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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
9 **COUNTY OF SAN DIEGO, CENTRAL DIVISION**

10 LET THEM CHOOSE, an initiative of  
11 LET THEM BREATHE, a California  
nonprofit public benefit corporation,

12 Plaintiff,

13 v.

14 SAN DIEGO UNIFIED SCHOOL  
15 DISTRICT; and DOES 1–50,

16 Defendants.

17 S.V., individually, and on behalf of J.D.,  
as guardian ad litem,

18 Plaintiff,

19 v.

20 SAN DIEGO UNIFIED SCHOOL  
21 DISTRICT; and DOES 1 through 50,  
inclusive;

22 Defendants.

Case No. 37-2021-00043172-CU-WM-CTL,  
consolidated with 37-2021-00049949-CU-  
MC-CTL

**PLAINTIFF LET THEM CHOOSE’S  
REPLY TO DEFENDANT’S  
OPPOSITION TO MOTION FOR  
JUDGMENT ON PETITION FOR WRIT  
OF MANDATE**

Department: C-64  
Judge: Hon. John S. Meyer  
Date: December 20, 2021  
Time: 9:00 a.m.

Action filed: October 12, 2021  
Trial date: Not set

1 Plaintiff Let Them Choose, an initiative of Let Them Breathe, a California nonprofit  
2 public benefit corporation, (“Plaintiff” or “LTC”) respectfully submits this reply to the  
3 opposition filed December 13, 2021, by Defendant San Diego Unified School District  
4 (“Defendant” or “SDUSD”).

5 **I. INTRODUCTION.**

6 SDUSD grossly mischaracterizes its Vaccination Roadmap as a “choice” for its students.  
7 Kicking thousands of children out of the schools *in which they are already enrolled*, and  
8 forcibly enrolling them midyear in a makeshift independent study program, can’t be  
9 characterized as anything short of coercion. As stated in SDUSD’s Student Vaccine FAQs, on  
10 January 24, 2021, students who have not received the COVID-19 vaccine “*will not be allowed*  
11 *on campus and will be enrolled* in or given options for independent learning opportunities.”  
12 (Spangler Decl., Ex. H, emphasis added.)

13 As far as its legal argument, SDUSD spends the first seven pages of its opposition  
14 reciting platitudes about the mandamus remedy, school districts’ “broad” discretion in  
15 educational matters, the responsibility to protect health and safety of students, and preemption  
16 standards — but when SDUSD finally gets around to addressing the statutes that are  
17 determinative, its case falls apart. The law is clear that local school districts do not have  
18 authority to set vaccine requirements for students, SDUSD’s Vaccination Roadmap conflicts  
19 with state law, and the field is fully or partially preempted by state law. For the reasons set forth  
20 herein and in LTC’s moving papers, judgment should be entered directing SDUSD not to  
21 enforce its Vaccination Roadmap and to allow continued attendance of all students regardless of  
22 vaccination status.

23 **II. ARGUMENT.<sup>1</sup>**

24 **A. Section 49405 of the Education Code confirms that a local school district is**  
25 **not authorized to set vaccination policy.**

26 SDUSD highlights section 49405 of the Education Code (Opp., at 13, 17), which is

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27 <sup>1</sup> In its moving papers, LTC adopted by reference the arguments set forth in the memorandum  
28 of points and authorities filed December 6, 2021, by Plaintiff S.V. in the consolidated case *S.V.*  
*v. San Diego Unified School District*, Case No. 37-2021-00049949-CU-MC-CTL. Likewise,

