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MEMORANDUM

ATTORNEY-CLIENT COMMUNICATION  
PRIVILEGED & CONFIDENTIAL

*By Email*

**DATE:** October 19, 2021

**TO:** Mark Campbell, Superintendent  
Calaveras Unified School District

**FROM:** Gabriela Flowers, Attorney

**RE:** Analysis of Liability Issues Related to Enforcement of COVID-19 Vaccination and Testing Guidance, Mandates, and Orders

**CLIENT/MATTER:**  
1650/611

**SUMMARY**

You have asked about the potential consequences of a school district adopting a policy or statement that a school district will not follow California Department of Public Health guidance and / or orders. A school district can adopt a policy like this, but it will have no legal effect whatsoever and is not recommended. Please note that school boards have no local authority to change or disagree with public health orders.

A school district's failure to follow Executive Orders or public health orders and directives related to COVID-19 exposes a school district to significant liability in the event District students or community members become infected with COVID-19. Even if no injuries occur, there may be other consequences such as loss of funding, administrative enforcement by various agencies, and other consequences. The primary ones of concern are:

- Tort liability against school district in the event of litigation over COVID-19 injury
  - Lack of insurance coverage in the event of litigation, especially if intentionally flouting the law causes injury
- Fines / penalties issued by Cal/OSHA and / or public health officials
- Potential criminal sanctions for failure to follow public health directives
- Potential loss of special funding tied to the pandemic or disaster relief
- Directing employees to violate state laws in the form of public health orders or guidance can result in significant liability to the District because the law prohibits a school district from terminating or disciplining an employee for refusing to violate state law.

The most damaging thing a school district can do is to go on record at a public school board meeting or elsewhere explicitly stating that the district will not follow or enforce the law. Schools that do not follow Executive Orders, public health orders, and public health guidance are likely to be targets of litigation.<sup>1</sup> Given that most or all school districts do not have insurance coverage for infectious diseases, the potential liability is very high.

## **1. Legal Weight of Orders and Directives**

### **A) Legal Weight of Executive Orders**

The California Emergency Services Act<sup>2</sup> (“ESA”) provides the Governor with the power to declare a state of emergency.<sup>3</sup> During a state of emergency, the Governor has broad authority to issue orders and regulations to carry out the ESA, and these orders and regulations have the force of law.<sup>4</sup> The ESA also provides for penalties, and any person violating orders issued under the ESA shall be guilty of a misdemeanor punishable by a fine of up to \$1,000 dollars and six months imprisonment. Because the State of California is currently in a state of emergency, Executive Orders have the force of law.

### **B) Legal Weight of State Public Health Directives**

The California Department of Public Health (“CDPH”) “may from time to time adopt and enforce regulations requiring strict or modified isolation, or quarantine, for any of the contagious, infectious, or communicable diseases, if in the opinion of the department the action is necessary for the protection of the public health.”<sup>5</sup> So CDPH guidance and orders carry the force of law. Most recently, the State Public Health Officer issued an order on August 11, 2021, which requires all asymptomatic unvaccinated or incompletely vaccinated individuals employed by public school districts undergo antigen or molecular COVID-19 testing at least once weekly. The order went into effect on August 12, 2021, and school districts must be in full compliance with the order by October 15, 2021.<sup>6</sup> This Order is issued pursuant to Health and Safety Code sections 120125, 120140, 120175, 120195, and 131080, and other applicable law.

### **C) Legal Weight of County Health Orders**

Local health officers have the power to issue orders to other governmental entities within their jurisdiction to take any action they deem necessary to prevent the spread of disease.<sup>7</sup>

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<sup>1</sup> We note that litigation would also require a plaintiff to demonstrate that infection occurred at school and that the infection was the result of a school’s negligence.

<sup>2</sup> Gov. Code, §§ 8550 – 8669.7.

<sup>3</sup> Gov. Code, §§ 8625 and 8558.

<sup>4</sup> Gov. Code §§ 8567, 8627, 8627.5.

