



September 21, 2021

VIA EMAIL & USPS

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**BOARD OF EDUCATION OF
THE CITY OF PIEDMONT**

Cory Smegal, Board President
Randall Booker, PUSD Superintendent
760 Magnolia Avenue
Piedmont, CA 94611

**RE: Board of Education Proposed Resolution Requiring
COVID-19 Vaccinations for Eligible Students**

Dear Superintendent Booker, and the Piedmont Board of Education:

This office has been contacted by parents within the Piedmont Unified School District (“PUSD”) regarding an apparent intent to implement a COVID-19 vaccination requirement at elementary and secondary schools in Piedmont. This letter is to inform you that your stated intent for the Board of Education of the City of Piedmont (“Board”) to take a vote on September 22, 2021 to pass a resolution to mandate COVID-19 shot for all students 12 years and older so that they might participate in in-person learning in (hereinafter “the Resolution”) is illegal, unconstitutional and must be abandoned. The Board does not have legal – express or implied – authority to add new immunizations to the K-12 schedule, let alone the currently-available COVID-19 vaccines, and must issue a statement specifically informing PUSD families of this, as well as of their right to choose whether or not to receive any of the currently-available COVID-19 vaccines.

To the extent this office hears that the Board passes the Resolution, we will take swift and decisive legal action against it, as well as against every school, administrator, and teacher that willfully participates in and enforces the unlawful mandate.

COVID-19 Vaccines Are Not Listed on the Current K-12 Immunization Schedule.

California has a list of ten (10) childhood immunizations students are required to obtain at certain stages of their education in order to attend a private or public secondary



or elementary school, child care center, day nursery, nursery school, family day care home, or development center; this list does *not* include COVID-19 vaccines (see Cal. Health & Safety Code §§ 120335(a)(1)-(10)):

- (1) Diphtheria.
- (2) Hepatitis B.
- (3) Haemophilus influenzae type b.
- (4) Measles.
- (5) Mumps.
- (6) Pertussis (whooping cough).
- (7) Poliomyelitis.
- (8) Rubella.
- (9) Tetanus.
- (10) Varicella (chickenpox)

Under Subsection 120335(a)(11), the only authority that may add new shots to the list is the *California Department of Public Health* (“CDPH”). At this time, CDPH has not chosen to do so. As a result, the only immunizations required for students 12 years and older are those set forth, above.

PUSD Does Not Have Authority to Add Immunizations to the K-12 Schedule.

There is no California law that grants individual schools or school districts the authority to unilaterally require additional vaccines to the K-12 immunization schedule in order for students to enjoy an in-person education, an education guaranteed to these students under Section 5, Article IX of the California Constitution.¹ We presume this is why the Board failed to include any such authority (to reiterate: because none exists).

If New Vaccines Are Added to the Schedule, Medical and Personal Beliefs Exemptions Must Be Provided.

Even if *CDPH* did elect to add COVID-19 shots to the immunization schedule, Section 120338 requires that both medical and personal belief exemptions be allowed. Accordingly, any unilateral COVID-19 mandate that PUSD intends to impose on its students is not only illegal, unconstitutional, and invalid on its face, but particularly so without allowance for medical and personal belief exemptions as required by law.

¹ Section 5 of the California Constitution reads as follows: “Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established.”



COVID-19 Vaccines Cannot Be Mandated by *Any* Governmental Entity.

While neither CDPH nor our state legislature has mandated COVID-19 vaccines for K-12 school attendance, no authority can do so while these vaccines are still under emergency use authorization (“EUA”).² The Emergency Use Authorization statute, 21 U.S.C. 360bbb-3, explicitly states that anyone to whom an EUA product is administered must be informed of (1) “the option to accept or refuse administration of the product” and (2) the risks and benefits of it. See 21 U.S.C. 360bbb-3(e)(1)(A)(ii) (III).

Please note that, regardless of any *opinions* interpreting this provision to not mean that choice is required, these opinions contradict the plain, unambiguous, and ordinary language of the statute; undermine the plain, ordinary, and reasonable meaning of the provision; subvert four decades of interpretation and application of the statute prohibiting mandates and requiring choice (*see e.g. Doe #1 v. Rumsfeld* (2003) 297 F.Supp.2d 119); conflict with other provisions of the statute (e.g. 21 U.S.C. 360bbb-3(j)(1)); and are illogical, disingenuous, dangerous, and unethical.

Children Cannot Be Enrolled in Clinical Trials by *Any* Governmental Entity.

When a product is not yet licensed or approved by the FDA, it is considered “investigational.”³ This “investigational” status does not change, even if an EUA is granted.⁴ Per the FDA, an investigational drug can also be called an “experimental drug”⁵ and when an experimental drug is administered, it is the equivalent of entering the recipient into a clinical trial.

