to bring a face covering to school to prevent unnecessary exclusions. Schools should offer alternative educational opportunities for students who are excluded from campus.

STAFF

- All staff must use face coverings in accordance with CDPH guidelines unless Cal/OSHA standards require respiratory protection.

- In limited situations where a face coverings cannot be used for pedagogical or developmental reasons, (i.e. communicating or assisting young children or those with special needs) a face shield can be used instead of a cloth face covering while in the classroom as long as the wearer maintains physical distance from others, to the extent practicable. Staff must return to wearing a face covering outside of the classroom.

- Workers or other persons handling or serving food must use gloves in addition to face coverings. Employers should consider where disposable glove use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are

for workers who are screening others for symptoms or handling commonly touched items.

4. Ensure Teacher and Staff Safety

- Ensuring staff maintain physical distancing from each other is critical to reducing transmission between adults.

- Ensure that all staff use face coverings in accordance with CDPH guidelines and Cal/OSHA standards.

- Support staff who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as telework, where appropriate, or teaching in a virtual learning or independent study context.

- Conduct all staff meetings, professional development training and education, and other activities involving staff with physical distancing measures in place, or virtually, where physical distancing is a challenge.

- Minimize the use of and congregation of adults in staff rooms, break rooms, and other settings.

- Implement procedures for daily symptom monitoring for staff.

5. Intensify Cleaning, Disinfection, and Ventilation

- Consider suspending or modifying use of site resources that necessitate sharing or touching items. For example, consider suspending use of drinking fountains and instead encourage the use of reusable water bottles.

- Staff should *clean and disinfect* frequently-touched surfaces at school and on school buses at least daily and, as practicable, these surfaces should be cleaned and disinfected frequently throughout the day by trained custodial staff.

- Buses should be thoroughly cleaned and disinfected daily and after transporting any individual who is exhibiting symptoms of COVID-19. Drivers should be provided disinfectant wipes and disposable gloves to support disinfection of frequently touched surfaces during the day.

- Frequently touched surfaces in the school include, but are not limited to:

  o Door handles

  o Light switches

  o Sink handles

  o Bathroom surfaces

  - o Tables
  - o Student Desks
  - o Chairs

- Limit use and sharing of objects and equipment, such as toys, games, art supplies and playground equipment to the extent practicable. When shared use is allowed, clean and disinfect between uses.

- When choosing disinfecting products, use those approved for use against COVID-19 on the Environmental Protection Agency (EPA)- approved list "N" and follow product instructions.

  - o To *reduce the risk of asthma* and other health effects related to disinfecting, programs should select disinfectant products on list N with asthma-safer ingredients (hydrogen peroxide, citric acid or lactic acid) as recommended by the US EPA Design for Environment program.

  - o Avoid products that contain peroxyacetic (paracetic) acid, sodium hypochlorite (bleach) or quaternary ammonium compounds, which can cause asthma.

  - o Follow label directions for appropriate dilution rates and contact times. Provide workers training on the chemical hazards, manufacturer's directions, Cal/OSHA requirements for safe

use, and as applicable and as required by the Healthy Schools Act.

- o Custodial staff and any other workers who clean and disinfect the school site must be equipped with proper protective equipment, including gloves, eye protection, respiratory protection, and other appropriate protective equipment as required by the product instructions. All products must be kept out of children's reach and stored in a space with restricted access.

- o Establish a cleaning and disinfecting schedule in order to avoid both under- and over-use of cleaning products.

- Ensure safe and correct application of disinfectant and keep products away from students.

- Ensure proper ventilation during cleaning and disinfecting. Introduce fresh outdoor air as much as possible, for example, by opening windows where practicable. When cleaning, air out the space before children arrive; plan to do thorough cleaning when children are not present. If using air conditioning, use the setting that brings in outside air. Replace and check air filters and filtration systems to ensure optimal air quality.

o If opening windows poses a safety or health risk (e.g., by allowing pollen in or exacerbating asthma symptoms) to persons using the facility, consider

alternatives. For example, maximize central air filtration for HVAC systems (targeted filter rating of at least MERV 13).

- Consider installing portable high-efficiency air cleaners, upgrading the building's air filters to the highest efficiency possible, and making other modifications to increase the quantity of outside air and ventilation in classrooms, offices and other spaces.

- *Take steps* to ensure that all water systems and features (for example, drinking fountains and decorative fountains) are safe to use after a prolonged facility shutdown to minimize the risk of *Legionnaires' disease* and other diseases associated with water.

6. Implementing Distancing Inside and Outside the Classroom

Arrival and Departure

- Maximize space between students and between students and the driver on school buses and open windows to the greatest extent practicable.

- Minimize contact at school between students, staff, families and the community at the beginning and end of the school day. Prioritize minimizing contact between adults at all times.

- Stagger arrival and drop off-times and locations as consistently as practicable as to minimize scheduling challenges for families.

- Designate routes for entry and exit, using as many entrances as feasible. Put in place other protocols to limit direct contact with others as much as practicable.

- Implement health screenings of students and staff upon arrival at school (see Section 9).

- Ensure each bus is equipped with extra unused face coverings on school buses for students who may have inadvertently failed to bring one.

Classroom Space

- To reduce possibilities for infection, students must remain in the same space and in cohorts as small and consistent as practicable, including for recess and lunch. Keep the same students and teacher or staff with each group, to the greatest extent practicable.

- Prioritize the use and maximization of outdoor space for activities where practicable.

- Minimize movement of students and teachers or staff as much as practicable. For example, consider ways to keep teachers with one group of students for the whole day. In secondary schools or in situations

where students have individualized schedules, plan for ways to reduce mixing among cohorts and to minimize contact.

- Maximize space between seating and desks. Distance teacher and other staff desks at least six feet away from student desks. Consider ways to establish separation of students through other means if practicable, such as, six feet between desks, where practicable, partitions between desks, markings on classroom floors to promote distancing or arranging desks in a way that minimizes face-to-face contact.

- Consider redesigning activities for smaller groups and rearranging furniture and play spaces to maintain separation.

- Staff should develop instructions for maximizing spacing and ways to minimize movement in both indoor and outdoor spaces that are easy for students to understand and are developmentally appropriate.

- Activities where there is increased likelihood for transmission from contaminated exhaled droplets such as band and choir practice and performances are not permitted.

- Activities that involve singing must only take place outdoors.

- Implement procedures for turning in assignments to minimize contact.

- Consider using privacy boards or clear screens to increase and enforce separation between staff and students.

Non-Classroom Spaces

- Limit nonessential visitors, volunteers and activities involving other groups at the same time.

- Limit communal activities where practicable. Alternatively, stagger use, properly space occupants and disinfect in between uses.

- Consider use of non-classroom space for instruction, including regular use of outdoor space, weather permitting. For example, consider part-day instruction outside.

- Minimize congregate movement through hallways as much as practicable. For example, establish more ways to enter and exit a campus, create staggered passing times when necessary or when students cannot stay in one room and create guidelines on the floor that students can follow to enable physical distancing while passing. In addition, schools can consider eliminating the use of lockers and moving to block scheduling, which supports the creation of cohort groups and reduces changes of classrooms.

- Serve meals outdoors or in classrooms instead of cafeterias or group dining rooms where practicable. Where cafeterias or group dining rooms must be used, keep students together in their cohort groups, ensure physical distancing, and consider assigned seating. Serve individually plated or bagged meals. Avoid sharing of foods and utensils and buffet or family-style meals.

- Consider holding recess activities in separated areas designated by class.

7. Limit Sharing

- Keep each child's belongings separated and in individually labeled storage containers, cubbies or areas. Ensure belongings are taken home each day to be cleaned.

- Ensure adequate supplies to minimize sharing of high-touch materials (art supplies, equipment, etc.) to the extent practicable or limit use of supplies and equipment to one group of children at a time and clean and disinfect between uses.

- Avoid sharing electronic devices, clothing, toys, books and other games or learning aids as much as practicable. Where sharing occurs, clean and disinfect between uses.

8. Train All Staff and Educate Families

- Train all staff and provide educational materials to families in the following safety actions:
    - o Enhanced sanitation practices
    - o Physical distancing guidelines and their importance
    - o *Proper use, removal, and washing of face coverings*
    - o Screening practices
    - o How COVID-19 is spread
    - o COVID-19 specific *symptom* identification
    - o Preventing the spread of COVID-19 if you are sick, including the importance of not coming to work if staff members have symptoms, or if they or someone they live with has been diagnosed with COVID- 19.
    - o For workers, COVID-19 specific *symptom* identification and when to seek medical attention
    - o The employer's plan and procedures to follow when children or adults become sick at school.

- o The employer's plan and procedures to protect workers from COVID-19 illness.

- Consider conducting the training and education virtually, or, if in-person, ensure a minimum of six-foot distancing is maintained.

9. Check for Signs and Symptoms

- Prevent discrimination against students who (or whose families) were or are diagnosed with COVID-19 or who are perceived to be a COVID-19 risk.

- Actively encourage staff and students who are sick or who have recently had *close contact* with a person with COVID-19 to stay home. Develop policies that encourage sick staff and students to stay at home without fear of reprisal, and ensure staff, students and students' families are aware of these policies.

- Implement screening and other procedures for all staff and students entering the facility.

- Conduct visual wellness checks of all students or establish procedures for parents to monitor at home. If checking temperatures, use a no-touch thermometer.

- Ask all individuals if they or anyone in their home is exhibiting COVID-19 symptoms.

- Make available and encourage use of hand-washing stations or hand sanitizer.

- Document/track incidents of possible exposure and notify local health officials, staff and families immediately of any exposure to a positive case of COVID-19 at school while maintaining confidentiality, as required under FERPA and state law related to privacy of educational records. Additional guidance can be found here. As noted in Section 11 below, the staff liaison can serve a coordinating role to ensure prompt and responsible notification.

- If a student is exhibiting symptoms of COVID-19, staff should communicate with the parent/caregiver and refer to the student's health history form and/or emergency card.

- Monitor staff and students throughout the day for signs of illness; send home students and staff with a fever of 100.4 degrees or higher, cough or other COVID-19 symptoms.

- Policies should not penalize students and families for missing class.

10. Plan for When a Staff Member, Child or Visitor Becomes Sick

- Work with school administrators, nurses and other healthcare providers to identify an isolation room

or area to separate anyone who exhibits symptoms of COVID-19.

- Any students or staff exhibiting symptoms should immediately be required to wear a face covering and be required to wait in an isolation area until they can be transported home or to a healthcare facility, as soon as practicable.

- Establish procedures to arrange for safe transport home or to a healthcare facility, as appropriate, when an individual is exhibiting COVID-19 symptoms:

  - o Fever
  - o Cough
  - o Shortness of breath or difficulty breathing
  - o Chills
  - o Repeated shaking with chills
  - o Fatigue
  - o Muscle pain
  - o Headache
  - o Sore throat
  - o Congestion or runny nose

- o Nausea or vomiting
- o Diarrhea
- o New loss of taste or smell

- For serious injury or illness, call 9-1-1 without delay. Seek medical attention if COVID-19 symptoms become severe, including persistent pain or pressure in the chest, confusion, or bluish lips or face. Updates and further details are available on CDC's webpage.

- Notify local health officials immediately of any positive case of COVID-19, and exposed staff and families as relevant while maintaining confidentiality as required by state and federal laws. Additional guidance can be found here.

- Close off areas used by any individual suspected of being infected with the virus that causes COVID-19 and do not use before cleaning and disinfection. To reduce risk of exposure, wait 24 hours before you *clean and disinfect*. If it is not possible to wait 24 hours, wait as long as practicable. Ensure a *safe and correct application* of disinfectants using personal protective equipment and ventilation recommended for cleaning. Keep disinfectant products away from students.

- Advise sick staff members and students not to return until they have met CDC criteria to

discontinue *home isolation*, including at least 3 days with no fever, symptoms have improved and at least 10 days since symptoms first appeared.

- Ensure that students, including students with disabilities, have access to instruction when out of class, as required by federal and state law.

- Schools should offer distance learning based on the unique circumstances of each student who would be put at-risk by an in-person instructional model. For example, students with a health condition, students with family members with a health condition, students who cohabitate or regularly interact with high-risk individuals, or are otherwise identified as "at-risk" by the parents or guardian, are students whose circumstances merit coffering distances learning.

- Implement the necessary processes and protocols when a school has an outbreak, in accordance with CDPH guidelines.

- Investigate the COVID-19 illness and exposures and determine if any work-related factors could have contributed to risk of infection. Update protocols as needed to prevent further cases.

- Update protocols as needed to prevent further cases. See the CDPH guidelines, Responding to COVID-19 in the Workplace, which are incorporated into this guidance and contain detailed recommendations for

establishing a plan to identify cases, communicating with workers and other exposed persons, and conducting and assisting with contact tracing.

11. Maintain Healthy Operations

- Monitor staff absenteeism and have a roster of trained back-up staff where available.

- Monitor the types of illnesses and symptoms among your students and staff to help isolate them promptly as needed.

- Designate a staff liaison or liaisons to be responsible for responding to COVID-19 concerns. Workers should know who they are and how to contact them. The liaison should be trained to coordinate the documentation and tracking of possible exposure, in order to notify local health officials, staff and families in a prompt and responsible manner.

- Maintain communication systems that allow staff and families to selfreport symptoms and receive prompt notifications of exposures and closures, while maintaining confidentiality, as required by FERPA and state law related to privacy of educational records. Additional guidance can be found here.

- Consult with local health departments if routine testing is being considered by a local educational agency. The role of providing routine systematic

testing of staff or students for COVID-19 (e.g., PCR swab testing for acute infection, or presence of antibodies in serum after infection) is currently unclear.

- Support students who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as virtual learning or independent stud

12. Considerations for Reopening and Partial or Total Closures

California schools have been closed for in-person instruction since mid-March 2020 due to the COVID-19 pandemic. School closures to in-person instruction were part of a broader set of recommendations intended to reduce transmission of SARS-CoV-2, the virus that causes COVID-19. For more detailed direction on measures to be taken when a student, teacher, or staff member has symptoms or is diagnosed with COVID-19, please see the COVID-19 and Reopening Framework for K-12 Schools in California.

- Check State and local orders and health department notices daily about transmission in the area or closures and adjust operations accordingly.

- When a student, teacher or staff member tests positive for COVID-19 and had exposed others at the school, refer to the CDPH Framework for K-12 Schools, and implement the following steps:

- o In consultation with the local public health department, the appropriate school official may decide whether school closure versus cleaning and quarantine of exposed persons or other intervention is warranted, including the length of time necessary, based on the risk level within the specific community as determined by the local public health officer.

- o Close off the classroom or office where the patient was based and do not use these areas until after cleaning and disinfection. Wait at least 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait as long as possible.

- o Additional areas of the school visited by the COVID-19 positive individual may also need to be closed temporarily for cleaning and disinfection.

- o Implement communication plans for exposure at school and potential school closures to include outreach to students, parents, teachers, staff and the community.

- o Include information for staff regarding labor laws, information regarding Disability Insurance, Paid Family Leave and Unemployment Insurance, as applicable to schools. See additional information on government programs supporting sick leave and

worker's compensation for COVID-19, including worker's sick leave rights under the Families First Coronavirus Response Act and employee's rights to workers' compensation benefits and presumption of the work-relatedness of COVID-19 pursuant to the Governor's Executive Order N-62-20, while that Order is in effect.

- o Provide guidance to parents, teachers and staff reminding them of the importance of community physical distancing measures while a school is closed, including discouraging students or staff from gathering elsewhere.

- o Develop a plan for continuity of education. Consider in that plan how to also continue nutrition and other services provided in the regular school setting to establish alternate mechanisms for these services to continue.

- o Maintain regular communications with the local public health department.

APPENDIX I — COVID-19 INDUSTRY GUIDANCE: SCHOOLS AND SCHOOL-BASED PROGRAMS

Updated: **August 3, 2020**

All guidance should be implemented only with local health officer approval following their review of local epidemiological data including cases per 100,000 population, rate of test positivity, and local preparedness to support a health care surge, vulnerable populations, contact tracing, and testing.

OVERVIEW

Communities across the state are preparing for the forthcoming school year. To assist with that planning process, the following guidelines and considerations are intended to help school and community leaders plan and prepare to resume in-person instruction.

This guidance is interim and subject to updates. These guidelines and considerations are based on the best available public health data at this time, international best practices currently employed, and the practical realities of managing school operations; as new data and practices emerge. Additionally, the guidelines and considerations do not reflect the full scope of issues that school communities will need to address, which range from day-to-day site-based logistics to the social and emotional well-being of students and staff.

Appendix I

California public schools (traditional and charter), private schools (including nonpublic nonsectarian schools), school districts, and county offices of education, herein referred to as schools, will determine the most appropriate instructional model, taking into account the needs of their students and staff, and their available infrastructure. This guidance is not intended to prevent a school from adopting a distance learning, hybrid, or mixed-delivery instructional model to ensure safety. Schools are not required to seek out or receive approval from a state or local public health officer prior to adopting a distance-learning model.

Implementation of this guidance will depend on local public health conditions, including those listed here. Communities meeting those criteria, such as lower incidence of COVID-19 and adequate preparedness, may implement the guidance described below as part of a phased reopening. All decisions about following this guidance should be made in collaboration with local health officials and other authorities.

Implementation of this guidance should be tailored for each setting, including adequate consideration of instructional programs operating at each school site and the needs of students and families. School leaders should engage relevant stakeholders—including families, staff and labor partners in the school community—to formulate and implement plans that consider the following:

- **Student, Family and Staff Population:** Who are the student, family and staff populations who

will be impacted by or can serve as partners in implementing any of the following measures?

- **Ability to Implement or Adhere to Measures:** Do staff, students and families have the tools, information, resources and ability to successfully adhere to or implement the new measures?

- **Negative or Unintended Consequences:** Are there any negative or unintended consequences to staff, students or families of implementing the measures and how can those consequences be mitigated?