<sup>5</sup> Health & Safety Code, § 120130(c).

<sup>6</sup> [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx?\\_cldee=aWRhbHRvbkBjc2JhLm9yZw%3d%3d&recipientid=contact-c722b59ddea7e8118110005056b02a09-a33638fb845541aa875e95e3ec7c7840&esid=91c5defb-07fb-eb11-8145-005056b02a09](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx?_cldee=aWRhbHRvbkBjc2JhLm9yZw%3d%3d&recipientid=contact-c722b59ddea7e8118110005056b02a09-a33638fb845541aa875e95e3ec7c7840&esid=91c5defb-07fb-eb11-8145-005056b02a09).

<sup>7</sup> Health & Safety Code, § 120175 et seq.; See Health & Safety Code, § 120175.5, which was a new law effective January 1, 2020, enacted by Assembly Bill 262 (2019).

Additionally, the sheriff or municipal chief of police are empowered to enforce the local health officer's orders.<sup>8</sup> While not directly stated in the law, due to the fact that law enforcement is empowered to carry them out, orders issued by the local health officer to prevent the spread of disease likely carry the force of law.

## **2. Testing and Vaccination Requirements as of October 15, 2021**

### **A. Public Health Order**

As of October 15, 2021, all school districts must verify the vaccination statuses of all its workers using the CDPH Guidance for Vaccine Records.<sup>9</sup> In the absence of knowledge to the contrary, a school may accept documentation presented by employees as valid.<sup>10</sup>

Workers who are not fully vaccinated, or for whom vaccine status is unknown or documentation is not provided, must be considered unvaccinated and undergo COVID-19 testing on at least a weekly basis. The Order includes additional specific testing requirements, including:

1. Unvaccinated, partially vaccinated, or workers who have received full doses of a vaccination within the last two weeks must be tested for COVID-19 at least once a week.
2. Workers may be tested with either antigen or molecular tests to satisfy this requirement. Any PCR (molecular) or antigen test used must either have Emergency Use Authorization by the U.S. Food and Drug Administration or be operating per the Laboratory Developed Test requirements established by the U.S. Centers for Medicare and Medicaid Services.
3. Unvaccinated or incompletely vaccinated workers must also observe all other infection control requirements and are not exempted from the testing requirement **even if they have a medical contraindication to vaccination, since they are still potentially able to spread the illness.**
4. Previous infection of COVID-19, from which the individual recovered **more than** ninety days earlier, or a previous positive antibody test for COVID-19, do not waive this requirement for testing.
5. Schools with workers required to undergo workplace diagnostic screening testing should have a plan in place for tracking test results and conducting workplace contact tracing. The results must be reported by the school district to the local public health departments.

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In addition, the violation of those orders is also a misdemeanor, punishable by a fine of up to \$1,000 and ninety days imprisonment.

<sup>8</sup> Gov. Code, §§ 26602 and 41601.

<sup>9</sup> <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Vaccine-Record-Guidelines-Standards.aspx>

<sup>10</sup> [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx?\\_cldee=aWRhbHRvbkBjc2JhLm9yZW%3d%3d&recipientid=contact-c722b59ddea7e8118110005056b02a09-a33638fb845541aa875e95e3ec7c7840&esid=91c5defb-07fb-eb11-8145-005056b02a09](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Order-of-the-State-Public-Health-Officer-Vaccine-Verification-for-Workers-in-Schools.aspx?_cldee=aWRhbHRvbkBjc2JhLm9yZW%3d%3d&recipientid=contact-c722b59ddea7e8118110005056b02a09-a33638fb845541aa875e95e3ec7c7840&esid=91c5defb-07fb-eb11-8145-005056b02a09)

## **B. Enforcement of Order**

The language of the Order is clear: it must be enforced by school districts. Therefore, we recommend against schools stating they will not enforce this rule or be lax in enforcement. The Order does not include an enforcement mechanism or manner to exclude employees who fail to comply with testing requirements. As a result, we recommend following disciplinary procedures already in place. Below are enforcement options available to districts:

### **1. Ask Employee to Take Unpaid Leave**

Prior to initiating or during the disciplinary process, the District can ask if the employee would be willing to go on unpaid leave to avoid disciplinary procedures. If the employee consents to unpaid leave to avoid discipline, then the district can avoid the cost and time associated with disciplinary procedures. This option would need to be tailored to the individual employee and would need to be flexible enough to permit the District to staff the position during the employee's absence. We recommend consulting legal counsel prior to carrying out this option.

