SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Cayla J. et al Plaintiff/Petitioner(s) vs. State of California et al Defendant/Respondent(s)	No. RG20084386 Date: 08/07/2023 Time: 2:59 PM Dept: 23 Judge: Brad Seligman ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 08/04/2023, now rules as follows: Defendants' Motion for Summary Judgment is DENIED.

Defendants' Motion for Summary Adjudication is GRANTED IN PART and DENIED IN PART.

Defendants' Motion for Summary Adjudication is GRANTED as to Plaintiffs' fourth cause of action for violation of article IX, sections 1 and 5 of the California Constitution. Defendants' Motion is otherwise DENIED.

BACKGROUND

While the COVID-19 pandemic caused may disruptions and heartbreaks, it created undeniable havoc in our public schools, which were forced to close down and resort to remote, internet-based learning. This case presents the important question of whether the state educational defendants did enough to alleviate or minimize the impact of the switch to remote learning, particularly for students of color and lower economic status. There is no dispute that many students, particularly students of color and poorer students, had less access to remote learning than other students. The Court finds that there are disputed facts regarding whether the Defendants' efforts were sufficient to avoid constitutional violations and accordingly denies the motion in part.

Plaintiffs—minors acting through their guardians ad litem—are "economically disadvantaged people of color," and current and former students at Oakland and Los Angeles Unified School Districts. (4/7/23 Second Amended Complaint ["SAC"], ¶¶ 8, 20-93.) They allege that the change to remote learning during the COVID-19 pandemic and subsequent return to in-person learning "have denied Student Plaintiffs the basic education equality guaranteed to them by the California Constitution." (SAC, ¶ 10.)

Plaintiffs sue Defendants—the State of California, the California Department of Education, the State Board of Education, and the State Superintended of Public Instruction (together, "Defendants")—for (1) racial discrimination; (2) wealth discrimination; (3) violation of article I, section 7 of the California Constitution; (4) violation of article IX, sections 1 and 5 of the California Constitution; and (5) declaratory relief.

Each side in this motion filed voluminous documents that often went above and beyond the specific issues in this case. The court emphasizes what is not at issue in this case. This case does not address any overarching claims about state's response to the COVID epidemic, nor the closures of schools that were the result of emergency orders. This case is also likewise not about historic inequities suffered by students of color or lower socio-economic means. The narrow focus of this case targets the period of time when the schools were physically closed and learning was available only remotely.

As the Court describes below, a limited number of declarations and depositions filed by both sides, informs the Court's ruling on this motion. Accordingly, the Court finds it unnecessary to address many of the declarations and documents, and objections thereto, filed by the parties.

A. Factual Background

On March 4, 2020, the California Governor declared a state of emergency because of the COVID-19 pandemic and issued a statewide stay-at-home order, which required public schools to cease in-person instruction. (UMF 8.) Public schools operated remotely between March 2020 and November 2020. (UMF 11; AMF 186.) Beginning in the fall of 2020, schools resumed in-person instruction. (UMF 12.) Los Angeles Unified School District ("LAUSD") resumed in-person instruction in January of 2021, and Oakland Unified School District ("OUSD") "fully" re-opened in March 2021. (UMF 12.) As of February 28, 2023, the California Governor terminated the state of emergency declaration. (UMF 13.)

There are approximately 1,000 school districts and 10,000 public schools in California, which serve over six million K through 12 students. (UMF 2.) During the pandemic, California received billions of dollars in educational funding, which the California Department of Education ("CDE") directed to Local Educational Agencies ("LEAs"). (Vella Decl., ¶¶ 6, 7.) The LEAs were responsible for determining how to allocate and use the funding. (*Ibid.*)

During the remote learning period, Defendants distributed more than 45,000 laptops and more than 73,000 computing devices to students throughout California. (UMF 24.) However, between 800,000 and 1 million students remained without access, or without sufficient access, to online classes. (AMF 193, 194; *see* Reply to Separate Statement, No. 194 ["Undisputed that, as Ms. Nicely testified, between May 2020 and September 2020 – not the end of the 2020-2021 school year – between 800,000 and 1 million students lacked devises and/or connectivity."].) Plaintiffs contend that the lack of access disproportionally impacted students from low-income communities and communities of color.

