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VIA EMAIL ONLY

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Norco-Corona Unified School District
2820 Clark Ave.
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Re: Enforcement of Mask Mandate

Dear Administrators:

As counsel for Let Them Breathe, we are writing to express support for the hundreds of Norco-Corona Unified School District students who have repeatedly removed their masks to peacefully protest the statewide K-12 school mask mandate. We stand with and are prepared to provide legal support for these and other students, who have chosen to exercise their constitutional rights to engage in peaceful protest by removing their facial coverings at school.

Let Them Breathe advocates for not only your students but all students and members of the public—including parents, teachers, school board members, government officials, and others—who want our schools to be governed by the rule of law, and sound public policy based on objective data.

We are disturbed by reports that some Norco-Corona Unified School District ("NCUSD") administrators are engaged in aggressive and demeaning enforcement policies, including bullying and harassment by administrators, in an effort to achieve full compliance with the California Department of Public Health's ("CDPH") school mask mandate. We are especially disturbed by Principal Amy Shainman's efforts to quash the fundamental First Amendment rights of students who chose to participate in a peaceful protest in opposition to CDPH's mask mandates after seeing video and photos of Governor Gavin Newsom and the mayors of Los

Angeles and San Francisco, among many other adults – including the famously immunocompromised Magic Johnson – unmasked and enjoying an NFL championship game at Los Angeles' SoFi Stadium (where masks are required).

"Peaceful protesting is an expressive activity involving speech protected by the First Amendment. Such expression, when undertaken in a public forum, receives heightened protection." (*Nat'l Council of Arab Americans v. City of New York* (2007) 478 F.Supp.2d 480, 487.) Despite Ms. Shainman's apparent beliefs to the contrary, this fundamental freedom of expression also applies to schoolchildren engaged in a peaceful protest at school, and that protest does not need to be "organized" or only occur on a certain day, at a certain time or in a certain location approved by administrators to qualify for constitutional protection.

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503, 506 [suspension of high school students who quietly and passively wore black arm bands in protest of Vietnam war violated constitutional rights to free speech].) "In order for […] school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." (*Id.* at 509.) Accordingly, NCUSD cannot prohibit a student from removing their mask as a means of peaceful protest simply because the act might create controversy or go against CDPH mandates. Unless the removal of a mask as a means of peaceful protest causes *material and substantial* interference with schoolwork or discipline, it cannot be prohibited under the constitution. (*Id*. at 511.)

On Monday, February 7, 2022, Ms. Shainman lectured a large group of students in a demeaning and condescending manner: "You guys think you are here because of the U.S. Constitution and you have a right," and inaccurately admonishing them that the "constitution is very clear about school protests." She continued, "Precedent law by the Supreme Court—because you guys are so sure you've got all the answers—[…] says that a school determines the manner, the time, the place of protest." She continued to state that the school administration would decide the "time, place and manner" of the students' exercise of their First Amendment rights, and the school had decided that the protests on that specific day were a "personal choice" that would result in truancy if students did not return to class within 30 minutes.

Not only are Ms. Shainman's statements legally inaccurate, but her blatant attempt to chill the students' free speech rights is an unconstitutional prior restraint. School authorities may not blanketly censor (i.e., exercise prior restraint over) student expression based upon content, as Ms. Shainman attempted to do on Monday. (*Lopez v. Tulare Joint Union High School Dist*. (1995) 34 Cal.App.4th 1302, 1320.)

"To withstand constitutional scrutiny, time, place and manner restrictions must be (1) content neutral, in that they target some quality other than substantive expression; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression.

Additionally, time, place and manner restrictions of speech in public fora are unconstitutional if they confer overly broad discretion on regulating officials." (*Nat'l Council of Arab Americans v. City of New York*, supra, 478 F. Supp.2d at 487-488.) While Ms. Shainman referenced a purported "time, place and manner restriction," enacted by the district or administrators we are not aware of any such formal or documented regulations applicable to Corona Intermediate School. If there are such regulations, please provide us with a copy. However, if, as we suspect, there are no relevant restrictions, but Ms. Shainman or the district intend to enact them, that must done only through proper channels, including a duly noticed board meeting that gives parents and students an opportunity to be heard.

Importantly, "to survive judicial review, a content based restriction on public forum speech must satisfy strict scrutiny." (*Nat'l Council of Arab Americans v. City of New York*, supra, 478 F.Supp.2d at 487.) A blanket restriction aimed at prohibiting students from protesting the K-12 mask mandate during school hours is a content-based exclusion and is therefore unlikely to survive strict scrutiny unless the district commits to providing students with an alternative means for expression of their opposition to the ongoing K-12 mask mandate. "For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1982) 460 U.S. 37, 45.)

While First Amendment freedoms may occasionally have to give way to other fundamental interests, such as the state's interest in providing a safe school environment, the fact that administrators may fear that a student or teacher who removes their mask in peaceful protest of CDPH mandates may be infected with COVID-19 does not justify prohibition of the protests. Simple "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression." (*Mahanoy Area Sch. Dist. v. B.L.* (2021) 141 S.Ct. 2038, 2048.)

