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TO: School Leaders

SUBJECT: Requirement for Universal Masking Indoors at K-12 Schools

On July 12, 2021, the California Department of Public Health (CDPH) updated its guidance for K-12 schools, which continued the universal mask requirement first instituted in January 2021. Schools throughout the state have implemented the requirement, which was subsequently adopted and endorsed by leading health authorities, including the Centers for Disease Control and Prevention (CDC) and the American Academy of Pediatrics (AAP). The scientific consensus is unequivocal. Unfortunately, some elected officials and school leaders have expressed their intent to violate the law—and risk their students' safety—by failing to enforce the universal mask requirement for indoor school settings.

To be clear: failure to enforce the mask requirement breaches not only a legal duty, but also the first and foremost duty of every school leader—to protect students.

Violation of mandatory public health guidance puts the health and safety of students, staff, and their families needlessly at risk, and also carries significant legal, financial, and other risks. This letter is intended to ensure all school leaders are fully aware of their legal obligations and the risks of not adhering to them as students return to campus. This letter is a restatement of long-standing policy and law, and should not be construed as setting new requirements. For the vast majority of school officials who are implementing the universal mask requirement, this letter serves only to confirm they have taken some of the appropriate measures to mitigate health, legal, and financial risks.

Legal Requirements for Schools to Implement Universal Masking. CDPH Guidance for K-12 Schools (Guidance) requires mandatory universal masking indoors in K-12 settings—both public schools and private schools—with limited exemptions as specified in the general Guidance for the Use of Face Coverings. Relevant here, the Guidance also requires schools to "develop and implement local protocols to enforce the mask requirements," as they had

for the latter half of the prior school year. Under this provision, schools retain flexibility to tailor the protocols for enforcing the mask requirement to their local circumstances. They do not have discretion or authority to opt out from enforcing the requirement.

State law authorizes the California Department of Public Health to "take measures as are necessary to . . . prevent [the] spread" of communicable diseases such as COVID-19 (Health & Safety Code § 120140). The Guidance was issued pursuant to a June 11, 2021 State Health Officer Order, expressly based on that statutory authority. In sum, the Legislature has expressly authorized CDPH to issue mandatory public health directives carrying the force of law to prevent the spread of communicable disease, including COVID-19, and the Guidance was issued pursuant to that authority.

Scientific Evidence Strongly Supports Universal Masking in K-12 Schools as Necessary to Protect the Health and Safety of Students, Staff, and Families, Particularly in the Face of the Delta Variant. There is strong consensus among public health and medical experts that universal masking in K-12 schools is an important and scientifically based strategy to protect the health and safety of students, staff, and their families. Both the federal CDC and the AAP have issued guidance that recommends precisely the approach that California has taken. For more background on the science of COVID-19 transmission and schools—and the demonstrated efficacy of universal masking—please review the CDC's Science Brief: Transmission of SARS-Cov-2 in K-12 Schools and Early Care and Education Programs.

Implementation of universal masking is also a strategy for maximizing in-person instructional days. Universal masking reduces the risk of outbreaks, thereby avoiding disruptions to school operations, including closure. Furthermore, masks empower schools to implement more targeted quarantine procedures, often eliminating the need for students to miss any instructional time.

The risks to students and staff of not implementing universal masking is not hypothetical: there are well-documented instances where unmasked students spread COVID-19 within classrooms, resulting in outbreaks and high case rates on staff.

As stated in the CDPH K-12 Schools Guidance 2021-2022 Questions & Answers:

Masks are one of the most effective and simplest safety mitigation layers to prevent in-school transmission of COVID-19. SARS-CoV-2, the virus that causes COVID-19, is primarily transmitted via airborne particles. Masks limit the spread of the virus in the air from infected persons and protect others exposed to these particles.

Universal masking indoors in K-12 schools is recommended by the American Academy of Pediatrics and by the CDC in its Guidance for COVID-19 Prevention in K-12 Schools (updated July 27, 2021). As the CDC noted: "CDC recommends universal indoor masking for all teachers, staff, students, and visitors to K-12 schools, regardless of vaccination status. Children should return to full-time in-person learning in the fall with layered prevention strategies in place."

Universal masking prevents outbreaks and permits modified quarantine under certain conditions in K-12 settings, supporting more instructional time and minimizing missed school days for students. Additionally, universal masking indoors is critical to enabling all schools to offer and provide full in-person instruction to all students without minimum physical distancing requirements at the outset of the school year.

As noted by the CDC, COVID-19 prevention strategies in K-12 schools are designed to protect people who are not fully vaccinated. Almost all K-6th graders are unvaccinated and will not be eligible for vaccines at the outset of the 2021-22 school year. Additionally, although some 7-12th grade students will be fully vaccinated by the start of the school year, many will not. As of July 22, 2021, less than 40% of Californians 12 to 17 years old were fully vaccinated.

The above was true before the Delta variant emerged as the dominant strain in California. The increased transmissibility of the Delta variant, coupled with a concerning increase in the number of children hospitalized with COVID-19, makes this common-sense public health mitigation strategy in K-12 schools all the more important.

