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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

CAYLA J., KAI J., AND ELLORI J., through their guardian ad litem ANGELA J., MEGAN O. AND MATILDA O., through their guardian ad litem MARIA O., ALEX R. AND BELLA R., through their guardian ad litem KELLY R., ISAAC I., AND JOSHUA I., through their guardian ad litem SUSAN I.,

Plaintiffs,

v.

STATE OF CALIFORNIA, STATE BOARD OF EDUCATION, STATE DEPARTMENT OF EDUCATION, TONY THURMOND, in his official capacity as State Superintendent of Public Instruction, and DOES 1-100,

Defendants.

Case No. RG20084386

UNLIMITED JURISDICTION

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Date: August 4, 2023
Time: 10:00 am
Dept: 23
Judge: Hon. Brad Seligman

Complaint Filed: Nov. 30, 2020
Trial Date: September 5, 2023

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INTRODUCTION

This case turns on a disagreement between the parties that can only be resolved at trial with robust presentation of evidence—whether the State acted during and after the pandemic to ensure that historically disadvantaged students could access their public school education.

Well before the pandemic, California operated a two-tier educational system in which the "haves" (white students and students from more affluent families) prospered in comparison to their "have-not" peers (predominantly students of color from low-income families). That prosperity had nothing to do with intelligence, work ethic, or desire to learn. One principal aspect of this pre-existing dual system was the digital divide, which impacted access to instruction and academic success over the course of the pandemic, a fact both parties acknowledge as a consequential reality. (Plaintiffs' Separate Statement in Opposition to Defendants' Mot. ("Pl. Sep. Stmt.") ¶ 184.)

As the Court recognized in its demurrer ruling, the pandemic "exposed and highlighted certain deficiencies in the California educational system." (Decl. of Elizabeth Lake in Supp. of Defs' Mot., Ex. 2 ("Order re: Dem."), at 1.) Those deficiencies, which were the historical source of the two-tiered system, have since multiplied. Once schools closed, entry into the newly remote classroom was entirely conditioned on digital access, again a fact neither party disputes. (Pl. Sep. Stmt. ¶¶ 184, 195-196, 198.) For those students on the wrong side of the digital divide, stopping in-person instruction meant stopping instruction altogether, no different than locking the schoolhouse doors to certain students in pre-pandemic times. (*Ibid.*)

The dispute here is whether what the State did—and did not do—when the pandemic moved the classroom from the schoolhouse to students' residences was sufficient to satisfy its constitutional obligation to provide basically equal education to all. The impacts of the State's response are tragically indisputable: the "haves" did far better. The achievement and opportunity gaps that existed before March 2020 widened significantly and are still widening, approaching a chasm. (Pl. Sep. Stmt. ¶¶ 200-201.)

Whether the State did what it needed—and still needs—to do to "ensure basic educational equality" for all its students is the factual crux of this case. It is an evidentiary inquiry

constitutionally structured by *Butt*, the California Supreme Court's race and wealth equal protection jurisprudence, and the free schools clause of the California Constitution. (*Butt v. State of California* (1992) 4 Cal.4th 668.) The evidence shows that the digital divide left over one million students without access to education for months. (Pl. Sep. Stmt. ¶¶ 189-195.) Hundreds of thousands of low-income and minority students were left behind due to the State's inaction. (*Ibid.*) The State failed to ensure basic educational equality, and it has done nothing to assess, let alone remediate, the devastating impacts California's historically disadvantaged students are facing. Urgent work remains to be done, and remediation is essential. In *Butt*, the students of Richmond were threatened with the loss of six weeks of instruction (*Butt*, *supra*, 4 Cal 4th at p. 673); here, Plaintiffs and other similarly situated students have suffered far more—the denial of months and even years of meaningful learning opportunities due to the State's failures. (Pl. Sep. Stmt. ¶¶ 189-195.)

The State rests its argument on (1) funding, (2) "action by the CDE and the SPI" to narrow the digital divide, and (3) its provision of guidance and resources for "learning acceleration." (Defendants' Memorandum in Support of Motion for Summary Judgment ("MPA") at 7.) What the State fails to show is any meaningful strategy or execution to ensure that the disparate impacts experienced by students of color and low-income students were address, much less remediated. The State did not review where funding went; its "action" was to distribute a mere 73,000 computing devices and 100,000 hotspots three months too late; and the provided "guidance" and resources were and remain wholly insufficient, first because they merely spell out what the law requires, and second because the State intentionally misrepresents the learning loss data necessary to inform any serious remediation effort.

What rides in the balance is the futures of blameless children who lost precious instructional time that must be made up if they are to have a chance to thrive in a society that brutally punishes loss of learning opportunity. The State, constitutionally taxed with ensuring these children should not be in the position in the first place, will have to answer for its inaction.

This is what the trial will be about.

FACTUAL BACKGROUND

I. The State's COVID-19 Education Policy Effectively Denied Schooling to Disadvantaged Schools and Students

On March 16, 2020, California's public schools shut their doors in response to the COVID-19 pandemic. Suddenly, access to education required reliable digital devices and internet connection that only some students had, and others would never receive. (Pl. Sep. Stmt. ¶¶ 189-195.) As the California Department of Education's ("CDE's") witness put it: "if [pupils] didn't have connectivity or access, then they weren't able to attend [school]." (Ex.[1] V [Tornatore Dep.] 164:2-11.)

The availability, or lack thereof, of both technology and live instruction defined the distance learning experience as it unfolded for students in three distinct stages: the transition to distance learning in Spring 2020, distance learning under Senate Bill 98 ("SB98"), and the uneven reopening of schools through Spring and Summer 2021. At each stage, Plaintiffs and other similarly situated students of color and low-income students were impacted by the State's failure to ensure that they had the tools necessary to attend school. As the classroom lights remained on for their more privileged peers, the State's failures to account for barriers to accessing distance learning left its most vulnerable students in the digital dark.

A. Spring 2020: The Transition to Distance Learning

For the final months of the 2019-2020 school year, as the pandemic spread, school was decidedly in session across California for students who had access to digital devices and reliable connectivity. (Pl. Sep. Stmt. ¶ 186.) High-income students were disproportionately likely to have existing digital access and high-speed connections. (Pl. Sep. Stmt. ¶ 185.) These children, and other students attending high-income schools and districts, quickly transitioned to online remote instruction, "re-creat[ing] the environment of a typical classroom experience." (Declaration of Tyrone Howard ("Howard Decl."), Attachment A ("Bishop-Howard Report") at 26, 196.) At Winston Churchill Middle School in Greater Sacramento, for example, Ms. Heck's English class met via Zoom to discuss the novel "Touching Spirit Bear," with "[s]tudents

[1] All exhibits cited herein are to the Declaration of Chelsea Kehrer ("Kehrer Decl.").

engag[ing] at all hours of the night, asking questions on Google Classroom." (*Id.* at 26, 198.)

