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Exempt from Fees
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CAYLA J. et al., Plaintiffs, **v.** **STATE OF CALIFORNIA et al.,** Defendants, **COMPTON UNIFIED SCHOOL DISTRICT, et al.,** Intervenors.	**Reservation ID: 480510236376** Case No. RG20084386 **DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT** Date: April 27, 2022 Time: 10:00 a.m. Dept: 21 Judge: The Honorable Evelio Grillo Trial Date: None set Action Filed: November 30, 2020

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INTRODUCTION

Plaintiffs' opposition doubles down on the same legally moot claims that the Court has already ordered dismissed. Plaintiffs' continued insistence that they can base their constitutional causes of action on students' alleged lack of access to devices and connectivity and the State's alleged response *during* distance learning in effect for only the 2020-21 school year ignores the clear language of this Court's demurrer order: that order granted leave to amend *only* as to non-moot claims based on "the State's provision of academic and mental health supports to assist students *in the aftermath* of the pandemic," which, unlike claims based on the now-rescinded distance learning, "might not be moot." (Order re Ruling on Demurrer, filed December 9, 2021 (Demurrer Order), at pp. 3-7, emphasis added.) Because the reconstituted complaint re-alleges essentially the same moot claims this Court previously dismissed, the demurrer must be sustained without leave to amend.

Plaintiffs also fail to rebut Defendants' arguments on the merits of their equal protection claims. They cannot demonstrate that they state a viable disparate impact claim, and their fundamental interest equal protection claim still fails to assert a viable prevailing statewide standard, among other defects. Plaintiffs' claim for violation of Article IX of the California Constitution, in addition to impermissibly resting on moot legal theories, further fails to allege that Defendants maintained a policy of charging students or their parents for Internet access or digital devices to access distance learning. Plaintiffs also fail to demonstrate that they exhausted that claim. In addition, Plaintiffs now concede that their claim for violation of Education Code sections 43500 et seq. should be dismissed. They also agree that their declaratory-relief claim is entirely derivative of Plaintiffs' other causes of action, thus confirming it must be dismissed for the same reasons as their substantive causes of action. Finally, Plaintiffs fail to state a viable taxpayer claim because the organizational Plaintiffs dispute *the manner* in which the State has chosen to administer its educational system, which does not rise to the level of a constitutional or statutory violation by the State, and they also failed to allege that they exhausted that claim.

The Court has already granted Plaintiffs an opportunity to re-state their case based on claims that are not moot. They have failed to do so. Accordingly, Defendants' demurrer to

Plaintiffs' amended complaint should be sustained *without* leave to amend.

ARGUMENT

I. PLAINTIFFS' EQUAL PROTECTION CLAIMS FAIL

Plaintiffs have failed to cure the fatal defects in their varied equal protection claims, so these claims must now be dismissed without leave to amend.

A. Plaintiffs Have Improperly Re-alleged Moot Equal Protection Claims That This Court Has Already Rejected

Faced with Defendants' argument that their amended equal protection causes of action are moot because they continue to be based on theories premised on Defendants' alleged response *during* the long-since-over period of remote learning and Plaintiffs' alleged lack of access to remote learning, Plaintiffs strain to argue that the Court could still grant them relief on these moot claims, and therefore they are still viable. (Plaintiffs' Opposition to Defendants' Demurrer to Amended and Supplemental Complaint (Opp.) at pp. 9-11.) Plaintiffs' improper attempt to re-litigate an issue that the Court has already conclusively resolved against them should be rejected.

