SCOTT J. RAFFERTY
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April 11, 2020

David Reid, Esq.
Clerk, Folsom Cordova USD
1965 Birkmont Drive
Rancho Cordova 95742-6407

Dear Mr. Reid:

As you know, I represent Neighborhood Elections Now, which notified you, as Clerk, that the District's at-large elections possibly violated the California Voting Rights Act (CVRA) and petitioned the Board to comply by electing by trustee area in November 2020. This letter is to call your attention to events that my clients and I view as a series of substantial violations of central provisions of the Ralph M. Brown Act, Government Code[1], Section 54950, et seq. These violations not only jeopardize the finality of various actions taken by Folsom Cordova Unified School District (FCUSD), but they also concealed information that we needed to exercise rights established under Article I, Section 3 of the California constitution in advance of emergency declarations made by Governor Gavin Newsom.[2]

The violations prevented the Governor from receiving and considering evidence indicating that your own attorney, not COVID-19, restricted opportunities for citizen participation. Your attorney limited public input by repeatedly committing or failing timely to correct violations of the Brown Act. At least in the case of FCUSD, COVID-19 is an improper basis to deny CVRA claimants access to state courts until it is too late to obtain an effective remedy. This notice does not threaten litigation, but proposes that the Board cure and correct these violations caused by District administration and cease and desist from future violations. If the trustees are true to their oaths of office, they will set this right.

It is the District's responsibility – not the petitioners - to conduct outreach to its constituents, especially minority communities. Nowhere on the website is there any

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[1] All references to "Section" refer to the Government Code, except as indicated.

[2] In addition, the Board violated the Brown Act by demanding that persons seeking to offer public comment consent to the publication of their address and telephone number. Statements made by District Counsel in advance of this violation provide evidence of specific intent to deprive speakers of rights guaranteed under the First Amendment, as interpreted by the California Supreme Court. Britt v. Superior Court (1978) 20 Cal.3d 844,853 citing Talley v. California (1960) 362 U.S. 60, 64-65.

visible reference to trustee area elections or opportunities to provide input.[3] This may be unique in the history of the CVRA. The lack of outreach calls demonstrates the insincerity of counsel's demands for delay and his complaints about lack of participation.

The conduct of FCUSD during the emergency is remarkable in several other respects, but none is related to or excused by the risk of COVID-19 exposure. FCUSD is also the only jurisdiction where the District counsel has ever failed to communicate with me, as counsel for CVRA petitioners, well in advance of the meeting at which the body adopts a resolution of intent to comply with the CVRA. Eventually I called the District to try to identify and communicate with District counsel, but these calls were never returned. I learned of the Board's intent only by monitoring District agendas. When I saw the agenda for the March 12, 2020 meeting, I noticed that the resolution made no reference to our petition or the CVRA. I immediately asked that the packet include our petition, which the District had received on February 6,2020, so that the public would understand the context for the agenda item. Again, the failure for the text of the resolution to refer to the CVRA and for the packet to include the petition were both unusual (in my experience, unprecedented).[4]

A close reading of the March 12, 2020 agenda packet reveals, contrary to statements made by trustees to the public, counsel <u>never</u> intended that the District comply until 2022. The "context" for item XI on the agenda states that the Administration would <u>commence</u> the process within 90 days, guaranteeing that it would not complete on time for implementation in 2020 (without a court order). District counsel claimed that the District would comply in 2020 on the following day, but a week later demanded that clients accept this pre-planned 90-day delay. Exhibit 1. The COVID outbreak was never more than pretext.

We would like to resolve this matter with as little disruption as possible. We are prepared to abate and withdraw this notice or to stipulate to an absence of prejudice is the Board provides a reliable assurance that it will implement district elections in 2020 and takes actions reasonably necessary to enable it to do so, such as seeking judicial authorization of a map or a process to achieve a timely map. After the emergency declaration, the trustees stated that compliance in 2020 was the purpose of Resolution

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[3] Even if there had been time for an agreed extension of the safe harbor, Elections Code, Section 10010(e)(1)(C)(ii) would have required to use the "additional time to conduct public outreach" and to post "a tentative schedule of outreach events."

[4] At some point, the notice-and-petition (described as a "demand letter") was added to the agenda packet, but only in connection with a subsequent item.