B. Defendants' Motion for Summary Judgment

Defendants move for summary judgment or, in the alternative, summary adjudication of Plaintiffs' claims.

Defendants argue that their "robust and wide-ranging efforts to remediate the impact of the pandemic" warrant summary judgment, and further assert that "plaintiffs are unable to establish… (1) the existence of a state policy that has caused a disparate impact on plaintiffs

because of their race or income status, or (2) that plaintiffs' educational experience fell below the 'prevailing statewide standard' for public school education upon the State's return to in-person instruction." (MPA, pp. 7-8.)

In support of their Motion, Defendants submit four declarations, in addition to other evidence.

Mao Vang, the Director of the Assessment Development and Administration Division at the CDE, who discusses pre-COVID and post-COVID testing scores, which indicate that "the State's learning recovery and acceleration efforts are having a positive impact." (Vang Decl., ¶ 2.)

Mary Nicely, Chief Deputy Superintendent, who addresses "Defendants' efforts to address the digital divide during the pandemic." (Nicely Decl., ¶ 3.)

Malia Vella, Deputy Superintendent, who discusses Defendants' programs and initiatives targeted at responding to the impacts of COVID-19 on students. (Vella Decl., ¶ 3.)

Chris Ferguson, the Program Budget Manager at the California Department of Finance, who discusses the "unprecedented amounts of funding and support to school districts and their students" and the "new programs" enacted to ameliorate "the impacts of the pandemic on students' academic progress and mental health." (Ferguson Decl., ¶ 3.)

C. Plaintiffs' Opposition

In opposition, Plaintiffs offer five reports, in addition to other evidence: (1) the Bishop-Howard Report; (2) the Ho Report; (3) the Santibañez Report; (4) the Dee Report; and (5) the Moje Report. (*Plaintiffs' Reports contain two different page numbers. All citations herein are to the bottom center page number*.)

1. Bishop-Howard Report

The Bishop-Howard Report—prepared by Joseph P. Bishop, Ph.D. and Tyrone C. Howard, Ph.D.—determined that LAUSD students missed 205 in-person instructional days during COVID-19 school closures. (Report, p. 40.) Oakland Unified School District students missed 204 in-person instructional days. (*Id.*, p. 41.) Thus, the authors opine that the prevailing standard for "quality, equitable education was not achieved" at most California public schools. (*Id.*, p. 42.)

The Bishop-Howard Report goes on to summarize the impact of the pandemic on students, by way of teachers and administrators (Section III), and describe the racial and socioeconomic imbalances in California's public school system (Section IV). The Report concludes by identifying challenges to, and providing recommendations for, addressing the negative effects of the pandemic on "student learning, health, development, and well-being." (Report, p. 6; *see also* Section V.)

2. Ho Report

The Ho Report analyzes student test scores before and after the pandemic, and its author—

Andrew Ho, Ph.D.—critiques Defendants' assessment and conclusions in the Vang Declaration (incorrectly referenced as the Vella Declaration). The Ho Report concludes that educational inequality grew over the course of the pandemic and achievement gaps widened between White students and Black and Hispanic students, and that the "magnitude of learning loss was greater in California school districts that serve more low-income students." (Report, p. 4.)

3. Santibañez Report

The Santibañez Report studies the impacts of COVID-19 on social-emotional learning ("SEL"). (Report, p. 5.) It details how California's "decentralized school system" and "minimal guidance" from the State "left many LEAs to their own devices" during the pandemic, which lead to "declines" in "student motivation" and "other indicators of student engagement and well-being." (*Id.*, pp. 5-6.) Santibañez opines that "low-income, English-learner classified students, and racial/ethnic minorities" were "hardest hit by the pandemic," and identifies certain "priorities" for addressing SEL going forward. (*Id.*, pp. 5, 8-9.)

4. Dee Report

The Dee Report looks at school enrollment patterns in California public schools before and after the pandemic. The Report finds a "dramatic" decline in enrollment following the pandemic, which cannot be explained through traditional factors, and that the declines were "particularly large" among "vulnerable students (i.e., homeless, socioeconomically disadvantaged) and among certain racial-ethnic groups (i.e., African-American, American Indian/Alaskan Native, White)." (Report, p. 4.)