This guidance is not intended to revoke or repeal any worker rights, either statutory, regulatory or collectively bargained, and is not exhaustive, as it does not include county health orders, nor is it a substitute for any existing safety and health-related regulatory requirements such as those of Cal/OSHA. Stay current on changes to public health guidance and state/local orders, as the COVID-19 situation continues.

1. General Measures

- Establish and continue communication with local and State authorities to determine current disease levels and control measures in your community. For example:

    - o Review and refer to, if applicable, the relevant county variance documentation. Documentation can be found here.

- o Consult with your county health officer, or designated staff, who are best positioned to monitor and provide advice on local conditions. A directory can be found here.

- o Collaborate with other schools and school partners in your region, including the county office of education.

- o Regularly review updated guidance from state agencies, including the California Department of Public Health and California Department of Education.

- Establish a written, worksite-specific COVID-19 prevention plan at every facility, perform a comprehensive risk assessment of all work areas and work tasks, and designate a person at each school to implement the plan.

  - o Identify contact information for the local health department where the school is located for communicating information about COVID-19 outbreaks among students or staff.

  - o Incorporate the CDPH Guidance for the Use of Face Coverings, into the School Site Specific Plan that includes a policy for handling exemptions.

  - o Train and communicate with workers and worker representatives on the plan. Make the

written plan available and accessible to workers and worker representatives.

- o Regularly evaluate the workplace for compliance with the plan and document and correct deficiencies identified.

- o Investigate any COVID-19 illness and determine if any work-related factors could have contributed to risk of infection. Update the plan as needed to prevent further cases.

- o Implement the necessary processes and protocols when a workplace has an outbreak, in accordance with CDPH guidelines.

- o Identify individuals who have been in close contact (within six feet for 15 minutes or more) of an infected person and take steps to isolate COVID-19 positive person(s) and close contacts. See Section 10 for more detail.

- o Adhere to these guidelines. Failure to do so could result in workplace illnesses that may cause classrooms or the entire school to be temporarily closed or limited.

- Evaluate whether and to what extent external community organizations can safely utilize the site and campus resources. Ensure external community organizations that use the facilities also follow this guidance.

- Develop a plan for the possibility of repeated closures of classes, groups or entire facilities when persons associated with the facility or in the community become ill with COVID-19. See Section 10 below.

- Develop a plan to further support students with access and functional needs who may be at increased risk of becoming infected or having unrecognized illness due to COVID-19. For example, review existing student health plans to identify students who may need additional accommodations, develop a process for engaging families for potentially unknown concerns that may need to be accommodated or identify additional preparations for classroom and non-classroom environments as needed. Groups who might be at increased risk of becoming infected or having unrecognized illness include the following:

    - o Individuals who have limited mobility or require prolonged and close contact with others, such as direct support providers and family members;

    - o Individuals who have trouble understanding information or practicing preventive measures, such as hand washing and physical distancing; and

    - o Individuals who may not be able to communicate symptoms of illness.

- Schools should review the CDPH Guidance for the Use of Face Coverings and any applicable local health department guidance and incorporate face-covering use for students and workers into their COVID-19 prevention plan. Some flexibility may be needed for younger children consistent with child development recommendations. See Section 3 for more information.

2. Promote Healthy Hygiene Practices

- Teach and reinforce washing hands, avoiding contact with one's eyes, nose, and mouth, and covering coughs and sneezes among students and staff.

  - o Teach students and remind staff to use tissue to wipe their nose and to cough/sneeze inside a tissue or their elbow.

  - o Students and staff should wash their hands frequently throughout the day, including before and after eating; after coughing or sneezing; after classes where they handle shared items, such as outside recreation, art, or shop; and before and after using the restroom.

  - o Students and staff should wash their hands for 20 seconds with soap, rubbing thoroughly after application. Soap products marketed as "antimicrobial" are not necessary or recommended.

- o Staff should model and practice handwashing. For example, for lower grade levels, use bathroom time as an opportunity to reinforce healthy habits and monitor proper handwashing.

- o Students and staff should use fragrance-free hand sanitizer when handwashing is not practicable. Sanitizer must be rubbed into hands until completely dry. Note: frequent handwashing is more effective than the use of hand sanitizers.

- o Ethyl alcohol-based hand sanitizers are preferred and should be used when there is the potential of unsupervised use by children.

  - Isopropyl hand sanitizers are more toxic when ingested or absorbed in skin.

  - Do not use hand sanitizers that may *contain methanol* which can be hazardous when ingested or absorbed.

- o Children under age 9 should only use hand sanitizer under adult supervision. Call Poison Control if consumed: 1-800-222-1222.

- Consider portable handwashing stations throughout a site and near classrooms to minimize movement and congregations in bathrooms to the extent practicable.

- Develop routines enabling students and staff to regularly wash their hands at staggered intervals.

- Ensure adequate supplies to support healthy hygiene behaviors, including soap, tissues, no-touch trashcans, face coverings, and hand sanitizers with at least 60 percent ethyl alcohol for staff and children who can safely use hand sanitizer.

- Information contained in the CDPH Guidance for the Use of Face Coverings should be provided to staff and families, which discusses the circumstances in which face coverings must be worn and the exemptions, as well as any policies, work rules, and practices the employer has adopted to ensure the use of face coverings.

- Employers must provide and ensure staff use face coverings in accordance with CDPH guidelines and all required protective equipment.

- The California Governor's Office of Emergency Services (CalOES) and the Department of Public Health (CDPH) are and will be working to support procurement and distribution of face coverings and personal protective equipment. Additional information can be found here.

- Strongly recommend that all students and staff be immunized each autumn against influenza unless contraindicated by personal medical conditions, to help:

- o Protect the school community

- o Reduce demands on health care facilities

- o Decrease illnesses that cannot be readily distinguished from COVID-19 and would therefore trigger extensive measures from the school and public health authorities.

- Nothing in this guidance should be interpreted as restricting access to appropriate educational services.

3. Face Coverings

Face coverings must be used in accordance with CDPH guidelines unless a person is exempt as explained in the guidelines, particularly in indoor environments, on school buses, and areas where physical distancing alone is not sufficient to prevent disease transmission.

- Teach and reinforce use of *face coverings*, or in limited instances, face shields.

- Students and staff should be frequently reminded not to touch the face covering and to *wash their hands* frequently.

- Information should be provided to all staff and families in the school community on *proper use, removal, and washing of cloth face coverings*.

- Training should also include policies on how people who are exempted from wearing a face covering will be addressed.

STUDENTS

Age	Face Covering Requirement
Under 2 years old	No
2 years old – 2nd grade	Strongly encouraged**
3rd grade – High School	Yes, unless exempt

**Face coverings are strongly encouraged for young children between two years old and second grade, if they can be worn properly. A face shield is an acceptable alternative for children in this cohort who cannot wear them properly.

- Persons younger than two years old, anyone who has trouble breathing, anyone who is unconscious or incapacitated, and anyone who is otherwise unable to remove the face covering without assistance are exempt from wearing a face covering.

- A cloth face covering or face shield should be removed for meals, snacks, naptime, or outdoor recreation, or when it needs to be replaced. When a cloth face covering is temporarily removed, it should be placed in a clean paper bag (marked with the student's name and date) until it needs to be put on again.

- In order to comply with this guidance, schools must exclude students from campus if they are not exempt from wearing a face covering under CDPH guidelines and refuse to wear one provided by the school. Schools should develop protocols to provide a face covering to students who inadvertently fail to bring a face covering to school to prevent unnecessary exclusions. Schools should offer alternative educational opportunities for students who are excluded from campus.

STAFF

- All staff must use face coverings in accordance with CDPH guidelines unless Cal/OSHA standards require respiratory protection.

- In limited situations where a face coverings cannot be used for pedagogical or developmental reasons, (i.e. communicating or assisting young children or those with special needs) a face shield can be used instead of a cloth face covering while in the classroom as long as the wearer maintains physical distance from others, to the extent practicable. Staff must return to wearing a face covering outside of the classroom.

- Workers or other persons handling or serving food must use gloves in addition to face coverings. Employers should consider where disposable glove use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are

for workers who are screening others for symptoms or handling commonly touched items.

4. **Ensure Teacher and Staff Safety**

- Ensuring staff maintain physical distancing from each other is critical to reducing transmission between adults.

- Ensure that all staff use face coverings in accordance with CDPH guidelines and Cal/OSHA standards.

- Support staff who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as telework, where appropriate, or teaching in a virtual learning or independent study context.

- Conduct all staff meetings, professional development training and education, and other activities involving staff with physical distancing measures in place, or virtually, where physical distancing is a challenge.

- Minimize the use of and congregation of adults in staff rooms, break rooms, and other settings.

- Implement procedures for daily symptom monitoring for staff.

5. Intensify Cleaning, Disinfection, and Ventilation

- Consider suspending or modifying use of site resources that necessitate sharing or touching items. For example, consider suspending use of drinking fountains and instead encourage the use of reusable water bottles.

- Staff should *clean and disinfect* frequently-touched surfaces at school and on school buses at least daily and, as practicable, these surfaces should be cleaned and disinfected frequently throughout the day by trained custodial staff.

- Buses should be thoroughly cleaned and disinfected daily and after transporting any individual who is exhibiting symptoms of COVID-19. Drivers should be provided disinfectant wipes and disposable gloves to support disinfection of frequently touched surfaces during the day.

- Frequently touched surfaces in the school include, but are not limited to:

    - Door handles

    - Light switches

    - Sink handles

    - Bathroom surfaces

- o Tables
- o Student Desks
- o Chairs

- Limit use and sharing of objects and equipment, such as toys, games, art supplies and playground equipment to the extent practicable. When shared use is allowed, clean and disinfect between uses.

- When choosing disinfecting products, use those approved for use against COVID-19 on the Environmental Protection Agency (EPA)- approved list "N" and follow product instructions.

  - o To reduce the risk of asthma and other health effects related to disinfecting, programs should select disinfectant products on list N with asthma-safer ingredients (hydrogen peroxide, citric acid or lactic acid) as recommended by the US EPA Design for Environment program.

  - o Avoid products that contain peroxyacetic (peracetic) acid, sodium hypochlorite (bleach) or quaternary ammonium compounds, which can cause asthma.

  - o Follow label directions for appropriate dilution rates and contact times. Provide workers training on the chemical hazards, manufacturer's directions, Cal/OSHA requirements for safe

use, and as applicable and as required by the Healthy Schools Act.

- o Custodial staff and any other workers who clean and disinfect the school site must be equipped with proper protective equipment, including gloves, eye protection, respiratory protection, and other appropriate protective equipment as required by the product instructions. All products must be kept out of children's reach and stored in a space with restricted access.

- o Establish a cleaning and disinfecting schedule in order to avoid both under- and over-use of cleaning products.

- Ensure safe and correct application of disinfectant and keep products away from students.

- Ensure proper ventilation during cleaning and disinfecting. Introduce fresh outdoor air as much as possible, for example, by opening windows where practicable. When cleaning, air out the space before children arrive; plan to do thorough cleaning when children are not present. If using air conditioning, use the setting that brings in outside air. Replace and check air filters and filtration systems to ensure optimal air quality.

  - o If opening windows poses a safety or health risk (e.g., by allowing pollen in or exacerbating asthma symptoms) to persons using the facility,

consider alternatives. For example, maximize central air filtration for HVAC systems (targeted filter rating of at least MERV 13).

- Consider installing portable high-efficiency air cleaners, upgrading the building's air filters to the highest efficiency possible, and making other modifications to increase the quantity of outside air and ventilation in classrooms, offices and other spaces.

- *Take steps* to ensure that all water systems and features (for example, drinking fountains and decorative fountains) are safe to use after a prolonged facility shutdown to minimize the risk of *Legionnaires' disease* and other diseases associated with water.

6. Implementing Distancing Inside and Outside the Classroom

Arrival and Departure

- Maximize space between students and between students and the driver on school buses and open windows to the greatest extent practicable.

- Minimize contact at school between students, staff, families and the community at the beginning and end of the school day. Prioritize minimizing contact between adults at all times.

- Stagger arrival and drop off-times and locations as consistently as practicable as to minimize scheduling challenges for families.

- Designate routes for entry and exit, using as many entrances as feasible. Put in place other protocols to limit direct contact with others as much as practicable.

- Implement health screenings of students and staff upon arrival at school (see Section 9).

- Ensure each bus is equipped with extra unused face coverings on school buses for students who may have inadvertently failed to bring one.

Classroom Space

- To reduce possibilities for infection, students must remain in the same space and in cohorts as small and consistent as practicable, including for recess and lunch. Keep the same students and teacher or staff with each group, to the greatest extent practicable.

- Prioritize the use and maximization of outdoor space for activities where practicable.

- Minimize movement of students and teachers or staff as much as practicable. For example, consider ways to keep teachers with one group of students for the whole day. In secondary schools or in situations

where students have individualized schedules, plan for ways to reduce mixing among cohorts and to minimize contact.

- Maximize space between seating and desks. Distance teacher and other staff desks at least six feet away from student desks. Consider ways to establish separation of students through other means if practicable, such as, six feet between desks, where practicable, partitions between desks, markings on classroom floors to promote distancing or arranging desks in a way that minimizes face-to-face contact.

- Consider redesigning activities for smaller groups and rearranging furniture and play spaces to maintain separation.

- Staff should develop instructions for maximizing spacing and ways to minimize movement in both indoor and outdoor spaces that are easy for students to understand and are developmentally appropriate.

- Activities where there is increased likelihood for transmission from contaminated exhaled droplets such as band and choir practice and performances are not permitted.

- Activities that involve singing must only take place outdoors.

- Implement procedures for turning in assignments to minimize contact.

- Consider using privacy boards or clear screens to increase and enforce separation between staff and students.

Non-Classroom Spaces

- Limit nonessential visitors, volunteers and activities involving other groups at the same time.

- Limit communal activities where practicable. Alternatively, stagger use, properly space occupants and disinfect in between uses.

- Consider use of non-classroom space for instruction, including regular use of outdoor space, weather permitting. For example, consider part-day instruction outside.

- Minimize congregate movement through hallways as much as practicable. For example, establish more ways to enter and exit a campus, create staggered passing times when necessary or when students cannot stay in one room and create guidelines on the floor that students can follow to enable physical distancing while passing. In addition, schools can consider eliminating the use of lockers and moving to block scheduling, which supports the creation of cohort groups and reduces changes of classrooms.

- Serve meals outdoors or in classrooms instead of cafeterias or group dining rooms where practicable. Where cafeterias or group dining rooms must be

used, keep students together in their cohort groups, ensure physical distancing, and consider assigned seating. Serve individually plated or bagged meals. Avoid sharing of foods and utensils and buffet or family-style meals.

- Consider holding recess activities in separated areas designated by class.

Sports and Extra Curricular Activities (Updated August 3, 2020)

- Outdoor and indoor sporting events, assemblies, dances, rallies, field trips, and other activities that require close contact or that would promote congregating are not permitted at this time. For example, tournaments, events, or competitions, regardless of whether teams are from the same school or from different schools, counties, or states are not permitted at this time.

- Youth sports and physical education are permitted only when the following can be maintained: (1) physical distancing of at least six feet; and (2) a stable cohort, such as a class, that limits the risks of transmission (see CDC Guidance on Schools and Cohorting). Activities should take place outside to the maximum extent practicable.

- For sports that cannot be conducted with sufficient distancing or cohorting, only physical conditioning and training is permitted and *ONLY* where physical

distancing can be maintained. Conditioning and training should focus on individual skill building (e.g., running drills and body weight resistance training) and should take place outside, where practicable. Indoor physical conditioning and training is allowed only in counties where gyms and fitness centers are allowed to operate indoors.

- Avoid equipment sharing, and if unavoidable, clean and disinfect shared equipment between use by different people to reduce the risk of COVID-19 spread.

- Consistent with guidance for gyms and fitness facilities, cloth face coverings must be worn during indoor physical conditioning and training or physical education classes (except when showering). Activities that require heavy exertion should be conducted outside in a physically distanced manner without face coverings. Activities conducted inside should be those that do not require heavy exertion and can be done with a face covering. Players should take a break from exercise if any difficulty in breathing is noted and should change their mask or face covering if it becomes wet and sticks to the player's face and obstructs breathing. Masks that restrict airflow under heavy exertion (such as N-95 masks) are not advised for exercise.

- Youth sports programs and schools should provide information to parents or guardians regarding this and related guidance, along with the safety

measures that will be in place in these settings with which parents or guardians must comply.

- Activities where there is increased likelihood for transmission from contaminated exhaled droplets such as band and choir practice and performances are not permitted.

7. Limit Sharing

- Keep each child's belongings separated and in individually labeled storage containers, cubbies or areas. Ensure belongings are taken home each day to be cleaned.

- Ensure adequate supplies to minimize sharing of high-touch materials (art supplies, equipment, etc.) to the extent practicable or limit use of supplies and equipment to one group of children at a time and clean and disinfect between uses.

- Avoid sharing electronic devices, clothing, toys, books and other games or learning aids as much as practicable. Where sharing occurs, clean and disinfect between uses.

8. Train All Staff and Educate Families

- Train all staff and provide educational materials to families in the following safety actions:

    - o Enhanced sanitation practices

- o Physical distancing guidelines and their importance

- o Proper use, removal, and washing of face coverings

- o Screening practices

- o How COVID-19 is spread

- o COVID-19 specific symptom identification

- o Preventing the spread of COVID-19 if you are sick, including the importance of not coming to work if staff members have symptoms, or if they or someone they live with has been diagnosed with COVID-19.

- o For workers, COVID-19 specific symptom identification and when to seek medical attention

- o The employer's plan and procedures to follow when children or adults become sick at school.

- o The employer's plan and procedures to protect workers from COVID-19 illness.

- Consider conducting the training and education virtually, or, if in-person, ensure a minimum of six-foot distancing is maintained.