Federal laws explicitly prohibit a child from being enrolled in the clinical trial of an “investigational” or “experimental” product without the parents’ express consent and even then, only under certain conditions. First, a child can only be entered in a clinical trial with **express consent** from their parents **if there is a benefit and a minimal risk to the child.** 45 CFR 46.404, 45 CFR 46.408. Furthermore, if there is a *greater than*

² The FDA has not approved any of the COVID-19 shots currently available in the United States. On August 23, the FDA granted BioNTech Manufacturing GmbH’s Biologics Licensing Application to distribute the Comirnaty vaccine in the United States once certain conditions are met; however, the Comirnaty vaccine is not currently available in the United States and will not be until the supply of the Pfizer-BioNTech vaccine is first exhausted. See <https://www.fda.gov/media/151710/download>. The Pfizer-BioNTech vaccine is currently available only under an EUA, which the FDA extended also on August 23, 2021. See <https://www.fda.gov/media/150386/download>.

³ *COVID-19 Vaccine: Questions and Answers*, <https://www.niaid.nih.gov/diseases-conditions/covid-19-vaccine-faq> (“A vaccine available under emergency use authorization is still considered investigational.”) [as of September 13, 2021]

⁴ *Ibid.* (“A vaccine available under emergency use authorization is still considered investigational.”)

⁵ *Understanding the Regulatory Terminology of Potential Preventions and Treatment of COVID-19*, <https://www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventions-and-treatments-covid-19> [as of September 13, 2021]



minimal risk to the child, **there must first be a “direct benefit” to that specific child, and any risk must be “as favorable as” those presented by alternative approaches.** 45 CFR 46.405. Whereas, here, children have a 99.97% chance of surviving COVID-19 – yes, *even the Delta variant*; face serious threats of life-altering conditions such as myo- and pericarditis, blood clots, neuropathy, stroke, and even death *from the vaccine*; and have safe, alternative treatments available to them, this legal threshold cannot be met and these children cannot be forced to enroll in these medical trials, with or without their parents’ consent.

COVID-19 Vaccines Do Not Provide Protection to the Health and Safety of All Students and Staff in School Communities and Actually Expose Community Members to Significant Risks of Injury and Even Death.

The only ostensible authority the school district has to make any health mandate is to protect the health and safety of the school community. However, when it comes to the Pfizer BioNTech shot – a product that does not purport to stop the transmission of any disease – this is not a public health policy, but rather a direction to take *medicine* as a condition for in-person schooling, a right explicitly safeguarded by the California Constitution. Prescribing, or even promoting, medicine is not something that a school district, a school board or superintendent of schools can lawfully do. In fact, doing so exposes the Board and its affiliated schools *and their administrators* with not only civil but *criminal liability* for practicing medicine – which includes the rendering of medical advice – without a medical license. See Calif. *Penal Code*, § 2052. Note that penalties for unauthorized practice of medicine are quite serious in California, including up to six (6) years in jail, and fines of up to \$10,000.00.⁶

Indeed, the currently-available COVID-19 vaccines do ***not*** protect the health and safety of the PUSD community and actually expose its members – *especially* children 12 years and older who are specifically entrusted in its care – to serious risks of harm, including death:

1. They do not prevent transmission of SARS-CoV-2.
 - a. Every COVID-19 vaccine manufacturer’s materials state that the vaccine clinical trials’ endpoints were to *reduce hospitalization and*

⁶ Violation of P.C. § 2052 is a “wobbler” offense that can be tried as a felony or misdemeanor. When tried as a misdemeanor, penalties are up to one (1) year in county jail and/or a fine of up to one thousand dollars (\$1,000), and when tried a felony, one and a half (1.5), two (2) or three (3) years in jail, and/or a fine of up to ten thousand dollars (\$10,000). All that is in addition to any professional disciplinary action you may face if you are a licensed health care professional and are alleged to have violated the terms of your license



death by reducing symptoms. None of these vaccine products were analyzed for transmission or prevention of SARS-CoV-2 infection.