5. Moje Report

Moje provides a narrative of the "problem" based upon "firsthand experience in the Detroit Public Schools Community District" as well as Plaintiffs' experiences, and documents the main challenges faced by students. (Report, pp. 4-11.) The Report also provides "researched based recommendations for how to remedy this situation." (Report, p. 11.)

SUMMARY JUDGMENT FRAMEWORK

The purpose of summary judgment is to allow the court to "cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Miller v. Fortune Commercial Corporation* (2017) 15 Cal.App.5th 214, 220, citing *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Summary judgment is proper only when "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civil Procedure ["CCP"] § 437c(c).)

When a defendant moves for summary judgment/adjudication, it is the defendant's burden as movant to show, for each challenged cause of action, that "one or more elements of the cause of action ... cannot be established, or that there is a complete defense to the cause of action." (CCP § 437c(p)(2); *see Miller, supra*, 15 Cal.App.5th at p. 220, citing *Aguilar, supra*, 25 Cal.4th at p. 849; *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.) A defendant may also make its showing by proving every element of an affirmative defense. (CCP § 437c(p)(2); *Anderson v.*

Metalclad Insulation Corp. (1999) 72 Cal.App.4th 284, 289.)

If the defendant has made the required showing, the burden then shifts to the plaintiff to show one or more triable issues of material fact. (CCP § 437c(p)(2).) Importantly, plaintiffs have no burden to prove any part of their case in the absence of defendant meeting its burden. If it makes that showing, then plaintiff must '"set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto."' A triable issue of material fact may not be created by speculation or a 'stream of conjecture and surmise.' Instead, the plaintiff must produce 'substantial responsive evidence.'" (*Miller*, *supra*, 15 Cal.App.5th at pp. 220-21, internal citations omitted.) The parties may not rely on the allegations in their pleadings to show that a triable issue of material fact does or does not exist. (CCP § 437c(p)(2).)

When deciding matters on summary judgment, the court considers the evidence offered in support and opposition to the motion. (CCP § 437c(c).) Mere statements unsupported by evidence are not sufficient to defeat the motion. (*See Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 616 ["A party cannot defeat summary judgment by the expedient of averring he or she has evidence to support a cause of action; instead, such evidence must be presented in opposition to summary judgment."].) Evidence must be admissible under the Evidence Code, and objections not raised are deemed waived. (CCP § 437c(c) ["[T]he court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court . . . ."]; *id.*, § 437c(b)(5).)

In considering the parties' evidence on a summary judgment motion, the court does not weigh the evidence or decide contested issues of fact. Rather, the court considers what conclusions a reasonable trier of fact could reach based on the evidence and reasonable inferences drawn from the evidence. (*See Miller*, *supra*, 15 Cal.App.5th at p. 221.) In cases decided on the preponderance of evidence, "if any evidence or inference presented or drawn by the plaintiff shows or implies that the elements of the cause of action were more likely than not satisfied, summary judgment must be denied, because a reasonable trier of fact could find for the plaintiff." (*Ibid.*) "Otherwise, there is no triable issue of material fact, and summary judgment should be granted." (*Ibid.*)

DISCUSSION

As noted above, Plaintiffs assert claims for violation of the equal protection clause of the California Constitution based upon racial discrimination and wealth discrimination; violation of article I, section 7 of the California Constitution; and violation of article IX, sections 1 and 5 of the California Constitution.

A. Equal Protection Clause of the California Constitution

Unlike the U.S. Constitution, the California Constitution expressly recognizes that the protections of California's equal protection clause "exceed those imposed" under the federal Constitution "with respect to the use of pupil school assignment or public transportation." (Cal. Const., Art. I, § 7, subd. (a).)

"Accordingly, 'established California case law holds that there is a fundamental right to equal

access to public education, warranting strict scrutiny of legislative and executive action that is alleged to infringe on that right.'" (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896, quoting *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1456.)

A violation of California's equal protection clause occurs "when a policy adopted in California has a substantial disparate impact on the minority of children of its schools, causing de facto segregation of the schools and an appreciable impact to a district's educational quality, and no action is taken to correct that policy when its impacts are identified." (*Collins*, *supra*, pp. 896-897.) Proof of intentional or purposeful discrimination is not required in order to establish an equal protection violation, so long as a discriminatory effect has been shown. (*Butt v. State of California* (1992) 4 Cal.4th 668, 681-682.) Put another way, public officials in some circumstances "bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results." (*Collins*, *supra*, 41 Cal.App.5th at p. 896.)