1 curious because this statute *undermines* SDUSD’s position and confirms that a local school  
2 district *does not* have the authority to set vaccination policy. The statute reads in full: “The  
3 control of smallpox is under the direction of the State Department of Health Services, and no  
4 rule or regulation on the subject of vaccination shall be adopted by school or local health  
5 authorities.” (Ed. Code, § 49405.) SDUSD does not explain how this statute supports its  
6 position; presumably, SDUSD is implying that the prohibition only applies to the smallpox  
7 vaccine, but the operative language of the statute could not be clearer in stating that “*no rule or*  
8 *regulation on the subject of vaccination* shall be adopted by school or local health authorities.”  
9 (*Ibid.*, emphasis added.) The statute recites that “[t]he control of smallpox is under the direction  
10 of the State Department of Health Services” (*ibid.*), but this is also true of any communicable  
11 disease. (See, e.g., Health & Safety Code, § 120125 [“The department shall examine into the  
12 causes of communicable disease in man and domestic animals occurring or likely to occur in  
13 this state.”]; *id.*, § 120130, subd. (c) [“The department may from time to time adopt and enforce  
14 regulations requiring strict or modified isolation, or quarantine, for any of the contagious,  
15 infectious, or communicable diseases, if in the opinion of the department the action is necessary  
16 for the protection of the public health.”]; *id.*, § 120140 [“Upon being informed by a health  
17 officer of any contagious, infectious, or communicable disease the department may take  
18 measures as are necessary to ascertain the nature of the disease and prevent its spread.”].) And  
19 of course, the State Department of Health Services is responsible for determining whether  
20 “[a]ny other disease” is “deemed appropriate” to add to the list of required immunizations for  
21 school admission. (Health & Safety Code, § 120335, subd. (b)(11).) There is simply no  
22 qualification to the legislative injunction that “*no rule or regulation on the subject of*  
23 *vaccination* shall be adopted by school or local health authorities.” (Ed. Code, § 49405,  
24 emphasis added.) By adopting the Vaccination Roadmap, SDUSD breached a clear, present, and  
25 ministerial duty, and it is proper for the Court to issue a writ of mandate directing SDUSD to  
26 correct this violation.

27 \_\_\_\_\_  
28 LTB adopts by reference the arguments set forth in the reply memorandum filed by Plaintiff  
S.V.

1           **B. Section 49403 of the Education Code does not authorize a local school**  
2           **district to set vaccination policy.**

3           SDUSD’s reliance on section 49403 of the Education Code is misplaced. This statute  
4 provides: “Notwithstanding any other law, the governing board of a school district shall  
5 cooperate with the local health officer in measures necessary for the prevention and control of  
6 communicable diseases in schoolage children. For that purpose, the board may use any funds,  
7 property, and personnel of the district, and may permit a licensed physician and surgeon, or a  
8 health care practitioner listed in subdivision (b) who is acting under the direction of a  
9 supervising physician and surgeon, to administer an immunizing agent to a pupil whose parent  
10 or guardian has consented in writing to the administration of the immunizing agent.” (Ed. Code,  
11 § 49403, subd. (a).) The statute goes on to specify which “health care practitioners” are allowed  
12 to “administer an immunizing agent” “under the direction of a supervising physician and  
13 surgeon.” (*Id.*, § 49403, subd. (b).) Section 49403 is inapposite because SDUSD does not claim  
14 to be acting in cooperation with the local health officer. Moreover, the statute applies only to  
15 programs for using school resources to administer vaccines to students — under medical  
16 supervision and *with* parental consent. The statute does not suggest that a district may *require*  
17 any particular vaccine.

18           Moreover, under subdivision (b)(2)(A), vaccines must be administered “upon the  
19 standing orders of a supervising physician and surgeon and in accordance with any written  
20 regulations that the State Department of Public Health may adopt.” (*Id.*, § 49403, subd.  
21 (b)(2)(A).) SDUSD does not cite any standing order, and the only regulation on point is the  
22 CDPH guidance, which states: “**COVID-19 vaccination is strongly recommended for all**  
23 **eligible people in California, including teachers, staff, students, and adults sharing homes**  
24 **with these members of our K–12 communities.**” (Bresee Decl., Ex. C, p. 39.) While the  
25 guidance “strongly recommend[s]” the vaccine, it does not require the vaccine. (*Ibid.*) The  
26 remainder of the CDPH guidance cited by SDUSD pertains to masking and other issues, not  
27 vaccinations. And off-the-record comments by Governor Newsom and State Senator Pan do not  
28 constitute “written regulations” and do not necessarily reflect the official policy of CDPH, much

1 less the Legislature. SDUSD therefore cannot claim to be acting pursuant to any directive from  
2 the state.