### **2. Ensure Due Process and Follow Disciplinary Process**

Generally, due process is required prior to discipline which would result in an employee's paycheck or other employment benefits being taken away because they have a constitutional right to public employment. We recommend that prior to initiating suspension or dismissal charges, the district engage in progressive discipline with at least a written warning and a letter of reprimand sent to employees who refuse to comply with testing requirements. If an employee continues to refuse to comply with the required testing, then we recommend consulting with legal counsel regarding proposed charges of suspension or dismissal. We also recommend that you consult Board Policy, Administrative Regulations, and the terms of your Collective Bargaining Agreements to ensure the district is following required disciplinary procedures.

### **3. Unilaterally Place Employee on Immediate Unpaid Leave**

Although untested, there is an argument that failure to be vaccinated or submit to weekly testing is akin to a failure to hold a required credential and therefore the employee can be excluded from the workplace without pay. This argument is untested, and it is unclear on how a court would rule. This option carries significant risk and is likely unlawful.

## **3. Student and Staff Vaccination Requirements**

On October 1, 2021, California became the first state to announce plans to add the COVID-19 vaccine to the list of vaccinations required for in-person school attendance, which currently includes measles, mumps, and rubella.<sup>11</sup> However, the vaccination will only be required after it

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<sup>11</sup> <https://www.gov.ca.gov/2021/10/01/california-becomes-first-state-in-nation-to-announce-covid-19-vaccine-requirements-for-schools/>

receives full approval from the Food and Drug Administration (FDA) for middle and high school grades. After the vaccination receives full FDA approval of age groups within a certain grade span, the CDPH will consider the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians prior to implementation of same.

After that, the requirement will take effect at the start of the term following full approval of that grade span, either January 1st or July 1st, whichever comes first. Based on current information available, this requirement is expected to apply only to grades 7-12 **starting on July 1, 2022**. The Governor indicated that school staff would be required to be fully vaccinated against COVID-19 along the same time lime.

Local health jurisdictions and local education agencies are encouraged to implement requirements ahead of a statewide requirement based on their local circumstances. If you are interested in adopting such a policy prior to the state’s requirement, we recommend contacting legal counsel to discuss the process and other considerations.

#### **4. Potential Consequence: Tort Liability**

Through the California Government Claims Act (“Claims Act”),<sup>12</sup> a public agency is liable for the actions of its employees and agents.<sup>13</sup> The Claims Act applies when an individual alleges that a public entity, through an employee, independent contractor,<sup>14</sup> or dangerous condition of public property, has caused an injury. Generally speaking, a plaintiff must establish the following four basic elements to prove that a district was negligent:

- (1) The district owed the plaintiff a duty of care;
- (2) The district breached that duty;
- (3) The district’s breach caused the plaintiff’s injury; and
- (4) The plaintiff suffered damages as a result of that injury.

##### **A) Negligence and Duty of Care**

Tort claims often allege that the school district, by and through its employees, negligently caused an injury or damages to a student or member of the public. In California, “[a] school district owes a duty of care to its students because a special relationship exists between the students and the district.”<sup>15</sup> While not exhaustive, the following provides some examples of the duty of care and potential liability:

Supervision of Students: A school district and its employees have the duty to exercise reasonable care in the supervision of students.<sup>16</sup> School districts are required to exercise that degree of care “which a person of ordinary prudence, charged with [comparable] duties, would exercise under the same circumstances.” Care must be taken to foresee and

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<sup>12</sup> Gov. Code, § 810 et seq.