Indeed, in their opposition to the State's prior demurrer, Plaintiffs made the same argument that such claims were not moot despite the end of distance learning, because they sought injunctive relief to redress Plaintiffs' injuries including, for example, individualized assessments and supports, planning regarding remediation of learning loss, and compensatory education to remediate their learning loss. (*See* 9/3/21 Plaintiffs' Opposition to Defendants' Demurrer at p. 10.) Defendants replied that Plaintiffs' requested relief did not shield their claims from mootness, and explained that no California court has ever recognized "compensatory education" as a valid form of relief for the constitutional violations they allege here and, in any event, the compensatory education claim is moot because the State already has provided billions of dollars to school districts to remedy any learning loss and provide mental health support. (*See* 9/10/21 Reply in support of Defendants' Demurrer to Plaintiffs' Complaint at p. 7.) The Court rejected Plaintiffs' argument, concluding that claims about the State's response *during* the period of distance learning were moot. (Demurrer Order at pp. 2-7.) The Court's Demurrer Order was clear that Plaintiffs were only permitted to amend by alleging claims that are not based on such

moot theories. (*Id.* at pp. 3-7.) Thus, Plaintiffs' claims based on theories pertaining to the State's response during the distance learning period and the digital divide continue to be moot because distance learning is over. (*Younger v. Super. Ct.* (1978) 21 Cal.3d 102, 120; Demurrer Order at pp. 2-4.) And, as discussed in Section VII, compensatory education is not an available remedy in any event. Thus, Plaintiffs' recharacterization of their claims is insufficient to resurrect them.

In addition, Plaintiffs disingenuously argue that they need to continue to base their equal protection claims on allegations regarding the State's alleged response during the period of distance learning because "it was this unlawful conduct that caused Plaintiffs' injuries" and gave rise to the need to remediate those injuries. (Opp. at pp. 10:21-11:2). In addition to being legally incorrect, as explained above, this argument also entirely disregards this Court's express instructions that Plaintiffs *may not* re-allege equal protection claims based on the State's supposed conduct during distance learning.[1] (Demurrer Order at pp. 4, 7.) Indeed, this argument flies in the face of this Court's finding of mootness. Instead, the Court very clearly explained that, any amended cause of action must attempt to allege an equal protection violation based on the State's purported failure to provide "academic and mental health supports to assist students *in the aftermath* of the pandemic." (*Id*., emphasis added.)

B. Plaintiffs Have Still Failed to State a Race-Based Disparate Impact Claim

Plaintiffs have also failed to cure their disparate impact claim on its merits. This is because they cannot point to any allegations that describe a disparate impact caused by any state policy enacted or implemented *in the aftermath* of the now-expired period of pandemic-related distance learning, which, again, is the only theory permitted by the Court. (Demurrer Order at pp. 3-4.) In other words, Plaintiffs fail to allege any State "policy" to ameliorate the post-distance learning impacts of the pandemic that impermissibly disparately impacts student Plaintiffs based on race. And their conclusory allegations that the State is failing to remedy such impacts are rebutted by

[1] While Defendants contest that the State *caused* Student Plaintiffs' alleged harms during distance learning, that question is not relevant to this litigation, as confirmed by the demurrer order. (Demurrer Order at pp. 3, 4.) Instead, Plaintiffs must allege a viable claim that the State is failing to "address[] the lost learning and mental health consequences *of the pandemic*" in a non-discriminatory manner, now that Student Plaintiffs have resumed in-person instruction. (*Id.*, emphasis added.)

the judicially noticeable facts that show the substantial remedial actions the State has taken, and continues to take, in that regard.

As Plaintiffs concede, under *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-97, they must: (1) identify a State "policy" that has a "substantial disparate impact;" and (2) show that the State has taken "no action" to "correct that policy when its impacts are identified." (Opp. at p. 14:3-8.) They have failed to do so. First, the so-called State "COVID-19 education policy" that Plaintiffs allege (Opp. at p. 14), does not reflect any actual policy that the State adopted, as confirmed by relevant statutes, enacted bills and judicially noticeable materials. (See Dem. at pp. 10-11.) Moreover, the reference to the alleged "policy" in paragraph 240 of the ASC—including the alleged lack of access to computers and internet connection, and "decreased instructional time, ineffective remote instruction due to lack of training and accountability, and a lack of academic and mental health supports"—pertains entirely and exclusively to the State's alleged response "*during* the remote learning period." (*See* Opp. at p. 15; ASC ¶ 240, emphasis added.) Because such allegations are moot, paragraph 240 clearly does not support a viable, non-moot disparate impact claim.