Low-income children, children of color, and children attending low-income schools and districts, however, did not have the same access to education as their peers. (Pl. Sep. Stmt. ¶ 199; see, e.g., Declaration of Lucrecia Santibanez ("Santibanez Decl."), Attachment A ("Santibanez Report"), 19; Bishop-Howard Report, 11-13.) The State admits that at the onset of the pandemic approximately 800,000 to 1 million students, disproportionately students of color and low-income students, lacked the devices necessary to attend remote schooling. (Ex. Q [Nicely Dep.] 73:24-74:25; see also Ex. V [Tornatore Dep.] 184:14-25 ["[W]e know that our students who are socioeconomically disadvantaged and then within that student group various races and ethnicities . . . did suffer the most from a lack of access to devices and connectivity."].) Plaintiffs are examples of these children. (Pl. Sep. Stmt. ¶ 190.) For these students, their education in the 2019-2020 school year effectively ended in March 2020, denying them three months of critical learning.

While high-income schools and districts had the devices to distribute to the few affluent students who did not possess them low-income schools and districts could only distribute older devices that did not meet the demands of distance learning on a "one-per-family basis," requiring multiple children in a household to share a single device. (Pl. Sep. Stmt. ¶¶ 195, 205.) For example, *Matilda O.* received a tablet to share with her older brother, but it did not work. (*Id.*; Ex. P [Mario O. Dep.] 97:13-98:18; 110:6-112:24; 113:21-25; 114:24-117:1.) *Cayla J.*, *Kai J.*, and *Ellori J.* each received laptops from their school, but none of them functioned properly, and their guardian ad litem, Angela J., could only afford to purchase a single laptop from a pawnshop for *Ellori J.* to use. (Pl. Sep. Stmt. ¶ 195; Ex. F [Angela J. Dep.] 63:23-65:5.)

Students of color and low-income students were also disproportionately likely to experience issues with connectivity due to the unaffordability of fast internet speeds, an overcrowded network, or, simply, the location of their homes. (Pl. Sep. Stmt. ¶ 195.) As *Maria O.* explained: "ours was a low income, $10 a month Internet, and it was supporting a lot of devices, including mine and the rest of the kids in class." (Ex. P [Maria O. Dep.] 141:4-13.) Even when Plaintiffs received a supplemental hot spot, they typically experienced "major issues

with connectivity" due to the need to share connectivity with siblings attending class at the same time. (Pl. Sep. Stmt. ¶ 195; Ex. D [Apr. 15, 2021 Susan I. Decl.], ¶ 6.) *Joshua I.* received a hotspot from LAUSD, for example, but his siblings did not, requiring them to share a connection across three computers and leading to "frequent glitches, cutting out as often as every 15 minutes." (Ex. D [Apr. 15, 2021 Susan I. Decl.], ¶ 5.) For *Alex R.* and *Bella R.*, Wi-Fi access issues at home, disrupted their ability to attend classes at least once a week. (Ex. O [Kelly R. Dep.] 138:25-140:5.) Where the digital divide once affected students only outside of the classroom, it now prevented many of them from getting into it at all.

Further, the level of distance instruction provided by low-income districts fell fundamentally below that offered in wealthier schools and districts across the State. (Pl. Sep. Stmt. ¶ 197.) *Alex R.*, a low-income, half-Black, half-Asian fourth grader in South Los Angeles, received roughly half an hour of live instruction a couple of days a week from teachers who lacked reliable internet themselves. (Ex. B [Apr. 20, 2021 Kelly R. Decl.], ¶ 5.) Unlike the student in Marin whose school had "done a terrific job trying to re-create the environment of a typical classroom experience," (Bishop-Howard Report, 196), Alex R. did not "learn[] anything in school" between March and June of 2020 (Ex. B [Apr. 20, 2021 Kelly R. Decl.], ¶ 5). In Oakland, the second-grade teacher for *Cayla J.* and *Kai J.* "AWOLed the kids"—she only held class twice and was otherwise unreachable. (Ex. F [Angela J. Dep.] 71:9-72:25; 77:21-78:8.)

Plaintiffs' experiences were typical for low-income students of color in low-income districts. (Pl. Sep. Stmt. ¶¶ 197, 199.) One study found that teachers at low-income schools were significantly less likely to deliver live online instruction than those at higher-income schools. (Bishop-Howard Report, 187.) According to another, distance learning programs were "less rigorous in more schools in historically higher-poverty and low-achieving districts than in wealthier, higher-achieving districts." (*Ibid.*) By the end of the 2019-2020 school year, these compounding challenges meant that Plaintiffs and similarly situated students across the State had already fallen behind their more privileged peers, who had no trouble walking through the newly digital schoolhouse gates and who received more live instruction from teachers when they did.

B. Fall 2020: Distance Learning under SB98

On June 29, 2020, the State enacted Senate Bill 98 ("SB98"), which authorized distance learning for the 2020-2021 school year but left districts little time to plan for or implement distance learning programs. Lack of access to devices and connectivity continued to exclude low-income students and students of color from the digital classroom in the 2020-2021 school year. In September 2020, 52.6 % of OUSD students lacked access to a computer. (Ex. CC [OUSD_000292] at OUSD_000301.) Defendants admit "that this was a pervasive statewide issue," (Ex. V [Tornatore Dep.] 77:19-22) and, even in October 2021, the digital divide had not changed at all: 800,000 to 1 million California public school students still lacked access to the technology necessary to fully participate in remote learning (Ex. Q [Nicely Dep.] 114:19-116:6). For Plaintiffs and low-income students of color across the State, a reliable internet connection remained unattainable. (Pl. Sep. Stmt. ¶¶ 193-195.)