3 **C. SDUSD’s Vaccination Roadmap illegally denies pupils enrollment in their**  
4 **school.**

5 SDUSD’s argument that its Vaccination Roadmap has nothing to do with enrollment and  
6 therefore does not conflict with state law is misleading. The way SDUSD puts it, the Health and  
7 Safety Code and CDPH regulations only define conditions for admission to, or enrollment in,  
8 the district. Pupils who do not receive the COVID-19 vaccine remain admitted to the district;  
9 the district is merely exercising its authority to alter the mode of instruction for these pupils to  
10 promote health and safety. The fallacy of this argument is that under the state’s vaccination  
11 laws, pupils are not admitted to a district generally; when pupils submit proof of vaccination,  
12 they are admitted to a specific *school* within the district and are entitled to continue attending  
13 that school as long as they remain otherwise eligible.

14 For example, under the Health & Safety Code, “[t]he governing authority shall not  
15 unconditionally *admit any person as a pupil of any private or public elementary or secondary*  
16 *school*, child care center, day nursery, nursery school, family day care home, or development  
17 center, unless, prior to his or her first admission to that institution, he or she has been fully  
18 immunized.” (Health & Safety Code, § 120335, subd. (b); see also, e.g., Health & Safety Code,  
19 § 120338 [“Notwithstanding Sections 120325 and 120335, any immunizations deemed  
20 appropriate by the department pursuant to paragraph (11) of subdivision (a) of Section 120325  
21 or paragraph (11) of subdivision (b) of Section 120335, may be mandated *before a pupil’s first*  
22 *admission to any private or public elementary or secondary school*, child care center, day  
23 nursery, nursery school, family day care home, or development center, only if exemptions are  
24 allowed for both medical reasons and personal beliefs.” (emphasis added)]; Health & Safety  
25 Code, § 120370, subd. (a)(2) [“Commencing January 1, 2020, a child who has a medical  
26 exemption issued before January 1, 2020, shall be allowed *continued enrollment to any public*  
27 *or private elementary or secondary school*, child care center, day nursery, nursery school,  
28 family day care home, or developmental center within the state until the child enrolls in the next

1 grade span. (emphasis added)].)

2 The CDPH regulations promulgated pursuant to the Health & Safety Code clarify  
3 further: “‘Admission’ means a pupil’s first *attendance in a school* or pre-kindergarten facility or  
4 re-entry after withdrawing from a previous enrollment.” (Cal. Code Regs., tit. 17, § 6000, subd.  
5 (a).) “‘Unconditional admission’ is admission based upon documented receipt of all required  
6 immunizations for the pupil’s age or grade, in accordance with section 6025, except for those  
7 immunizations [that are exempted for medical reasons or personal beliefs].” (*Id.*, § 6000, subd.  
8 (a)(1).) “‘Pupil’ means a person admitted to or seeking *admission to any school* or pre-  
9 kindergarten facility.” (*Id.*, § 6000, subd. (k).) “A *school* or pre-kindergarten facility shall  
10 unconditionally *admit or allow continued attendance* to any pupil age 18 months or older whose  
11 parent or guardian has provided documentation of ... each immunization required for the pupil's  
12 age or grade ....” (*Id.*, § 6025, subd. (a).) Thus, when SDUSD does not allow pupils’ continued  
13 attendance at the *school* to which they have been admitted pursuant to section 6025, SDUSD  
14 violates section 6025.