03-12-20-31. Less than a week later, and prior to any Executive Order related to the timeframes, counsel for the District demanded that my clients accept delays that would have precluded timely compliance. It has become clear that strategic discussions took place without public notice at closed sessions in advance of the resolution of intent. After your attorney ridiculed a highly respected Latino activist, he attempted to force commenters to disclose their residency and consent to publishing their phone numbers. In each respect, his actions violated the Brown Act, prejudiced my clients, and gave Governor Newsom a misleading impression of events.

Just in case your attorney failed to mention it, my clients have always strived to accommodate and compromise, particularly if trustees become ill or genuine obstacles arise. My settlement communication of March 24, 2020 makes that abundantly clear. Exhibit 1. But we also expect the Board to act in good faith and to honor the commitment it made on March 12, 2020, with a majority of trustees professing enthusiastic support.

Initial Violation: Actions and Strategic Decisions Taken Outside Properly Noticed Meeting

The nature of the initial violation is as follows: During closed sessions that occurred after the District received notice that its at-large elections may violate the California Voting Rights Act, FCUSD agreed to take administrative actions to respond to the notice (including, but not limited, to hiring a demographer) and developed a consensus as to how the body would respond to the notice in a certain manner in the future. In particular, the administration and counsel developed a strategy of having the trustees pass a resolution committing the District to comply with the CVRA under Elections Code, Section 10010, while actually making undisclosed entreaties to Governor Newsom to allow FCUSD to use the COVID emergency to avoid such compliance.

But for actions taken and strategies devised – in violation of the Brown Act – at prior meetings, the public could have advised the Board on the impact of COVID on its ability to participate in public hearings. These comments would likely have made a public record contradicting claims that counsel for the District made less than a week after the March 12, 2020 meeting. Apparently, these claims were made to the Governor in support of suspending enforcement of the CVRA.

The actions taken and consensus plans made were not in compliance with the Brown Act. The CVRA was not disclosed as a topic of any closed sessions, either on the agenda or even by announcement at the start of any session. This violated Sections

54956.9(e)(2) and 54954.5(c). There was no adequate notice to the public on the posted agenda for the meeting that the matter acted upon would be discussed, and there was no finding of fact made by the FCUSD that urgent action was necessary on a matter unforeseen at the time the agenda was posted. These omissions clearly establish violations of the Brown Act, as the Court emphasized in Fowler v. City of Lafayette (2020) 45 Cal.App.5th 68, 76.

Before the District took administrative actions to respond to the notice, or developed the consensus strategy behind its response, or allowed its attorney to seek "emergency" relief from CVRA compliance, the public had a right to address the appropriate response. Because the District failed to make the disclosures required by the Brown Act, my clients and other members of the public were deprived of the opportunity to advice the Board – prior to the development of its strategy – of facts and opinions relevant to the actions the Board took. The facts and opinions included views on the relevance of COVID-19 to the "safe harbor" process that the Board appeared to be embracing.

A legislative body that receives a notice of possible violation of the CVRA and a petition to comply with the law is obviously aware of "facts and circumstances… that might result in litigation and that are known to a potential plaintiff or plaintiffs." Because you knew we knew about the potential liability, but had not yet threatened litigation, Section 54956.9(e)(2) unambiguously required that these "facts or circumstances shall be publicly stated on the agenda or announced." As to closed sessions that occurred during the regular meetings on February 13, 2020; February 27, 2020, and March 12, 2020, the Board did not disclose any matter subject to Section 54956.9(e)(2); nor did it publicly identify the CVRA, the notice-and-petition, or disclose any circumstances to provide notice to the public that it intended to discuss the CVRA or its strategy of creating a public appearance that it intended to come into compliance.

The notice-and-petition does not include any explicit threat of litigation. Therefore, as Fowler made clear, and numerous other jurisdictions have recognized, there is no excuse for failing to identify the facts and circumstances surrounding the request to comply with the CVRA. Consider, for example, agendas from Ontario (February 22, 2020) and Santa Clarita (March 10, 2020), disclosing receipt of similar petition, giving notice that the matter will be discussed during the closed session, and providing an opportunity for public comment prior to that session.