Similar to Spring 2020, students across the State experienced huge variations in their distance learning curriculum, with those in higher-income districts receiving more live online instruction on average than those in lower-income districts. (Bishop-Howard Report,187.) For example, a fourth grader in LAUSD, where eight in ten students qualify as low-income, could receive only an hour of live instruction per day—fewer than that of the next four largest districts. (*Id.*, p. 157-8.) In OUSD, the amount of live instruction "depended on the grade level," but "30 minutes was the standard for everyone." (Ex. E [Aguilera Dep.] 222:12-223:4.) Meanwhile, in Santa Monica-Malibu Unified School District, where less than three in ten students are low-income, elementary school students received nearly four hours of daily live instruction, including thirty minutes of social emotional learning. (Bishop-Howard Report, 206-207.) Plaintiffs' experience is nowhere near that of students in the Santa Monica-Malibu District. For example, *Isaac I.*'s classes were each supposed to last 70 minutes, but they often lasted "for only 30 minutes or less," not including the six times there was no class at all. (Ex. D [Apr. 15, 2021 Susan I. Decl.], ¶ 17.) *Alex R.* and *Bella R.* had 30 to 40 minutes of scheduled live instruction per day. (Ex. O [Kelly R. Dep.] 93:10-94:17, 95:17-96:9.) *Cayla J.* and *Kai J.* received 75 minutes of live instruction each day, but 45 of those had "absolutely no structure" and were "just social

time." (Ex. A [Apr. 19, 2021 Angela J. Decl.], ¶ 8.) For Plaintiffs and similarly situated students, "teacher-led instruction over the 14 months of the height of the pandemic was in many cases minimal to non-existent, poorly organized, and largely inaccessible[.]" (Declaration Elizabeth Moje ("Moje Decl."), Attachment A ("Moje Report"), 7.) Defendants received complaints from parents that certain schools "basically spend no time on zoom with the kids," but no evidence suggests that CDE followed up or addressed these concerns. (Ex. Z.)

The disparate impact of the basic inputs of distance learning—devices, reliable internet connections, and live instruction—were compounded by the disparate availability of quiet spaces integral to learning. While high- and low-income students alike shared a classroom during in-person schooling—providing an equal learning environment regardless of income status—distance learning required students to learn from their homes. There, wealthier students more often had access to private spaces conducive to learning, while lower-income students of color disproportionately shared their "classroom" with other family members. (Bishop-Howard Report, 187-215.) *Maria O.*, for example, shared a one-bedroom apartment with her husband and four children, where there was "hardly enough space for all my children to engage in their remote classes. It can be impossible for each of them to concentrate in this small space, especially when they see their siblings participating in their own classes." (Ex. C [Apr. 13, 2021 Maria O. Decl.], ¶ 3.) Facing similar challenges, *Susan I.* "rearranged [her] house to accommodate three students trying to attend three different schools all at the same time." (Ex. D [Apr. 15, 2021 Susan I. Decl.], ¶ 4.) Despite their best attempts to create a quiet space conducive to learning, Plaintiffs were required to attend school in close quarters within earshot of their siblings' lessons (see, e.g., Ex. O [Kelly R. Dep.] 298:8-300:9)—barriers that more affluent students largely did not face.

C. Spring-Summer 2021: The Reopening of Schools

In Spring 2021, the prospect of a safe return to in-person learning promised to be the great equalizer: all students would receive the same education, in the same setting, with the same amount of in-person instruction. Most critically, educators would have the opportunity to address and remediate the disparate impacts of distance learning. But as schools began to reopen in 2021, higher-income schools with a higher proportion of white students uniformly opened significantly

earlier than lower-income schools with a higher proportion of students of color. (see e.g. Bishop-Howard Report, 40-41, 210-214.) Rather than initiate an urgently needed emergency response, schools, under the State's guidance (or lack thereof), largely returned to business as usual. None of the Plaintiffs' academic progress was assessed upon the return to in-person learning, and Defendants admit that they *still* have no plan to remediate learning loss. (Pl. Sep. Stmt. ¶ 203; see, e.g., Ex. J [Cotton Dep.] 169:9-16 [Q. "To your knowledge, does CDE have a document that sets forth a plan to remediate learning loss that students have suffered during the pandemic?" […] A. "I'm unaware of that."].) Defendants also admit that, upon the return to in-person learning, they did not require Local Education Agencies ("LEAs") to measure or assess the effects of the pandemic, nor have they modified any State priorities for LEAs to include addressing learning loss. (Ex. S [Strong Dep.] 111:8-112:9; 102:9-24.) The State's indifference to students' learning loss ensures that harms will continue to compound for historically disadvantaged student groups.

II. The Prevailing Statewide Standard

In California, a system of public school regulations sets the prevailing statewide standard of education for children. The State has constitutional and statutory obligations to ensure that no students receive an education that falls fundamentally below this standard. Plaintiffs are low-income school-aged children subject to these laws and are similarly situated to any other child for the purposes of the instruction they are expected to receive. (Pl. Sep. Stmt. ¶¶ 1, 184.) Statewide, children are expected to have (1) access to education, (2) a set number of instructional minutes based on that access, and (3) prescribed standards for the curriculum a child benefits from within the State. (See, e.g., Educ. Code §§ 46110, 51200.) During the COVID-19 pandemic, public education maintained these requirements. As described above, Plaintiffs and other similarly situated students[2] did not receive them. (Pl. Sep. Stmt. ¶¶ 196-198.)

[2] Students of color, low-income students, and students attending low-income schools and districts

Requirement	Prevailing Standard	Plaintiffs and Similarly Situated Students
Access to Devices	✓	Disproportionately lacked adequate devices and connectivity
Live Daily Interaction with Credentialed Teacher (180-240 minutes)	✓	Infrequent interaction (30-75 minutes) Higher rates of uncredentialed teachers
Instruction pursuant to state curriculum	✓	Unstructured "social hour"

In March 2020, the State transitioned to distance learning with "almost no warning" and "minimal guidance from federal and state officials." (Ex. AA [DEFS-111285].) Students' access to their constitutionally guaranteed schooling became contingent on having access to digital devices and connectivity. (Pl. Sep. Stmt. ¶¶ 188-189.) Students across the State attending wealthy schools and school districts had such access in March 2020 and could continue to receive the instructional time owed them. (*Id.* ¶ 189; see, e.g., Ex. AA [DEFS-111285] at -111289.) As Defendants admit, however, approximately 1 million students—overwhelmingly students of color and low-income students—did not have digital access. (Ex. Q [Nicely Dep.] 73:24-74:25; Ex. V [Tornatore Dep.] 184:14-25; see e.g. Ex. E [Aguilera Dep.] 140:6-15 [when schools closed, 75% of Latinx, Black, and low-income students were under connected].) Plaintiffs are indisputably a part of this under connected group. (Pl. Sep. Stmt. ¶ 190.) As a result, these students did not meet the minimum instructional day requirement for the 2019-2020 school year, losing out on at least three months of critical learning. (Bishop-Howard Report, 37-41.)

For the 2020-2021 school year, SB98 codified the statewide standard for distance learning— "connectivity and devices" for all pupils, daily live interaction with credentialed teachers and peers, attendance, and remediation of learning loss –and re-affirmed the minimum instructional minute requirement. (Ex. DD [Sen. Bill No. 98 (2019-2020 Reg. Sess.)], § 110(d)(1); Ed. Code, §§ 43501-43502 (2020).) Students in more affluent districts continued to receive this standard of education. Plaintiffs and other similarly situated students, as described above, did not. (Pl. Sep. Stmt. ¶ 197.)