15 The district understands that enrollment is site-specific. As stated on the enrollment page  
16 of SDUSD’s official website: “ The district offers online school-site enrollment.” (General  
17 Enrollment Information, at  
18 [https://sandiegounified.org/departments/neighborhood\\_schools\\_and\\_enrollment\\_options/genera](https://sandiegounified.org/departments/neighborhood_schools_and_enrollment_options/general_enrollment_information)  
19 [l\\_enrollment\\_information](https://sandiegounified.org/departments/neighborhood_schools_and_enrollment_options/general_enrollment_information).) Further, SDUSD requires its students to submit a new enrollment  
20 application to transfer to another school within the district:

21 Who needs to enroll?

- 22 • Students who are attending school for the first time
- 23 • Students new to the district ....
- 24 • Students who were previously attending a district school,  
25 but have moved to a different area of the district.

26 (*Ibid.*) This confirms that denial of pupils’ attendance at a school site equals a denial of  
27 enrollment, even if they are offered online education through some alternative districtwide  
28 program, thus violating section 6025.

1 In its opposition, SDUSD barely acknowledges the CDPH regulations, except to argue  
2 weakly that they are in conflict with Health & Safety Code, section 120335. But there is no  
3 conflict. Given the Legislature’s intent to occupy the field of school vaccination requirements,  
4 as expressed in section 49405 of the Education Code and the legislative history cited in  
5 Plaintiffs’ moving papers, the Legislature must have intended that, as a necessary corollary to  
6 the requirement that schools deny unconditional admission to pupils who have not received the  
7 state-mandated vaccines, schools must *grant* unconditional admission to pupils who have  
8 receive the state-mandated vaccines. CDPH’s adoption of section 6025 simply made explicit  
9 what was already implicit in the statutory scheme. SDUSD is breaching a clear, present, and  
10 ministerial duty under

11 **D. SDUSD may not forcibly enroll pupils in independent study.**

12 Even if SDUSD has the power generally to determine modes of instruction, SDUSD  
13 may not force its pupils to enroll in an online independent study program, as explained in LTB’s  
14 moving papers. (See Ed. Code, § 51747, subd. (f)(8) [providing that “independent study is an  
15 optional educational alternative in which no pupil may be required to participate”].) Moreover,  
16 SDUSD may not deny pupils enrolled in independent study access to their school facilities. (Ed.  
17 Code, § 51746 [requiring, for pupils in an independent study program, that the district ““shall  
18 ensure the same access to all existing services and resources in the school in which the pupil is  
19 enrolled ... as is available to all other pupils in the school”].)

20 SDUSD does not even address these arguments directly in its opposition. SDUSD  
21 suggests, however, that section 120335, subdivision (f), of the Health & Safety Code, implies  
22 that a district may create a new vaccine requirement and force *currently enrolled pupils* to  
23 “choose” between leaving the district or enrolling in the district’s independent study program.  
24 That is quite a dystopian view of the principle of free choice! For students who cannot  
25 physically leave the district or do not have the means to enroll in a private school, there is no  
26 choice. As stated in the declaration of Susan Barndollar, Executive Director of Nursing and  
27 Wellness for SDUSD, pupils who are unable to obtain a medical exemption from the COVID-  
28 19 vaccine requirement “*will be enrolled* in independent study unless they are vaccinated.”

1 (Barndollar Decl., ¶ 5.)