"In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." (*Tinker v. Des Moines Indep. Cmty. Sch. Dist*., supra, 393 U.S. at 511.)

The K-12 mask mandate is not equivalent to the FAA's mask requirement applicable to airplanes.

During her lecture, Ms. Shainman attempted to equate school mask mandates with Federal Aviation Administration mask requirements applicable to passengers on commercial flights, seemingly suggesting the two requirements are equivalent, and openly belittling students who volunteered that they have (or have not) worn a mask on an airplane. Ms. Shainman's comparison is not equivalent to the K-12 mask mandate that is the subject of your students' protests. First, students obviously do not fly on an airplane five days a week, for more than six hours each day. Second, for the most part, students are not attempting to learn and socialize on

an airplane. Third, air travel is not a fundamental right under either the U.S. Constitution or California Constitution, whereas students do have a fundamental right to a free public education under the California Constitution. Furthermore, and finally, as the K-12 mask mandate is interfering with that right by negatively impacting some students' ability to learn and socialize—thereby affecting both their academics and mental health—the fact that some students may choose to wear a mask on an occasional flight is not relevant to a students' decision to protest the K-12 mask mandate.

Forcible removal, segregation or "disenrollment" of students violates California law.

While Education Code section 49403 requires NCUSD to "cooperate with the local health officer in measures necessary for the prevention and control of communicable diseases in schoolage children," there is nothing in that section that requires NCUSD to exclude a student from their classrooms and to segregate them in different areas throughout the school campus due to their refusal to wear a mask. Moreover, there are no applicable county health orders that require local schools to exclude children from in-person instruction if they are not wearing a mask. Thus, the school's decision to exclude a child from class and to force them to sit outside, away from their classmates, appears punitive.

All of these children are healthy young students. They were not ill and were not exhibiting any symptoms of COVID-19 or any other communicable disease when they removed their masks in class. The State of California's indoor mask mandate is unevenly enforced, at best, and set to expire in a few days, everywhere except schools and health care facilities. Moreover, millions of children throughout the nation and world currently attend school on a daily basis without being required to wear a facial covering. There is simply no evidence that any of these students' unmasked faces presented any danger to anyone anywhere near them.

Where there is no evidence that a child is infectious—that is, the child is not exhibiting symptoms, does not have a diagnosis of COVID-19, and has not had any known exposure to an infected person—a principal cannot validly determine the child to be a "clear and present danger" simply because they are not wearing a mask.

We further understand that the parents have been instructed to remove their students from campus unless they wear a face covering. While NCUSD may remind students to wear a mask inside the classroom, enforcement strategies that involve the involuntary removal or disenrollment of children from their regular classes or exclusion from school infringe on a student's fundamental right to education and violate California law, constraining the disciplinary powers of public school administrators.

California law is clear: "willfully def[ying] the valid authority of supervisors, teachers, administrators, school officials, or other school personnel … *shall not constitute grounds* for a pupil enrolled in kindergarten or any of grades 1 to 12, inclusive, *to be recommended for expulsion*." (Educ. Code, § 48900, subd. (k) [emphasis added].) This means children cannot be

removed or disenrolled from school for peaceably refusing to wear a mask.[1] Even in those instances where suspension may be a potential disciplinary measure, the school must first exhaust "other means of correction" before imposing suspension as a last resort. (Educ. Code, § 48900.5, subd. (a).)[2]

A child cannot be suspended unless the principal or superintendent has sufficient factual basis to determine that "the pupil's presence causes a danger to persons." (*Ibid.*) Where there is no evidence that a child is infectious—that is, the child is not exhibiting symptoms, does not have a diagnosis of COVID-19, and has not had any known exposure to an infected person—a principal or superintendent cannot validly determine the child to be a "danger" simply because they are not wearing a cloth mask.

Finally, no child can be suspended indefinitely. Any suspension must be "no more than five consecutive schooldays" (Educ. Code, § 48911, subd. (a)), and all suspensions cumulatively "shall not exceed 20 schooldays in any school year." (Educ. Code, § 48903, subd. (a).)

The state's mandate does not require schools to exclude students for refusing to wear a mask.

Section 120230 of the Health and Safety Code has been cited by some as authority for a school to exclude a child who fails to follow the CDPH mask mandate. This section is being misapplied; it provides only narrow authority for schools to exclude a child who is subject to an isolation or quarantine order duly issued by a county health officer.

Section 120230 reads in relevant part: "No … child *who resides where any contagious, infectious, or communicable disease exists or has recently existed, that is subject to strict isolation or quarantine* of contacts, shall be permitted by any superintendent, principal, or teacher of any … public or private school to attend the … school, except by the written permission of the health officer." (Emphasis added.)

Two things must exist before this section can apply: First, a "contagious, infectious, or communicable disease" must exist or have recently existed at the child's place of residence. Where a child has not received a diagnosis of COVID-19 and has not been exposed to the disease through a family member or close contact, this condition cannot be met. Second, the child must be subject to a "strict isolation or quarantine" order by the county health officer.[3] In

[1] Furthermore, a child may not be expelled from school without a full hearing before the governing board. (Educ. Code, § 48918.) Decisions by the governing board are appealable to the county board of education. (Educ. Code, § 48919.) A school official cannot simply call the sheriff to escort a child from campus.