Defendants admit that they failed to monitor or ensure that SB98's distance learning requirements were implemented by schools. (*Id.* ¶ 198; see, e.g., Ex. S [Strong Dep.] 174:8-13 ["[t]here is no program monitoring," to ensure LEAs implemented the requirements under SB98].) And the data now shows that districts did not comply with these requirements. (Pl. Sep. Stmt. ¶ 197.) Plaintiffs and similarly situated students continued to face barriers to participating due to lack of access to devices and connectivity, causing rates of absenteeism to skyrocket in low-income districts. (Ex. Q [Nicely Dep.] 73:24-74:25; Santibanez Report, 8-9, 20-21, 58-59, 65-70; Moje Report, 8-9.) Low-income students and students of color that *were* able to attend school did not receive the required instructional minutes and often were not learning from a credentialed professional. (Pl. Sep. Stmt. ¶ 199.)

The State issued its first guidance on how to conduct distance learning in August 2020, nearly six months *after* the start of the pandemic. (Ex. Y [DEFS-013816] at -013830.) The late-coming guidance stated that "well-designed online or blended instruction can be as or more effective than in-classroom learning alone" if it includes (1) "[a] strategic combination of synchronous and asynchronous instruction," (2) "[s]tudent control over how they engage with asynchronous instruction," (3) "[f]requent, direct, and meaningful interaction," (4) "[c]ollaborative learning opportunities," (5) "[i]nteractive materials," (6) "[a]ssessment through formative feedback, reflection, and revision," and (7) "[e]xplicit teaching of self-management strategies." (*Id.* at -013821–-013824.) Having set out these factors, the State—as Plaintiffs' examples make clear—did nothing to ensure they were actually met. Having a teacher who went "AWOL" or two siblings sharing a single phone because the provided device did not function hardly allows for "a strategic combination of synchronous and asynchronous instruction." (Ex. F [Angela J. Dep.] 64:20-65:5; 71:8-19; Ex. P [Maria O. Dep.] at 97:13-99:12; 110:6-113:12.) Nor did low-income and students of color receive "frequent, direct and meaningful interaction" or the "collaborative learning opportunities" that the State's own research demonstrated is essential to successful remote learning outcomes. (Bishop-Howard Report, 40-41, 187-215; Moje Report, 7.) These experiences were in stark contrast to those of students in more affluent communities, who were more likely to receive frequent, direct, and meaningful live interaction with their

teachers and more meaningful engagement with grade-level curriculum. (*Id.*)

III. Defendants Misrepresent the Harm Faced by Students of Color and Low-Income Students

California uses its statewide assessment system—also called the CAASPP—to measure students' performance and progress for English Language Arts ("ELA") and mathematics each year. Defendants admit that the CAASPP assessments are the only metrics they use to measure (1) whether students are meeting the statewide standards set for each grade level and (2) the extent of the opportunity and achievement gap between student groups. (Ex. J [Cotton Dep.] 76:21-78:17.)

The 2021-2022 CAASPP results provide critical insights into the effects of school closures and distance learning on students' academic progress because the 2021-2022 school year is the first time since the 2018-2019 school year that nearly all California students took the CAASPP ELA and math assessments. (Vang Decl. in Supp. of Mot. for Summ. J. ¶ 10.) According to a four-year matched cohort analysis conducted by the Educational Testing Service ("ETS"), CDE's testing vendor, the 2021-2022 CAASPP results show that students are not where they would have been if the pandemic had not occurred. (Ex. W [Vang Dep.] 205:17-22.) Unfortunately, neither ETS nor CDE examined the effect of the pandemic on students of color and low-income students despite having the ability to do so. (*Id.* 219:7-19 [CDE has not conducted any analysis that looks at the magnitude of student losses by student subgroup].) Instead, and only to support the State's Motion for Summary Judgment, CDE's Mao Vang compared the percentage of students meeting statewide standards by student group—a flawed methodology that well-respected experts, including State Board of Education President Linda Darling-Hammond, have cautioned against using due to the risk of giving rise to misleading conclusions. (Declaration of Andrew Ho ("Ho Decl."), Attachment A ("Ho Report"), ¶¶ 17-20.) Such an analysis, moreover, is the domain of a psychometrician—a scientist who studies the measurement of knowledge, skills, and other attributes—or another qualified data analysis professional. (Ex. W [Vang. Dep.] 92:5-19.) Dr. Vang—who does not possess this qualification—admitted that no psychometrician reviewed or approved the conclusions made in

her declaration. (*Id.* at 103:10-16.) If the State had conducted a professional analysis of the change in scale score points among student groups—the methodology widely accepted in the field—it would have found: (1) Black and Latinx students in grades 3 through 8 consistently lost more scale score points in the 2021-2022 school year than white students in both ELA and mathematics; and (2) the achievement gap has increased between Black and white students, among Latinx and white students, and among low-income and more affluent students in nearly every grade for both ELA and mathematics. (Ho Report, Table 1; Table 2a.)

Alarmingly, the State has not only failed to conduct any meaningful analysis into the extent of the harm faced by historically disadvantaged student groups, but it has also adopted a policy of misrepresenting the data to suggest—to the public and to this Court—that students are better off than the data shows.[3] The State continues to present a two-year cohort analysis to suggest that students are recovering from the pandemic. The problem? This two-year cohort analysis is based on a subset of the general population that is whiter, wealthier, and higher performing. (Ho Report ¶¶ 21-27.) Defendants know this data is not generalizable to all students but fails to make that important caveat clear to this Court.[4] (Pl. Sep. Stmt. ¶ 39; see, e.g., Ex. W [Vang Dep.] 186:21-188:15.) The State's attempts to withhold and misrepresent relevant data does not alter the reality: over distance learning, students of color and low-income students experienced greater harms to their academic achievement compared to their wealthier, white peers, and college-readiness has severely declined. (Ho Report ¶¶ 8-12.)

IV. Defendants Did Not Ensure Basic Educational Equality

Although the pandemic presented novel challenges, the State was far from powerless to respond effectively for the benefit of all students. The digital divide, for example, was already well understood by Defendants, who admit to being "very aware that . . . the digital divide existed

[3] Plaintiffs sought to enlist Dr. Sean Reardon, a renowned education expert from the Learning Policy Institute and a professor at the Stanford Graduate School of Education, to testify to his analysis of testing data, some of which he had published in the New York Times. The State, however, threatened to sue him, however, and he declined. (Declaration of Michael A. Jacobs ("Jacobs Decl."), ¶¶ 2-8.)

