



August 26, 2020

Dr. Gail Newel
Public Health Officer
Health Services Agency
Santa Cruz County
1080 Emeline Ave
Santa Cruz, CA 95060

Sent via U.S. Mail and Email

Re: Santa Cruz County Allows Schools to Provide Childcare to Children, But Unconstitutionally Bars Schools from Providing “In-Person Instruction”

Dr. Newel:

First Liberty Institute is a non-profit law firm dedicated to defending and restoring religious liberty for all Americans. We are writing on behalf of St. Abraham’s Classical Christian Academy, a small, private school in Santa Cruz, California, that seeks to instill in its students the love and knowledge of the Triune God, His Word, and His world. St. Abraham’s is dedicated to providing a safe and educational environment for its students, staff, and the surrounding community.

The County of Santa Cruz allows schools like St. Abraham’s to provide childcare to children in small groups, but unconstitutionally bars schools from providing “in-person instruction” to these same children while they are safely under the school’s care. The school simply seeks to educate children while they are on its premises. Barring the in-person education of students is not rationally related to any legitimate purpose, interferes with parents’ constitutional right to educate their children, and violates the school’s right to free speech, free exercise, and religious autonomy.

The rate of COVID-19 cases in the county has decreased to the point where Santa Cruz is no longer on the monitoring list. Per state guidelines, schools in counties that have been off the monitoring list for fourteen days may reopen. In response to this good news, the county has threatened to disregard state guidance and require schools to remain closed. This action will not withstand strict scrutiny if a legal challenge is brought. We respectfully urge the county to announce that it will follow state guidelines allowing schools to open.

Background

The State of California permits daycares, childcare facilities, and day camps throughout the state to open. For counties on the monitoring list, elementary schools may also open, but only

if a local health official grants a waiver.¹ Since Santa Cruz was placed on the monitoring list July 28, 2020,² your office has not accepted waiver applications to permit elementary schools to safely reopen, even though the county allows schools to act as childcare facilities or day camps.³

The county's Health Services Agency has delegated much of its responsibility to the county's Office of Education, which has been releasing mandates for private schools in addition to public schools. On August 14, 2020, the County Superintendent of Schools, Dr. Faris Sabbah, sent an email to private school leaders. According to the email, enclosed as Attachment A, "Santa Cruz County Public Health is supportive of schools (public or private) providing childcare on their school campuses, under the umbrella of their school program. Schools remain closed for in-person instruction and our county is not prepared to safely accept Elementary School Waiver Applications at this time. However, schools may offer childcare, with necessary mandated modifications to ensure the safety of children, providers, and families." The county recommends childcare providers oversee groups of up to 12 children with 1-2 adult supervisors.

The county's stated reason for not accepting waiver applications is an alleged lack of testing and contact tracing capacity.⁴ However, child care centers and day camps in Santa Cruz are supported by the county without testing or tracing capabilities standing as a barrier. For example, county officials approve of a program to "provide child care and online learning for students" called Out of School Time, which would have up to 12 students and 1-2 teachers in a group on school campuses.⁵ As a small school, St. Abraham's could easily adopt the same structure, dividing students into groups of 12 or less.

According to the state's COVID-19 website, Santa Cruz met the conditions to be removed from the monitoring list as of August 14, 2020. This change was announced on August 17, 2020.⁶ State guidance permits schools in counties that have been off the monitoring list for fourteen days to open. However, the county has announced that it may not allow schools to open even if Santa Cruz remains off the monitoring list for over 14 consecutive days.⁷ This policy is contrary to state guidance, which provides that schools may open under these conditions and are not required to close even if the county subsequently returns to the monitoring list.⁸

¹ *Governor Gavin Newsom Lays Out Pandemic Plan for Learning and Safe Schools*, OFF. GOV. GAVIN NEWSOM (July 17, 2020), <https://www.gov.ca.gov/2020/07/17/governor-gavin-newsom-lays-out-pandemic-plan-for-learning-and-safe-schools/>.

² *Santa Cruz County Placed on Monitoring List*, HEALTH SERVS. AGENCY (July 27, 2020), <https://www.santacruzcounty.us/Portals/7/Pdfs/Coronavirus/MonitoringList.07272020.pdf>.

³ *Elementary School Waivers for In-Person Instruction*, SANTA CRUZ COUNTY OFF. EDUC. (July 27, 2020), <https://santacruzcoe.org/superintendent/health-and-wellness/coronavirus/santa-cruz-coe-newsroom/>.

⁴ See supra note 1.

⁵ Phil Gomez, *Child Care Facilities Offer Distance Learning, Recreational Activities as School Year Begins*, KSBW8 (updated Aug. 10, 2020), <https://www.ksbw.com/article/child-care-facilities-offer-distance-learning-recreational-activities-as-school-year-begins/33567118>.

⁶ COVID19.CA.GOV (updated Aug. 17, 2020 at 11:00AM), <https://covid19.ca.gov/roadmap-counties/>.

⁷ *Santa Cruz County has been Removed From the State Monitoring List*, SANTA CRUZ COUNTY OFF. EDUC. (updated Aug. 18, 2020), <https://santacruzcoe.org/superintendent/health-and-wellness/coronavirus/santa-cruz-coe-newsroom/>.

⁸ *COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year*, CAL. DEPT. PUB. HEALTH (July 17, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Schools%20Reopening%20Recommendations.pdf>.