Separately, when "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards," a violation of the Constitution's basic educational equality guarantee occurs. (*Butt*, *supra*, 4 Cal.4th at pp. 686-687.)

Defendants argue that Plaintiffs' disparate impact claims fail for several reasons. The Court addresses each in turn.

1. Similarly Situated

First, Defendants argue that Plaintiffs are not "similarly situated" to the comparator group (i.e., wealthy, White students). Defendants argue that because Plaintiffs allege that Black, Latinx, and low-income students have been "historically disadvantaged populations," Plaintiffs cannot establish a causal link between Defendants' conduct and the disparate impact. (MPA, p. 19, citing *Collins*, *supra*, p. 893.)

In opposition, Plaintiffs suggest that identification of a suspect class is not required because California applies strict scrutiny "whenever the disfavored class is suspect or the disparate treatment has a real and appreciable impact on a fundamental right or interest." (Opposition, p. 21, citing *Butt*, *supra*, p. 685-686.)

Even accepting Defendants' argument *arguendo*, it would not entitle Defendants to summary judgment. As noted in *Collins*, the "inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*Collins*, *supra*, p. 893 [cleaned up], citing *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) In *Collins*, plaintiffs alleged that school districts disciplined African American and Latino students at disproportionally higher rates than White students. The court determined these allegations stated an equal protection claim under the California Constitution. (*Collins*, *supra*, pp. 897-900.)

Here, the evidence indicates that Defendants implemented a remote learning policy that failed to provide all students with computers and internet access. (*Compare* Bishop-Howard Report, p. 27 [an estimated 800,000 to 1 million students needed laptops and hotspots], AMF 189 *with* UMF 24 [distributed more than 45,000 laptops and more than 73,000 computing devices].) Plaintiffs

also submit evidence that the failure to provide adequate connectivity disproportionately impacted low-income students and students of color. (Ho Report, *generally*; *see also* AMF 193, 195, 197-201.) Whether the "historical" discrimination undermines any causal connection between Defendants' policy and the purported disparate impact is a triable issue of fact.

Defendants cite *Villafana v. County of San Diego* (2020) 57 Cal.App.5th 1012 for the proposition that "a policy that applies uniformly to all people subject to that policy with the same results cannot constitute disparate treatment or be said to cause a disparate impact." (MPA, p. 23.) *Villafana* considered a claim under Government Code § 11135, which prevents discrimination in state funded programs, as opposed to a constitutional disparate impact claim. Moreover, *Villafana* recognized that plaintiffs asserting disparate impact claims "must employ an appropriate comparative measure," which takes into account "the correct population base and its racial makeup." (*Villafana*, *supra*, p. 1018.) There, the court found that the plaintiffs failed "to allege that Hispanic, Latino, or female applicants suffered harsher impacts than other groups to whom the practice [was] applied," which are the allegations Plaintiffs make here. (*Id.*, p. 1020; *see also* SAC, ¶¶ 213-216, 222.)

2. Infringement of Right to Education

Defendants next argue that "Plaintiffs are unable…to demonstrate that their fundamental right to educational equality has been unconstitutionally infringed." (MPA, p. 20, citing *Butt*, *supra*, p. 685 [stating the California Constitution "prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts"].)

First, Defendants argue that Plaintiffs "fail even to identify or articulate an actionable 'state policy'" that has purportedly caused a disparate impact. (MPA, p. 21.) At the hearing, however, Defendants conceded that there is, at least, a triable issue regarding the disparate impact claim.

Second, Defendants argue that Plaintiffs fail to establish both the prevailing statewide standard, and that the education received by Plaintiffs fell fundamentally below that standard. (MPA, p. 21; *see also* Reply, pp. 6-10.) At the hearing, Defendants argue that SB 98 could not be the basis for establishing the prevailing statewide standard and that Plaintiffs otherwise identify no facts (citing Plaintiffs' interrogatory responses).