[4] The State also fails to disclose that three of the grade levels—or 30% of those analyzed—showed *slower* than average growth. (Ex. W [Vang Dep.] 175:2-16.)

before the pandemic." (Ex. V [Tornatore Dep.] 180:4-19.) But the State waited two months into the pandemic before even asking all its districts—on a voluntary basis—to identify how many of their students lacked connectivity. (Ex. Q [Nicely Dep.] 40:2-17.) Similarly, although Defendants admit they were "very well aware" of the coverage surrounding student learning loss during the pandemic (Ex. V [Tornatore Dep.] 102:4-103:15), they nevertheless failed to collect data necessary to address learning recovery in its aftermath. (See Ex. J [Cotton Dep.] 108:13-20, 109:3-14, 110:5-25; Ho Report ¶ 5 ["The limitations of available analyses that the state did make available, as well as testimony from state officials . . . *are consistent with a pattern of state disinterest* in existing test scores and what they could measure through the pandemic."], italics added.)

Defendants' efforts during that timeframe speak for themselves. Rather than ensure student access to the digital classrooms, Defendants announced a task force and a contest—both of which fell short. (Pl. Sep. Stmt. ¶¶ 24-26.) Defendants admit that, while closing the digital divide would have required "in the range of $400 million," Defendants raised only about "$18 million." (Ex. Q [Nicely Dep.] 79:3-80:1.) While they could have leveraged the State's purchasing power to address the digital divide and distribute devices to districts in need Defendants did no such thing. Instead, the State directly secured and distributed only 73,000 computing devices and 100,000 hotspots. (Nicely Decl. in Supp. of Summ. J. ¶ 3.) Defendants admit that these efforts left over eight-hundred thousand students disconnected. (Ex. Q [Nicely Dep.] 73:24-74:25.)

Defendants took a similarly hands-off approach to the distance learning requirements set out in SB98. Although the State created a "Learning Continuity and Attendance Plan" ("LCP") template for school districts to fill out, Defendants reviewed few of those plans. Astonishingly, Defendants appear to disclaim all obligation to ensure the requirements of SB98—beyond the completion of the LCP template—were actually fulfilled. (Ex. S [Strong Dep.] 175:11-176:12 [testifying that measuring learning loss is "the responsibility of the LEA itself"].)

The LCP template was adapted from the Local Control and Attendance Plan, which has been long criticized for failing to provide meaningful oversight. (Pl. Sep. Stmt. ¶ 198.) Upon

receiving a research report highlighting similar failures in LCP implementation, Defendants again did nothing. (*Ibid.*) As a result, schools and districts were left alone to navigate a crisis without a modicum of State oversight. And without such oversight, Defendants could not and did not know how—or even if—schools were providing education during the distance learning period. As a result, they could not—and did not—ensure basic educational equality.

V. Defendants Have Not Remedied the Harms Caused by the Pandemic

Although students of color and low-income students have suffered extraordinary learning loss, Defendants refuse to address the historical achievement gaps that widened due to their failures. As learning loss from distance learning endures, many one-time COVID funds have ended, and programs supported by those funds are being eliminated. (Pl. Sep. Stmt. ¶¶ 14-17, 203.) Astoundingly, despite funding LEAs through the pandemic, the State has no idea whether that funding has actually remediated the learning loss suffered by disadvantaged students. (*Id.*) It hasn't. (Ho Report ¶¶ 9-16.) Nor does the State know—because it has not inquired— (1) how many students are receiving additional learning support or are in need of such supports; or (2) the funding necessary to provide those supports. (Pl. Sep. Stmt. ¶ 203.) While the State highlights "actions" it took during the pandemic, these are largely guidance documents, webinars, continuations of programs that existed pre-pandemic, or are programs unrelated to learning loss. (See Vella Decl. in Supp. of Defs. Mot. ¶¶ 9, 15-21.) These "actions" are plainly insufficient to tackle the momentous learning loss suffered by Plaintiffs and similarly situated students.

VI. Plaintiffs' Expert Witnesses Show the State Failed Its Constitutional Duty

Plaintiffs will present testimony from six educational experts: Dr. Joseph Bishop, Dr. Tyrone Howard, and Dr. Lucrecia Santibañez (UCLA), Dr. Thomas Dee (Stanford University), Dr. Andrew Ho (Harvard University), and Dr. Elizabeth Moje (University of Michigan). These preeminent scholars in the field of education and learning will testify as to Defendants (1) failure to respond to the pandemic, and (2) importantly, continued to failure to remediate the learning loss suffered by California schoolchildren. At trial, these experts will present key evidence on issues including lost instructional time, the compounding effects of learning loss, social emotional learning, school absenteeism, distance learning environments, and student engagement.

ARGUMENT

I. The State Violated Plaintiffs' Right to a "Basically Equal" Education During the Pandemic

The Court's ruling on the demurrer to the First Amended Complaint frames the analysis:

> [a]ll causes of action are to a large degree based on the duty to provide "basically equal" education to all students attending California public schools. (*Butt v. State of California* (1992) 4 Cal.4th 668 (*Butt*).) In *Butt*, the California Supreme Court held: "California['s] Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." (*Butt*, supra, 4 Cal.4th at 685.)[5]

(Order re: Dem. at 1-2.)

Collins v. Thurmond (2019) 41 Cal.App.5th 879, on which the State heavily relies, makes clear that Plaintiffs need not prove inequality measured on a district-by-district basis; inequality within a school district can also support a claim. (*Id*. at pp. 898-99.)

To defeat the State's motion under *Butt*, therefore, Plaintiffs must show that there is a genuine dispute of fact whether the State failed to provide basic equality of educational opportunity during the pandemic. As shown below, Plaintiffs can readily make that showing. Students in wealthier districts had access to education during that period. Plaintiffs, and many like them, did not. The State's actions and inactions created that basic inequality.

A. The State Mischaracterizes Plaintiffs' Fundamental Right Claim

The State does not—and cannot—deny that the California Constitution enshrines public education as a fundamental right for all schoolchildren. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 608-609 [education's "distinctive and priceless function . . . in our society warrants, indeed compels" its treatment as fundamental].) Instead, the State seeks to minimize this right, asserting:

(i) that its "fundamental" character is relevant only "for purposes of a state equal-protection claim," rather than reflective of education's independent significance as society's principal engine of socioeconomic mobility, (MPA at 20);

[5] The Court then held that Plaintiffs' claims—which were, the Court determined, based on action or inaction by the State before November 20, 2020—were not moot as the Court could plausibly provide effectual relief for those violations. (Order re: Dem. at 3.)

(ii) that the fundamental right to an education "is no more sacred than any of the other fundamental rights" so long as the State attributes its denial to "health and safety" concerns, (MPA at 17 [citing *Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1147]); and

(iii) that the State's infringement of students' fundamental right to an education is not a claim independent of suspect-class discrimination, (MPA at 27 [characterizing Plaintiffs' fundamental right to education claim as only "[p]urportedly distinct from their race and wealth-base discrimination claim"]).

The State is wrong on all counts.