2 In any event, SDUSD’s argument does not follow from the actual text of subdivision (f),  
3 which states: “This section does not apply to a pupil in a home-based private school or a pupil  
4 who is enrolled in an independent study program pursuant to Article 5.5 (commencing with  
5 Section 51745) of Chapter 5 of Part 28 of the Education Code and does not receive classroom-  
6 based instruction.” This simply means that a pupil receiving homeschooling or enrolled in an  
7 independent study program does not have to comply with the *state’s* vaccination requirements  
8 under section 120335. Notably, subdivision (f) incorporates the requirements of Article 5.5,  
9 which includes the noncoercion and full access standards of sections 51746 and 51747 of the  
10 Education Code. SDUSD is stretching this statute beyond recognition by asserting that the  
11 *district* can unilaterally impose its own, additional, non-state required vaccination mandate on  
12 *currently enrolled pupils* and force them to either leave the district or enroll in the district’s  
13 independent study program. Even if the district could do that, as previously noted, the district  
14 must provide independent study pupils access to “*all* services and resources” of the schools in  
15 which they are enrolled — which would include not only classroom instruction but also  
16 extracurricular activities, sports, and all other programs offered by the school. (Ed. Code, §  
17 51746, emphasis added.) And finally, even if SDUSD could force students into independent  
18 study and deny them access to their schools’ facilities, SDUSD must “transition pupils whose  
19 families wish to return to in-person instruction from independent study expeditiously, and, in no  
20 case, later than five instructional days.” (Ed. Code, § 51747, subd. (f).) SDUSD thus cannot  
21 keep pupils in independent study more than a week if they wish to return to in-person  
22 instruction. SDUSD is in breach of clear, present, and ministerial duties under sections 51746  
23 and 51747 of the Education Code, warranting the issuance of a writ of mandate.<sup>2</sup>

24  
25 \_\_\_\_\_  
26 <sup>2</sup> SDUSD’s cursory citation to sections 48213 and 49451 of the Education Code as authority for  
27 a school to remove students from campus is misplaced, as those sections apply only to students  
28 who are “a clear and present danger to the life, safety, or health of a pupil or school personnel,”  
or where “there is a good reason to believe that the child is suffering from a recognized  
contagious or infectious disease,” respectively. None of these apply to an otherwise healthy  
student who is simply unvaccinated for COVID-19, and SDUSD does not suggest otherwise.



1           **E.       SDUSD has abused its discretion.**

2           LTC need not show that SDUSD abused its discretion because it is in violation of clear,  
3 present, and ministerial duties for the numerous reasons explained above and in LTC’s moving  
4 papers. (See, e.g., *Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29  
5 Cal.4th 911, 926 [holding writ of mandamus should issue requiring district to reelect teacher for  
6 next school year because district breached “clear, present and ministerial” duty to provide  
7 timely notice of teacher’s temporary status].) Regardless, an abuse of discretion may be found  
8 where a government entity acts in a manner that is not “guided and controlled in its exercise by  
9 fixed legal principles” and “exercised in conformity with the spirit of the law and in a manner to  
10 subserve and not to impede or defeat the ends of substantial justice.” (*Nowicki v. Contra Costa*  
11 *County Employees' Retirement Assn.* (2021) 67 Cal.App.5th 736, 750, internal quotation marks  
12 omitted.) As demonstrated herein and in LTC’s moving papers, SDUSD committed legal error  
13 in construing the scope of its authority beyond the bounds of the law as set forth in Education  
14 Code, section 35160, which restricts the district from acting in a manner which is “in conflict  
15 with or inconsistent with” state law or in an area which is “preempted by” state law. SDUSD’s  
16 unprecedented vaccine mandate is in conflict with both the “spirit” and the letter of numerous  
17 state statutes as explained herein and in LTC’s moving papers and intrudes on an area —  
18 vaccine mandates for school attendance — fully or partially occupied by state law.

19           **F.       School districts are not entitled to a higher standard of preemption.**

20           SDUSD utterly fails to provide legal authority supporting the astounding notion that a  
21 different preemption standard somehow applies to school districts. As noted, the Legislature  
22 expressly directed that a school district’s authority does not allow it to act in any matter “in  
23 conflict with or inconsistent with” state law or in an area which is “preempted by” state law.  
24 (Ed. Code, § 35160.) Nothing in this statute suggests that anything other than the standard,  
25 time-honored principles of preemption would apply under section 35160. To avoid unnecessary  
26 repetition, LTC here incorporates by reference the discussion at pages 2 through 4 of Plaintiff  
27 S.V.’s reply brief filed concurrently herewith.

28       ///