Plaintiffs further argue that the State has a policy of allegedly "fail[ing] to remediate the learning loss and mental health consequences of the remote learning period despite knowing that minority students were disproportionately impacted." (Opp. at 15:3-5.) But they cite no factual support for this conclusory assertion; instead, the cited paragraphs on which they rely merely discuss the so-called "digital divide" that Plaintiffs claim existed *during distance learning*. Plaintiffs do not allege that they have not been attending in-person school during the 2021-22 school year, so outdated allegations about the digital divide impacting access to their education are entirely untethered from the actual in-person educational program being implemented. Thus, these factual allegations are not only moot, but do not actually pertain to any actual state "policy." (ASC ¶¶ 241-242.) Plaintiffs' further allegation in the second half of paragraph 242 that "[n]ow that schools have returned to in-person learning, the State has still failed to ensure" appropriate remediation for learning loss is entirely conclusory, and assumes a constitutional violation that is entirely derivative of the claim the Court already concluded is moot. And, again, it fails to point

to a specific State "policy" that is supposedly responsible for the alleged disparate impact on minority students. (*Collins, supra,* 41 Cal. App. 5th at pp. 898-900.)

Second, even if Plaintiffs were able to sufficiently allege a post-distance-learning state policy of failing to ensure remediation of learning loss, they nevertheless fail to meet the essential requirement to show that the State has taken "no action" to "correct" the policy when its alleged disparate impacts were identified. (*Collins*, *supra*, 41 Cal.App.5th at pp. 896-897.) Plaintiffs' citations to various paragraphs in their ASC for support is unavailing because, to the extent they even contain allegations related to remediating learning loss and mental health issues, they constitute mere "contentions, deductions or conclusions of fact or law" that courts are not required to accept as true on demurrer, and especially when they are "contradicted by judicially noticeable facts." (*Serrano v Priest* (1971) 5 Cal.3d 584, 591; *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6, 20.) (Opp. at p. 15:10-12 [citing ¶¶ 3, 9, 120, 130, 154, 167-168, 170].)

Relevant Education Code provisions, enacted legislation, and judicially noticeable materials submitted by Defendants amply demonstrate that, contrary to Plaintiffs' conclusory allegations, the State has taken—and continues to take—substantial, wide-ranging and, indeed, unprecedented actions to ameliorate the effects of the pandemic on students' educational progress and mental health. (*See* Dem. at pp. 10-11; Senate Bill No. 98 (Reg. Sess. 2019-20), Assembly Bill No. 86 (Reg. Sess. 2020-21); Assembly Bill No. 130 (Regs. Sess. 2021-22); Ed. Code, §§ 43509, 43520-43525; Request for Judicial Notice, Exs. 1-50.) Plaintiffs' attempt to insulate their claims from these undisputed facts by asking the Court to deny Defendants' proper request for judicial notice should be rejected. Moreover, under the *Collins* framework, Plaintiffs are not permitted to litigate the sufficiency of the State's undisputed response while it is ongoing; they may challenge only the State's wholesale failure to respond to alleged violations. In sum, Plaintiffs cannot show that the State failed to take action to remedy those impacts.

C. Plaintiffs Continue to Fail to State a Claim for Wealth-Based Discrimination

Just as they did in their opposition to prior demurrer, Plaintiffs treat their wealth-based claim as an additional disparate impact claim (Opp. at pp. 14-16), despite their failure to plead it

as such in their amended complaint. (ASC ¶¶ 246-252.) Even accepting this amendment-via-opposition-brief as proper, for the same reasons discussed above, the claim fails to satisfy the *Collins* requirements that it identify a state "policy" causing a "substantial disparate impact" and that the State has taken "no action" to "correct" it. (*Collins*, *supra*, 41 Cal.App.5th at pp. 896-897.)