First, in treating Plaintiffs' fundamental right to an education as a box-checking element of an equal protection claim, the State misapprehends the immense significance accorded to public education by both the California Constitution and longstanding precedent. Over 50 years ago, the California Supreme Court described education as "perhaps the most important function of state and local governments." (*Serrano*, *supra*, 5 Cal.3d at p. 606 [quoting *Brown v. Bd. of Ed.* (1954) 347 U.S. 483, 493].) The Court underscored that, for a child, education is both "a major determinant of . . . economic and social success in our competitive society" and a prerequisite for meaningful "participation in political and community life." (*Id.* at p. 605.) For this reason, as this Court acknowledged, the "California Constitution makes public education uniquely a fundamental concern of the State." (Order re: Dem. at 4 [quoting *Butt*, 4 Cal.4th at p. 685], internal brackets omitted.)

Second, contrary to the State's assertion, the California Supreme Court has recognized that education's significance to both the individual and the State surpasses that of even other fundamental rights. Unlike, for example, a defendant's right to a court-appointed lawyer to safeguard their freedom, the right to education "affects directly a vastly greater number of persons . . . in ways which—to the State—have an enormous and much more varied significance." (*Serrano*, 5 Cal.3d at p. 607.) The fundamental right to an education is thus similar to the fundamental right to vote in that both are "preservative of other basic civil and political rights." (*Id.* at pp. 607-608 [citation omitted].) Strikingly, *Serrano* recognizes that education is more important even than voting. Not only does education make voting "more meaningful," but it also, "[m]ore significantly," fires students' interest in public issues, providing the foundation for lifelong civic engagement beyond the periodic casting of a ballot. (*Id.* at p. 608.) Plaintiffs do

not, as the State suggests, argue that their fundamental right to an education outweighed the State's need to cease in-person instruction at the outset of the pandemic. Instead, Plaintiffs maintain that, during the period in which the remote classroom was the primary site of education delivery across the State, the State had a duty to ensure that Plaintiffs were able to access it and the learning opportunities therein. The State's failure to do so—and subsequently, to assess and remediate the learning losses that occurred while Plaintiffs were locked out of the remote classroom—is at the heart of Plaintiffs' fundamental right claim.

Third, the State's attempt to conflate its violation of Plaintiffs' fundamental right to an education with suspect-class discrimination is both doctrinally incorrect and factually unfounded. It is well-established that the State's infringement of students' fundamental right to an education is a constitutional violation independent of discrimination on the basis of membership in a protected class. (*Butt*, *supra*, 4 Cal.4th at pp. 685-686 ["[B]oth federal and California decisions make clear that heightened scrutiny applies to State-maintained discrimination whenever the disfavored class is suspect *or* the disparate treatment has a real and appreciable impact on a fundamental right or interest."], original italics.) The Court should reject the State's bid to graft the *Collins* standard onto *Butt*. (See MPA at 20-21.)

In *Butt*, the California Supreme Court found that when the Richmond Unified School District truncated the school year by six weeks, it violated students' fundamental right to an education, even where plaintiffs alleged neither race- nor wealth-based discrimination. (*Butt*, *supra*, 4 Cal.4th at p. 703–04.) So too here: if the State since 2020 had failed to ensure educational access for students in a given district—Beverly Hills, for example—that failure would violate those students' right to a fundamental education, irrespective of the district's demographic composition. That the students deprived of an education here are also members of groups already subject to discrimination underscores how the State's (in)action cemented—indeed, worsened—pre-pandemic race- and wealth-based disparities.

B. Between March 2020 and November 2020, the State failed to ensure that Plaintiffs had educational opportunities basically equivalent to those provided elsewhere in the State.

The State complains that Plaintiffs have failed to demonstrate the "prevailing statewide

standard" during each of three periods, which it characterizes as "school-closure (March-June 2020)," "distance-learning (2020-2021)," and "after the return to in-person instruction (beginning in 2021-2022)." (MPA at 22.) In the same breath, however, the State concedes that Plaintiffs *have* defined the prevailing statewide standard (access to the remote classroom, which was the primary site of educational delivery during the relevant periods) and the State's duty thereunder (ensuring that Plaintiffs had access comparable to that of students elsewhere in the State). (*Id.*) That the State disagrees with Plaintiffs' evidentiary showing as a factual matter—and instead urges the Court to credit its own evidence of "*the reality of the level and quality of* [educational] *services actually being provided*"—simply highlights the parties' genuine dispute over the facts on which this case turns. (*Id.*, original italics.)

Put differently, the critical questions under *Butt* (What was the prevailing statewide standard during the relevant period? Did the State ensure that Plaintiffs' education measured up?) require empirical answers, not legal ones. Comparing the parties' answers to these questions reveals that, for each of the periods delineated by the State above, there exists triable issues of material fact as to (1) whether the State ensured basic equivalence between the educational opportunities (or lack thereof) available to Plaintiffs and those provided to students elsewhere in California and (2) whether the State remediated the learning loss and other harms faced by Plaintiffs and other similarly situated students as a result of the State's COVID-19 policy.

March to June 2020: Unsurprisingly, the State's papers are largely silent on what they define as the prevailing statewide standard—*i.e.*, "the reality" of the educational "services actually being provided"—during this period. (MPA at 22, italics omitted.) Notwithstanding the State's emphasis on empirical reality elsewhere in its papers, here, the State claims that, because its school-closure policy applied to all districts, Plaintiffs were "impacted[] identically to every other student in the state."[6] (*Id.* at 23.) This massive inferential leap has no basis in fact, and

[6] Taken to its logical conclusion, the State's argument would permit it to order all districts to cease all instruction between now and 2024. If challenged, the State would respond—as it does here—that its order to cease instruction applies equally to all districts (and therefore, to all students). This would, of course, render the fundamental right to an education a nullity, and it demonstrates the absurdity of the State's attempt to cabin violations of that right to instances of "*unequal* [State] *treatment*." (MPA at 22, original italics.)

ignores facts the State knows to be true.

As the State concedes in a footnote, public education didn't cease entirely between March and June 2020. (MPA at 22 n.4 ["Some schools . . . implemented some form of remote learning or alternate instruction during this time period[.]"].) Rather, after a *three-week* period at the end of March, education resumed in *a majority of California school districts*. Thus, contrary to the State's suggestion, public schools did not shutter; they moved from brick-and-mortar locations to online ones. Across the State, districts transitioned to providing educational services through the remote, rather than the physical, classroom. (Pl. Sep. Stmt. ¶ 186.) And Plaintiffs, lacking the devices and connectivity to access this remote public education, were left behind. (*Id.* ¶ 188.)