<sup>13</sup> Gov. Code, §§ 815.2, subd. (a), 815.6.

<sup>14</sup> Gov. Code, § 815.6.

<sup>15</sup> *Guerrero v. South Bay Union Sch. Dist.* (2003) 114 Cal.App.4th 264, 268, citations omitted.

<sup>16</sup> *Leger v. Stockton Unified Sch. Dist.* (1988) 202 Cal.App.3d 1448, 1459-60, citations omitted.

avoid any situation that could be potentially dangerous, even if the precise injury has never occurred before.<sup>17</sup>

**Enforce Rules and Regulations:** In prior lawsuits, schools have been found to have a duty to enforce the rules and regulations necessary for their protection, and to take all reasonable steps to protect its students where it knows or should know of certain risks to students.<sup>18</sup>

**Duty to Warn:** Generally, a school district must warn students of dangerous conditions. If a school district allows students to forego face covering requirements, for example, the duty to warn would arguably require a school district to, at a minimum, provide a general warning of the risk associated with not wearing face coverings and being around others who are not wearing face coverings. Similarly, if a vaccine mandate goes into effect and the district chooses not to follow it, it may have a duty to warn students that unvaccinated students pose a greater risk of suffering serious health outcomes if they contract COVID-19 and also pose a greater chance of infecting others than vaccinated students.<sup>19</sup>

## **B) Negligence Per Se**

The “negligence per se” doctrine is the greatest concern. Under negligence per se, the law finds negligence or a failure to meet the duty of care when one does not follow laws or regulations. The law creates a rebuttable presumption that one is negligent if:

- (1) He/she violated a statute, ordinance, or regulation of a public entity;
- (2) The violation proximately caused death or injury to person or property;
- (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
- (4) The person suffering death or injury was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.<sup>20</sup>

Here, if a school district does not follow an Executive Order or public health orders and guidance, a court could find a school district negligent per se. While we have not located any cases that trigger the negligence per se doctrine in California related to “guidance” documents, it would be a significant factor in determining whether the agency breached its duty of care and was negligent.<sup>21</sup> Even if a district has breached its duty of care, the plaintiff must still prove that the breach caused the plaintiff’s injury, rather than some other cause outside of the district’s control.

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<sup>17</sup> *Ziegler v. Santa Cruz City High Sch. Dist.* (1959) 168 Cal.App.2d 277, 284; *J.H. v. Los Angeles Unified Sch. Dist.* (2010) 182 Cal.App.4th 123, 146-48.

<sup>18</sup> *Virginia G. v. ABC Unified School District* (1993) 15 Cal.App.4th 1848, 1853.

<sup>19</sup> *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 815 a college district’s failure to warn of known crime dangers in a student parking lot.

<sup>20</sup> Evid. Code, § 669.

<sup>21</sup> *A.J. v. Victor Elementary Sch. Dist.*, No. E049404, 2011 WL 1005009, at \*5 (Cal. Ct. App. Mar. 22, 2011), while this case is unpublished, and this is not law, the court held that it would not state that guidance issued by a federal agency would not trigger negligence per se under Evidence Code section 669.

## **5. Indemnity, Immunity & Liability of Public Employees**

### **A) Liability of Public Officials & Indemnity**

Public employees generally have immunity from liability for actions taken within the scope of their employment. A school district has an obligation to employees to defend and indemnify them against lawsuits arising from their employment-related actions.<sup>22</sup> Generally speaking, a school district is required to pay for defense costs and any judgment or settlement against an employee.<sup>23</sup> The chief exceptions are when an employee commits a crime, acts outside of the scope of employment, or when a public employee acts with “actual fraud, corruption or actual malice.”<sup>24</sup>

Government Code section 820.9 states that elected officials such as school board members “are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body.” But the statute also says that “Nothing in this section exonerates an official from liability for injury caused by that individual’s own wrongful conduct.”