Furthermore, Plaintiffs have failed to rebut Defendants' argument that the wealth-based claim must be dismissed for the additional fundamental reason that Plaintiffs do not identify any "prevailing statewide standard" against which to assess whether Plaintiffs have been denied a "basically equivalent education" based on their low-income status. (*Butt v. State of Calif.* (1992) 4 Cal.4th 668, 686-687 & fn.14.) Unable to cite to any allegations in their complaint that actually identify and describe with specific facts any such so-called "prevailing statewide standard," Plaintiffs again resort to arguments resting on vague and conclusory assertions as to what was "prevailing" in wealthier communities, and that low-income students "suffered more learning loss than their peers during the remote learning period." (Opp. at 12:18-13:9; 15:26-16:2.) Such assertions about unidentified wealthy communities do not establish a viable *prevailing statewide* standard against which to assess Plaintiffs' experience. (*See, e.g.*, *Butt, supra*, Cal.4th 668, 686-687.) In fact, it cannot be a prevailing statewide standard under *Butt* because it prevails in only a limited subset of communities. Moreover, such claims premised on the availability of remote instruction *during the period remote learning* are, of course, moot. (Demurer Order, at 4, 7.) Thus, Plaintiffs' wealth-based claim also fails.

D. Plaintiffs Also Continue to Fail to State a Viable Equal Protection Claim Under Article I, Section 7

As with their other claims, Plaintiffs' "fundamental interest" claim under the California Constitution rests on moot claims regarding the State's alleged failures *during* the period of distance learning, which this Court has already rejected as moot. (Dem. at pp. 2-6.) Moreover, Plaintiffs have failed to otherwise cure their Article I claim.

Plaintiffs' improperly attempt to reallege an appropriate comparator group in their opposition brief by pointing to Student Plaintiffs' "peers." (See Opp. at p 12:14-20.) Even

looking past this problem, their amended complaint fails to identify the relevant "peers" or provide any facts about them whatsoever, and therefore they fail to allege sufficient facts from which this Court could reasonably infer the improper denial of a basically equivalent education. (*Butt, supra,* Cal.4th at p. 687 & fn. 14 [Richmond Unified School District (RUSD) would have operated for six fewer weeks than other districts, thus depriving all RUSD students of a basically equivalent education provided to students in those other districts].)

Plaintiffs' further argument that they adequately alleged a viable prevailing statewide standard—an essential component of an equal protection claim under *Butt*—also fails. (*Butt*, *supra*, 4 Cal.4th at pp. 686-687.) As noted above, Plaintiffs' allegations about a "digital divide" during the period of remote instruction decidedly fail to describe any state policy, or a "prevailing statewide standard." (Opp. at pp. 12:18-13:3.) Plaintiffs' argument on this basis is irrelevant in any event because, once again, it pertains to the period of distance learning, and does not refer to any standard in effect for the current 2021-22 school year.

Plaintiffs also argue that now-expired standards for distance learning under Education Code section 43500 et seq., established a "prevailing statewide standard" supporting their claim. (Opp. at p. 13:3-13:9.) But expired statutory provisions cannot constitute a prevailing statewide standard as a matter of law, and this Court has already ruled that any claims premised on such obsolete law are moot. (Demurer Order at pp. 4. 7.) Moreover, a statewide standard must be determined based on students' "actual" education that they are receiving, not on state requirements for what districts were expected to provide during the relevant period of time. (*See Butt, supra,* 4 Cal.4th at pp. 686-687.) Accordingly, Plaintiffs' disparate treatment claim fails.