Provision of Legal Advice in Violation of Brown Act

The initial violation has been compounded by subsequent violations designed to conceal information about the strategy or to advance the strategy by preventing speakers from expressing support for CVRA compliance. This enabled counsel for the District to argue that fears of exposure to COVID-19 had discouraged speakers, rather than the unlawful condition he imposed that they consent to the Board's publication of their telephone numbers.

My request that the District produce these records was made on March 11, 2020, and promptly referred to District counsel. Despite the requirement in Section 54957.5 that records be made available "without delay," i.e., before the March 12, 2020 meeting, district counsel treated it as an ordinary request under the Public Records Act. He provided a "ten-day notice" on March 23, 2020, which was two days late, and contained no documents. On April 3, 2020, he produced a single document – our petition. The timing alone demonstrates a lack of good-faith and a clear violation of Section 54957.5's demand for immediate production. Had District counsel provided this single document on the timely basis required by Section 54957.5, he would have alerted my clients to the possibility that District counsel was implementing a strategy that differed from the apparent acceptance by trustees of 2020 implementation.

District counsel's attempt to distinguish Fowler are unavailing. He unconditionally concedes that the District's abrogation of attorney-client privilege applies to the Brown Act. He concedes that the Board held at least one closed session at which CVRA compliance was discussed as "threatened litigation." But unlike some "demand letters," our petition to comply with the law, only invokes the collaborative framework set forth in Section 10010. It does not threaten litigation, and we have not yet done so. This has legal consequences under Section 54956.9(e)(2) that are reemphasized in Section 54954.5(c). The District must proactively disclose the nature of the claim. The non-disclosure is not a "technical variance" or "substantial compliance." It completely deprived the public of an opportunity to comment, allowing the District counsel to promote his aggressive strategy without risk of contradiction.

District counsel admits that privileged documents exist, which acknowledges that legal advice was given during closed sessions in violation of Section 54956.9. Roberts v. City of Palmdale (1993) 20 Cal.Rptr.2d 330, 5 Cal.4th 363:

> [Section 54956.9] closed a loophole [that] a governing body's meetings with counsel were privileged and did not come under the Brown Act, even if the meetings were not strictly related to pending litigation …. [The law] was intended to make it clear that closed sessions with counsel could only occur as provided in the Brown Act, that is, after written notice, and in connection with pending or threatened litigation.

It is not necessary to see these papers to establish that District counsel gave verbal advice in violation of the Brown Act, presumably congruent with his demands that the plaintiffs consent to delays in violation of Section 10010(e)(3)(C)(i), with the inevitable consequence of abandoning 2020 compliance. The public had no timely or meaningful opportunity to dispute this advice, which constitutes additional prejudice to my clients. The substance of verbal advice is not privileged if the District becomes engaged in any litigation regarding districting in the future.

Interference with Public Comment

In order to protect them against intimidation, those members of the protected group who have agreed to be named in litigation (if litigation were ever to be threatened or initiated) avoid appearing or commenting at public meetings or hearings. Two members of the public commented on March 12, 2020: Patricia Johnson, a former District employee, and one of the Sacramento area's most highly regarded Latino activists, Carolina Flores. Ms. Flores, who had foster children in District schools, observed (in an abundance of candor) that she currently lives in Sacramento. In a subsequent phone call, District counsel ridiculed the fact that neither commenter lived in the District.

- Disparagement and Intimidation of Latino Activists

Many local Latino organizations cross both the American River and the Placer County line. Because I learned that the March 12, 2020 meeting would discuss CVRA on very short notice, these organizations were unable to mobilize, but all have extreme respect for the dedication and wisdom of Ms. Flores. Your attorney picked the wrong activist to disparage.

I related the criticism to my clients, Ms. Flores, and other Latino citizens. The meeting required submission in writing, and that form listed as "required" fields the commenter's name; status as parent, employee, or community member; address and telephone number. Given the context of the prior criticism of Ms. Flores, all members of the Latino community, whether resident or not, declined to participate. Section

54953(3) and Education Code, Section 35145, Board Bylaw 9323, and established custom all permit anonymous comment. It was reasonable to assume that addresses could be used to disparage activists, and the demand to consent to the publication of phone numbers was an obvious burden on speech. *See* footnote 2, supra. The violation was not corrected in a timely manner. Your attorney's conduct – not COVID-19 – caused the Latino community not to participate.