9. Check for Signs and Symptoms

- Prevent discrimination against students who (or whose families) were or are diagnosed with COVID-19 or who are perceived to be a COVID-19 risk.

- Actively encourage staff and students who are sick or who have recently had close contact with a person with COVID-19 to stay home. Develop policies that encourage sick staff and students to stay at home without fear of reprisal, and ensure staff, students and students' families are aware of these policies.

- Implement screening and other procedures for all staff and students entering the facility.

- Conduct visual wellness checks of all students or establish procedures for parents to monitor at home. If checking temperatures, use a no-touch thermometer.

- Ask all individuals if they or anyone in their home is exhibiting COVID-19 symptoms.

- Make available and encourage use of hand-washing stations or hand sanitizer.

- Document/track incidents of possible exposure and notify local health officials, staff and families immediately of any exposure to a positive case of COVID-19 at school while maintaining

confidentiality, as required under FERPA and state law related to privacy of educational records. Additional guidance can be found here. As noted in Section 11 below, the staff liaison can serve a coordinating role to ensure prompt and responsible notification.

- If a student is exhibiting symptoms of COVID-19, staff should communicate with the parent/caregiver and refer to the student's health history form and/or emergency card.

- Monitor staff and students throughout the day for signs of illness; send home students and staff with a fever of 100.4 degrees or higher, cough or other COVID-19 symptoms.

- Policies should not penalize students and families for missing class.

10. Plan for When a Staff Member, Child or Visitor Becomes Sick

- Work with school administrators, nurses and other healthcare providers to identify an isolation room or area to separate anyone who exhibits symptoms of COVID-19.

- Any students or staff exhibiting symptoms should immediately be required to wear a face covering and be required to wait in an isolation area until they can be transported home or to a healthcare facility, as soon as practicable.

- Establish procedures to arrange for safe transport home or to a healthcare facility, as appropriate, when an individual is exhibiting COVID-19 symptoms:

    - o Fever
    - o Cough
    - o Shortness of breath or difficulty breathing
    - o Chills
    - o Repeated shaking with chills
    - o Fatigue
    - o Muscle pain
    - o Headache
    - o Sore throat
    - o Congestion or runny nose
    - o Nausea or vomiting
    - o Diarrhea
    - o New loss of taste or smell

- For serious injury or illness, call 9-1-1 without delay. Seek medical attention if COVID-19 symptoms

become severe, including persistent pain or pressure in the chest, confusion, or bluish lips or face. Updates and further details are available on CDC's webpage.

- Notify local health officials immediately of any positive case of COVID-19, and exposed staff and families as relevant while maintaining confidentiality as required by state and federal laws. Additional guidance can be found here.

- Close off areas used by any individual suspected of being infected with the virus that causes COVID-19 and do not use before cleaning and disinfection. To reduce risk of exposure, wait 24 hours before you *clean and disinfect*. If it is not possible to wait 24 hours, wait as long as practicable. Ensure a *safe and correct application* of disinfectants using personal protective equipment and ventilation recommended for cleaning. Keep disinfectant products away from students.

- Advise sick staff members and students not to return until they have met CDC criteria to discontinue home isolation, including at least 3 days with no fever, symptoms have improved and at least 10 days since symptoms first appeared.

- Ensure that students, including students with disabilities, have access to instruction when out of class, as required by federal and state law.

- Schools should offer distance learning based on the unique circumstances of each student who would be put at-risk by an in-person instructional model. For example, students with a health condition, students with family members with a health condition, students who cohabitate or regularly interact with high-risk individuals, or are otherwise identified as "at-risk" by the parents or guardian, are students whose circumstances merit coffering distances learning.

- Implement the necessary processes and protocols when a school has an outbreak, in accordance with CDPH guidelines.

- Investigate the COVID-19 illness and exposures and determine if any work-related factors could have contributed to risk of infection. Update protocols as needed to prevent further cases.

- Update protocols as needed to prevent further cases. See the CDPH guidelines, Responding to COVID-19 in the Workplace, which are incorporated into this guidance and contain detailed recommendations for establishing a plan to identify cases, communicating with workers and other exposed persons, and conducting and assisting with contact tracing.

11. Maintain Healthy Operations

- Monitor staff absenteeism and have a roster of trained back-up staff where available.

- Monitor the types of illnesses and symptoms among your students and staff to help isolate them promptly as needed.

- Designate a staff liaison or liaisons to be responsible for responding to COVID-19 concerns. Workers should know who they are and how to contact them. The liaison should be trained to coordinate the documentation and tracking of possible exposure, in order to notify local health officials, staff and families in a prompt and responsible manner.

- Maintain communication systems that allow staff and families to self-report symptoms and receive prompt notifications of exposures and closures, while maintaining confidentiality, as required by FERPA and state law related to privacy of educational records. Additional guidance can be found here.

- Consult with local health departments if routine testing is being considered by a local educational agency. The role of providing routine systematic testing of staff or students for COVID-19 (e.g., PCR swab testing for acute infection, or presence of antibodies in serum after infection) is currently unclear.

- Support students who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as virtual learning or independent study.

12. Considerations for Reopening and Partial or Total Closures

California schools have been closed for in-person instruction since mid-March 2020 due to the COVID-19 pandemic. School closures to in-person instruction were part of a broader set of recommendations intended to reduce transmission of SARS-CoV-2, the virus that causes COVID-19. For more detailed direction on measures to be taken when a student, teacher, or staff member has symptoms or is diagnosed with COVID-19, please see the COVID-19 and Reopening Framework for K-12 Schools in California.

- Check State and local orders and health department notices daily about transmission in the area or closures and adjust operations accordingly.

- When a student, teacher or staff member tests positive for COVID-19 and had exposed others at the school, refer to the CDPH Framework for K-12 Schools, and implement the following steps:

    - o In consultation with the local public health department, the appropriate school official should ensure cleaning and quarantine of exposed persons and whether any additional intervention is warranted, including the length of time necessary, based on the risk level within the specific community as determined by the local public health officer.

- o Close off the classroom or office where the patient was based and do not use these areas until after cleaning and disinfection. Wait at least 24 hours before cleaning and disinfecting. If 24 hours is not feasible, wait for at least two hours and as long as possible.

- o Additional areas of the school visited by the COVID-19 positive individual may also need to be cleaned and disinfected.

- o Implement communication plans for exposure at school and potential school closures to include outreach to students, parents, teachers, staff and the community.

- o Include information for staff regarding labor laws, information regarding Disability Insurance, Paid Family Leave and Unemployment Insurance, as applicable to schools. See additional information on government programs supporting sick leave and worker's c om pensati on for COVID-19, including worker's sick leave rights under the Families First Coronavirus Response Act and employee's rights to workers' compensation benefits and presumption of the work-relatedness of COVID-19 pursuant to the Governor's Executive Order N-62-20, while that Order is in effect.

- o Provide guidance to parents, teachers and staff reminding them of the importance of

community physical distancing measures while a school is closed, including discouraging students or staff from gathering elsewhere.

- o Develop a plan for continuity of education. Consider in that plan how to also continue nutrition and other services provided in the regular school setting to establish alternate mechanisms for these services to continue.

- o Maintain regular communications with the local public health department.

APPENDIX J — GOVERNOR NEWSOM UNVEILS CALIFORNIA'S SAFE SCHOOLS FOR ALL PLAN

Published: Dec 30, 2020

Governor outlines framework to continue and expand safe in-person instruction in early spring, including a $2 billion early action proposal to support school safety measures

Governor's plan is built on four pillars: Funding to Support Safe Reopening; Safety & Mitigation Measures for Classrooms; Hands-on Oversight & Assistance for Schools; and Transparency & Accountability for Families & School Staff

Governor also announces Dr. Naomi Bardach, a UCSF pediatrician and expert on school safety for COVID-19, as the leader of a cross-agency Safe Schools for All Team

SACRAMENTO – Governor Gavin Newsom today released the State Safe Schools for All plan, California's framework to support schools to continue operating safely in-person and to expand the number of schools safely resuming in-person instruction. Informed by growing evidence of the decreased risks and increased benefits of in-person instruction – especially for our youngest students – Governor Newsom is advancing a strategy that will help create safe learning environments for students and safe workplaces for educators and other school staff. The plan was developed in partnership with the Legislature, and the Governor will propose an early action package to ensure schools have the resources necessary

to successfully implement key safety precautions and mitigation measures. Components of the plan will be launched in the coming weeks.

"As a father of four, I know firsthand what parents, educators and pediatricians continue to say: in-person is the best setting to meet not only the learning needs, but the mental health and social-emotional needs of our kids," said Governor Newsom. "In the midst of this pandemic, my Administration is focused on getting students back into the classroom in a way that leads with student and teacher health. By focusing on a phased approach with virus mitigation and prevention at the center, we can begin to return our kids to school to support learning needs and restore the benefits of in-person instruction. It's especially important for our youngest kids, those with disabilities, those with limited access to technology at home and those who have struggled more than most with distance learning."

The Administration's strategy focuses on ensuring implementation and building confidence by bringing back the youngest children (TK-2) and those who are most vulnerable first, then phasing in other grade levels through the spring. This phased-in return recognizes that younger children are at a lower risk of contracting and transmitting COVID-19. At the same time, distance learning will remain an option for parents and students who choose it and for those whose health status does not allow them to return to school in the near term. Please find additional details about the rationale behind the plan here.

Appendix J

California's Safe Schools for All framework to safe reopening of in-person instruction is built on four pillars:

1. **Funding to Support Safe Reopening:** The Budget will propose for immediate action in January, $2 billion to support safety measures – including testing, ventilation and PPE – for schools that have resumed in-person instruction or phasing in of in-person instruction by early spring.

2. **Safety & Mitigation Measures for Classrooms:** To further ensure health and safety in the classroom, the Administration will support implementation of key health measures. This will include frequent testing for all students and staff, including weekly testing for communities with high rates of transmission; masks for all students and staff, including distribution of millions of surgical masks for school staff; improved coordination between school and health officials for contact tracing; and prioritization of school staff for vaccinations.

3. **Hands-on Oversight & Assistance for Schools:** Dr. Naomi Bardach, a UCSF pediatrician and expert on school safety, will lead the Safe Schools for All Team, a cross-agency team composed of dedicated staff from CDPH, Cal/OSHA, and educational agencies. The Team will provide hands-on support to help schools develop and implement their COVID-19 Safety Plans. These

supports include school visits and walkthroughs as needed, webinars and training materials and ongoing technical assistance.

4. **Transparency & Accountability for Families and Staff:** A state dashboard will enable all Californians to see their school's reopening status, level of available funding and data on school outbreaks. Additionally, a web-based "hotline" will empower school staff and parents to report concerns to the Safe Schools for All Team, which will lead to escalating levels of intervention beginning with technical assistance and ending with legal enforcement.

Please find additional details about the components of the plan here.

"These four pillars will serve as tools to safely guide our state's return to in-person instruction and protect the health of students, educators and all school staff," said CHHS Secretary Dr. Mark Ghaly. "As a pediatrician and father, I know schools are the best place our kids can be and the positive impact in-person learning has on their overall health and well-being."

Throughout the course of the COVID-19 pandemic, Governor Newsom has prioritized the health and safety of California's children and educators. He has worked tirelessly to ensure that learning continues, whether it is taking place in a living room or a classroom. Within 72 hours of the first school closures, the State of California

issued guidance for schools to provide instruction through distance learning. Beginning in May, the state also issued guidance regarding key school safety precautions and has continued to update the guidance, including pathways – regardless of county tier status – for all schools to serve elementary school students via waivers and to serve students with disabilities and others via stable cohorts. The Newsom Administration has also worked to build a pipeline of PPE and get critical supplies into the hands of students and educators and to bridge the Digital Divide with device donations, pledges from internet service providers and an executive order marshaling cross-agency resources to solve longer-term barriers to connectivity. In partnership with the Legislature, Governor Newsom secured $5.3 billion for California schools and fought hard to make sure that those funds were distributed equitably, taking into account school demographics and needs of students with disabilities and other student populations disproportionately impacted by the pandemic.

Governor Newsom has also prioritized students with special needs. The federal Individuals with Disabilities Education Act, which entitles children with disabilities to special education and related services through an Individualized Educational Program (IEP), has not been suspended during the COVID emergency. The budget enacted in June included trailer bill language (SB 98) making clear that distance learning must include required special education and related services for eligible students and that schools must determine what accommodations are necessary to ensure that required IEP services can be delivered in a distance learning environment.

Thus, the state expects, and state law requires, schools implementing distance learning must deliver services required under IEPs.

Leaders and advocates react:

"This framework is a positive step forward in ensuring that every child – regardless of where they may live or be enrolled in school – has the ability to receive quality instruction in California. Students learn and perform at their best in person, and parents across the state are anxious to ensure that their kids don't fall further behind due to the pandemic. I share the Governor's goal of returning to in-person instruction as quickly and as safely as possible, and look forward to continue working with the Administration on this important issue," said Senator Connie M. Leyva (D-Chino), Chair of the Senate Education Committee.

"Offering as many California students in-person instruction as safely and as quickly as possible must be a team effort. All of us agree that, even during a global pandemic, learning is non-negotiable, and students learn best when they can be safely receiving instruction in school. The Governor's plan is a first step towards reopening schools safely and I look forward to further discussions with him and the Legislature on this critical issue," said Assemblymember Patrick O'Donnell (D-Long Beach), Chair of the Assembly Education Committee.

"A safe return of kids to the classroom is on the wish list of countless California families, and Governor Newsom's

Safe Schools for All Plan paves the way. The plan is rooted in science, health and safety – all key tenets to any conversation about returning to in-person instruction," said California State PTA President Celia Jaffe.

"Getting our kids back to school safely must be the top priority for our state and guide our reopening policy. School is an essential service for millions of California children and their families, especially in lower-income communities where we are seeing higher rates of adverse health impacts tied to prolonged time away from the classroom. Getting schools reopened quickly and safely is an issue of equity. CMA stands ready to help policy makers and educators find ways to prioritize the needs of our children and their families, while ensuring that educators and kids are able to return to the classroom safely," said Shannon Udovic-Constant, MD, Chair of the California Medical Association Board of Trustees.

"CSEA is appreciative of the governor's continued commitment to safe reopening of California schools. Our members do the critical work of ensuring our students are healthy, safe, and ready to learn. Our Association President, Board of Directors, members, and staff look forward to continuing our partnership with state and district leaders to get our schools opened safely at the appropriate time, considering the needs of students, families, school employees, and our local communities," said Keith Pace, Executive Director of the California School Employees Association.

"The pandemic and remote learning are delivering a double dose of harm to California public education. Black and Brown students especially are falling further behind academically and socio-emotionally and the school system as a whole is losing credibility with the public, despite heroic efforts. The solution to both problems is getting students back on campus safely, in person with their teachers and their peers. The proposal announced today holds real promise to accelerate that effort and to avoid surrendering the whole year as lost to the pandemic," said Public Advocates Managing Attorney John Affeldt.

"I am in full support of Governor Newsom's plan to reopen schools in California. We now have evidence from other countries and states that if we take the proper precautions we can open schools safely in several communities. The plan he has developed is sound and based on the best research available for keeping children and adults safe," said Pedro Noguera, Dean of the USC Rossier School of Education.

APPENDIX K — SAFE SCHOOL PLAN SUMMARY

Throughout the course of the COVID-19 pandemic, Governor Newsom has prioritized the health and safety of California's children and schools. As a father of four, Governor Newsom agrees with parents, educators, policymakers, and pediatricians that in-person is the best setting to meet not only the core learning needs of students, but also their mental health and social-emotional needs. It's especially important for our youngest kids, students with disabilities, and those already disproportionately impacted by the pandemic. Resuming in-person instruction is critical for kids, families, and communities throughout the state.

The safety of staff and students is foundational. With growing evidence that the right precautions can effectively stop the spread of COVID-19 in schools—especially in elementary schools—the Administration is committed to doing everything it can to make in-person instruction in schools safe for students and staff. Developed in partnership with the Legislature, the Administration's plan focuses on ensuring careful implementation and building confidence by supporting schools to bring back the youngest children (TK-2) and those who are most disproportionately impacted first, then phasing in other grade levels through the spring, as conditions allow. This phased-in approach recognizes that younger children are at a lower risk of contracting and transmitting COVID-19, with core safety measures in place.

At the same time, distance learning will remain an option for parents and students who choose it and for those whose health status does not allow them to return to school in the near term.

Today, Governor Newsom pledges to advance, with the Legislature, California's Safe Schools for All Plan, built on four pillars:

1. **Funding.** The Budget will propose for immediate action in January, $2 billion for the safe reopening of schools beginning in February, with a priority for returning the youngest children (TK-2nd grade) and those who are most disproportionately impacted first, then returning other grade levels to in-person instruction through the spring. These funds will provide approximately $450 per student to school districts offering in-person instruction and will be weighted for districts serving students from low-income families, English learners and foster youth.

2. **Safety & Mitigation.** To further ensure health and safety in the classroom, the Administration will focus on implementation of key measures, including testing, PPE, contact tracing, and vaccinations.

    1. **Testing.** The Administration will support frequent COVID-19 testing for all school staff and students, including weekly testing at schools in communities with high rates of

transmission. For example, any interested public school will be on-boarded to the state-owned Valencia Branch Lab for PCR tests at one-third the market rate and the State will establish a hotline to help schools implement testing.

2. **PPE.** All staff and students in schools are required to wear masks. Furthermore, surgical masks will be recommended for school staff, and the Administration will distribute millions of surgical masks to schools at no cost. The Administration has also enabled schools to leverage state-negotiated master contracts for PPE to reduce costs and streamline supply chains.

3. **Contact Tracing.** Schools will continue to be on-boarded onto the School Portal for Outbreak Tracking (SPOT) to improve collaboration between school and health officials, and members of the state contact tracing workforce will be deployed to improve communication with schools.

4. **Vaccinations.** School staff will be prioritized in the distribution of vaccines through the spring of 2021.