California is currently experiencing a significant increase in COVID-19 cases with 28.4 new cases per 100,000 people per day, and case rates that increased fourteen-fold in less than three months. Hospitalizations have increased over 700% in the past two months and are projected to continue to increase. Nationally, we are for the first time seeing substantial pediatric hospitalizations for COVID-19 in areas with low vaccination rates, and public servants throughout the state must act decisively and in concert to protect California's children.

Schools Face Substantial Legal, Financial, and Other Risks if They Do Not Follow Mandatory Universal Masking Directive. COVID-19, particularly the Delta variant, poses significant health risks to students, and adults responsible for their safety should do everything possible to minimize those risks. There is a clear public health

justification for requiring universal masking in K-12 schools to minimize those risks and avoid the needless tragedy of a student dying from COVID-19 due to exposure that could have been prevented through universal masking.

In addition to the moral imperative to take this common-sense step to protect the California's students, school leaders have legal duties to protect the health and safety of students attending school. (See Cal. Const. art. I, § 28 [public school students and staff "have the inalienable right to attend campuses which are safe, secure and peaceful"].) Failure to follow the mandatory public health directive will expose schools and school leaders personally to substantial legal and financial risks, some of which are highlighted below.

First, courts have long recognized that school leaders have a heightened duty of care to protect the health and safety of students under their supervision. (*C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal. 4th 861, 869 [noting heightened duty of care because "a school district and its employees have a special relationship with the district's pupils, a relationship arising from the mandatory character of school attendance and the comprehensive control over students exercised by school personnel"].) In light of the overwhelming evidence detailed above about the risks to students of not implementing the universal masking requirement, schools and school leaders involved in that decision could face significant financial liability if a student or staff member contracts COVID-19 in the absence of universal masking being enforced. Similar liability would exist if the refusal to implement the mask requirement causes a staff member to contract COVID-19. The financial exposure would be substantial if a student or staff member were to die from COVID-19.

Second, schools and school officials involved in the decision not to follow the mandatory public health guidance may face civil lawsuits by concerned families and staff compelling them to comply with the guidance. As noted, the public health directive has the force of law, and a mandatory duty therefore exists for schools to implement the guidance.

Third, certificated individuals—including school administrators—may be subject to referral to the Commission on Teacher Credentialing for disciplinary action for violating a mandatory legal duty to implement the masking requirement and knowingly exposing students to preventable harm. (See Educ. Code § 44421 [authorizing discipline for "refusal to obey . . . laws regulating the duties of persons serving in the public school system"].)

Finally, schools and school officials may be subject to fines or civil enforcement actions by local health officers for refusal to adhere to the mandatory masking directive, pursuant to Health and Safety Code section 120175. In fact, Education Code section 49403 states clearly: "the governing board of a school district shall cooperate with the local health officer in measures necessary for the prevention and control of communicable diseases in school-age children."

Opposition to Mask Requirements Is Based on Misinformation. First, masking does not pose health risks for children. Misinformation circulating to the contrary points to pseudo-science around CO2 levels or potential mental health impacts of masking. The lone scientific study indicating an unhealthy link between masking and CO2 levels was retracted due to "numerous scientific issues" with the study's methodology. This persistent myth also has no basis in data: in the year and a half since children began wearing masks, pediatric hospital admissions tied to CO2 poisoning have not increased. Furthermore, there is no scientific evidence that masks have an adverse mental health impact, in contrast to the ample evidence that masks prevent illness, school absences, and even death.

Second, some argue that mandatory masking violates personal freedom of students and parents to decide whether to follow this precaution. Courts, however, have long recognized limits to personal freedom when actions imperil the health and safety of others, particularly in school settings where the health and safety of children is at stake. (*Vernonia School District 47J v. Acton* (1995) 515 U.S. 646; *Abeel v. Clark* (1890) 84 Cal. 226; *Love v. State Dept. of Education* (2018) 29 Cal.App.5th 980, 993, 994.) Schools routinely enforce requirements on students designed to protect the broader school community, such as bans on carrying weapons on campus, prohibitions on bullying, and even dress codes.

Overwhelming scientific evidence and empirical experience in California and elsewhere underscore how universal masking safeguards the health and safety of students, school staff, and their families. Indeed, it would irresponsible and unreasonable to allow personal preference against a common-sense public health measure to put at risk the health, and potentially cause the death, of a child or school employee.

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The universal mask requirement is a public health directive that all schools are required to follow, similar to other public health orders, including orders that have been implemented both before and throughout this pandemic. The State is committed to working with schools, local governments, and other state officials to ensure schools implement this requirement to keep children and staff safe.

We are sharing a version of this letter with various law firms and legal offices that represent schools, as well as with various insurance and risk-pool entities that work with K-12 schools in California. If you are considering an approach that does not adhere to the universal mask requirement, we encourage you to consult with those experts to help assess and verify the risks identified above. If, like the vast majority of school leaders across California, you are implementing the universal mask requirement, we are grateful to you for taking the necessary measures to protect the children in your care.

Sincerely,



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