[2] "Other means of correction" might include, among other things, "(1) A conference between school personnel, the pupil's parent or guardian, and the pupil"; "(2) Referrals to the school counselor, psychologist, social worker, child welfare attendance personnel, or other school support service personnel …"; or "(7) A positive behavior support approach with tiered interventions that occur during the schoolday on campus." (Educ. Code, § 48900.5, subd. (b).)

[3] "Strict isolation or quarantine" means a person is subject to an order by the county health officer not to leave his or her place of confinement: "A person subject to quarantine or strict isolation residing or in a quarantined building, house, structure, or other shelter, shall not go beyond the lot where the building, house, structure, or other shelter is

all the known instances where a school has excluded or threatened to exclude a child from campus for noncompliance with the mask mandate, neither of these conditions has been met.

Section 49451 of the Education Code likewise does not authorize school officials to send a healthy child home simply for refusing to wear a mask. Section 49451 provides that "whenever there is a *good reason to believe that the child is suffering from a recognized contagious or infectious disease*, he shall be sent home and shall not be permitted to return until the school authorities are satisfied that any contagious or infectious disease does not exist." (Educ. Code, § 49451.) A child's refusal to wear a mask does not establish "good reason to believe that the child is suffering from" COVID-19 or any other disease.

Article I, section 28, of the California Constitution sets forth "the inalienable right to attend campuses which are safe, secure and peaceful." CDPH, in a letter published on its website August 23, 2021, makes the misleading argument that this constitutional provision imposes a legal and moral imperative on schools to ensure compliance with the mask mandate.[4] This section, however, is part of a victim's rights initiative enacted by ballot measure in 2008 and pertains solely to a person's safety from the criminal acts of others. While we agree that schools must take reasonable measures to provide a safe environment for students, nothing in the California Constitution allows, much less requires, schools to bar a healthy student from attending class. And in any event, real-world data from the two years have failed to show any correlation between mask mandates for children and a decrease in the spread of COVID-19 in schools.

Truancy proceedings are not appropriate, warranted or legally justified.

We understand Ms. Shainman threatened protesting students with truancy if they did not return to class within 30 minutes on February 7, 2022. Children between the ages of 6 and 18 are subject to compulsory full-time education under California law. A student may be excluded from school under Education Code Section 48213, which authorizes schools to exclude students pursuant to Health & Safety Code Section 120230, based upon a determination that the student resides "where any contagious, infectious, or communicable disease exists or has recently existed," or who is subject to strict isolation or quarantine of contact. A student who is excluded pursuant to section 48213 is exempt from truancy proceedings because the absence would qualify as excused. (Ed. Code, § 48205.)

Similarly, students who are excluded pursuant to Section 48213 based upon a determination that their continued presence "constitute[s] a clear and present danger to the life, safety, or health of a pupil or school personnel," are also excused from attendance and exempt from truancy proceedings. (Ed. Code, § 48205.)

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situated, nor put himself or herself in immediate communication with any person not subject to quarantine, other than the physician, the health officer or persons authorized by the health officer." (Heath & Safety Code, § 120225.)

[4] https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Requirement-for-Universal-Masking-Indoors-at-K-12-Schools.aspx.

Therefore, pursuant to the Education Code, RUSD cannot lawfully determine that unmasked students should be excluded from the classroom because they are subject to isolation or quarantine for COVID-19 and/or constitute a "clear and present danger," while also taking the inimical position that the student was absent from school without a valid excuse and is subject to truancy proceedings.

Excluded students must be provided with an opportunity to complete and obtain credit for their schoolwork.

Moreover, a student who is absent because they are excused from attendance because they have been adjudged to "constitute a clear and present danger" under Section 48213 "shall be allowed to complete all assignments and tests missed during the absence that can be reasonably provided and, upon satisfactory completion within a reasonable period of time, shall be given full credit therefor. The teacher of the class from which a pupil is absent shall determine which tests and assignments shall be reasonably equivalent to, but not necessarily identical to, the tests and assignments that the pupil missed during the absence." (Ed. Code, § 48213(b).)

Conclusion.

Until such time as CDPH withdraws its K-12 mask mandate or a court declares it unlawful, we appreciate that masks are required in indoor settings of schools. But, for as long as the mandate exists, schools, including NCUSD, are under no obligation to enforce it by excluding children from in-person instruction, whether by means of expulsion, suspension, or forced enrollment in an independent study program. Schools must respectfully exempt students from mask requirements as provided in the CDPH guidance, without an onerous application process, and all exempt students should be free from all forms of harassment, discrimination, and retaliation.

If you would like assistance in protecting the rights of schoolchildren, please visit Let Them Breathe at https://www.letthembreathe.net/. However, if you continue to exclude students who choose to exercise their First Amendment rights of peaceful protest through unmasking or otherwise, we will pursue legal action on their behalf.

Very truly yours,

AANNESTAD ANDELIN & CORN LLP

Arie L. Spangler

cc: Members of the Board
Sharon McKeeman