3. **Oversight & Assistance.** Dr. Naomi Bardach, a UCSF pediatrician and expert on COVID-19 transmission in schools, will lead the Safe Schools

for All Team, a cross-agency team composed of dedicated staff from CDPH, Cal/OSHA, and educational agencies. The Team will provide hands-on support to help schools develop and implement their COVID-19 Safety Plans. These supports include school visits and walk-throughs as warranted, webinars and training materials, and ongoing technical assistance.

4. **Transparency & Accountability.** A state dashboard will enable all Californians to see their school's reopening status, level of available funding, and data on in-school transmissions. Additionally, a web-based "hotline" will empower school staff and parents to report concerns to the Safe Schools for All Team, which will lead to escalating levels of intervention, starting with technical assistance and ending with legal enforcement.

California's Safe Schools for All Plan provides the support and accountability to establish a clear path to minimize in-school transmissions and enable, first, a phased return to in-person instruction, and then ongoing safe in-person instruction.

APPENDIX L — SAFE SCHOOL PLAN RATIONALE

Protecting the safety and wellbeing of California's children throughout the COVID-19 pandemic has been a top priority of the Newsom Administration. The benefits of in-person instruction are plain to see, especially for our youngest students and students disproportionately impacted by the pandemic. Now, with growing evidence that the right precautions can effectively stop the spread of COVID-19 in schools—particularly in elementary grades—the Administration is committed to doing everything it can to support students and staff to safely return to in-person instruction.

We have learned a great deal since the beginning of the pandemic, and both national and international studies demonstrate the relatively low risks and high benefits of educating students in classrooms—especially for elementary grades.

With the Right Precautions, We Can Minimize Transmissions in Schools—Especially in Elementary Grades

Research across the globe shows that children get COVID-19 less often than adults, and when they do get sick, they get less sick than adults. Population-wide studies in Italy and Spain using antibody tests, which indicate whether a person has been infected at any point previously, find that children have lower rates of infection compared to adults.

Appendix L

In studies of open schools in America and around the world, children do not seem to be major sources of transmission—either to each other or to adults. In fact, the greatest risk in school settings comes from adults transmitting it to other adults, often in settings like breakrooms where we sometimes let down our guard. One study in Australia of 10 early childhood centers and 15 schools (>6000 people) found low rates in the schools overall (1.2%), and an adult-to-adult transmission rate almost 15 times higher than child-to-child transmission.

The growing body of evidence is particularly strong for lower risks associated with elementary schools. For example, a study analyzing elementary schools in a heavily impacted region of France found that the risks of transmission inside schools were approximately the same as outside schools. The lower risks associated with younger grades is likely due to, among other reasons, the fact that younger people produce fewer ACE-2 receptors—COVID's doorway into human cells.

Even in communities with many COVID cases, we do not see many outbreaks in schools. That's because the right precautions can stop outbreaks before they start. Evidence shows that schools with the right mitigation strategies have been able to prevent in-school transmission among students and staff.

We know what works. We can stop the spread in schools by layering and carefully implementing mitigation strategies, including masks, cohorting, proper ventilation, washing hands, testing and symptom screening.

Appendix L

For more information, please refer to Evidence Summary: TK-6 Schools and COVID-19 Transmission (California Department of Public Health)

In-Person Instruction Is Critical for Learning and Growth—Especially in Elementary Grades

While California has made great strides in distance learning—and this option will remain for parents and students who choose it and for those whose health status does not allow them to return to school in the near term—remote learning is still very challenging for many students and their caregivers. In a recent survey by the Alliance for Children's Rights, 42% of caregivers reported that they are not comfortable supporting youth in their care with technology needs, and 39% of caregivers reported that they are not comfortable providing academic support to the youth in their care during distance learning.

Older students are better equipped to manage technology and benefit from distance learning, but younger students—especially TK-2—are less equipped. Furthermore, the social-emotional skills cultivated in the youngest grades are foundational for future wellbeing. In the classroom, students learn not only academic skills, but social and emotional skills as well. In a classroom of peers led by an expert teacher, students learn to listen and focus, to share, to wait their turn, to encourage others and to allow others to encourage them. They also begin to learn skills such as self-awareness, social awareness, self-management and responsible decision-making that will carry them through life.

There are also immediate health-related benefits for children who are provided in-person instruction, including lower rates of anxiety and depression, higher rates of immunizations, and other positive indicators of public health and wellbeing. These benefits are particularly critical for foster youth, homeless youth, and other students disproportionately impacted by the pandemic, for whom school provides safety and stability. In-person instruction also helps school staff to detect and address child abuse and neglect. For example, the state observed a roughly 40% drop in child welfare referrals following the stay-at-home orders in March 2020 compared to spring averages from the prior year.

Conclusion

Through careful implementation of safety measures and by phasing in our youngest students—who are at lowest risk and stand to benefit the most from in-person settings—we can build experience, confidence, and trust that our schools can be both safe workplaces and safe learning environments.

APPENDIX M — EVIDENCE SUMMARY: TK-6 SCHOOLS AND COVID-19 TRANSMISSION

This is a summary document of the evidence thus far that informs safe and successful in-person instruction in TK-6 schools in the context of the COVID-19 pandemic. The overall topics covered include: frequency of infection in elementary-aged students; why they get it less often and with less severe disease than adults; transmission patterns in elementary-school aged students; transmission patterns in TK-12 schools; and the evidence for COVID-19 transmission mitigation strategies particular to the school context.

This summary is not comprehensive, but focuses on the best evidence we have to inform us regarding the safety of in-person instruction for TK-6 students. The studies cited are chosen for their rigor, rather than because they support a specific position regarding whether or not it is safe to be open. We have learned a considerable amount since March 2020 regarding schools, through scientific studies of schools or camps that have been open in the U.S. or internationally. Because change is the only constant in the COVID-19 pandemic, we will continue to gather and monitor the evidence carefully, to inform safe and successful schooling.

Why Children Get COVID-19 Less Frequently and Have Less Severe Disease

In epidemiological studies globally and nationally, the evidence suggests that children seem to get COVID-19 less frequently than adults. Originally it was thought

that they might be less frequently diagnosed due to less testing because children are more often asymptomatic or have less severe symptoms. However, population-wide studies in Iceland and Spain using antibody tests that assess prior infection at any time find that children have lower rates of infection compared to adults.

There are two general explanations for why children get COVID-19 less frequently and have less severe disease compared to adults. The first is that they produce fewer ACE-2 receptors. Essentially, ACE-2 receptors are the doorway into human cells for SARS-CoV-2, the virus that causes COVID-19. A study from May 2020 showed that elementary students produce fewer ACE-2 receptors than middle and high school-aged students, who produce fewer receptors than receptors adults. Consequently, children have fewer doorways into the body for the virus, which leads to fewer infections and less severe infections for those who catch the virus.

The other explanation is that, because children's immune systems are used to fighting off common colds, they are better primed to fight off COVID-19. Other viruses in the same family (coronaviruses) as the SARS-CoV-2 virus cause the common cold. Since they are in the same family of virus, some parts of the virus, including something called the S2 spike, are very similar. There is a study of children from 2011-2018 (before SARS-CoV-2 appeared) that shows that more children (ages 1-16) had antibodies against the S2 spike than young adults (17-25), likely because they have coughs and colds from other coronaviruses more often than adults. It is likely a combination of these two

phenomena—ACE-2 receptor production and preexisting antibodies to other coronaviruses—that explain why children get disease less frequently and less severely.

Children with COVID-19 Most Often Get It from a Household Contact

When children do get COVID-19, the predominant pattern of transmission is to get the infection from an adult household contact (someone the child lives with at home who has COVID-19). High rates of household infection from adults to children have been seen in studies from Chicago, India, Greece, Australia, Switzerland, South Korea, and China. This has been seen even in settings where schools were open. For instance, a study of 10 early childhood centers and 15 schools (>6000 people) found low rates in the schools overall (1.2%) and >90% of cases were from the community, not from in-school transmission.

Transmission Among or from Students Is Uncommon

A recent study in the Morbidity and Mortality Weekly Report (MMWR) from the Centers for Disease Control and Prevention (CDC) found that for students, going to schools was not associated with having a positive COVID-19 test, but that social gatherings were—including weddings, parties, and playdates. This likely reflects the more controlled school environment leading to a low risk of transmission. It may also be that families who were going to these types of higher-risk social gatherings may have had other higher risk behavior such as decreased mask use.

The study from Australia mentioned above investigated the cases where there was transmission in school. It found that, of children who tested positive—a low number relative to the total number of students—only 0.3% had had contact with another child who was positive (child-to-child transmission). Child-to-adult transmission occurred only 1% of the time. In contrast, adult-to-child transmission occurred 1.5% of the time, and adult-to-adult transmission was 4.4%, almost 15 times higher than child-to-child transmission. This was in the context of masks not being encouraged at the time in Australia, though small groups and physical distancing recommendations were in place. The higher risk of adults transmitting to others compared to children transmitting to others is likely due to adults getting COVID-19 more often than children and youth, and adults having worse symptoms like cough, which makes it easier to transmit the virus.

These data suggest that adult-to-adult transmission is the most likely scenario for in-school transmission. This indicates that we have more control over in-school transmission, since adults are more likely to be able to adhere to policies for mitigation strategies such as masking and physical distancing. To achieve low in-school transmission, school communities will need to remain focused on ensuring places like teacher/staff break rooms are well-controlled and on effectively implementing the core mitigation strategies for staff as well as for students.

Appendix M

Low Risk of Transmission in Elementary Schools

The data indicate that the risk of transmission in elementary schools can be low. Two studies from early in the pandemic in Oise, one of the most heavily affected areas of France, focused on elementary schools and the local high school. Both studies examined the presence of antibodies (evidence of prior infection) to the SARS-CoV-2 virus in students and staff who had been attending the open schools without any precautions (e.g., masking, distancing) in place. The high school study showed evidence of potential spread within the school, with 43% of teachers, 59% of other school staff, and 38% of students with antibodies, compared to community prevalence of 9%. The elementary school study included six schools and >500 students, with only 9% of students, 7% of teachers, and 4% of non-teaching adults with antibodies, very similar to community prevalence. The lower transmission in the elementary schools likely reflects the lower infection rates and lower severity of illness in elementary students. However, it also likely reflects the much higher rates of student mixing in a traditional high school curriculum. This highlights why a modified high school curriculum that creates stable groups can substantially mitigate the risk of widespread in-school transmission in high schools.

Lessons About What Not to Do

In addition to the studies above, a study from a middle and high school in Israel after re-opening in May illustrates the need for mitigation strategies to support safe schools. The school re-opened in May, with no physical distancing

measures in place. Due to a heat wave, they stopped requiring masking for two days and had closed windows with air conditioners. During the two days without masking or proper ventilation, two symptomatic cases were in the school, leading to an outbreak across more than 100 students and staff. This study highlights the risk of spread without mitigation strategies—teaching us what *not* to do. Core strategies include masks, physical distancing, enhanced ventilation with open windows and without strong inward-directed air currents, and symptom screening.

Testing Students and Staff with Symptoms Can Prevent Outbreaks

Though approximately 40% of children do not have symptoms of COVID-19, symptom screening will still identify children with a higher likelihood of COVID-19 compared to students without symptoms. Screening students and staff and excluding those with symptoms creates a system for preventing possibly infectious people with COVID-19 from coming to school, thereby avoiding or breaking the chain of in-school transmission. One potential option for getting cleared to return to school after having symptoms includes getting tested. So, in addition to helping to prevent in-school transmission, the screening and testing of symptomatic students and staff provides ongoing data about COVID-19 in school communities.

Core Mitigation Strategies

The successful approach to preventing transmission in schools leverages layers of safety strategies. Core strategies include: masks; physical distancing; small, stable groups; hand hygiene; ventilation; screening for symptoms or close contact; and asymptomatic testing. Each layer provides additional protection and, when used together, have been associated with low or zero transmission, even in communities with high COVID-19 prevalence (paper in-press at *Pediatrics*). A modeling study examined the efficacy of different mitigation strategies to prevent in-school COVID-19 transmission. The study compared the efficacy of masking, monthly and weekly testing of teachers and students, and stable groups of students and staff, examining each strategy alone and then examining combinations of strategies. The authors looked at how much each strategy could decrease the proportion of symptomatic infections for teachers in high schools, middle schools and elementary schools, and for students, and for household members of students or teachers. They found that masks alone and stable cohorts alone were more effective than even weekly testing of students and teachers. This illustrates again the importance of masks and stable cohorts.

In Summary:

Though the evidence continues to evolve, we know more now than we did in July regarding how to prevent transmission in schools. We have learned from examples of what works and what does not work. Core mitigation

strategies are necessary for safe and successful schooling. If those mitigation strategies are implemented as several layers of safety, elementary schools can be safe workplaces for teachers and other staff and safe learning environments for children.

APPENDIX N — COVID-19 AND REOPENING IN-PERSON INSTRUCTION FRAMEWORK & PUBLIC HEALTH GUIDANCE

COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-2021 School Year

January 14, 2021

[Table of Contents omitted]

Overview

The California Department of Public Health (CDPH) developed the following framework to support school communities as they decide when and how to implement in-person instruction for the 2020-2021 school year. This document is rooted in the scientific evidence available to date and supports twin goals: **safe** and **successful** in-person instruction.

Understanding and evidence about the transmission and epidemiology of SARS-CoV-2, the virus that causes COVID-19, has evolved significantly over the course of the pandemic. Schools throughout the state are now in various stages of instruction including fully distance learning, fully in-person learning, and hybrid instruction based on local conditions.

Key mitigation strategies, studied in multiple settings and used successfully in schools nationally and internationally, allow for safe in-person instruction. The thoughtful

implementation of mitigation strategies, specific to school context, provides a careful and effective pathway forward as community transmission rates fluctuate.

Information about the latest science of COVID-19 transmissions, including evidence regarding the lower risk of transmission for elementary aged students compared to middle and high-school aged students, is available here as an evidence summary. However, new evidence and data about COVID-19 transmission, including variations by age, and the effectiveness of disease control and mitigation strategies continues to emerge regularly.

Recommendations regarding in-person school reopening and closure should be based on the latest available evidence as well as state and local disease trends and we will update this guidance as needed to reflect new evidence.

This document is intended to provide an update to the *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools* in California, 2020-2021 School Year (July 17, 2020) guidance. This document also provides a consolidation of content from other CDPH COVID-19 and school-related guidance and supersedes previous CDPH COVID-19 and Cal/OSHA school guidance.

AUTHORITY

This guidance is a public health directive that applies to all public and private schools operating in California. Under operative executive orders and provisions of the California Health and Safety Code, schools 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.

Governmental and non-governmental entities at all levels have issued guidance and directives relating to the safe reopening of schools for in-person instruction. Schools may comply with guidance from other federal, state, local, and nongovernmental sources, to the extent those guidelines are not weaker than or inconsistent with state and local public health directives.

This updated directive also incorporates two other public health directives issued January 14, 2021, related to: (1) reporting details of any positive case of a person who has been on campus to LHDs and (2) reporting to CDPH whether and to what degree all public and private schools have reopened to serve students in-person on campus. These directives are attached as Appendices 3 and 4.

SUMMARY OF CHANGES AND ADDITIONS

CDPH developed this comprehensive framework to support school communities as they determine how to implement in-person instruction for the remainder of the 2020-2021 school year.

This document is intended to consolidate and update prior state public health guidance and orders related to schools. Specifically, this document supersedes the following guidance, orders, and frequently asked questions:

- *COVID-19 Industry Guidance: Schools and School-Based Programs* (first published in May 2020; last updated August 3, 2020).

- The *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools* in California, 2020-2021 School Year (July 17, 2020).

- The Elementary Education Waiver process and the associated School Waiver Letter and Cover Form and Local Health Officer Waiver Notice Form (all issued on August 3, 2020).

- CDPH Schools Frequently Asked Questions (first issued August 3, 2020; last updated October 20, 2020).

This update provides both K-12 schools and LHDs additional guidance for providing in-person instruction, including:

1. Criteria and processes for school reopenings under the Blueprint for a Safer Economy framework. (Updated on January 19, 2021 to clarify language in the Re-open definition.)

2. Considerations intended to help school community leaders plan for and prepare to resume in-person instruction including steps to take when a student or staff member is found to have COVID-19 symptoms during the school day and while participating in before and after school programs.

3. Response to confirmed COVID-19 infections when:

    a. a case of COVID-19 is confirmed in a student or staff member; and

    b. a cluster or outbreak of COVID-19 at a school is being investigated.

4. Physical distancing in classrooms.

5. Implementation of stable groups of students and staff.

This document does *not* modify or supersede the Guidance Related to Cohorts for Children and Youth (first issued on August 25, 2020; last updated September 4, 2020), which applies to groups of children and youth in controlled, supervised, and indoor environments. The Cohort Guidance continues to allow schools that are not permitted to reopen under state or local public health directives and schools (and any grades at schools) that have not yet reopened if permitted to do so to serve students in-person in small, stable cohorts, as specified in the Cohort Guidance.

DEFINITIONS

Schools and Local Educational Agencies (LEAs): As used throughout this document, refer to county offices of education or their equivalent, school districts, charter schools, and the governing authorities of private schools (including nonpublic nonsectarian schools).

Appendix N

Transitional Kindergarten: Means the first year of a two-year kindergarten program that uses a modified kindergarten curriculum that is age and developmentally appropriate. As used throughout this document, "kindergarten" is inclusive of transitional kindergarten.

Cohorts: In this document, "cohorts" has a specific meaning, which are groups of students who are meeting for targeted supports and intervention services, under the direction of an LEA, while the school is closed to in-person instruction and in addition to distance learning. Sometimes these groups are also called "learning hubs" or "pods." Regardless of the name, all of the provisions in the Cohorting Guidance must be followed for such cohorts to meet, whether they are operated by LEAs, non-profits, or other providers, as a maximum of 16 individuals (students and staff). In this document, "cohort" does not refer to the more general "stable groups" that are described in the Stable Group Guidance section below.