- Manipulation of Agenda

Three days before the March 26, 2020 meeting, District counsel announced that "the District will be asking that the Board…. to delay the public hearings for the duration of the current state of emergency so that the public can be assured appropriate opportunity to fully participate in the process." Even though the item was not on the agenda, I responded "I am willing to discuss this." Exhibit **.

In a telephone call, I asked that your counsel notify me when the special meeting agenda was posted to add this item. He declined to do so, forcing me to monitor the website. Fifteen minutes before the close of business the evening before the meeting, he advised me that the item had been removed from the agenda. At this time, he demanded that any written input from me be submitted in writing by noon, "so that [he] can review them before submission." These burdens and implied censorship is not consistent with any provisions relaxing the Brown Act in Executive Order N-20-25 or N-20-29. I was unable to attend in person or electronically because of a current hearing at Napa Valley USD, but I entitled to present written comments for the record until the meeting. I later learned that the delay was advocated by two trustees.

At 2:06 on March 26, 2020, just hours before the meeting, I received an email accusing me of "multiple misrepresentations" and "outright falsehoods." My response is attached. Exhibit 2. As I explained, these manipulations and unlawful conditions on public comment prevented the collaboration envisioned by AB 350: "If the District fails, it will not be able to blame COVID-19."

CONCLUSION

Unfortunately, the violations of the Brown Act described herein have distorted the record by preventing timely public input. As a result, the District has not only blamed COVID-19, but it has inflicted an injustice on the Latino community statewide.

Pursuant to that Section 54960.1, my clients and I demand that the FCUSD cure and correct the illegally taken actions.[5] I recognize that the Board may repeal its resolution of intent, but this would not fully cure the consequences of inaccurate or unrebutted statements described herein that were made possible by the Brown Act violation. I am willing to discuss terms that do not require invalidation and reconsideration of the resolution of intent, if these terms can be agreed significantly in advance of the 30-day deadline for your response. Pursuant to Section 54960.2, we also demand that the Board cease and desist from the violations described herein. Again, the desired remedy is effective outreach that is agreed significantly in advance of the 60-day deadline.

As provided by Section 54960.1 and 54960.2, you have 30 days from the receipt of this demand to either cure or correct the challenged actions or inform me of your decision not to do so, and 60 days to commit to cease and desist from violations of the type previously committed. I hope that your response will come sooner, in order to provide an effective remedy that will not unduly burden the Board.

Sincerely,

Scott J. Rafferty

[5] In the event that you question whether the conduct described herein amount to the taking actions, I call your attention to Section 54952.6, which defines "action taken" for the purposes of the Act expansively, i.e. as "a collective decision made by a majority of the members of a legislative body, a collective commitment or promise by a majority of the members of a legislative body to make a positive or negative decision, or an actual vote by a majority of the members of a legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance."

EXHIBIT 1

Gmail

Scott Rafferty <rafferty@gmail.com>

Folsom Cordova Unified School District^Trustee Area Election Transition

2 messages

Paul Gant <pgant@kblegal.us> 23 March 2020 at 20:16
To: Scott Rafferty <rafferty@gmail.com>
Cc: Sarah Koligian <skoligian@fcusd.org>

Dear Mr. Rafferty,
Based on the Emergency Order issued by the Governor on March 20, 2020 (https://www.gov.ca.gov/wp-content/uploads/2020/03/3.20.20-EO-N-34-20-COVID-19-Elections.pdf), District staff is no longer proposing a 90-day stipulated continuance in completing the current trustee area mapping process as recommended in my previous communication.
Rather, on March 26, 2020 the District will be asking that the Board determine whether to comply with the letter and spirit of the Governor's emergency order and delay the public hearings for the duration of the current state of emergency so that the public can be assured appropriate opportunity to fully participate in the process.
Do not hesitate to notify me of any comments or concerns you may have on this topic.
Sincerely,Paul Gant

Scott Rafferty <rafferty@gmail.com> 24 March 2020 at 01:13
To: Paul Gant <pgant@kblegal.us>

I am willing to discuss this, but your prior letter discusses extending the safe harbor - which is precluded by law.