### **B) Immunity from Liability**

California law provides “discretionary immunity” from liability to a public school official when performing an act within the scope of the individual’s duties that requires the “exercise of discretion or judgment.”<sup>25</sup> Courts have drawn a line between planning/policy decisions, which are covered by discretionary immunity, and operational/ministerial actions that merely implement an already formulated policy, which are not covered by discretionary immunity.<sup>26</sup> Where there is already a legal requirement that a school district must follow, it may be found that the school district’s actions are operational/ministerial as it is merely implementing an existing policy decision that has already been made and is not entitled to discretionary immunity.<sup>27</sup> At this time, school districts do not have any form of blanket immunity from COVID-19 related issues.<sup>28</sup>

### **C) Additional Considerations: Improper Government Activities**

School districts have begun to push back against many COVID-19 safety requirements. While issuing a message of disagreement is appropriate, directing employees to violate orders and mandates may result in additional liability under the Reporting by School Employees of

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<sup>22</sup> Gov. Code, § 825.

<sup>23</sup> Gov. Code, § 825.2.

<sup>24</sup> Gov. Code, § 825.2(b).

<sup>25</sup> *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 979; case held that decision of school board to replace the district Superintendent was entitled to discretionary immunity.

<sup>26</sup> *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 981.

<sup>27</sup> *Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 794.

<sup>28</sup> Gov. Code, § 855.4 gives discretionary immunity for liability related to diseases but it is limited “the decision to perform or not to perform any act to promote the public health of the community...”

Improper Governmental Activities Act (“Act”).<sup>29</sup> Under the Act, employees have a right to report or disclose matters under the scope of the Act, including:

1. **Illegal Orders:** Any directive to violate or assist in violating a federal, state, or local law, rule, or regulation;<sup>30</sup> and
2. **Improper Governmental Activity:** An activity by a public-school agency or by an employee that is undertaken in the performance of the employee’s official duties, regardless of whether the activity is within the scope of employment, and (1) violates a state or federal law or regulation or (2) is economically wasteful or involves gross misconduct, incompetency, or inefficiency.<sup>31</sup>

Interference with an employee’s right to disclose may result in liability in an action for civil damages.<sup>32</sup> Additionally, a person who intentionally engages in acts of reprisal, retaliation, threats, coercion, or similar acts against a public-school employee for making a protected disclosure is subject to a fine not to exceed ten thousand dollars (\$10,000) and imprisonment in the county jail for a period not to exceed one year, as well as liability for attorney’s fees.<sup>33</sup>

## **6. Potential Consequences For Failure to Follow Mandates/Orders**

### **A. Lack of Insurance Coverage**

School districts are required by statute to obtain insurance.<sup>34</sup> *Many school districts have no liability coverage for COVID-19 claims* since many insurance companies exclude coverage for organic pathogens and other forms of viruses. School districts in many counties have already learned that they do not have insurance coverage for COVID-19. In addition, many policies or memoranda of coverage exclude coverage for “intentional acts.” Therefore, even if there is insurance coverage for a given claim, where a school district intentionally violates the law and that leads to a lawsuit, then coverage may be denied.

For this reason, COVID-19 litigation would have a significant impact on a school district’s general fund for the *payment of both attorneys’ fees and adverse judgments*. We recommend carefully reviewing the memorandum of coverage and engaging in discussions with insurance providers.

### **B. Criminal Liability for Failure to Follow Public Health Directives**

Failure to follow CDPH public health directives like those set forth in the CDPH Schools Guidance is a misdemeanor offense, with fines up to \$1000 or up to six months in jail. (Government Code, § 8665.) Failure to follow the orders of a local public health officer is also a misdemeanor with civil and criminal penalties. (Health & Safety Code, § 120275.) While we are not currently aware of prosecutions under these statutes related to the pandemic, the laws

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<sup>29</sup> Ed. Code, § 44110, *et. seq.*

<sup>30</sup> Ed. Code, § 44112(b).

<sup>31</sup> Ed. Code, § 44112(c).

<sup>32</sup> Ed. Code, § 44113(d).