At the hearing, Defendants cited *Butt*, *supra*, pp. 868-867 and fn. 14 for the proposition that Plaintiffs cannot rely upon SB 98 to establish the prevailing statewide standard. The Court does not read *Butt* to prohibit SB 98 from being a consideration in establishing the prevailing standard. Defendants cite *Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 907-909 , which they assert holds that the constitution does not guarantee a "right" to quality education. (Reply, p. 10.) In that case, however, unlike this one, plaintiffs relied solely on the constitutional provisions themselves, and not on statewide standards set by statute. The court's holding was clear: "In the absence of a challenge to any legislative enactment, we conclude sections 1 and 5 of article IX, *standing alone*, do not allow the courts to dictate to the Legislature, a coequal branch of government, how to best exercise its constitutional powers to encourage education and provide for and support a system of common schools throughout the state." (*Campaign for Quality Education*, *supra*, 246 Cal.App.4th at pp. 915–916

(emphasis added).) This at least suggests that SB 98 can be relevant to establishing the statewide standard, contrary to Defendants' argument that *Butt* prohibits its consideration.

Moreover, the Court does not find that Plaintiffs' discovery responses are factually devoid. Plaintiffs' interrogatory responses regarding the definition of "prevailing statewide standard" reference SB 98 and the need to access to internet connectivity to participate in remote learning programs. (*See* Defendants' Exhibits 3-20 at supplemental response to interrogatory no. 5.) Therefore, the Court finds that Defendants have not shifted the burden.

Even if *arguendo* SB 98 were insufficient to establish a statewide standard, there is ample evidence in the record of a disputed issue of fact. (*See, e.g.*, Nicely Decl., ¶¶ 6-18 [outlining Defendants' efforts to provide remote access to students statewide]; Vella Decl., generally [detailing Defendants' work with LEAs during the pandemic]; *see also* Plaintiffs' MPA p. 13 [arguing that the standard required access to remote devices, daily live interaction with teachers and minimal instructional minutes].)

As to the second element, whether the education fell "fundamentally below" the prevailing standard, there is similarly a triable issue of fact. (AMF 197-202.) The Ho Report finds that achievement gaps grew between economically advantaged and disadvantaged students from 2019 to 2022. (Ho Report, ¶¶ 13-16.) Also, Defendants' witnesses confirm the basic facts upon which Plaintiffs rely: that 800,000 to 1 million students lacked connectivity or devices to connect (Ex. Q [Nicely Depo.] at pp. 74, 116.) Defendants were aware of this lack of access and estimated that it would cost $400-500 million to remedy this, but only raised about $18 million for this purpose, enough for 45,884 Chromebooks. (*Id.*, pp. 74, 79-80; *see also* Ex. V [Tornatore Depo.] at p. 180.) Defendants also knew that socioeconomically disadvantaged and students of color had higher percentages of lack of access to connectivity and digital devices than other students. (Tornatore Depo., p. 184.)

Plaintiffs' evidence raises at least a triable issue regarding whether Plaintiffs and other putative class members received the prevailing state standard.

3. Statewide Assessment Results

Defendants argue that statewide testing before and after the school closures "reflect[s] a similar decline between the three racial groups and two wealth-based groups, as measured by the percentages of students meeting or exceeding standards," which "contradicts plaintiffs' assertions that the State's mitigation policies caused a substantial disparate impact on them…" (MPA, p. 24.) Defendants rely on the Vang Declaration, which analyzed testing results according to Interpretation Guides prepared by Vang and their team.

Vang's conclusions, however, were challenged by the Ho Report, which determined that Defendants' calculations were "fundamentally flawed." (Ho Report, ¶¶ 17-27.) According to the Ho Report, educational inequality increased from 2019 to 2022 and achievement gaps widened between average White students, on the one hand, and average Black and Hispanic students on the other. (Ho Report, p. 3.) The Ho Report also states that the achievement gap widened between students of low-income and high-income families. (*Ibid.*) Significantly, in their Reply to Plaintiffs' Further Disputed Material Facts Nos. 200-201, Defendants do not

dispute the Ho Report conclusions.

Thus, there is a triable issue of fact whether statewide assessment results support or contradict Plaintiffs' claims.

4. Individual Experiences

Defendants finally argue that Plaintiffs cannot rely solely on their own experiences to support their equal protection claim (MPA, pp. 24-25), or rely on data from only one or two school districts (Reply MPA, pp. 6-7). The Court need not resolve the argument because, as demonstrated above, the Court finds a triable issue precludes summary adjudication of Plaintiffs' equal protection claims without resort to Plaintiffs' individual experiences or a few districts.