Having no answer to this factual reality, the State reinterprets *Butt*. So long as the State treats all districts equally, it argues, neither its actions nor its omissions can deprive any student of the fundamental right to an education. (MPA at 22 [asserting no constitutional violation occurred because "the State's school-closure policy applied [equally] to all students"].) That is not the law. Under *Butt*, the State's duty is not to treat all *districts* equally, but to ensure that *students across the State* have "basically equivalent" public educational opportunities, regardless of the district in which they reside. (*Supra*, 4 Cal.4th at p. 685.) Indeed, *Butt*'s core ruling—that the State has an obligation to intervene when the education provided in a given district falls fundamentally below the prevailing statewide standard, (*id.* at pp. 686-687)—rests on the high court's understanding that the State will have to treat some districts differently in order to ensure that all students have basically equivalent educational opportunities.[7]

In *Butt*, the Supreme Court rejected the State's argument that providing emergency aid to Richmond would contravene the State's equalized funding policy. (*Id.* at p. 691.) Rather than mandating equal treatment, the Supreme Court explained, its *Serrano* cases recognized that the

[7] Imagine that (1) the State adopted a policy allowing districts to choose whether or not to teach subtraction, and (2) under this policy, a majority of districts in the State chose to teach it. Subtraction instruction would therefore be the prevailing statewide standard, and the State, under *Butt*, would be required to ensure that all California students had the opportunity to learn how to subtract (by, for example, providing supplemental learning materials to students in districts without subtraction instruction). In the absence of such intervention—and the disparate treatment it entails—the State would violate students' fundamental right to an education basically equivalent to the prevailing statewide standard.

State's responsibility to ensure basic educational equality "extends beyond the detached role of . . . fair legislator." (*Id.* at p. 688.) Nor did the Supreme Court accept that requiring the State to intervene would unfairly hold it responsible for remedying a constitutional violation it did not cause. *Id.* at 688–89 (rejecting the State's argument that "[a]llowing the District's students to absorb the consequences of District mismanagement . . . was necessary to preserve the State's" policy of local control and accountability).

Thus, the State's uniformly applicable policy did not absolve it of the duty to act when, in March 2020, the remote classroom became the primary site of educational delivery across the State.[8] Nor is the State excused because it was not the primary cause of the transition to remote learning or the digital divide that existed between Plaintiffs and their peers in other districts. At a minimum, there are genuine disputes of material fact as to whether, as Plaintiffs' evidence demonstrates: (1) the prevailing statewide standard from March 2020 to June 2020 was access to the remote classroom—it was (Pl. Sep. Stmt. ¶196); (2) Plaintiffs lacked such access—they did (*Id.* ¶ 197); and (3) the State's actions failed to ensure such access—they did (*Id.* ¶ 198).

August 2020 to November 2020: Plaintiffs' evidence demonstrates that, during the 2020–21 school year, the prevailing statewide standard continued to be access to the remote classroom with daily live interaction and between 180 and 240 instructional minutes per day, followed by gradually increasing access to in-person instruction in the latter half of the academic year. (*Id.* ¶ 196) Plaintiffs' evidence further shows that, during both of these phases, Plaintiffs lacked access to instruction—remote, hybrid, then in-person—basically equivalent to that available to their peers across the State. (*Id.* ¶ 197.)

Finally, Plaintiffs' evidence demonstrates that—notwithstanding the litany of policies the State adopted ostensibly to broaden access first to the virtual, then to the in-person, classroom—those actions were ineffective in affording Plaintiffs learning opportunities even remotely comparable (much less basically equivalent) to those available elsewhere in the State. (*Id.* ¶ 198)

[8] Incredibly, the State has repeatedly attempted to shift its responsibility for basic educational equality onto Plaintiffs, asserting, for example, that Plaintiffs should have utilized the Uniform Complaint Process to seek access to devices and digital connectivity. (MPA at 31.)

Yet again, the State presents no evidence of "the reality" of the educational "services actually being provided" to a majority of California students, much less evidence sufficient to disregard the facts adduced by Plaintiffs. While the State's brief reads like an extended press release trumpeting its own policies, e.g., (MPA at 15 [describing at length an award received by the State]), it is notably silent on the factual issues at the heart of this case: the educational services students were required to receive by law, the education "*actually*" being provided to a majority of students across the State, and Plaintiffs' (lack of) access thereto, (MPA at 22, original italics). Indeed, nowhere in its brief does the State proffer its own version of the educational conditions prevailing in the State during this period. There is a simple explanation for this glaring omission: the State *does not know*. That is, despite the State's exhaustive narration of its own activities over the course of this period, the State failed to collect any meaningful data demonstrating how well, if at all, its policies were meeting students' needs on the ground. The State did not require consistent data collection on the digital divide across districts, so the information available is a hodgepodge of district reports. (Pl. Sep. Stmt. ¶ 188.) Further, the State had no consistent requirement for collecting data on learning loss and was poorly positioned to ensure equal access to education even once distance learning ended. (*Id.* ¶ 198)

Instead, the State lightly modified its existing and ineffectual "accountability" system—which amounts to little more than box-checking by the districts without substantive follow-up — to require districts to submit "Learning Continuity Plans" that promised to provide instructional continuity. Plaintiffs' evidence demonstrates that, upon receiving these submissions, the State deposited them into a (metaphorical) file cabinet and never referred to them again. (Ex. S [Strong Dep.] 208:9-209:4.) To the extent the State claims to have taken *any* of the actions a reasonable government actor would have taken under the circumstances—for example, assisting districts in preparing the substance of the plans; following up to assess whether districts were implementing the plans, and to what effect; or otherwise enforcing the districts' commitments—that is a genuine issue of triable fact inappropriate for summary judgment or adjudication.

November 2020 to Present: Although the State treats the learning losses suffered by Plaintiffs during each previous period as independent harms, they are not. The State's artificial

division of the last three years into three distinct periods—which Plaintiffs follow only for clarity of argument—reflects its fundamental misunderstanding of the cumulative nature of education. Learning losses do not occur in a vacuum; they compound over time. (Bishop-Howard Report, 13.) Every successive level of education builds on knowledge students are expected to have learned at previous levels. Thus, the State's business-as-usual approach following the return to fully in-person learning has not remedied and will not remedy the injuries resulting from Plaintiffs' lack of access to education between March 2020 and November 2020.

Rather than using the return-to-school as an opportunity to address the harms faced by Plaintiffs, the State has ingrained the harms caused by the pandemic. There is no justification for the State's *laissez-faire* approach to remedial education for Plaintiffs and other students locked out of the digital classroom. Not only has the State failed to collect necessary data on the amount of learning loss students have suffered, but it has mischaracterized even the limited data it has collected through false statistical analysis. (See Ho Report ¶¶ 21-27.) Although the State could have implemented targeted remedial programs for the students who lacked access to education during distance learning, and who were thus most at risk of falling behind, it did not.