Reopen for in-person instruction:

What does it mean to be "open" or "reopened"? The term "open" or "reopen" refers to operations for at least one grade at the school that are permitted only if the county satisfies the eligibility requirements for schools to "open" or "reopen." Specifically, the school must have given all students in at least one grade the option to return for in-person instruction for at least part of the school-week to be considered to "open" or "reopen." This includes a school that has offered all students in at least one grade the option of receiving in-person instruction for only certain

days during the week (commonly referred to as a "hybrid" model). Schools that were operating only in the manner permitted under the Cohorting Guidance are therefore not "open" or "reopened."

In addition, if 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 as of January 14, 2021, 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.

Is a school "reopened" if it was previously permitted to reopen but became ineligible to reopen before actually reopening? No. Schools must have actually reopened for in-person instruction (using the definition above) while the county was in the Red Tier in order to remain open if the county moves back to Purple Tier. If the county is in the Purple Tier on the day the school plans to reopen for in-person instruction, the school must wait until it is eligible again.

If a school was implementing a phased reopening (e.g., only opened grades 9-10 for in-person instruction with set plans to phase in grades 11 and 12) while the county was in the Red Tier, the *school site* may continue their phased

reopening if the county reverts back to the Purple Tier, if authorized by local health officer (LHO). This is only applicable to individual school sites. If a school district has a phased reopening of their schools, the schools in that district that did not open for in-person instruction may not re-open until the county meets the reopening criteria.

This also applies to schools subject to the updated Elementary Reopening Process (see below) applicable to the Purple Tier. Even if the school previously received a waiver under the former Elementary Education Waiver Process or meets the conditions to reopen under the updated Elementary Reopening Process, if it has not yet reopened and the county case rate (CR) exceeds the criteria described below, the school must delay reopening until the county case rate drops below the threshold.

In-Person School Reopening

The two subsections below describe the requirements for all schools, including those that have already reopened and those that have not. The Blueprint for a Safer Economy continues to inform the school reopening process. The Blueprint for a Safer Economy is based on Tiers, defined using the CR, the 7-day average of daily COVID-19 cases per 100,000 population, and the test positivity in a county. This Schools Framework uses the adjusted case rate, as described in the Blueprint.

Under this updated guidance, all schools must complete and post to their website homepages a COVID-19 Safety Plan (CSP), described below in COVID-19 Safety Plan for

In-person Instruction section (page 10) prior to reopening for in-person instruction. Schools that have already reopened are required to post their CSPs by February 1, 2021. The CSP is intended to consolidate requirements to develop written plans pursuant to CDPH guidance first issued in May 2020 and the Cal/OSHA Emergency Temporary Standards finalized in November 2020.

Of note, the Cal/OSHA Emergency Temporary Standards require a written plan called the Cal/OSHA COVID-19 Prevention Program (CPP) (see the COVID-19 Safety Plan for In-person Instruction for more information); therefore, schools are expected to have already created this written plan. In order to align with Cal/OSHA standards and minimize burden to schools, the CPP for the school is the first component of the CSP.

As described below, under the updated Elementary Reopening Process, schools must also submit a copy of the CSP to the LHD and the State Safe Schools for All Team before they reopen elementary schools if they are operating within a jurisdiction or county that is in the Purple Tier.

REQUIREMENTS FOR SCHOOLS THAT HAVE ALREADY REOPENED

The *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools* in California, 2020-2021 School Year (July 17, 2020 Framework) permitted schools to reopen for in-person instruction at all grades if they are located in counties in the Red, Orange, or Yellow Tiers

under the Blueprint for a Safer Economy. Operations for schools that are already open must adhere to the School Reopening Guidance section below.

Schools that have already reopened for in-person instruction must, by February 1, 2021, complete and post a COVID-19 Safety Plan (CSP) to their website homepage or, in the case of schools that do not maintain websites, in another publicly accessible manner, to continue operating in-person instruction, as described in the Covid-19 Safety Plan for In-Person Instruction section.

Schools that have reopened are not required to close if the county moves to the Purple Tier or goes over a CR of 25 per 100,000 population. See School Closure Determinations below for more information.

CRITERIA TO REOPEN FOR IN-PERSON INSTRUCTION

Red, Orange, and Yellow Tiers. Consistent with the July 17 Framework, schools may reopen at all grades if they are located in counties in the Red, Orange or Yellow Tiers under the Blueprint for a Safer Economy. Operations once reopened must adhere to the updated Sector Guidance for School and School-Based Program reflected in this document (see below). Schools that reopen under this paragraph must complete and post a CSP to their website homepage before reopening for in-person instruction, as described in the CSP Posting and Submission Requirements for In-Person Instruction section.

Purple Tier. Schools may not reopen for grades 7-12 if the county is in Purple Tier. Subject to the limitation in the bullet immediately below, schools serving grades K-6 may reopen for in-person instruction in the Purple Tier, including during a State of California Regional Stay at Home Order, if they complete and post a CSP to their website homepage and submit the CSP to their local health officer (LHO) and the State Safe Schools for All Team and there are no identified deficiencies, as described in the Covid-19 Safety Plan (CSP) Posting and Submission Requirements for In-Person Instruction section below.

- **K-6 schools in counties in Purple Tier with CR>25:** Schools serving students in grades K-6 may not reopen for in-person instruction in counties with adjusted CR above 25 cases per 100,000 population per day. They may post and submit a 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. This case rate reflects recommendations from the Harvard Global Health Institute analysis of safe school reopening policy. Please find additional information on how the adjusted CR is calculated here. Recognizing that re-opening for in-person instruction takes time to routinize and improve safety, and that some schools may have already been conducting in-person learning successfully and had time to optimize all their policies and procedures to support minimal disease transmission on-site and detect new cases, schools who have already opened, as defined above, with minimal or no in-school

> transmission, may remain open and may consider increasing testing per CDPH supported testing framework.

These new criteria and the requirements below replace the Elementary Education Waiver (issued August 3) that allowed LHOs to grant a waiver to school applicants for grades K-6 if specific criteria were satisfied. All waivers approved prior to this date remain valid.

COVID-19 SAFETY PLAN (CSP) FOR IN-PERSON INSTRUCTION

The COVID-19 Safety plan (CSP) consists of two parts: (1) the Cal/OSHA COVID-19 Prevention Program (CPP) and (2) the COVID-19 School Guidance Checklist.

Cal/OSHA Prevention Program (CPP)

On December 1, 2020, Cal/OSHA's Emergency Temporary Standards requiring employers to protect workers from hazards related to COVID-19 went into effect. The regulations require that employers, including schools, establish and implement a written CPP to address COVID-19 health hazards, correct unsafe or unhealthy conditions, and provide face coverings. Employers can also create a written CPP by incorporating elements of this program into their existing Injury and Illness Prevention Program (IIPP), if desired. Cal/OSHA has posted FAQs and a one-page fact sheet on the regulation, as well as a model COVID-19 prevention program.

- Cal/OSHA Frequently Asked Questions
- Cal/OSHA Fact Sheet
- Cal/OSHA Prevention Program Template - Example

COVID-19 School Guidance Checklist

In addition to the CPP, a COVID-19 School Guidance Checklist must be included and be posted online and submitted as outlined below.

COVID-19 SAFETY PLAN (CSP) POSTING AND SUBMISSION REQUIREMENTS FOR IN-PERSON INSTRUCTION

The Tiers from the Blueprint for a Safer Economy Framework inform the process needed for submission of CSPs for maintaining and/or resuming in-person instruction as described below and in Table 1.

Yellow (Tier 4/Minimal), Orange (Tier 3/Moderate), and Red (Tier 2/Substantial):

- For schools that have already reopened and are located in a county that is in the Yellow, Orange, or Red Tier, the LEA must post the CSP publicly on its website homepage by February 1, 2021.
- For those schools that have not reopened, and the county has been in the Purple Tier, the county must be in the Red Tier for 5 consecutive days before the school may reopen.

- For schools that have not reopened, the LEA must complete and post the CSP publicly on its website homepage at least 5 days prior to providing in-person instruction.

- While developing and prior to posting a CSP, it is strongly recommended that the LEA (or equivalent) consult with labor, parent, and community organizations. Examples of community organizations include school-based non-profit organizations and local organizations that support student enrichment, recreation, after-school programs, health services, early childhood services, or provide family support.

Purple (Tier 1/Widespread):

- For schools that have already reopened and are located in a county or LHD that is in the Purple Tier, the LEA must post the CSP publicly on its website homepage by February 1, 2021.

- 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 LHD 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. Under these circumstances, schools serving grades K-6 may only reopen for their K-6 grade students, even if their school serves non-K-6 grade students (e.g., a 6-8 school).

- o While developing and prior to submitting a CSP, the LEA must consult with labor, parent, and community organizations. Examples of community organizations include school-based non-profit organizations and local organizations that support student enrichment, recreation, after-school programs, health services, early childhood services or provide family support.

- o The COVID-19 School Guidance Checklist requires that the LEA provide evidence of consultation with labor, parent, and community organizations.

    - ▪ The LEA must sign an attestation confirming the names and dates that the organizations were consulted. If school staff are not represented by a labor organization, then the applicant must describe the process by which it consulted with school staff.

- o The LEA must confirm publication of the CSP on the website of the LEA.

- o The LEA must submit the CSP on behalf of all schools within their direct administrative authority, with site-specific precautions noted within the CSP to address considerations unique to specific school sites, as applicable. For example, a school district must submit

a consolidated CSP for every school under its direct administrative authority, and must outline site-specific precautions insofar as there are features unique to the site that raise greater risks of COVID-19 transmission.

- o If a group of private, faith-based, or charter schools within a single county are subject to the same governing authority (e.g., an archdiocese, charter management organization, etc.), the governing authority may submit the CSP on behalf of those schools, but must address site-specific considerations consistent with the bullet above. Otherwise, independent, private, faith-based, or charter schools that are affiliated with a broader network should post and submit the CSP for each school.

- o LHDs and the State Safe Schools for All Team have 7 business days to provide feedback to the LEA regarding deficiencies in the CSP.

- o The school may reopen on the eighth business day after submitting the CSP if the LHD and/or State Safe Schools for All Team do not provide notification that the CSP is unsafe within 7 business days of submission.

- o If the LHD and/or State Safe Schools for All Team identify any deficiencies during

the 7-business-day review period, the LEA will receive feedback on what they need to improve in order to be able to reopen for in-person instruction.

- o After the LEA responds to feedback and re-submits the plan, the entity that identified the deficiency will have 7 business days to review revisions.

- o If the LHD has noted a deficiency in a submitted CSP and has required a response prior to opening for in-person instruction, the LHD must notify the State Safe Schools for All Team.

- o The school may reopen on eighth business day after submitting the revisions if the LHD and the State Safe Schools for All Team do not provide additional feedback.

- As noted above, schools serving grades K-6 may not reopen for in-person instruction in jurisdictions with CR above 25 cases per 100,000 population per day.

Appendix N

Table 1. School reopening actions for in-person instruction, by Tier

Yellow	**Orange**	**Red**	**Purple**
CR <1.0* TP<2%	**CR 1-3.9* TP 2-4.9%**	**CR 4-7* TP 5-8%**	**CR>7* TP >8%**
- CSP posted publicly for K-12th grades 5 days prior to in-person instruction.	- CSP posted publicly for K-12th grades 5 days prior to in-person instruction.	- CSP posted publicly for K-12th grades 5 days prior to in-person instruction. - Must be in Red 5 days prior to reopening.	- Already reopened: CSP posted publicly by 02/01/21. Not previously open: - CSP posted publicly for K-6, and submitted concurrently to LHD and State Safe Schools for All Team. - 7 business days for review. - 7th-12th grade reopening not permitted if CR>7*.

			- K-6th grade reopening not permitted if CR>25*, though CSP can be posted and submitted for review. - Note: Targeted in-person instruction may be offered pursuant to the Cohorting Guidance.

*Adjusted case rate.

While not required, LEAs are strongly encouraged to post on their website, along with the CSP, the detailed plans describing how they will meet the requirements outlined in the CSP elements. This can provide transparency to school community members making decisions about participation in in-person learning.

The email address for submission of the CSP to the State Safe Schools for All Team is: K12csp@cdph.ca.gov.

Cohorting Guidance for Specialized Services

This updated guidance does not modify or supersede the applicability of the Cohorting Guidance to school settings. More information regarding the minimum health and safety guidelines that must be followed to provide in-person services and supervision to children and youth in cohorts is set forth in the Cohorting Guidance, which applies across multiple sectors serving youth, including childcare and schools that are not reopened for in-person instruction.

The stable groups described in the Cohorting Guidance, and described below in the Stable Group Guidance decreases opportunities for exposure to or transmission of the virus; reduces the numbers of exposed individuals if COVID-19 is introduced into the cohort; facilitates more efficient contact tracing in the event of a positive case; and allows for targeted testing and quarantine of a single cohort instead of potential schoolwide closures in the event of a positive case or cluster of cases.

The Cohorting Guidance provides a way for schools not yet permitted to reopen under state and local public health directives or that have not yet reopened even though permitted to reopen to provide in-person supervision, instruction, targeted support services, and facilitation of distance learning for some students, especially high-need student groups and students who may not be able to benefit fully from distance learning offerings.

Existing state law requires public schools to provide in-person instruction to the greatest extent possible (Education Code section 45304(b)). State law further requires that distance learning ensure access to connectivity and devices that allow students to participate in the educational program and complete assigned work. In addition, state law requires that students with disabilities and English learners receive educational and related services to which they are entitled under the law, among other requirements (Education Code section 45303(b) (1), (4) & (5)). The Cohorting Guidance therefore provides an important avenue for schools that have not yet reopened under this guidance to provide supervision, instruction and support to small cohorts of students to ensure students receive necessary services even while students are generally participating in distance learning.

ADDITIONAL REOPENING CONSIDERATIONS

Availability of Distance Learning for Students Who Request It. Schools should continue to offer distance learning for students who request it.

Thoughtful, Phased Implementation. K-12 school sites should employ a phased-in model as a part of their reopening plan. Phased reopening plans for in-person instruction may include, but are not limited to:

- Shifting from a full distance learning model to hybrid.

- Gradually allowing for specified grades and/or a percentage of each grade to resume in-person learning, beginning with the youngest and most disproportionately impacted students.

- Allowing for a gradual number of students, at a specified capacity, per grade or school site.

If a school with a phased-in model has opened for in-person instruction, and the county changes to the Purple Tier or to a CR>25, the school may continue the phased reopening.

Staff Access to Campus if Not Reopened for In-Person Instruction. Teachers, school and support staff, and administrators may return to work physically without students on site while counties are not open for in-person instruction, provided that those on site follow the school's COVID-19 Safety Plan consistent with Cal/OSHA regulations.

Boarding Schools. Residential components of boarding schools are to remain closed (with the exception of residential components of boarding schools that are currently operating with the permission of local health

authorities, and those serving wards or dependents of the juvenile courts) regardless of the Tier status of their county until further guidance is issued. The non-residential components of boarding schools (e.g., in-person instruction for day students) are governed by the same guidelines as other K-12 schools.

School Reopening Guidance

All guidance, as schools plan and prepare to resume in-person instruction, should be implemented as outlined in the In-Person School Reopening section, including the development of a CSP.

LAYERS OF SAFETY: INFECTION MITIGATION STRATEGIES

A key goal for safe schools is to reduce or eliminate in-school transmission. A helpful conceptual framing as schools plan for and implement safety measures for in-person instruction, is the layering of mitigation strategies. Each strategy (face coverings, stable groups, distancing, etc.) decreases the risk of in-school transmission; but no one layer is 100% effective. It is the combination of layers that are most effective and have been shown to decrease transmissions.

As schools plan for reopening for in-person instruction and as they continue to work on operations once open, it may be helpful to understand the mitigation strategies with stronger evidence supporting their use. We have ordered the list below such that the interventions known

at this time to be more effective in reducing the risk of transmission appear before the ones that are helpful but may have a potentially smaller effect or have less evidence of efficacy. Of note, though scientific comparative assessments are limited, the top three items are likely of similar importance:

1. Face coverings.

2. Stable groups.

3. Physical distancing.

4. Adequate ventilation.

5. Hand hygiene.

6. Symptom and close contact exposure screening, with exclusion from school for staff or students with symptoms or with confirmed close contact.

7. Surveillance or screening testing.

Frequent disinfection, which was thought at the beginning of the pandemic to be a key safety component, can pose a health risk to children and students due to the chemicals used and has proven to have limited to no impact on COVID-19 transmission. Disinfection with specified products (see Cleaning and Disinfection section), is recommended for schools after a case has been identified in the school, in the spaces where the case spent a large proportion of their time (e.g., classroom, or administrator's

office if an administrator). Please see Cleaning and Disinfection section for additional details.

Of note, adults (>18 years old) appear to be more infectious overall than children, making staff-to-staff transmission an important focus for safety efforts. A specific situation that has resulted in exposure and transmission among staff in multiple schools is eating and drinking indoors without being physically distant (for instance, in break rooms or common areas). Specific messaging and support to staff to prevent this scenario are strongly recommended.

The following sections outline specific actions school sites should take to keep students and staff safe.

GENERAL MEASURES

Establish and continue communication with local and state authorities to determine current disease levels and control measures in your community. For example:

- Consult with your LHO, or designated public health staff, who are best positioned to monitor and provide advice on local conditions. A directory can be found here.

- Collaborate with other schools and school partners in your region, including the county office of education.

- Access State Technical Assistance resources available for schools and for LHDs to support safe and successful in-person instruction, available on the Safe Schools for All Hub.

- Regularly review updated guidance from state agencies, including CDPH and California Department of Education.

Per Cal/OSHA requirements noted above, establish a written CPP at every facility, perform a comprehensive risk assessment of all work areas and work tasks, and designate a person at each school to implement the plan.