- b. The CDC has admitted that vaccinated persons can contract and transmit the currently predominant variant, Delta, at even higher viral loads than those who are not vaccinated, particularly those who have already naturally recovered from COVID-19.⁷
 - c. Since these shots do not prevent contraction or transmission, they are not traditional “vaccines” and are more akin to “medicine” used to reduce symptomology. PUSD, indeed no district, has ever before taken it upon itself to mandate *medicine* for its community that exposes children in its care to serious risks of harm (see No. 3, below), let alone medicine that has not been approved by the FDA and is still in clinical trials. This is because doing so is not within its legal authority and would violate its community members’ federal and California constitutional rights to direct their health and medical care, and also, specifically in California, even to die.
2. They create an undetectable risk of indiscriminate transmission of SARS-CoV-2 since vaccinated individuals can transmit the virus with the same viral loads as unvaccinated individuals without exhibiting symptoms. We believe PUSD already understands this, as it has mandated that everyone mask indoors, regardless of vaccination status.
 3. They cause life-threatening conditions in the children targeted by the mandate. It is unrefuted that the COVID-19 shots – *especially*, the Pfizer-BioNTech shot – cause myocarditis, pericarditis, and other life-threatening conditions that would otherwise not affect children of this age.⁸
 - a. Regardless of how “rare” this might be (which *is* in dispute), there is *zero* justification for exposing otherwise healthy children who have a *statistical zero* chance of dying from the virus to *any* risk, especially where the individuals they would presumably be protecting are able to protect themselves. (See No. 4, below).
 4. Those who need to protect themselves against severe COVID or death can and have received the vaccine, mask themselves, and distance. Requiring a COVID-19 vaccine, especially to students in middle and high school who are

⁷ <https://www.cdc.gov/media/releases/2021/s0730-mmwr-covid-19.html>

⁸ *SARS-CoV-2 mRNA Vaccination-Associated Myocarditis in Children Ages 12-17: A Stratified National Database Analysis*, September 8, 2021, <https://www.medrxiv.org/content/10.1101/2021.08.30.21262866v1>; *Boys more at risk from Pfizer jab side-effect than Covid, suggests study*, September 10, 2021 [<https://www.theguardian.com/world/2021/sep/10/boys-more-at-risk-from-pfizer-jab-side-effect-than-covid-suggests-study>]; VAERS, <https://vaers.hhs.gov> [all as of September 13, 2021]



at a higher risk of particular harms from the vaccine than they are from the disease, is an unethical and unscientific way to use children as a shield to protect segments of the population who are able to protect themselves by masking, distancing, and vaccinating themselves.

PUSD Will Be Liable for Any Harms Suffered as a Result of Any Mandate.

The Federal Public Readiness and Emergency Preparedness Act shields certain “covered entities” from liability caused by a “countermeasure” developed in response to a public health emergency.⁹ “Covered entities” includes countermeasures developers, manufacturers, distributors, and administrators; it does *not* include a school, school district, or its associated staff. As a result, PUSD and any school complying with the Resolution and mandating the experimental vaccines – *or even FDA-approved ones* – will be exposed to lawsuits and liability arising from any harms resulting therefrom. It is also a liability to vote to implement these policies, which are a clear violation of the rights of students and parents in the district and could result in immediate legal action. Simply voting to implement an unconstitutional and illegal measure under federal law can trigger a lawsuit asking for an injunction to implementation of the policy.

There are less than ten other districts *in the country* contemplating this kind of unconstitutional, illegal, and immoral mandate against children and their parents, and we cannot conceive of a reason why Piedmont would want to expose itself in this way and put the children in its district in harm’s way. ***Is it money?*** It certainly cannot be “health and safety” given all of the data we currently have at our disposal, including but not limited to the September 17, 2021 FDA Advisory Committee Hearing wherein the Committee “overwhelmingly rejected” the White House’s plan to give Pfizer shots to most Americans, citing “lack of safety data” and “doubting the value” of mass boosters, especially for children 16 years and up.¹⁰ To that end, **we intend to conduct rigorous, exhaustive discovery into any reason the Board might possibly have to mandate this illegal policy that has no basis in science, medicine, or the facts.**

To reiterate and be nothing but explicitly clear: PUSD lacks any authority to bypass existing California and federal law and impose an experimental vaccine upon, and/or compel the children entrusted in its care to enroll a clinical trial as a condition to attending school. If the Board chooses to move forward with and vote on

⁹ <https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx>

¹⁰ <https://www.youtube.com/watch?v=WFph7-6t34M&feature=youtu.be>



the Resolution, it must integrate these comments into the hearing minutes, as required by law and promised by the district.¹¹

Please confirm receipt of this letter and that these comments and concerns will be integrated into your discussion on the Resolution and your decision making.

We look forward to receiving confirmation of receipt of this letter, and notice that the Board has decided to reconsider and table the Resolution until further notice. To the extent PUSD fails to heed this warning, it will be met with swift legal action on behalf of these parents and face heavy fire in the courts of law and public opinion.

Very truly yours,

Nicole C. Pearson

Attorney for Children's Health Defense, CA Chapter

¹¹ See Citizen Input and Protocol for Responding, <https://www.piedmont.k12.ca.us/board-of-education/citizen-input/> [as of September 21, 2021]