5. Remediation Efforts

Defendants argue that even if Plaintiffs can show discriminatory disparate impact, they cannot "show that the State has taken 'no action' to remediate the impacts of school closures and distance learning—a required element of their claim." (MPA, p. 26.)

The law on the issue is as follows: In recognition of the fundamental right to education in California, the state Supreme Court recognized that school boards "bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." (*Collins*, *supra*, p. 896, quoting *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 290.) Public officials "in some circumstances bear an affirmative obligation to design programs or frame policies so as to avoid discriminatory results." (*Ibid.*, quoting *Crawford*, *supra*, at pp. 296-297.) Thus, while a claim may be stated by alleging that the state took "no action" to correct a policy when its impacts are identified, the applicable standard is whether "reasonable steps" were taken so as to avoid discriminatory results. (*Id.*, pp. 896-897.)

Here, while there is evidence that Defendants took some steps "to address pandemic-related impacts" (MPA, pp. 26-27, citing UMF 14-31), the question is whether those steps were "reasonable." Plaintiffs offer evidence that Defendants' actions were insufficient to remedy the disparate impact. (Opposition, p. 18, citing Ho Report, ¶¶ 9-16, AMF 203.) Ultimately, whether Defendants' remediation efforts were reasonable is a triable issue of fact.

At the hearing, Defendants argued that the standard is whether Defendants took "any" action (as opposed to "no" action), and further argued that Defendants' actions were reasonable as a matter of law. As to the first argument, the Court disagrees that the standard is "some action" versus "no action." The "no action" language comes from *Collins*, which held that an equal protection claim was stated when plaintiffs allege disparate impact and that "no action is taken to correct" it. (*Collins*, *supra*, pp. 896-897.) *Collins* did not hold that "some" or "any" action will insulate a defendant from such a claim. Rather, it is clear from *Collins* and *Crawford* that "public school districts bear an obligation under the state Constitution to undertake reasonably feasible steps to alleviate" known disparate impacts. (*Crawford*, *supra*, pp. 301-302.)

Second, the Court cannot find that Defendants' remedial efforts entitle them to summary

adjudication as a matter of law. The "reasonableness" of Defendants' is a factual inquiry and while Defendants submit evidence of "unprecedented" efforts, as counsel argued at the hearing, Plaintiffs submit evidence that the achievement gap grew between advantaged and disadvantaged students, and the remediation efforts were insufficient. (AMF 201, 203.)

As a matter of procedure, the court does not—and cannot—weight evidence on a motion for summary judgment. (*See Miller*, *supra*, 15 Cal.App.5th at p. 221.) Thus, in finding a triable issue, the Court expresses no opinion regarding the sufficiency or adequacy of Defendants' efforts.

In conclusion, for the foregoing reasons, Defendants' Motion for Summary Adjudication of Plaintiffs' first and second causes of action is DENIED. Therefore, Defendants' Motion for Summary Judgment is also DENIED.

B. Basic Educational Equality

Plaintiffs' third cause of action is based upon article I, section 7, of the California Constitution, which states that "[a] citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens." (Cal. Const., art. I, § 7, subd. (b).) Plaintiffs allege this entitles students to receive "basic educational equality." (SAC, ¶ 228, citing *Butt*, *supra*, 4 Cal.5th at p. 679, fn. 9.)

Here, the Court finds a triable issue of fact whether Plaintiffs were denied "basic educational equality." (*See*, Section A.2, *supra*.) As discussed above, the Court does not read *Butt* to prohibit consideration of SB 98 with regard to the prevailing statewide standard, and the record demonstrates a triable issue as to both the prevailing statewide standard and whether the education provided fell substantially below that standard.

Therefore, Defendants' Motion for Summary Adjudication of Plaintiffs' third cause of action is DENIED.

C. Article IX, Sections 1 and 5 of the California Constitution

Referred to as the "common schools" or "free schools" clause, sections 1 and 5 of article IX "are part of a larger set of constitutional mandates supporting California's assumption 'of a specific responsibility for a statewide public education system open on equal terms to all.'" (*Collins*, *supra*, 41 Cal.App.5th at p. 901, quoting *Butt*, *supra*, 4 Cal.4th at p. 680.)