II. PLAINTIFFS' ARTICLE IX CLAIM ALSO STILL FAILS.

Plaintiffs' Article IX claim still fails for multiple reasons, and must now be dismissed without leave to amend.

First, this claim is defective because it is still improperly premised on alleged events occurring during distance learning, and thus, as this Court previously ruled, the claim is moot. (Demurrer Order, pp. 2-7.) The Court granted Plaintiffs leave to amend to assert a non-moot Article IX claim, and they have failed to do so. (*Id*., p. 7.)

Second, there is simply no authority for Plaintiffs' interpretation of the right to an education under Article IX as broadly encompassing a right to virtually anything that touches on student experience, including "mental health supports." (Opp. at pp. 17-18). Indeed, neither *Hartzell v. Connell* (1984) 35 Cal.3d 899 (*Hartzell*)—nor any subsequent case—recognize such a broad "access to education" claim under Article IX. (*See, e.g.*, *Srouy v. San Diego Unified School Dist.* (2022) 75 Cal.App.5th 548, 621-622 [costs to student for litigation, that may be "'useful' and 'necessary' to the student" litigant, are "'not an expense peculiar to education' and 'not a necessary element which each student must utilize or be denied the opportunity to receive an education'"]; see also *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 262-263 [*Hartzell* "did not extend [an] expansive understanding of the free school clause beyond the realm of educational activities to noneducational supplemental services"].)

Third, Plaintiffs do not allege any facts showing any statewide policy of charging students or their parents for "Internet access," "digital devices," or "mental health supports," in purported violation of Article IX. (*See, e.g.,* ASC ¶¶ 210-211.) Not even a single student alleges that their school district denied them devices or wireless hotspots (or mental health supports) upon request, or charged them for such services. Moreover, judicially noticeable documents affirmatively establish that LAUSD and OUSD, where student-plaintiffs attend school, provided students with options to obtain Internet access, wireless hotspots, digital devices, and mental health supports, flatly belying Plaintiffs' otherwise defective claim. (Suppl. RJN, Ex. 51 at pp. 1-4, 9-11, 14, 21-22, 33, 36, 49, 64; *id*. Ex. 52 at pp. 21-27; *id*. Ex. 53 at pp. 21-27; *id*. Ex. 54 at pp. 1, 23-27, 46, 47.)

Fourth, Plaintiffs incorrectly argue that they are not required to exhaust administrative remedies under Education Code section 49010 et seq. because those provisions "do not apply to claims brought solely under Article IX of the California Constitution." (Opp. at p. 18.) The exhaustion provisions of section 49010 et seq. codify Article IX's provisions, and thus clearly encompass claims brought under that article. (Ed. Code, § 49010, subd. (b) ["'Pupil fee' means a fee, deposit, or other charge imposed on pupils, or a pupil's parents or guardians, in violation of Section 49011 and Section 5 of Article IX of the California Constitution, which require

educational activities to be provided free of charge to all pupils without regard to their families' ability or willingness to pay fees or request special waivers, as provided for in *Hartzell*[.]").

Indeed, Plaintiffs cite no authority for their position that they are excused from the exhaustion requirement under section 49010 simply because they have pleaded their claim as a violation of Article IX. (*See PegaStaff v. P.U.C.* (2015) 236 Cal.App.4th 374, 388-389 [exhaustion still required even if plaintiff "could not have obtained all of the relief it seeks at the administrative level"]). Here, there is no dispute that Plaintiffs' Article IX claim based on connectivity, devices, and mental health supports is subject to the exhaustion provisions of section 49010 et seq. regarding pupil fee prohibition. (Supp. RJN, Ex. 55 at pp. 1 & 7 [showing that counsel for Plaintiffs, Mark Rosenbaum, is aware that exhaustion requirements of Ed. Code sections 49010 et seq. apply to Article IX claims, having executed a settlement agreement in 2013 that specifically dismissed Article IX claims against the State in light of the enactment of those provisions].) Nor is it disputed that the administrative procedures mandated under Education Code sections 49010 et seq. could have provided Plaintiffs some relief on their complaints with respect to connectivity, devices, and mental health supports.