FACE COVERINGS

Face coverings must be used in accordance with CDPH guidelines unless a person is exempt as explained in the guidelines.

- Information contained in the CDPH Guidance for the Use of Face Coverings should be provided to staff and families of students. The face covering guidance applies to all settings, including schools. The guidance discusses the circumstances in which face coverings must be worn and the exemptions, as well as any policies, work rules, and practices employers have adopted to ensure the use of face coverings.

- Teach and reinforce use of face coverings, or in limited instances, face shields with drapes.

- Students and staff should be frequently reminded not to touch the face covering and to wash their hands frequently.

- Information should be provided to all staff and families in the school community on proper use, removal, and washing of cloth face coverings.

- Training should also include policies on how people who are exempted from wearing a face covering will be addressed.

- **Students in all grade levels K-12 are required to wear face coverings at all times, while at school, unless exempted.**

    - o A cloth face covering or face shield should be removed for meals, snacks, naptime, or when it needs to be replaced. When a cloth face covering is temporarily removed, it should be placed in a clean, safe area, clearly marked with the student's name and date, until it needs to be put on again.

- Participants in youth and adult sports should wear face coverings when participating in the activity, even with heavy exertion as tolerated, both indoors and outdoors.

- The face covering guidance recognizes that there are some people who cannot wear a face covering for a number of different reasons. People are exempted from the requirement if they are under age 2, have a medical or mental health condition or disability that would impede them from properly wearing or handling a face covering, those with a

communication disability, or when it would inhibit communication with a person who is hearing impaired. Those with communication disabilities or caregivers of those with communication disabilities can consider wearing a clear mask or cloth mask with a clear panel when appropriate.

- Persons exempted from wearing a face covering due to a medical condition, as confirmed by school district health team and therapists, must wear a non-restrictive alternative, such as a face shield with a drape on the bottom edge, as long as their condition permits it.

- Schools must develop protocols to provide a face covering to students who inadvertently fail to bring a face covering to school to prevent unnecessary exclusions.

- Schools should offer alternative educational opportunities for students who are excluded from campus because they will not wear a face covering.

- In order to comply with this guidance, schools must exclude students from campus if they are not exempt from wearing a face covering under CDPH guidelines and refuse to wear one provided by the school.

- Employers must provide and ensure staff use face coverings and all other required personal protective equipment in accordance with CDPH guidelines.

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- The California Governor's Office of Emergency Services (CalOES) and CDPH are and will be working to support procurement and distribution of face coverings and needed personal protective equipment to schools. Additional information can be found here.

- The Department of General Services negotiated statewide master contracts, which LEAs may leverage to reduce costs and secure supply chains. Additional information can be found here.

- Face covering policies apply on school buses and any vehicle affiliated with the LEA used to transport students, staff, or teachers to and/or from a school site.

- Classrooms, school buses, and shared school office spaces used by persons who cannot tolerate face coverings are less safe for others who share that environment. Schools may want to consider notifying others who share spaces with unmasked or sub-optimally masked individuals about the environment. Also consider employing several additional mitigation strategies (or fortifying existing mitigation strategies) to optimize safety. These may include increasing the frequency of asymptomatic tests offered to unmasked or sub-optimally masked individuals, employing longer social distances, installing clear physical barriers, reducing duration of time in shared environments, and opting for either outdoor or highly-ventilated indoor educational spaces, as possible.

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Staff

- All staff must use face coverings in accordance with CDPH guidelines unless Cal/OSHA standards require respiratory protection.

- For staff who come into routine contact with others, CDPH recommends the use of disposable 3-ply surgical masks, which are more effective than cloth face coverings.

- In limited situations where a face covering cannot be used for pedagogical or developmental reasons, (e.g., communicating or assisting young children or those with special needs) a face shield with a drape (per CDPH guidelines) can be used instead of a face covering while in the classroom as long as the wearer maintains physical distance from others. Staff must return to wearing a face covering outside of the classroom.

- Workers or other persons handling or serving food must use gloves in addition to face coverings.

- Employers should consider where disposable glove use may be helpful to supplement frequent handwashing or use of hand sanitizer; examples are for workers who are screening others for symptoms or handling commonly touched items.

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STABLE GROUP GUIDANCE CONSIDERATIONS BY GRADE LEVEL

Stable groups provide a key mitigation layer in schools. A stable group is a group with fixed membership that stays together without mixing with any other groups for any activities.

Guidance from other agencies, including the federal Centers for Disease Control and Prevention (CDC), sometimes refers to them as "cohorts"[1] or "pods."

Implementing stable groups of students and staff reduces the numbers of exposed individuals if COVID-19 is introduced into the group, decreases opportunities for exposure to or transmission of the virus; facilitates more efficient contact tracing in the event of a positive case; and allows for targeted testing and quarantine of a small group instead of potential schoolwide closures in the event of a positive case or cluster of cases.

How can an elementary school create stable groups?

- Students can be placed into stable groups that stay together all day with their core teacher (and any aide or student teacher who is present). If there are counselors or teachers of electives, they should

1. The CDC's use of the term is different from the use of "cohort" within California's guidance. "Cohort" is specifically defined in the Cohort Guidance as a group no larger than 16 individuals. To avoid any confusion, this guidance uses "stable group" instead of "cohort" for this concept.

ideally be assigned to only one group or conduct their classes / counseling virtually.

- Students should eat lunch and go to recess with their group at times that are staggered and separated from other groups.

- There are different approaches to organizing stable groups. Students can be divided into smaller groups that attend school in person on a rotating schedule. Here are a few examples:

    - A group of students comes to school for in-person instruction on Monday and Tuesday. Another attends on Thursday and Friday.

    - On the alternating days, they learn remotely.

    - Some LEAs or schools have students attend school in-person during alternating weeks.

    - Other LEAs or schools have one group of students attend school in person in the morning and another group attend school in person in the afternoon.

These approaches create even smaller groups that stay together and do not mix with one another. Electives or counseling can be conducted virtually to limit the number of staff in direct contact with any given stable group.

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How can a middle or high schools school create stable groups?

- Students can be placed into groups that remain together all day during in-person instruction. Middle or high school groups are often larger than elementary school groups. Because middle and high school curricula differ from elementary school curricula, teachers are not usually assigned to one stable group of students, creating an opportunity for mixing across stable groups or students. The following guidance provides examples of approaches to minimizing crossover of staff across stable groups of students.

- The CDC guidance notes that schools may keep a single group together in one classroom and have educators rotate between groups, or have smaller groups move together in staggered passing schedules to other rooms they need to use (e.g., science labs) without allowing students or staff to mix with others from distinctive groups.

- Teachers and supports staff from different content areas can work in teams that share students, preferably in a dedicated space, separate from others. For example: math, science, English, and history teachers might work as a team with a set group of students they share.

- When combined with block schedules that reduce the number of courses students take in any one day, the number of educators and students who interact can be minimized further.

- It is also possible to keep students in one stable group that stays together with one or two instructors who teach them directly part of the day and support their instruction from others who teach them virtually during other parts of the day.

- Electives can be offered virtually or organized so that no group of students takes more than one elective in a term and the elective teachers do not work with more than one or two groups.

- Stable groups could switch schedules or even membership after a break at the quarter, trimester, or semester in ways that support students being able to take additional classes without substantial group mixing.

- The school year can be divided into even smaller time units – 4 to 8 weeks for example – in which students study one or two subjects intensively, completing all of the work they might normally have completed in a semester or a year. They stay in stable groups with only 1 or 2 teachers during this time. At the end of unit, they switch schedules and groups to take 1 or 2 other courses, and so on throughout the year.

- Additional examples of approaches to creating stable groups of students that limit the risk of transmission across large groups of students are available here.

OTHER CONSIDERATIONS:

- **Schedule for Access and Inclusion**: The construction of stable groups can increase or decrease equity or segregation across the school campus, so consider how to support inclusion and access for all student populations as you organize students for learning.

- **Schedules as Tools for Physical Distancing:** To the extent possible, schools should think about how to reconfigure the use of bell schedules to streamline foot traffic and maintain practicable physical distancing during passing times and at the beginning and end of the school day. Create staggered passing times when students must move between rooms minimize congregated movement through hallways as much as is practicable.

- **Restructure Electives:** Elective teachers who move in and out of stable groups can become points of exposure for themselves and the students they work with. Some models have made elective teachers part of middle and high school stable groups, while others have used them only for remote instruction. Other options include ensuring elective teachers maintain longer distance from students (e.g., 12 feet).

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IMPLEMENTING DISTANCING INSIDE AND OUTSIDE THE CLASSROOM

Arrival and Departure

- Maximize space between students and between students and the driver on school buses and open windows to the greatest extent practicable. Two windows on a bus should be opened fully at a minimum.

- Minimize contact at school between students, staff, families and the community at the beginning and end of the school day. Prioritize minimizing contact between adults at all times.

- Stagger arrival and drop off-times and locations as consistently as practicable to minimize scheduling challenges for families.

- Designate routes for entry and exit, using as many entrances as feasible. Put in place other protocols to limit direct contact between people as much as practicable.

- Ensure each school bus is equipped with extra unused face coverings for students who may have inadvertently failed to bring one.

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Classroom Space

Figure 1. Classroom with adequate spacing between students

- Maximize space between seating and desks. Distance teacher and other staff desks at least 6 feet away from student and other staff desks. Distance student chairs at least 6 feet away from one another, except where 6 feet of distance is not possible after a good-faith effort has been made. Upon request by the local health department and/or State Safe Schools Team, the superintendent should be prepared to demonstrate that good-faith effort, including an effort to consider all outdoor/indoor space options and hybrid learning models. Please

reference Figures 1 and 2 for examples of adequate and inadequate spacing. Under no circumstances should distance between student chairs be less than 4 feet. If 6 feet of distance is not possible, it is recommended to optimize ventilation and consider using other separation techniques such as partitions between students or desks, or arranging desks in a way that minimizes face-to-face contact.

Figure 2. Classroom without adequate spacing between students

- Short-term exposures of less than 6 feet between students and staff are permitted (e.g., a teacher assisting a student one-on-one), but the duration should be minimized and masks must be worn.

- Consider redesigning activities for smaller groups and rearranging furniture and play spaces to maintain separation.

- Staff should develop instructions for maximizing spacing and ways to minimize movement in both indoor and outdoor spaces that are easy for students to understand and are developmentally appropriate.

- Prioritize the use and maximization of outdoor space for activities where possible.

- Activities where there is increased likelihood for transmission from contaminated exhaled aerosols such as band and choir practice and performances are permitted outdoors only, provided that precautions such as physical distancing and use of face coverings are implemented to the maximum extent (see below in Non-classroom spaces).

- Consider using cleanable privacy boards or clear screens to increase and enforce separation between staff and students.

Non-Classroom Spaces

- Limit nonessential visitors, volunteers and activities involving other groups at the same time. School tours are considered a non-essential activity and increase the risk of in-school transmission.

- Limit communal activities. Alternatively, stagger use, properly space occupants and clean in between uses.

- Consider use of non-classroom space for instruction, including regular use of outdoor space, weather permitting. For example, consider part-day instruction outside.

- Minimize congregate movement through hallways as much as practicable. For example, establish more ways to enter and exit a campus, create staggered passing times when necessary or when students cannot stay in one room and use visual reminders on the floor that students can follow to enable physical distancing while passing and waiting in line. In addition, schools can consider eliminating the use of lockers, which can become congregating areas.

- Serve meals outdoors or in classrooms instead of cafeterias or group dining rooms where practicable. Where cafeterias or group dining rooms must be used, keep students together in their stable groups, ensure physical distancing, hand hygiene before and after eating, and consider assigned seating. If indoor meal times are paired with recess or outdoor time, consider having half of a stable group of students eat while the other half is outdoors and then switch. Serve individually plated or bagged meals. Avoid sharing of foods and utensils and buffet or family-style meals.

- Consider holding recess activities in separated areas designated by group.

- School athletic activities and sports should follow the CDPH Outdoor and Indoor Youth and Adult Recreational Guidance. Note that risk of infection transmission increases for indoor activities; indoor sports are higher risk than outdoor sports due to reduced ventilation. And transmission risk increases with greater exertion levels; greater exertion increases the rate of breathing and the quantity of air that is inhaled and exhaled with every breath.

- Outdoor singing and band practice are permitted, provided that precautions such as physical distancing and mask wearing are implemented to the maximum extent possible. Playing of wind instruments (any instrument played by the mouth, such as a trumpet or clarinet) is strongly discouraged. School officials, staff, parents, and students should be aware of the increased likelihood for transmission from exhaled aerosols during singing and band practice, and physical distancing beyond 6 feet is strongly recommended for any of these activities.

VENTILATION

- Ensure sufficient ventilation in all school classrooms and shared workspaces per American Society of Heating, Refrigerating, and Air-Conditioning Engineers (ASHRAE) guidance on ventilation.

  o Contact a mechanical engineer, heating, ventilation, and air conditioning (HVAC)

design professional, or mechanical contractor in order to evaluate your ventilation system in regards to the ASHRAE guidance.

- o If opening windows poses a safety or health risk (e.g., by allowing pollen in or exacerbating asthma symptoms) to persons in the facility, consider alternatives. For example, maximize central air filtration for HVAC systems by using filters with a minimum efficiency reporting value (MERV) of at least 13.

- o Consider installing portable high-efficiency air cleaners, upgrading the building's air filters to the highest efficiency possible, and making other modifications to increase the quantity of outside air and ventilation in classrooms, offices and other spaces.

- o If not able to properly ventilate indoor instructional spaces, outdoor instruction is preferred (use caution in poor air quality conditions).

- Ventilation considerations are also important on school buses; use open windows as much as possible to improve airflow.

- Specific practices to avoid:

  - o Classrooms or buses with no ventilation.

- o Classrooms or buses with increased airflow across occupants (e.g., air conditioners or fans blowing into the classroom or overhead fans creating air currents across occupants).

PROMOTE HEALTHY HAND HYGIENE PRACTICES

- Teach and reinforce washing hands, avoiding contact with one's eyes, nose, and mouth, and covering coughs and sneezes among students and staff.

  - o Teach students and remind staff to use tissue to wipe their nose and to cough/sneeze into a tissue or their elbow.

  - o Students and staff should wash their hands frequently throughout the day, including before and after eating; after coughing or sneezing; after classes where they handle shared items, such as outside recreation, art, or shop; and before and after using the restroom.

  - o Students and staff should wash their hands for 20 seconds with soap, rubbing thoroughly after application. Soap products marketed as "antimicrobial" are not necessary or recommended.

  - o Staff should model and practice handwashing. For example, use bathroom time in

lower grade levels as an opportunity to reinforce healthy habits and monitor proper handwashing.

- o Students and staff should use fragrance-free hand sanitizer when handwashing is not practicable. Sanitizer must be rubbed into hands until completely dry. Note: frequent handwashing is more effective than the use of hand sanitizers.

- o Ethyl alcohol-based hand sanitizers are preferred and should be used when there is the potential of unsupervised use by children.

- Isopropyl alcohol-based hand sanitizers are more toxic when ingested or absorbed into skin.

- Do not use hand sanitizers that may contain methanol which can be hazardous when ingested or absorbed.

  - o Children under age 9 should only use hand sanitizer under adult supervision. Call Poison Control if consumed: 1-800-222-1222.

- Consider portable handwashing stations throughout the school site and near classrooms to minimize movement and congregating in bathrooms to the extent practicable.

- Develop routines enabling students and staff to regularly wash their hands at staggered intervals.

- Ensure adequate supplies to support healthy hygiene behaviors, including soap, tissues, no-touch trashcans, face coverings, and hand sanitizers with at least 60 percent ethyl alcohol for staff and children who can safely use hand sanitizer.

CLEANING AND DISINFECTION

The section below provides recommendations for cleaning and disinfection. "Cleaning" involves water and soap or a detergent, does not use disinfecting agents, and significantly decreases germs on surfaces and decreases infectious risks. "Disinfection" kills germs on surfaces using specific agents (see below for those approved for use). If a case has been identified, the spaces where the case spent a large proportion of their time (e.g., classroom, or administrator's office if an administrator) should be disinfected. Frequent disinfection can pose a health risk to children and students due to the strong chemicals often used and so is not recommended in the school setting unless a case has been identified.

- Staff should clean frequently-touched surfaces at school and on school buses daily.

- Buses should be thoroughly cleaned daily and after transporting any individual who is exhibiting symptoms of COVID-19. Drivers should be provided cleaning materials, including but not limited to

wipes and disposable gloves, to support cleaning of frequently touched surfaces during the day.

- Frequently touched surfaces in the school include, but are not limited to:

  - Sink handles.

  - Shared tables, desks, or chairs.

    - If a school has morning and afternoon stable groups, the desks and tables are considered shared and should be cleaned before the next group arrives.

    - Desks or chairs do not need daily cleaning if only used by one individual during the day.

  - Door handles.

  - Shared technology and supplies.

- If used, outdoor playgrounds/natural play areas only need routine maintenance. Make sure that children wash or sanitize their hands before and after using these spaces. When hand hygiene is emphasized, cleaning of outdoor structures play is not required between cohorts.

- When choosing disinfection products after an in-school COVID-19 case has been identified (see

"What to do if there is a case of COVID-19 in a School"), use those approved for use against COVID-19 on the Environmental Protection Agency (EPA)-approved list "N" and follow product instructions.

- o To reduce the risk of asthma and other health effects related to disinfection, programs should select disinfectant products on list N with asthma-safer ingredients (hydrogen peroxide, citric acid or lactic acid) as recommended by the US EPA Design for Environment program.

- o Avoid products that contain peroxyacetic (peracetic) acid, sodium hypochlorite (bleach) or quaternary ammonium compounds, which can cause asthmatic attacks.

- o Follow label directions for appropriate dilution rates and contact times. Provide workers training on the chemical hazards, manufacturer's directions, Cal/OSHA requirements for safe use, and as applicable and as required by the Healthy Schools Act.