Section 1 "is general and aspirational" whereas section 5 is "more concrete." (*Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 908-909.)

"This broader undertaking, however, is distinct from the provisions expressly provided in sections 1 and 5 of article IX of the California Constitution" and "[a]s such, these provisions have not been considered to enshrine the right 'to an education of some quality' or, indeed, any particular quality.'" (*Collins*, *supra*, p. 901; *see also Campaign for Quality Education v. State of California* (2016) 246 Cal.App.4th 896, 906-916 [finding sections 1 and 5 of article IX "do not include qualitative or funding elements that may be judicially enforced by the courts"].)

Section 5 "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.) "The free school guarantee extends to 'all educational activities—curricular or "extracurricular."'" (*Srouy v. San Diego Unified School Dist.* (2022) 75 Cal.App.5th 548, 560-561, quoting *Hartzell*, *supra*, p. 911.)

Here, there is no evidence that Defendants imposed any affirmative charges upon students or Plaintiffs. Plaintiffs cite no case finding a violation of article IX in the absence of a fee or charge imposed by the educational entity. Thus, there is no Constitutional violation here.

Plaintiffs argue that under *Hartzell*, "access to public education cannot be conditioned on familial wealth." (Opposition, p. 29.) While *Hartzell* discussed family wealth, it did so with respect to "the imposition of fees for educational activities…," which is absent here. (*Hartzell*, *supra*, p. 911-913.)

Therefore, Defendants' Motion for Summary Adjudication is GRANTED as to Plaintiffs' fourth cause of action for violation of article IX, sections 1 and 5 of the California Constitution.

D. Declaratory Relief Claim

Plaintiffs seek a declaration "that Defendants' actions and inactions as described above have violated Article I, section 7(a) and Article IV, section 16(a) of the California Constitution; Article I, section 7(b) of the California Constitution; Article IX, sections 1 and 5 of the California Constitution; and California Education Code section 43500 *et. seq.*" (SAC, ¶ 237.)

While the Court sustained Defendants' demurrer to the Education Code cause of action without leave to amend, the causes of action remain active and disputed, except for the free schools claim. Because a triable issue remains as to Plaintiffs' equal protection claims, Defendants' Motion for Summary Adjudication of Plaintiffs' fifth cause of action for declaratory relief is DENIED.

The Court also denies summary adjudication of the declaratory relief cause of action as not necessary or proper under the circumstances. (Code Civ. Proc., § 1061.)

EVIDENCE

A. Request for Judicial Notice

Defendants' Request for Judicial Notice submitted with its moving papers is GRANTED IN PART and DENIED IN PART.

"Although the *existence* of a document may be judicially noticeable, the truth of statements contained in the document and its proper interpretation are not subject to judicial notice if those matters are reasonably disputed." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 113.) A precondition to taking judicial notice is that the matter to be noticed must be relevant to a material issue. (*NCR Properties, LLC v. City of Berkeley* (2023) 89

Cal.App.5th 39, 43, fn. 1.)

Here, Defendants request the Court take judicial notice of several websites (RJN, Exs. 45, 48, 54, 59, 61-67, 69, 70, 78, 79, 81) and press releases (RJN, Exs. 44, 46, 47, 49, 68, 71, 72, 73, 75, 76, 77, 80). It appears that these matters primarily support the Vella Declaration, which attests to the facts contained within the websites and press releases. As such, the Court declines to judicially notice the websites and press releases for the truth of the matter asserted. Further, Vella's Declaration provides a vehicle for introduction of the factual matters contained in the websites and press releases. Thus, the websites and press releases are not relevant to the Court's consideration.

Additionally, Defendants submit a supplemental request for judicial notice along with their reply brief. The supplemental request asks the Court to take judicial notice of the legislative information regarding Senate Bill 101 and SB 114, as well as the 2023-2023 California State Budget Summary. As there were no objections at the hearing, Defendants' supplemental request for judicial notice is GRANTED.

A. Objections

The court rules only on objections that are material to its disposition of the motion. (Code Civ. Proc., § 437c, subd. (q).)

To the extent the Howard-Bishop and Ho Reports are cited the "Discussion" section above, Defendants' objections to those reports are OVERRULED.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 08/07/2023

Brad Seligman / Judge