You have acknowledged the various harms that are likely to befall children, especially elementary school children, if they are denied an in-person education. In a Town Hall Meeting on August 6, 2020, you mentioned that the American Academy of Pediatrics strongly encourages classroom education this fall.⁹ According to their report, “all policy considerations for the coming school year should start with a goal of having students physically present in school.”¹⁰ In addition, the experts at the Center for Disease Control also recommend classroom education this fall, concluding that “in-person schooling is in the best interest of students.”¹¹

St. Abraham’s Classical Christian Academy

St. Abraham’s is a small, Christian school located in Aptos, California. St. Abraham’s believes education is about cultivating virtue in the soul of its students to make each into a better person. According to its vision statement, “Education is nothing short of the discovery of one’s soul and the fulfillment of God’s calling on us as men and women made in His image. It involves learning not merely a skill here or there, but learning in order to act in accordance with the purposes for which we were made.”¹² This cultivation of virtuous character cannot be fully achieved by online-only instruction. St. Abraham’s has been working tirelessly throughout the summer to safely reopen and is dedicated to serving as a refuge for students and families.

Legal Analysis

Private faith-based education is a constitutionally protected right, first recognized by the United States Supreme Court 1925. In *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the Court struck down a law as unconstitutional that interfered with “the liberty of parents and guardians to direct the upbringing and education of children under their control.” In 1972 through *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972), the Court further upheld the “rights of parents to direct the religious upbringing of their children.”

Just this year, the Supreme Court again reaffirmed that the First Amendment protects the “independence of religious institutions.” *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 207 L. Ed. 2d 870, 876 (2020). Because religious schools exist for the purpose of conveying their faith to the next generation, “State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion.” *Id.* at 881.

Governments may not interfere with the right of parents to direct the religious education of their children unless the government action withstands strict scrutiny. *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990). As the Supreme Court explained in *Employment Division v. Smith*, the

⁹ *School Safety COVID 19 Town Hall Meeting Aug 6 2020* (uploaded Aug. 10, 2020), <https://www.youtube.com/watch?v=9CLeBe0M4-E&t=800s> (citing

¹⁰ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>

¹¹ <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/reopening-schools.html>

¹² *Our Mission, Vision, and Values*, SAINT ABRAHAM’S CLASSICAL CHRISTIAN ACADEMY (last visited Aug. 11, 2020), <https://www.stabrahams.com/aboutus/#missionvisionvalues>.

First Amendment bars even neutral, generally applicable laws if they have the effect of interfering with this right. *Id.*

A law will not withstand strict scrutiny unless a government can demonstrate that the law furthers “interests of the highest order” and is “narrowly tailored in pursuit of those interests.” *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993). The existence of multiple exceptions for similar conduct undermines a government’s argument that its action is necessary to further its interests. *Id.* (“The absence of narrow tailoring suffices to establish the invalidity of the ordinances.”).

State guidance permits schools to open in counties that have been off the monitoring list for fourteen days. On Friday, fourteen days will have elapsed for Santa Cruz county. Therefore, per state guidance, schools in this county may open beginning on Monday, August 31, 2020, provided the current trend continues.

If Santa Cruz refuses to follow state guidance, refusing to allow even small, private schools to open, this decision will not withstand strict scrutiny if a legal action is brought against the county. Allowing schools to open as childcare centers with identical class sizes and structures undermines any interest the county has in preventing adults from teaching students in person while they are safely on the school’s campuses.

Conclusion


For the foregoing reasons, St. Abraham’s urges the county to announce immediately that it will follow state guidance, which would allow schools to open beginning on Monday. If the school does not receive a response from the county by September 1, 2019, it will consider all available legal options.

Thank you for your attention to this matter. Please direct all correspondence on this matter to me. I can be reached at [REDACTED].

Respectfully,



Stephanie N. Taub
Senior Counsel
First Liberty Institute

CC: Faris Sabbah
County Superintendent of Schools
Santa Cruz County Office of Education
400 Encinal Street
Santa Cruz, CA 95060


The Hon. William P. Barr,
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EXHIBIT A

From: **Faris Sabbah** [REDACTED] >
Date: Fri, Aug 14, 2020 at 2:28 PM
Subject: Childcare on Private School Campuses
To: Private Schools contacts list [REDACTED] >
Cc: Jennifer Buesing <[REDACTED]>

Dear Private School Leaders,

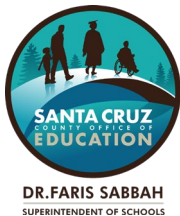
As promised, during our Wednesday meeting, the COE continued conversations with our Local Public Health Department regarding Private Schools in Santa Cruz County providing childcare to our community in need. The current health crisis has created a fluid environment for our school communities. We continue to coordinate our efforts with state and local agencies to provide support, as well as updated information and guidance that is responsive to questions and suggestions from providers, families, and stakeholders.

Santa Cruz County Public Health is supportive of schools (public or private) providing childcare on their school campuses, under the umbrella of their school program. Schools remain closed for in-person instruction and our county is not prepared to safely accept Elementary School Waiver Applications at this time. However, **schools may offer childcare, with necessary mandated modifications to ensure the safety of children, providers, and families.**

Schools will need to follow the CDPH [Updated 7/17 Childcare Program and Provider Guidance](#) (ie. no mixing of students/staff, 12 students maximum, etc.) and [Updated 7/29 Day Camp Guidance](#). Implementation of these guidelines should be tailored for each of your individual settings. **Additionally, schools should follow the state's guidance from the [COVID-19 Employer Playbook](#) as well as the county's [Employer Toolkit](#).**

Please let us know if you have any questions.

Respectfully,
Faris



Dr. Faris Sabbah
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pronouns: he, him, his
[f](#) [t](#) [i](#) [i](#)

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