- o Custodial staff and any other workers who clean and disinfect the school site must be equipped with proper personal protective equipment, including gloves, eye protection, respiratory protection, and other appropriate protective equipment as required by the

product instructions. All products must be kept out of the reach of children and stored in a space with restricted access.

- o Establish a cleaning schedule in order to avoid both under- and over-use of cleaning products.

- Ensure safe and correct application of disinfectant and keep products away from students.

- Ensure proper ventilation during cleaning and disinfecting. Introduce fresh outdoor air as much as possible for example by opening windows where practicable. When disinfecting, air out the space before students arrive; disinfection should be done when students are not present.

- Take steps to ensure that all water systems and features (for example, drinking fountains and decorative fountains) are safe to use after a prolonged facility shutdown to minimize the risk of Legionnaires' disease and other diseases associated with water.

CHECK FOR SIGNS, SYMPTOMS AND EXPOSURES

- Actively encourage staff and students who are sick or who have recently had close contact with a person with COVID-19 to stay home. Develop policies that encourage sick staff and students to stay at home without fear of reprisal, and ensure staff, students and students' families are aware of these policies.

- Implement symptom and exposure screening for all staff and students at home each day before leaving for school.

- Students or staff exhibiting symptoms of COVID-19 at school (fever of 100.4 degrees or higher, cough, difficulty breathing, or other COVID-19 symptoms) must be immediately isolated in a private area until they can leave school or be picked up by a parent or guardian. Ill students and staff should be recommended to be tested for COVID-19 as soon as possible.

- Policies should not penalize students for missing class.

Symptom and Exposure Screening

Daily screening for COVID-19 symptoms and for exposure to someone with COVID-19 prior to leaving for school can prevent some people with COVID-19 from coming to school while infectious, thus preventing in-school transmission. Screening does not prevent asymptomatic cases from being at school and spreading SARS-CoV2, the virus that causes COVID-19.

CDPH recommends that:

1. Parents be provided with the list of COVID-19 symptoms and instructed to keep their child at home if the child is feeling ill or has symptoms of COVID-19, even if symptoms are very mild, and to get their ill child tested for SARS-CoV2.

2. Staff members be provided with the list of COVID-19 symptoms and be instructed to call in sick and stay home if having symptoms of COVID-19 and to get tested for SARS-CoV2.

Note: If a student or staff member has chronic allergic or asthmatic symptoms (e.g., cough or runny nose), then a change in their symptoms from baseline would be considered a positive symptom.

Implementation of home symptom and exposure screening

- There are several implementation options, each with benefits and challenges. Implementing a daily reminder system for home screening, such as a text message or through an online screening application, can support families and staff to review the symptom list each day before leaving for school and confirm that they do not have symptoms of COVID-19 and have not had close contact with a known case. This is likely the easiest and most effective approach, but families or staff may not all have technology access to support this. For those who do not, a list of screening questions on paper can be provided for daily review at home. Schools do not need to monitor compliance with home screening.

Symptoms at School

- Identify an isolation room or area to separate anyone who exhibits 1 or more symptoms of COVID-19 while at school.

- Staff and students should self-monitor throughout the day for signs of illness; staff should observe students for signs or symptoms of illness to support students who are less able to self-monitor or less likely to self-report.

- Any students or staff exhibiting 1 or more symptoms should be required to wait in the previously identified isolation area until they can be transported home or to a healthcare facility, as soon as practicable.

- If a student is exhibiting 1 or more symptoms of COVID-19, staff should communicate with the parent/caregiver and refer to the student's health history form and/or emergency card.

- Unless the LHD recommends otherwise, there is no need to exclude asymptomatic contacts (students or staff) of the symptomatic individual from school until test results for the symptomatic individual are known.

Return to school after exclusion for symptoms at home or in school:

- Ensure that students, including students with disabilities, have access to instruction when out of class, as required by federal and state law.

- Testing of symptomatic students and staff can be conducted through local health care delivery

systems or other testing resources, as fits the context of the local health jurisdiction. Advise staff members and students with symptoms of COVID-19 infection not to return for in-person instruction until they have met CDPH criteria to discontinue home isolation for those with symptoms:

- o At least 24 hours have passed since resolution of fever without the use of fever-reducing medications; and
- o Other symptoms have improved; and
- o They have a negative test for SARS-CoV-2, OR a healthcare provider has provided documentation that the symptoms are typical of their underlying chronic condition (e.g., allergies or asthma) OR a healthcare provider has confirmed an alternative named diagnosis (e.g., Streptococcal pharyngitis, Coxsackie virus), OR at least 10 days have passed since symptom onset.

STAFF-TO-STAFF INTERACTIONS

- Ensuring staff maintain physical distancing of six feet from each other is critical to reducing transmission between adults.
- Ensure that all staff use face coverings in accordance with CDPH guidelines and Cal/OSHA standards.

- Support staff who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as telework, where appropriate, or teaching in a distance learning context.

- Conduct all staff meetings, professional development training and education, and other activities involving staff with physical distancing measures in place, outside, or virtually, where physical distancing is a challenge.

- Minimize the use of and congregation of adults in staff rooms, break rooms, and other settings. Try to provide space outside whenever possible.

LIMIT SHARING

- Consider suspending or modifying use of site resources that necessitate sharing or touching items. For example, consider suspending use of drinking fountains and instead encourage the use of reusable water bottles.

- Limit use and sharing of objects and equipment, items such as electronic devices, clothing, toys, games, and art supplies to the extent practicable, or limit use of supplies and equipment to one group of children at a time and clean between uses.

    o Cleaning shared objects between uses (for example with microfiber cloths or baby

wipes) can help to physically remove germs on surfaces.

- o Ensure adequate supplies to minimize sharing of high-touch materials.

- Keep each student's individual belongings separated and in individually labeled storage containers, cubbies or areas.

TRAIN ALL STAFF AND EDUCATE FAMILIES

- Train all staff and provide educational materials to families in the following safety actions:

  - o Proper use, removal, and washing of face coverings.

  - o Physical distancing guidelines and their importance.

  - o Symptoms screening practices.

  - o COVID-19 specific symptom identification.

  - o How COVID-19 is spread.

  - o Enhanced sanitation practices.

  - o The importance of staff and students not coming to work they have symptoms, or if they or someone they live with or they have

had close contact with has been diagnosed with COVID-19.

- o For staff, COVID-19 specific symptom identification and when to seek medical attention.

- o The employer's plan and procedures to follow when staff or students become sick at school.

- o The employer's plan and procedures to protect staff from COVID-19 illness.

Consider conducting the training and education virtually, or, if in-person, outdoors, and ensure a minimum of six-foot distancing is maintained.

MAINTAIN HEALTHY OPERATIONS

- Monitor staff absenteeism and have a roster of trained back-up staff where available.

- Monitor symptoms among your students and staff on school site to help isolate people with symptoms as soon as possible.

- Designate a staff liaison or liaisons to be responsible for responding to COVID-19 concerns. Other staff should know who the liaisons are and how to contact them. The liaison should be trained to coordinate the documentation and tracking of possible exposures, in order to notify local health officials, staff and

families in a prompt and responsible manner. This will support local health department contact tracing efforts.

- Maintain communication systems that allow staff and families to self-report symptoms and receive prompt notifications of exposures, exclusions, and closures, while maintaining confidentiality, as required by FERPA and state law related to privacy of educational records. Additional guidance can be found here.

- Consult with CDPH K-12 School Testing Guidance if routine testing is being considered by a LEA.

- Support students who are at higher risk for severe illness or who cannot safely distance from household contacts at higher risk, by providing options such as distance learning.

What to do if there is a Confirmed or Suspected Case of COVID-19 in a School

What measures should be taken when a student, teacher or staff member has symptoms, is a contact of someone infected, or is diagnosed with COVID-19?

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Table 2. Actions to take if there is a confirmed or suspected case of COVID-19 in a school

	Student or Staff with:	**Action**	**Communication with school community**
1.	COVID-19 symptoms (e.g., fever, cough, loss of taste or smell, difficulty breathing) Symptom screening: per CDC Symptom of COVID-19.	• Send home if at school. • Recommend testing (If positive, see #3, if negative, see #4). • School/classroom remain open.	• No action needed.
2.	Close contact (†) with a confirmed COVID-19 case.	• Send home if at school. • Exclude from school for 10 days from last exposure, per CDPH quarantine recommendations. • Recommend testing 5-7 days from last exposure (but will not shorten 10-day exclusion if negative). • School/classroom remain open.	• Consider school community notification of a known exposure. No action needed if exposure did not happen in school setting.

3.	Confirmed COVID-19 case infection.	• Notify the LHD. • Exclude from school for 10 days from symptom onset date or, if asymptomatic, for 10 days from specimen collection date. • Identify school contacts (†), inform the LHD of identified contacts, and exclude contacts (possibly the entire stable group (††)) from school for 10 days after the last date the case was present at school while infectious. • Recommend testing asymptomatic contacts 5-7 days from last exposure and immediate testing of symptomatic contacts (negative test results will not shorten 10-day exclusion).	• School community notification of a known case. • Notification of persons with Potential exposure if case was present in school while infectious

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		• Disinfection and cleaning of classroom and primary spaces where case spent significant time. • School remains open.	
4.	Symptomatic person tests negative or a healthcare provider has provided documentation that the symptoms are typical of their underlying chronic condition.	• May return to school after 24 hours have passed without fever and symptoms have started improving. • School/classroom remain open.	• Consider school community notification if prior awareness of testing.

(†) A contact is defined as a person who is within 6 feet from a case for more than 15 minutes cumulative within a 24-hour period, regardless of face coverings. In some school situations, it may be difficult to determine whether individuals have met this criterion and an entire stable group, classroom, or other group may need to be considered exposed, particularly if people have spent time together indoors.

(††) See Stable Group Guidance for definition of a stable group. In some situations, (e.g., when seating charts are used, face covering is well adhered to, and teachers or staff have observed students adequately throughout the day), contact tracing and investigation may be able to determine more precisely whether each stable group member has been exposed. In this situation, those who were not close contacts could continue with in-person instruction.

CONFIRMED COVID-19 CASE

Although the LHD may know of a confirmed or probable case of COVID-19 in a student or staff member before the school does, it is possible that the school may be made aware of a case before the LHD via a parent or staff member report.

The following are the interim COVID-19 case definitions from the Council of State and Territorial Epidemiologists'.

Confirmed case: Meets confirmatory laboratory evidence (detection of SARS-CoV-2 RNA in a clinical or autopsy specimen using a molecular amplification test).

Probable case: Meets clinical criteria AND epidemiologic linkage(‡) with no confirmatory lab testing performed for SARS-CoV-2; OR meets presumptive laboratory evidence (detection of SARS-CoV-2 by antigen test in a respiratory specimen); OR meets vital records criteria with no confirmatory laboratory evidence for SARS-CoV-2.

(‡) Epidemiologically-linked cases include persons with close contact with a confirmed or probable case of COVID-19 disease; OR a member of a risk stable group as defined by public health authorities during an outbreak. This includes persons with identifiable connections to each other such as sharing a defined physical space e.g., in an office, facility section or gathering, indicating a higher likelihood of linked spread of disease than sporadic community incidence.

Local Health Department Actions

1. Interview the case to identify the infectious period and whether case was infections while at school; identify household and community close contacts, particularly any close contacts at school.

2. It may be necessary to consider the entire class or members of the case's stable group exposed, as it can be challenging to determine who may have had contact with the case within 6 feet for at least 15 cumulative minutes in a 24-hour period. In some situations, case investigations may be able to determine individual members of a stable group are close contacts, and allow those who

are not identified as close contacts to continue in-person instruction.

3. Notify the school COVID-19 coordinator or point person at the school that a case of COVID-19 in a student or staff member has been reported and provide guidance to identify and generate a line list of close contacts at the school.

4. Notify all close contacts at the school and instruct them to follow CDPH COVID-19 Quarantine Guidance . (or follow LHO orders, if relevant and/or more stringent).

5. Recommend that all close contacts be tested; symptomatic contacts should be prioritized for immediate testing, and asymptomatic contacts should be recommended to be tested 5-7 days from last exposure.

6. Contacts who test negative must still complete the required quarantine as defined in the CDPH guidance.

7. Contacts who test positive are required to isolate until at least 10 days have passed since symptom onset; and at least 24 hours have passed since resolution of fever without the use of fever-reducing medications; and other symptoms have improved. If asymptomatic, cases should be isolated for 10 days after the specimen collection date of their positive test.

8. Investigate COVID-19 cases in school students and staff to determine if in-school transmission likely occurred and whether any school-related factors could have contributed to risk of infection. Assist schools to update protocols as needed to prevent additional cases.

School Actions

1. Schools must adhere to required reporting requirements and notify, as indicated, the LHD of any newly reported case of COVID-19 in a student or staff member if the LHD has not yet contacted them about the case.

2. If the case is present at school at the time the school is notified, the case must go home and be excluded from school for at least 10 days from symptom onset date or, if asymptomatic, 10 days from the date the specimen was collected for the positive test.

3. Send a notice, developed in collaboration with the LHD, to parents and staff to inform them that a case of COVID-19 in a student or staff member has been reported and that the school will work with the LHD to notify exposed people. (see sample notification #1 in Appendix 2).

4. Arrange for cleaning and disinfection of the classroom and primary spaces where case spent significant time (see Cleaning and Disinfection

above for recommendations). This does not need to be done until students and staff in the area have left for the day.

5. Implement online/distance learning for student cases if they are well enough to participate.

School closure determinations should be made in consultation with the LHO according to the section "School Closure Determinations." A school with confirmed cases and even a small cluster of COVID-19 cases can remain open for in-person education as long as contact tracing identifies all school contacts for exclusion and testing in a timely manner, any small cluster is investigated and controlled rapidly, and the LHO agrees that the school can remain open.

MEASURES FOR WHEN A CLUSTER OR OUTBREAK IS BEING INVESTIGATED AT A SCHOOL

When either a school or LHD is aware that an outbreak may be underway, the LHD should investigate, in collaboration with the school, to determine whether these cases had a common exposure at school (e.g., a common class or staff member, bus ride, or other common exposures outside of school).

CDPH defines a school outbreak as 3 or more confirmed or probable cases of staff or students occurring within a 14-day period who are epidemiologically-linked in the school, are from different households and are not contacts of each other in any other investigation cases (e.g., transmission likely occurred in the school setting).

The objectives of a school outbreak investigation are to identify and isolate all cases and to identify, quarantine, and test contacts to prevent further transmission of COVID-19 at the school. In addition, the investigation will attempt to ascertain whether the cases had a common exposure at school (e.g., a common class or teacher, bus ride, or other common exposures in the school setting). The investigation may also reveal common exposures outside of the school setting.

As noted above, an outbreak investigation is also an opportunity to understand the circumstances that may have allowed for transmission in the school setting. It is recommended that investigations determine whether there is adherence to key mitigation strategies to prevent school transmission. If gaps are identified, schools should take steps to strengthen strategies to prevent future outbreaks.

Local Health Department Actions

1. Review interviews (or re-interview as needed) of clustered cases to identify common exposures and determine whether the cluster suggests an outbreak with transmission at the school. If data suggest an outbreak, then notify the school about starting an investigation.

2. Provide the school with guidance on identifying and creating a line list of all school cases and contacts, including illness onset date, symptoms, date tested, test results, etc. (see sample data collection notification in Appendix 2).

3. Consult with CDPH as needed for technical assistance, testing, and other resources.

4. Form an outbreak investigation team with a lead investigator and including one or more school staff members to assist with the investigation.

5. Identify all potential exposures and close contacts and implement testing of contacts, prioritizing symptomatic contacts for testing.

6. Testing may be recommended for those who were not identified as close contacts but could potentially have been exposed; the fastest pathway to get test results rapidly should be used.

7. All symptomatic contacts should be considered probable cases and be interviewed to identify prioritized close contacts and exposures while awaiting their test results.

8. Implement isolation of all cases and symptomatic contacts and quarantine of all asymptomatic contacts of confirmed and probable cases.

9. Investigate to determine if in-school transmission likely occurred and whether any school-related factors could have contributed to risk of transmission. Assist schools to update and strengthen protocols as needed to prevent additional cases.

10. Determine, in collaboration with the school, whether the school meets closure criteria. See School Closure Determinations (page 36).

11. Determine, in collaboration with the school, when the school should be closed for 14 days even if the conditions outlined in School Closure Determinations below have not been reached. This may be when: 1) the investigation shows that cases or symptomatic students or staff members continue to be identified and school-based transmission of SARS-CoV2 is likely ongoing despite implementation of prevention and control measures; or 2) other local epidemiologic data support school closure.

School Actions

1. Notify parents/guardians and school staff of a cluster/outbreak investigation related to the school and encourage them to follow public health recommendations (see sample notification #2 in Appendix 3).

2. Identify, as part of the CSP, one or more school staff member who can liaise with the LHD regarding the cluster/outbreak investigation by confirming which classes and stable groups included confirmed cases or symptomatic students and staff members, and if recent events or gatherings involved any cases or symptomatic persons.

3. Identify absenteeism among those in affected classes or stable groups, and coordinate with the LHD to contact these absentees to screen for symptoms of COVID-19 if they were exposed to a case during the cases infectious period.

4. Coordinate with the LHD to share a line list of cases and contacts with dates present at or absent from school.

5. Arrange for cleaning and disinfection of classrooms or other areas where cases or symptomatic students or staff members spend significant time.

6. Coordinate with the LHD on notifications to the school community, including specific notifications of stable groups or classrooms regarding their exclusion status and instructions.

7. Coordinate with the LHD on whether and when the school should be closed and reopened.

8. Notify the school community if the school is to be closed for 14 days due to widespread and/or ongoing transmission of SARS-CoV2 at the school or in the general community, and repeat recommendations for prevention and control measures (see sample notification #3 in Appendix 2).