Since education is cumulative, the need for learning loss remediation is greater than ever. Unless the State takes action sufficient to redress the widened learning disparities resulting from its failures over the past three years, Plaintiffs and their classmates will be permanently relegated to a lower tier of academic achievement and socioeconomic opportunity. (Bishop-Howard Report, 13.) Plaintiffs' evidence demonstrates that the State has taken no such action. (Pl. Sep. Stmt. ¶ 203.) That the State disputes these critical facts only underscores the need for their determination at trial.

II. The State's Omissions Discriminated Against Plaintiffs on the Basis of Wealth and Race

Separate from their evidentiary showing under *Butt*, Plaintiffs have adduced evidence demonstrating: (1) the State's omissions between March 2020 and November 2020 had a substantial disparate impact on students of color and students from low-income families, causing *de facto* racial and wealth segregation, (Pl. Sep. Stmt. ¶ 199); and (2) following the identification

of this impact, the State failed to take sufficient corrective action, (Pl. Sep. Stmt. ¶ 203). The State disputes Plaintiffs' evidence of both elements as a matter of fact, not law.

A. A Genuine Issue of Triable Fact Exists as to the Disparate Impact of the State's Omissions.

Plaintiffs will present undisputed evidence, that students of color and students from low-income families, including Plaintiffs:

- disproportionately lacked the digital devices and connectivity necessary to access the remote classroom between March 2020 and November 2020, (Pl. Sep. Stmt. ¶¶ 194, 197, 199);
- received less virtual live instruction and had less contact with their teachers than students elsewhere in the State, (Pl. Sep. Stmt. ¶¶ 197, 199);
- disproportionately lacked access to critical mental health supports, (Pl. Sep. Stmt. ¶ 202); and
- as a result of these disparities, suffered disproportionately greater learning losses than their peers in other districts, (Pl. Sep. Stmt. ¶¶ 200-201).[9]

The crux of the parties' factual disagreement is whether (as Plaintiffs assert) these disparities resulted from the State's inaction, or whether (as the State claims) they were caused by characteristics of the Plaintiffs themselves.

Whereas Plaintiffs' evidence demonstrates that the State could have, but did not, ensure access to the devices, instructional minutes, and learning loss remediation required by law, the State maintains that its failure to take these actions is not responsible for the disparities described herein. Instead, the State asserts, the disparate impacts suffered by Plaintiffs during the pandemic resulted from their membership in "historically disadvantaged populations" that "have contended with 'long-standing structural and systemic barriers' to education having nothing to do with the State's pandemic response." (MPA at 19.) On the State's view, the harms Plaintiffs experienced while excluded from the remote classroom are attributable not to any failure of the State, but to "the material differences in life circumstances" between Plaintiffs and their white and wealthier peers. (*Id.* at 20.)

[9] The State's acknowledgment of these disparities is impossible to reconcile with its glib assertion that under its school-closure policy, "the plaintiff group was . . . impacted[] identically to every other student in the state." (MPA at 23.)

The State's decision to pathologize Plaintiffs and their families is both deeply troubling and reflective of the State's profound indifference to the effects of its policies on low-income people and people of color. But even putting this aside, whether the State or Plaintiffs and their families are responsible for the disparate harms Plaintiffs suffered during the pandemic is a factual question, not a legal one. So too is the income level of Plaintiffs' school districts, which is the relevant measure of wealth under *Serrano* and *Crawford*. (*Serrano*, *supra*, 5 Cal.3d at p. 601; *Crawford v. Bd. of Ed.* (1976) 17 Cal.3d 280, 290-292.) The request underlying the State's argument—that the Court "weigh the evidence in the manner of a fact finder to determine whose version is more likely true"—is inappropriate at summary judgment. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840.)

B. A Genuine Issue of Triable Fact Exists as to the Absence of Corrective State Action.

Remarkably, the State continues to assert that it need not "take more than 'de minimis' action to ameliorate a disparate impact [to educational opportunity] caused by a state policy." (MPA at 27; see also *id.* at 26 ["[T]he second required element of a state equal protection claim in the public-education context is that '*no action* is taken to correct that policy when its impacts are identified.'"], original italics [quoting *Collins*, *supra*, 41 Cal.App.5th at p. 896].) The State's position—that *any* remedial action, no matter how small and ineffectual, will defeat a claim of disparate impact in education—is, obviously, untenable. The State has an obligation "to correct" educational disparities, not gesture in that direction.

Recognizing this, the State points to its "full-throated mitigation program," (MPA at 27), which consisted of the disbursement of funds untethered to any meaningful accountability mechanism. Plaintiffs' evidence demonstrates the remedial insufficiency of requiring districts to submit Learning Continuity Plans that (1) the State did not review and (2) districts did not follow. To the extent the State argues that its actions did, in fact, remedy Plaintiffs' disproportionate exclusion from the remote classroom, that is a genuine factual dispute for resolution at trial.

III. The State's failure to ensure Plaintiffs' access to the remote classroom

violated Article IX's free school guarantee.

The California Constitution's free school guarantee "entitles 'the youth of the State . . . to be educated at the public expense.'" (*Hartzell v. Connell* (1984) 35 Cal.3d 899, 905 [quoting *Ward v. Flood* (1874) 48 Cal. 36, 51].) It requires the State to eliminate any financial burden attached to any activity that is an integral component of public education. (*Id.* at p. 911 ["In guaranteeing 'free' public schools, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education—none."].) *Hartzell* embodies the straightforward proposition that access to public education cannot be conditioned on familial wealth. (See *id.* at pp. 911-913.)

The State's hyper-literal interpretation of *Hartzell*—that the free school guarantee may *only* be violated by a fee charged for educational participation—is not only absent from the decision itself, but also subverts its core constitutional principle: "[A]ccess to public education is a right enjoyed by all." (*Id*. at p. 913.) On the State's view, for example, a public school could limit enrollment to students from families with incomes exceeding $200,000, so long as it didn't impose an actual fee on educational services. This absurd result (and others that follow from the State's proposed rule) would negate the free school guarantee.

Under Article IX, therefore, the State's failure to cover the cost of digital access to the remote classroom violated Plaintiffs' right to a free public education.[10] That is, the movement of instruction from the physical to the remote classroom conditioned children's access to education on their families' ability to afford devices and connectivity, an outcome prohibited under *Hartzell*. To the extent the State argues that access to the remote classroom was *not* contingent on familial resources, that is an issue of fact not susceptible to resolution at summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' motion for summary judgment and summary adjudication.

[10] The State repeats its assertion that plaintiffs were required to exhaust this claim. (MPA at 31.) The State is wrong. By its express terms, section 49013 of the Education Code applies only to complaints alleging "noncompliance with the requirements *of this article*." (Ed. Code, § 49013, italics added.)

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