<sup>33</sup> Ed. Code, § 44114(b), (c).

<sup>34</sup> Ed. Code, § 35208, subd. (a)(2).

are on the books and local district attorneys have complete discretion to prosecute if they determine that the law has been violated.

### **C. Cal/OSHA Complaint and Fines**

The California Department of Industrial Relations' Division of Occupational Safety and Health ("Cal/OSHA") adopted COVID-19 Emergency Temporary Standards ("ETS"). We recommend reviewing the Cal/OSHA standards to ensure compliance with the requirements to provide a safe work environment, and to ensure that the district has an appropriate injury and illness prevention plan ("IIPP") addressing COVID-19. Failure to establish same may result in Cal/OSHA issuing a citation and applicable fines.<sup>35</sup>

In addition, employees have the right to refuse hazardous work if: (1) performing the work would violate a Cal/OSHA regulation; and (2) the violation would create a real and apparent hazard.<sup>36</sup> We have seen an uptick in employees and unions filing Cal/OSHA complaints; we expect refusals to perform unsafe work will also begin to occur.

### **D. Loss of Funding**

Loss of funding is another potential consequence. In May 2020, the Governor's Office of Emergency Services wrote a [letter](#) to Tulare County, which had recently voted to allow most businesses and churches to reopen, threatening to withhold disaster and COVID-19 related funding if the county reopened in violation of federal guidelines and the Governor's stay-at-home order. The Governor's letter to Tulare County also cited to a May 14, 2020, letter from the Department of Finance to the Senate and Assembly Budget Review Committees in which the Department of Finance makes clear that funding to local government under the CARES Act was contingent on "adherence to federal guidance and the state's stay-at-home orders. Funding shall be released upon jurisdictions' certification of both."

Further, in order to receive ESSER III funding under the American Rescue Plan Act, LEAs are required to complete, publish, and periodically (at least once every six months) revise as needed a Safe Return to In-Person Instruction and Continuity of Services Plan. (See <https://www.cde.ca.gov/fg/cr/documents/returnplantemplate.pdf>.) One requirement of this plan is for LEAs to ensure compliance with CDC safety recommendations. At this time, [CDC guidance](#) recommends face covering indoors by all individuals who are not fully vaccinated, student physical distancing of 3 feet, and screening, testing, ventilation, handwashing and respiratory etiquette. A school district's ESSER III allocation may be put in jeopardy if the district does not comply with the requirements of the Safe Return to In-Person Instruction Plan, as will any funding for which the district has provided assurances that it will comply with public health guidelines.

There are several other penalties a school district could suffer. Perhaps most devastating would be if the CDPH closed the school, which could result in a complete loss of ADA. Under California law, cities, county boards of health, and the State Board of Health have the authority to order school closure to prevent the spread of disease. (See Ed. Code, § 37202; Health & Saf.

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<sup>35</sup> See here for a list of COVID-19 related fines: <https://www.dir.ca.gov/dosh/COVID19citations.html>.

<sup>36</sup> See <https://www.dir.ca.gov/dosh/documents/health-and-safety-rights-for-workers.pdf>

Code, § 120175.5, subd. (b); Cal. Code of Regs., tit. 17, § 2500, subd. (a)(16); Health Officer Practice Guide for Communicable Disease Control in California (2013) California Department of Public Health, accessible at:

<https://www.cdph.ca.gov/Programs/CCLHO/CDPH%20Document%20Library/HO%20Practice%20Guide%20for%20Communicable%20Disease%20Control%20in%20CA%202013.pdf>.)

While it may be relatively unlikely that any of these agencies would in fact order the district to close its schools given the push to maintain in-person instruction, it is permissible under the law.

## **CONCLUSION**

In summary, a school district should follow Executive Orders, public health orders, and guidance documents when developing and implementing COVID-19 vaccination and testing requirements and regulations on school grounds. Failure to follow an applicable Executive Order or public health orders and guidance exposes the school district to the many potential consequences listed above.

We hope this information has been helpful.