Scott Rafferty
1913 Whitecliff Ct
Walnut Creek CA 94596

Gmail

Scott Rafferty <rafferty@gmail.com>

FCUSD^Trustee Area Transition

4 messages

Paul Gant <pgant@kblegal.us> 25 March 2020 at 16:45
To: Scott Rafferty <rafferty@gmail.com>
Cc: Grant Orbach <gorbach@kblegal.us>, Maria Amador <mamador@kblegal.us>, Shannon Diaz <sdiaz@kblegal.us>

Scott,

Thank you for the discussion this afternoon.

District staff is **not** scheduling a special meeting of the Board tomorrow. Thus, the Board **will not** have on its agenda an item to address the recent Governor's Emergency Order pertaining to the CVRA hearing timeline.

I acknowledge that you remain unequivocal in your clients' opposition of any postponement of the transition process, and you do not believe that the current emergency unduly inhibits your client's participation.

The Public Hearing on the Trustee Area transition is scheduled to proceed as set forth on the current regular meeting Agenda.

As always, the District welcomes participation and input from interested members of the public. You suggested that you may wish to submit some input in writing in advance of the Hearing and I offered, if it is forwarded to me, to bring such material, as appropriate, to the attention of District staff and the Board at the time of the Hearing. I would ask that any such materials address the specific topic of this Public Hearing, and be forwarded to me by Noon so that I can review them before submission to staff.

Thank you,

Paul R. Gant

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Scott Rafferty <rafferty@gmail.com> 26 March 2020 at 12:01
To: Paul Gant <pgant@kblegal.us>

Pursuant to your demand.

Scott Rafferty
1913 Whitecliff Ct
Walnut Creek CA 94596
mobile 202-380-5525

[Quoted text hidden]

200326 Rafferty Comments for FCUSD.pdf
934K

Paul Gant <pgant@kblegal.us> 26 March 2020 at 14:06
To: Scott Rafferty <rafferty@gmail.com>
Cc: Sarah Koligian <skoligian@fcusd.org>, Shannon Diaz <sdiaz@kblegal.us>

Dear Mr. Rafferty,

I regret that you have chosen, in response to what I believed was a cordial and professional conversation, to make multiple misrepresentations in your referenced correspondence. I will not seek in this communication to catalogue all of the inaccuracies, if not outright falsehoods, at this time, but I reserve the right to do so in the future, as deemed necessary.

Let me be clear on this point: at no time did I suggest that either you or your clients were required to, or should, submit material to me for consideration by the Board at the Hearing scheduled for this evening. Rather, you stated, that 1) you have not been able to establish recent contact with your clients; and 2) due to the current COVID-19 emergency you are not able to attend the meeting electronically. On these bases, you represented that neither you or your clients would participate in the Hearing. Clearly these factors are not in control of the District or the Board.

Purely as a courtesy, I then offered to bring to the attention of the Board any materials that you wished to forward to me by noon today that were relevant to the Hearing. I am now confused by your intentions. Of course you and your clients are entitled to attend the Board meeting and the Public Hearing. That is your right. It seems that you are objecting to the opportunity to submit your written materials on the matter of the Hearing through me, though you thanked me for the courtesy during our call. Please clarify. Absent such clarification, since you have decided to forward these materials to me by the time requested, I will submit them as promised.

You also appear to complain that no Special Meeting has been scheduled on the matter of the Governor's Emergency Order pertaining to elections, including the extension of hearings under the CVRA. This is odd since you clearly have objected to any delay in the process by the FCUSD Board of Education. To reiterate, there is no special meeting scheduled and therefore your comments on that topic are moot.

I repeat, in the event you claim to somehow be confused on this point, you and your client remain entitled to appear (electronically as set forth under the Governor's most recent Emergency Order suspending certain provisions of the Brown Act) and, so long as you comply with law and lawful Board policies, you may bring such information as you deem appropriate to the attention of the Board.

Sincerely

[Quoted text hidden]

Scott Rafferty <rafferty@gmail.com> 26 March 2020 at 16:14
To: Paul Gant <pgant@kblegal.us>, Christopher Clark <cbclark@fcusd.org>
Cc: Sarah Koligian <skoligian@fcusd.org>, Shannon Diaz <sdiaz@kblegal.us>

I am not claiming to be confused, nor am I confused. I have not made multiple misrepresentations or engaged in outright falsehoods. For the benefit of the Board, I respond to your various accusations at the end of this message.

