

# THE FELDHAKE LAW FIRM

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## PRIVILEGED AND CONFIDENTIAL

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CALIFORNIA SCHOOLS RISK MANAGEMENT  
CALIFORNIA SCHOOLS EMPLOYEE BENEFITS ASSOCIATION  
1950 S. Sunwest Lane, Suite 100  
San Bernardino, CA 92408

Re: Board – Member Election to Not Comply with Mandatory Vaccination and Testing Executive Orders and Public Health Mandates – Member Exposure

Javier:

Further to our discussion on Tuesday, October 26, 2021, you have asked us to offer our best immediate professional opinion and advices relative to the risks and exposures of Members of California Schools Risk Management (“CSRM”) where Governing Boards elect and take action not to comply with COVID-19 related Executive Orders of the Governor or Public Health Mandates of the California Department of Health. Given the importance of the issue framed, and the clear risks we see to Members from such decisions, we have expedited our comments. We also provide them while recognizing the divisiveness of some in articulating their personal viewpoints, and an appreciation for the pressures some Members face in some communities over implementation of COVID-19 requirements.

Specifically, on receiving inquiries from one or more CSRM Members, you have advised us that Governing Boards are taking action to have their Districts disregard the Orders of the California State Public Health Officer (i.e., Order of August 11, 2021), as well as Executive Orders of the Governor, requiring verification of COVID-19 vaccination status among K-12 school workers and diagnostic screening testing of unvaccinated workers. Those are legal mandates in California, not matters of discretionary application. While not raised in our call, of concern is whether these Members may also elect to disregard the Executive Order from the Governor as to required student vaccinations following formal vaccine approval, targeted for January, 2022. You have asked in specific the impact of such actions by Members on defense and indemnification benefits for resulting claims under CSRM’s Memorandum of Liability Coverage (“MOC”), such as a suit alleging injury or death to a student or teacher due to exposure to COVID-19 carried by an unvaccinated individual arising out of a Member’s election to refuse to follow California mandates and Orders.

We state the obvious that elective non-compliance with California's COVID-19 related public health mandates as to vaccination and testing cannot be anything but a serious issue. To state the issue is to answer the question, and the answer is unaffected by dissenting opinion no matter how strongly held or passionately voiced. All public educational agencies are legally required to comply with as well as enforce the referenced public health mandates. Compliance in a state of emergency is not a matter of choice, discretion or bowing to dissenting views among community members. If the Governing Board or a Superintendent makes a conscious decision not to comply, and the Member refuses to follow and enforce vaccination-testing mandates, it is violating California legal requirements. Regardless of differences held on a topic where contrary opinions abound, no one can responsibly contest that among the readily foreseeable consequences of such action is exposure of others, children included, to COVID-19 with resulting short-term and potential long term consequences which could have been avoided.

Regardless of differences of opinion as to the efficacy or safety of the COVID-19 vaccine, were a Member to take the action indicated, a resulting injury cannot be fairly described as unexpected, and it would therefore not in all probability be a covered occurrence under the MOC. While the specifics of any claim or suit would need to be considered on any ultimate coverage decision by CSRM, a Member's election to willfully violate California public health Orders, and to do so in the absence of seeking judicial or other relief through proper avenues, cannot be viewed as other than an intentional act as well as a violation of law. CSRM's MOC under such circumstances would likely not provide coverage to the Member, inclusive of the Board. Relevant MOC provisions relating to coverage include:

- CSRM would not cover liability for injuries or damages which do not arise out of an unexpected or unintended event as not being a covered occurrence. Loss or damage resulting from the Member's intentional and knowing conduct in violating a legal requirement would in all probability not be a covered occurrence. [MOC, Section 7(1)(B).]
- Claims and civil litigation brought against the District and Board by employees exposed to health risks and sustaining loss or injury would also be excluded under the liability program. [MOC, Section 7(1)(C).]
- Indemnification of the Member on claims and suits would also likely be precluded in the event of willful or intentional violation of law. [MOC, Section 7(1)(U).]
- Where there is also a purposeful violation of any statute rule regulation or regulatory order, there would also be no coverage for any employment claim. [MOC, Section 7(2)(C).]
- The MOC also excludes coverage as to any claim based upon or arising out of any requirement imposed by any Member that any student, teacher, employee or agent be vaccinated or any failure to receive a vaccination or to require a vaccination. [MOC, Section 7(1)(AA).]

Accordingly, there is no other conceivable opinion than stating what we suspect every Board and Member already knows is true. Actions by a Member to knowingly refuse to comply with or enforce California's public health mandates will impact and likely jeopardize any coverage under the MOC in the event of later claims or suits arising out of that refusal. Any claim would be reviewed on the specifics, but if a result of an intentional decision as discussed, it would be extremely difficult to envision facts bringing the claim or suit within coverage.

A few additional comments bearing on the opinion. First, not one word in this letter is intended to be disrespectful to any Member or Board, or to ignore the atypical dissension of some, and the tone and manner of its expression, has on anyone in a decision-making role. But if we shroud the opinion in ambiguity, it is not worth the paper it is written on. Second, we know of CSRMs strong commitment to its Members, and have for many years supported it at every turn. Here, the situation is an exception. CSRMs is a risk pool, with many public agencies sharing in the risks of claims and suits against any Member. The MOC of CSRMs, like those of every joint powers authority, does not contemplate a Member, for whatever reason, knowingly electing to violate California Executive Orders and Public Health Orders, and all other compliant Members sharing in that risk. CSRMs does not cover intentional and knowing actions leading to foreseeable injuries and damage. Third, in lieu of refusing to follow the law, Members facing community demands could engage counsel to bring legal challenges to the Orders, including for injunctive relief. The odds are against such relief being judicially granted, but it is an alternative to electing to violate those Orders. In like fashion, parents who protest preemption of personal family decisions, even though in a public shared school environment with others, can have options as to home schooling, remote learning, and other devices. No, that educational option isn't perfect, but then it is far superior to willfully ignoring California legal mandates. It is also respectful of those employees and parents who support the health and safety benefits of vaccinations and testing. Fourth, any Member's general counsel should be brought in to provide objective, dispassionate advice, so that the Board has countervailing legal opinions expressed.

The opinion offered is not a difficult one to reach. And we expect that it was anticipated, as the decision in issue creates the risk to coverage. We would never advise any public educational agency to not follow California's mandates for vaccinations and testing. We would always look to alternatives to test the mandates or work with them in a fashion to where the mandates are honored and the interests of those wanting compliance are not subjugated to holders of different opinions. Nothing about COVID-19 presents a platform of easily adopted steps to do the best one can to prevent infection, illnesses and death. But taking action to refuse to comply, in lieu of alternatives, places every District doing so at financial and other risk.

Yours very truly,



Robert J. Feldhake  
General Counsel for CSRMs and CSEBA