Finally, Plaintiffs fail to show how this nominal Article IX claim is meaningfully different from and not simply duplicative of their failed equal protection claims. For all of these reasons, the Court should dismiss the Article IX claim without leave to amend.

III. PLAINTIFFS AGREE TO DISMISSAL OF THEIR CLAIM UNDER EDUCATION CODE SECTION 43500 *ET. SEQ.*

In their Opposition, Plaintiffs "do not object to dismissing" their cause of action for violation of Education Code sections 43500 *et seq*. (Opp. at fn. 5.)

IV. PLAINTIFFS' DECLARATORY RELIEF CLAIM FAILS.

Plaintiffs concede that their declaratory relief claim is derivative of their other causes of action. (Opp. at 21:15-16.) It should be dismissed for the reasons discussed above.

V. THE ORGANIZATIONAL PLAINTIFFS' TAXPAYER CLAIM FAILS

Plaintiffs' taxpayer claim fails for numerous reasons and should thus also be dismissed without leave to amend.

First, as with Plaintiffs' other claims, the taxpayer claim is premised on theories stemming from alleged actions that the Court previously ruled are moot. (Demurrer Order, pp. 2-6.) Second, organizational Plaintiffs cannot demonstrate that they are excused from applicable exhaustion requirements simply because they challenge alleged State-level policies rather than school-district policies. Indeed, Organizational Plaintiffs confirm their failure to exhaust by neither disputing that they failed to seek relief from local school districts, nor that those school districts would be able to provide some of the alleged relief they seek. (See generally *PegaStaff*, *supra*, 236 Cal.App.4th at pp. 388-389.) Finally, Organizational Plaintiffs fail to dispute that their taxpayer claim is a challenge to ***the manner*** in which the State has chosen to administer its educational system, and thus does not state a constitutional or statutory violation by the State. (Demurrer Order at p. 10; *California DUI Lawyers Association v. California Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247, 1258.) The Court should sustain the demurrer to the taxpayer claim without leave to amend.

VI. PLAINTIFFS NATALIA T. AND DANIEL A. SHOULD BE DISMISSED

Plaintiffs concede that Natalia T. and Daniel A. have completed twelfth grade, and therefore are no longer part of California's K-12 education system. (Opp. at p. 19.) Nonetheless, they claim those students are still proper plaintiffs because they claim "compensatory education" as a remedy, which they argue remains available to them even after graduation. (*Id*., citing ASC ¶ 278.) Yet, as explained in Defendants' concurrently filed reply in support of their motion to strike, no cases support their claim that compensatory education is a valid form of relief for the constitutional violations they allege here. (Reply in Support of Motion to Strike, Section IV.A.)

Even if the Court were to borrow from inapposite contexts recognizing compensatory education cited in Plaintiffs' opposition, this form of individualized relief is mooted by the broad, programmatic remedies sought and that the State has already provided through billions of dollars to school districts to address impacts of the pandemic on students' academic and mental health. (see Argument, Section I.A, *supra*.)

CONCLUSION

Defendants request that this court sustain their demurrer without leave to amend.

Dated: April 20, 2022

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: **Cayla J. v. CA**
Case No.: **RG20084386**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On April 20, 2022, I served the attached

- **DEFENDANTS' REPLY IN SUPPORT OF DEMURRER TO PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT**
- **DEFENDANTS' SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER TO PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT AND DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT**
- **REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO STRIKE PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT**
- **DEFENDANTS' OBJECTIONS TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO DEFENDANTS' DEMURRER TO PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT**
- **DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO DEFENDANTS' REQUEST FOR JUDICIAL NOTICE**

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on April 20, 2022, at San Francisco, California.

G. Guardado
Declarant

Signature

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