9. Implement online/distance teaching and learning during school closure.

10. Arrange for cleaning and disinfection of entire school before reopening in the case of closure.

School Closure Determinations

What are the criteria for closing a school to in-person learning?

Individual school closure, in which all students and staff are not on campus, is recommended based on the number of cases and stable groups impacted, which suggest that active in-school transmission is occurring. Closure should be done in consultation with the LHO. Situations that may indicate the need for school closure:

- Within a 14-day period, an outbreak has occurred in 25% or more stable groups in the school.

- Within a 14-day period, at least three outbreaks have occurred in the school AND more than 5% of the school population is infected.

- The LHO may also determine school closure is warranted for other reasons, including results from public health investigation or other local epidemiological data.

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Length of closure: 14 days, or according to a decision made in consultation with the LHO.

The State Safe Schools for All Technical Assistance teams (TA teams), comprised of experts across multiple state agencies, will be available to assist schools with disease investigation for those with outbreaks that cannot find resources to investigate the outbreaks. The TA teams will also be available to help schools that close in order to identify and address any remediable safety issues.

If a school is closed, when may it reopen?

Schools may typically reopen after 14 days and if the following have occurred:

- Cleaning and disinfection
- Public health investigation
- Consultation with the LHD

What are the criteria for closing a LEA?

A school district should close if 25% or more of schools in a district have closed due to COVID-19 within a 14-day period and in consultation with the LHD.

If a LEA is closed, when may it reopen?

LEAs may typically reopen after 14 days, in consultation with the LHD.

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K-12 School Testing

OVERVIEW

Used in conjunction with other mitigation strategies, testing for SARS-CoV-2 provides an additional tool to support safe and successful K-12 in-person instruction. Testing can allow for early identification of cases and exclusion from school to prevent transmission. However, it should not be used as a stand-alone approach to prevent in-school transmission. A negative test provides information only for the moment in time when the sample is collected. Individuals can become infectious shortly after having a negative test, so it is important to maintain all other mitigation strategies even if a recent negative test has been documented.

There are several circumstances under which a student or staff member might undergo testing. Below, we outline these circumstances and considerations for testing implementation in K-12 schools.

DEFINITIONS

Symptomatic testing: This testing is used for individuals with symptoms of COVID-19, either at home or at school. In this situation, the school guidance requires that these individuals stay home and isolate in case they are infectious. The Guidance includes the possibility of return to school in the case of a negative test for SARS-CoV-2 and 24 hours after fever is resolved and symptoms are improving.

Response testing: This testing is used to identify positive individuals once a case has been identified in a given stable group. Response-based testing can be provided for symptomatic individuals or for asymptomatic individuals with known or suspected exposure to an individual infected with SARS-CoV-2.

Asymptomatic testing: This testing can be used for surveillance, usually at a cadence of every 2 weeks or less frequently, to understand whether schools have higher or lower rates of COVID19 rates than the community, to guide decisions about safety for schools and school administrators, and to inform LHDs about district level in-school rates. Asymptomatic testing can also be used for screening, usually at a higher cadence (weekly or twice weekly) than surveillance testing, to identify asymptomatic or pre-symptomatic cases, in order to exclude cases that might otherwise contribute to in-school transmission. Screening testing is indicated for situations associated with higher risk (higher community transmission, individuals at higher risk of transmission (e.g., adults and high school students transmit more effectively than elementary aged students).

TESTING STRATEGY APPROACH

Asymptomatic testing considerations

The science regarding the extent to which asymptomatic testing will achieve the goal of safe and successful schools is still under development. Empirically, schools that have successfully implemented the core mitigation strategies outlined in the School Guidance are operating safely,

with limited or no in-school transmission, under a range of asymptomatic testing approaches. The approaches range from no additional asymptomatic testing, to testing a sample of staff and students monthly, to testing all students and staff every other week. Modeling studies show that masking alone and cohorting alone can decrease symptomatic infections more than weekly testing of students and school staff. Taken together, these data suggest that a range of potential testing approaches can be considered for implementation as part of a comprehensive safety strategy.

The state of California has put into place support for the testing cadences in Table 3, through supplemental testing supplies, shipment, laboratory capacity, enrollment and reporting technology, training, and assistance with insurance reimbursement.

The increased levels of testing in the higher Tiers in Table 3 reflect the higher likelihood that someone in the school community might be infected due to higher levels of circulating virus in the surrounding community.

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Table 3. Testing Cadences with Support from the State of California for K-12 schools

	Yellow CR <1.0* TP<2%	**Orange CR 1-3.9* TP 2-4.9%**	**Red CR 4-7* TP 5-8%**	**Purple CR >7-13.9* TP >8%**	**CR >14***
Staff	Symptomatic and response testing.	Symptomatic and response testing.	Symptomatic and response testing + every 2 weeks asymptomatic testing.	Symptomatic and response testing + every 2 weeks asymptomatic testing.	Symptomatic and response testing + weekly asymptomatic (PCR or twice weekly antigen testing)**.
Students K-12	Symptomatic and response testing.	Symptomatic and response testing.	Symptomatic and response testing + every 2 weeks asymptomatic testing.	Symptomatic and response testing + every 2 weeks asymptomatic testing.	Symptomatic and response testing + weekly asymptomatic (PCR or twice weekly antigen testing)**.

TP = test positivity

** The case rates above are adjusted case rates.*

*** Weekly asymptomatic testing assumes the use of a PCR test. If antigen testing is used, testing should be at a twice weekly cadence.*

Students or staff who have tested positive for active infection with SARS-CoV-2 virus within the last 90 days are exempt from asymptomatic testing. Any school currently open is subject to the minimum testing requirement standards established by Cal/OSHA. These standards include response testing for exposed cases and outbreak testing for everyone weekly until no longer considered an outbreak. Please refer to Cal/OSHA guidance for complete details.

Vaccines for K-12 Schools

CDPH strongly recommends that all persons eligible to receive COVID-19 vaccines receive them at the first opportunity. Currently, people under 16 are not eligible for the vaccine since trials for that group are still underway.

In addition to vaccines required for school entry, CDPH strongly recommends that all students and staff be immunized each autumn against influenza unless contraindicated by personal medical conditions, to help:

- Protect the school community.
- Reduce demands on health care facilities.
- Decrease illnesses that cannot be readily distinguished from COVID-19 and would therefore trigger extensive measures from the school and public health authorities.

Because vaccine implementation for schools is rapidly evolving, we are providing a separate vaccine guidance document that will be available on the Safe Schools for All Hub here.

Appendix 1: Resources

SCHOOL RESOURCE LINKS

- Safe Schools for All Hub
- Testing Guidance

Appendix 2: Sample Notifications

SCHOOL EXPOSURE TO A CASE OF COVID-19 NOTIFICATION

K-12 SCHOOL NAME/LETTERHEAD

From School Principal (or Designee)

Date

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Dear Parents/Guardians,

We would like to inform you that we have been notified about a confirmed case of COVID-19 (Coronavirus Disease 2019) in a member of our school community. The individual who tested positive (the "case") was last on school premises on [DATE]. All school areas where the case spent time will be cleaned and disinfected before they are in use again.

Our school is working with the [LOCAL HEALTH DEPARTMENT] to follow up with the case and will reach out to all persons who are identified as having had close contact with the case to recommend home quarantine and COVID-19 testing. If you or your child are not contacted, it means that you or your child were not identified as exposed to the case.

Please remind your child to use their face covering, stay at least 6 feet from other people, and wash their hands often with soap and water for at least 20 seconds.

Symptoms of COVID-19 may appear 2-14 days after exposure to the virus and include:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue

- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Anyone with COVID-19 symptoms should be tested. However, many infected people do not develop symptoms, which is why it is recommended that exposed people be tested whether they have symptoms or not.

Ensuring the health and safety of our students, teachers, and staff members is of the utmost importance to us. If you have any questions or concerns, please contact [CONTACT NAME] at XXX-XXX-XXXX.

Sincerely,

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COVID-19 SCHOOL OUTBREAK NOTIFICATION

TK-12 SCHOOL NAME/LETTERHEAD

From School Principal (or Designee)

Date

Dear Parents/Guardians, Teachers, and Staff Members,

We would like to inform you that we are working with the [LOCAL HEALTH DEPARTMENT] on their investigation of a COVID-19 outbreak in our school community. Our school is working with the [LOCAL HEALTH DEPARTMENT] to follow up with all cases and symptomatic contacts to identify all exposed persons and recommend home quarantine and testing. If you or your child are not contacted, it means that you or your child were not exposed to either a case or a symptomatic contact.

If you are a parent/guardian, please remind your child to use their face covering, stay at least 6 feet from other people, and wash their hands often with soap and water for at least 20 seconds.

Symptoms of COVID-19 may appear 2-14 days after exposure to the virus and include:

- Fever or chills
- Cough

- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Anyone with COVID-19 symptoms should be tested. However, many infected people do not develop symptoms, which is why it is recommended that exposed people be tested whether they have symptoms or not.

Ensuring the health and safety of our students, teachers, and staff members is of the utmost importance to us. If you have any questions or concerns, please contact [CONTACT NAME] at XXX-XXX-XXXX.

Sincerely,

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SCHOOL CLOSURE DUE TO COVID-19 NOTIFICATION

TK-12 SCHOOL NAME/LETTERHEAD

From School Principal (or Designee)

Date

Dear Parents/Guardians, Teachers, and Staff Members,

We are informing you that we are closing our school, starting on [DATE] due to the ongoing COVID-19 outbreak and likely continuing transmission at our school. In consultation with the [LOCAL HEALTH OFFICER], we have been advised that the school should be closed for 14 days to prevent further transmission of COVID-19 and to clean and disinfect the school before reopening on [DATE].

During school closure, the school will switch to online teaching to continue our classes; please see attached information sheet on how students can sign in to continue their schoolwork online. The [LOCAL HEALTH DEPARTMENT] will also continue to follow-up with cases and contacts during school closure to ensure isolation and quarantine and testing.

If upon school reopening, your child is feeling ill or having a fever or symptoms of COVID-19, even if symptoms are very minor, please do not send your child to school and consider getting your ill child tested for COVID-19. If your

child is well without any symptoms, please remind your child before going back to school to use their face covering, stay at least 6 feet from other people, and wash their hands often with soap and water for at least 20 seconds. School staff should call in sick and stay home if having a fever or symptoms of COVID-19 and consider getting tested.

Symptoms of COVID-19 may appear 2-14 days after exposure to the virus and include:

- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Ensuring the health and safety of our students, teachers, and staff members is of the utmost importance to us. If you have any questions or concerns, please contact [CONTACT NAME] at XXX-XXX-XXXX.

Sincerely,

Appendix 3: Public Health Directive

REPORTING DETAILS OF POSITIVE CASES

Required COVID-19 Case Reporting By Schools

January 14, 2021

Following school closures that occurred in spring 2020 in response to the COVID-19 pandemic, the California Department of Public Health ("CDPH") developed the "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year" (July 17, 2020) to support school communities as they decided when and how to implement in-person instruction for the 2020-2021 school year. Public and private K-12 schools throughout the state are currently in various stages of instruction including distance learning, in-person learning, and hybrid instruction based on local conditions.

New evidence and data about COVID-19 transmission coupled with the experiences of schools both nationally and internationally demonstrates that schools, particularly

elementary schools, can operate in-person instruction safely with the correct safety protocols in place. Concurrently with this directive, CDPH issued updated, consolidated guidance for K-12 schools (including public, private, and charter) to support school re-openings and safe implementation of in-person instruction for students and staff.

Under current guidance, schools that have already reopened are permitted to continue offering in-person instruction, and additional schools are expected to reopen under the forthcoming K-12 school guidance. To be equipped to prevent and mitigate ongoing community COVID-19 transmission, a comprehensive and coordinated approach for the secure sharing of vital data and information regarding COVID-19 infections among school employees and students is necessary, especially in light of current epidemiological conditions.

The sharing of identified case information data with public health professionals is therefore necessary to ensure that state and local public health experts can respond to confirmed cases of COVID-19 who have been present at a school site, to track and understand the extent of disease transmission within the state, and to support communities with appropriate prevention strategies and support. Accordingly, to monitor and prevent the spread of COVID-19, it is necessary for CDPH and local health jurisdictions to have accurate information about COVID-19 infections among school employees and students. Specifically, the prompt, secure, and confidential sharing of information about individuals within the school community who have tested positive for COVID-19 is

critical to ensure that public health authorities can rapidly respond by:

1. Instituting necessary case investigation and contact tracing;

2. Focusing public health resources to effectively provide comprehensive support to the affected schools related to further investigation, mitigation strategies, and operational plans;

3. Assessing and monitoring the practices and activities that may have led to the infection or transmission of COVID-19;

4. Taking appropriate measures to protect the health of both the school community and population-at-large; and

5. Ensuring that CDPH and local health jurisdictions have the information necessary to accurately assess the impact of school reopening on COVID-19 transmission and case rates to effectively update operative public health guidance and directives as necessary.

Schools are authorized under the Family Educational Rights and Privacy Act (FERPA) to disclose personally identifiable information without parental consent to local health departments regarding COVID-19 testing and cases. (20 USC § 1232g(b)(1)(I).) In response to the COVID-19 pandemic, California has been under a State

of Emergency since March 4, 2020. California continues to see the dire effects of this pandemic through limited ICU capacities and new cases and deaths each day. The COVID-19 pandemic poses an extreme threat to the health and safety of all Californians. Even with protocols in place to mitigate the transmission of COVID-19, the presence of an individual who has tested positive of COVID-19 on a K-12 public or private school campus is an emergency that poses a risk to health or safety of students and employees present on the campus. Reporting to the local health officer the presence of a positive case of COVID-19 in an individual who is or has been present on a K-12 public or private school campus is necessary to protect the health and safety of students and employees present on the campus. California law (17 C.C.R. section 2508) also requires anyone in charge of a K-12 public or private school kindergarten to report at once to the local health officer the presence or suspected presence of any of the communicable disease, which includes COVID-19.

Accordingly:

- Effective immediately, every local educational agency (school district, county office of education, and charter school) and private school in California shall notify its local health officer of any known case of COVID-19 among any student or employee who was present on a K-12 public or private school campus within the 10 days preceding a positive test for COVID-19. Specifically, the local educational agency or private school shall report the following information:

- o The full name, address, telephone number, and date of birth of the individual who tested positive;

- o The date the individual tested positive, the school(s) at which the individual was present on-site within the 10 days preceding the positive test, and the date the individual was last on-site at any relevant school(s); and

- o The full name, address, and telephone number of the person making the report.

- This information shall be reported to the local health officer by telephone within twenty-four hours from the time an individual within the local educational agency or private school is first made aware of a new case.

- This reporting shall continue until this directive is modified or rescinded.

Information reported to the local health officer pursuant to this directive shall not be disclosed except to (1) the California Department of Public Health; (2) to the extent deemed necessary by the local health officer for an investigation to determine the source of infection and to prevent the spread of COVID-19, including with health officers in other jurisdictions as necessary to monitor, investigate, prevent, and/or control the spread of COVID-19; (3) if required by state or federal law; or (4) with the written consent of the individual to whom the

information pertains or the legal representative of the individual.

This reporting does not replace or supersede any other statutory or regulatory requirements that require reporting of COVID-19 cases and/or outbreaks to other entities or institutions, such as Cal/OSHA.

Appendix 4: Public Health Directive

REPORTING DETAILS OF IN-PERSON INSTRUCTION

COVID-19 School Reopening Status Reporting

January 14, 2021

Following school closures that occurred in spring 2020 in response to the COVID-19 pandemic, the California Department of Public Health (CDPH) developed the "COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year" (July 17, 2020) to support school communities as they decided when and how to implement in-person instruction for the 2020-2021 school year. Schools throughout the state are currently in various stages of instruction including distance learning, in-person learning, and hybrid instruction based on local conditions.

New evidence and data about COVID-19 transmission and experience nationally and internationally demonstrate that schools, particularly elementary schools, can operate

safely for in-person instruction with the correct safety protocols in place. Concurrently with this directive, CDPH issued updated, consolidated guidance for public and private K-12 schools to support school re-openings and safe implementation of in-person instruction for students and staff.

Under the guidance, schools that have already reopened are permitted to continue offering in-person instruction, and additional schools will reopen through the early spring. To be equipped to prevent and mitigate ongoing community COVID-19 transmission, it is necessary for CDPH and local health jurisdictions to have accurate information about which school sites are serving students in-person and to which degree such in-person services are being provided, especially in light of evolving epidemiological conditions.

This information will assist public health authorities maintain awareness of possible locations where case transmission may occur and can rapidly respond to any confirmed positive cases of individuals who have been on-site at schools offering in-person instruction and services. It is also necessary to focus public health resources to support schools, including COVID-19 testing support, contact tracing, and technical assistance related to mitigation strategies and operational plans, to make the most efficient and effective use of those resources. Finally, this information will assist CDPH and local health jurisdictions to accurately assess the impact of school reopening on COVID-19 and update operative public health guidance and directives as necessary.

Accordingly:

- Beginning January 25, 2021, every local educational agency (school district, county office of education, and charter school) and private school in California shall notify the California Department of Public Health whether it is serving students in-person. Specifically, the local educational agency or private school shall report the following information:

    - In-person instruction is provided full-time, including whether provided for all grades served by the local educational agency or private school or only certain grade spans.

    - In-person instruction is provided only part-time (hybrid model), including whether provided for all grades served by the local educational agency or private school or only certain grade spans.

    - In-person instruction and services are provided only pursuant to the Guidance Related to Cohorts issued by the California Department of Public Health.

    - No in-person instruction and services are provided (distance learning only).

- This reporting shall continue every other Monday (or the Tuesday immediately following, if the Monday is a state holiday) until this directive is modified or rescinded.

- This information shall be reported via a web form that will be made available by the California Department of Public Health.

- The California Department of Public Health will provide this information to local health officers and, once the information is processed, will make this information publicly available on the Safe Schools For All Hub website.