But first, I will state the basic situation. The Board resolved to comply with the CVRA in 2020 eight days after the Governor declared a state of emergency and five days after a neighboring district closed its schools. You now argue that the Board should continue all of its business except for those essential to the conduct a lawful election, from which you want the district excused for the entire duration of the emergency (even after social distancing abates). The Board is accountable both to the law and to the voters. A similar gambit forever sullied the reputation of Rudolph Guiliani. The Board might also seek guidance from Madeleine Kronenberg, 16-year incumbent of West Contra Costa USD and president of her League of Women Voters. She voted for a resolution to comply in 2018, but then decided to delay the transition two years by demanding that the people vote on whether Latinos should have equal rights. The voters, at-large, defeated her even before they learned that her antics cost the district $650,000.

I collaborate with jurisdictions in lieu of litigation. I provide far more extensive evidence in CVRA petitions, and much greater detail about the demographics of the specific jurisdiction than attorneys who file demand letters that threaten litigation. Then I support the minority community by attending hearings and analyzing map options. Under this process, my client's reimbursement is limited by statute. As a result of the last week's efforts to extend the safe harbor and delay compliance for two years, that statutory fee has been exhausted. I typically spent two to three times the number of hours for which I am compensated in support of the jurisdiction in the collaborative process. There is no good reason to do so here.

The District violated the Brown Act and Bylaw 9321 before there was a health emergency, by discussing this matter in closed sessions without notice required by law. The Board is holding a hearing tonight without having posted the CVRA petition or any information about district elections. That cannot possibly be productive. The District has further discouraged public participation by requiring disclosure of personal information, in apparent violation of its own established customs, bylaw 9323, Ed Code 35145.5, Gov Code 54953.3 and other laws. Last week, you demanded extending the safe harbor in a manner explicitly prohibited by law. These are transparent attempts to immunize the 2020 election from complying with the CVRA.

As to your allegations:

(1) I stated that I was unable to attend the meeting. Due to the health orders, I would also be unable to attend a physical teleconferencing location in Rancho Cordova if the District were to provide one, which it is not. I did not deny that I could fill out your Google form, which was not yet available, if that is what you consider "attending the meeting electronically." At 4:45PM, you directed me as follows: "I would ask that any such materials address the specific topic of this Public Hearing, and be forwarded to me by Noon so that I can review them before submission to staff." Giving someone three business-day hours to prepare comments by demanding they be submitted 7 hours in advance of the meeting is not the kind of accommodation the EO N-25-20 and N-29-20 envisioned. Other jurisdictions have requested that written submissions be emailed 15 minutes before the meeting, so there is time to make a copy for each member.

(2) I am not complaining that no special meeting has been scheduled. I am complaining that you told me that you were presenting "the matter of the Governor's Emergency Order pertaining to elections, including the extension of hearings under the CVRA" three days ago, at a time when this matter was not on the agenda. I am aware that an agenda can be amended by noticing a special meeting 23 hours in advance, but it is not a best practice. Nor is 24 hours' notice fair to the public if the matter was planned to be agendized at least three days earlier. A special meeting notice is what you told me would occur imminently at approximately 2:30PM yesterday, requiring me to monitor the District website. Then, 15 minutes before the deadline, you told me that it would not occur. This matter is not moot, because your actions demonstrate clear disregard for public comment and imposed unnecessary burden on my client.

(3) I am declining to identify the persons who are willing to become the named plaintiff, if litigation (which has not yet been threatened) were to occur. I am publicizing that anyone who does speak is unlikely to become the named plaintiff. These are protective measures, In prior cases when litigation has occurred, the named individuals have been subject to harassment by other members of the public (and in one case by a board member). I mentioned that I was unable to reach one specific person. I can assure you that I have had extensive discussions with other members of the organizational client, particularly with regard to the demand that speakers are "required" to disclose their telephone numbers and other personal information. They also had strong views on your demand to review our comments for seven hours before submitting them to "staff."

Good luck complying with the safe harbor. You have deprived the District a source of uncompensated collaboration. If the District fails, it will not be able to blame COVID-19.