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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., MATTHEW E. AND JORDAN E., through their guardian ad litem CATHERINE E., 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., NATALIA T. AND BILLY T., through their guardian ad litem HILLARY T., DANIEL A. through his guardian ad litem SARA A., COMMUNITY COALITION, AND THE OAKLAND REACH,

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.

COMPTON UNIFIED SCHOOL DISTRICT, DUARTE UNIFIED SCHOOL DISTRICT and CALIFORNIA ASSOCIATION OF BLACK SCHOOL EDUCATORS,

Intervenors.

Case No. RG20084386

UNLIMITED JURISDICTION

PLAINTIFFS' OPPOSITION TO DEFENDANTS' DEMURRER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Date: April 27, 2022
Time: 10:00 a.m.
Dept: 21
Judge: The Honorable Evelio Grillo

Complaint Filed: Nov. 30, 2020
Trial Date: Not Yet Set

Reservation ID: 480510236376

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I. INTRODUCTION

Plaintiffs brought this case to address the State's[1] willingness to sit on the sidelines during the COVID-19 pandemic, which predictably resulted in students without digital devices and internet connectivity receiving no education for seventeen months, up to a sixth of their entire school career. These students are disproportionately Black, Latinx, and low-income. When in-person instruction later resumed, the State continued to sit on the sidelines while low-income students of color continued to experience severe learning losses and mental health consequences resulting from the State's inaction. In its December 8, 2021 demurrer ruling, the Court permitted Plaintiffs to amend their complaint—which was originally filed in November 2020 at the peak of the remote learning period—to allege claims that are not moot now that schools have returned to in-person instruction. Plaintiffs have done so. The Amended and Supplemental Complaint ("ASC") (1) alleges that the State has failed to remediate the learning loss and mental health consequences of the remote learning period, which have exacerbated the achievement gap between low-income students of color and their peers, (*e.g.*, ASC ¶¶ 3, 141-43, 167-68, 189, 210, 223, 242-43, 262-63, 265); and (2) seeks available relief including provision of assessments, instructional and mental health supports, development of plans to remediate learning loss, and compensatory education (*id.* ¶¶ 276-78).

The State argues that because schools have now resumed in-person instruction, it no longer has any responsibility to address the ongoing consequences of its failure to act during the remote learning period. In essence, the State's position is that it may violate an individual's constitutional rights so long as it discontinues the violation before a court rules on the matter. This position fundamentally misapprehends the doctrine of mootness: a case or claim is moot only if defendants can meet the heavy burden of showing that there is *no available relief* that would redress Plaintiffs' injuries. (*Parkford Owners for a Better Cmty. v. Cnty. of Placer* (2020) 54 Cal.App.5th 714, 721-22.) Defendants have not made this showing here, nor could they, because the ASC seeks numerous forms of relief—assessments, instructional and mental health

[1] Plaintiffs refer to all Defendants State of California, State Board of Education, State Department of Education, and State Superintendent of Public Instruction Tony Thurmond collectively as "the State."

supports, remediation of learning loss, and compensatory education—that would redress Plaintiffs' injuries and that are available now that schools have returned to in-person learning. Moreover, the State's position that the ASC's allegations about past inaction are "moot" is similarly off the mark. The ASC contains allegations regarding the State's failure to provide Student Plaintiffs with equal access to basic education during the remote learning period, including by ensuring that they had digital access (*e.g.*, ASC ¶¶ 239-41), because it was this unlawful conduct that caused Plaintiffs' injuries and created the need for remediation.

On the merits, the State recycles its old arguments, repeating for the third time contentions that this Court already rejected in its preliminary injunction and demurrer rulings and that other courts analyzing similar claims have rejected for years. Plaintiffs' claims fall squarely within well-established case law articulating the State's obligation to ensure the fundamental right to education under the California Constitution, (*Butt v. State of California* (1992) 4 Cal.4th, 668, 685), and to correct policies and practices that have a disparate impact on minority schoolchildren and cause de facto school segregation. (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-97.) In its demurrer, the State repeats that that it believes that it has fulfilled its constitutional obligations by making one-time allocations of arbitrary sums to districts. But the State cannot cite a single case validating this "defense," which, at best, amounts to a factual dispute inappropriate at the demurrer stage. The leading cases have rejected nearly identical arguments that would permit the State to pass the buck for ensuring basic equality of educational opportunity to local school districts, (*Butt*, *supra*, 4 Cal.4th at p. 692), or to fail to correct educational disparities causing de facto school segregation merely by taking *any* action, no matter how ineffective. (*Collins*, *supra*, 41 Cal.App.5th at pp. 895, 897.)

Plaintiffs' claims involve serious injuries to their constitutional rights, and the relief they seek will better their circumstances and their ability to become meaningful participants in our democracy. The Court should reject Defendants' attempt to brush away these claims with deficient, recycled arguments.

II. STATEMENT OF FACTS

As a result of the COVID-19 pandemic, from March 2020 through the 2020-2021 school

year ("remote learning period"), almost all instruction in California's public schools shifted to remote learning. (ASC ¶ 2.) Despite the profound need for action to protect vulnerable children during this crisis, and despite being on notice of the problems alleged by Plaintiffs (*id.* ¶¶ 136-138), the State abdicated its constitutional responsibility to ensure that students had the necessary access to education during the remote learning period. Students of color and low-income students disproportionately lacked access to, among other things, working devices, connectivity, and academic and mental health supports. (See, *e.g.*, *id.* ¶¶ 4, 39, 59-60, 95, 131, 148-50, 154-55, 174, 261.) As a consequence of the State's inaction, many students were functionally denied access to education during the seventeen months of the remote learning period. (*Id.* ¶ 2.) Even when they could connect to their classrooms, they were denied the statutorily prescribed minimum duration of instruction. (*Id.* ¶¶ 4, 157, 218-28.) These conditions were not prevailing, nor would they have been accepted, in wealthier, whiter communities. (*Id.* ¶ 4; *see also id.* ¶¶ 156-57, 169.) The State's failure to address these disparities during the remote learning period caused severe learning loss and mental health consequences for low-income students and students of color, disproportionately harming them as compared to their more affluent peers (see, *e.g.*, *id.* ¶¶ 3, 129, 167-68), and widening existing achievement gaps (*see id.* ¶¶ 131, 134-38).

Although the State is aware that these students received an education in name only, if that, for well over a year (*id*. ¶ 6), now that in-person instruction has resumed, the State has failed to take action to remediate the staggering loss of education caused by the remote learning period (*id.* ¶¶ 167-68, 197-200). The State has not devised any plan to address the learning loss and mental health challenges caused by its inaction during the remote learning period or to assist students who lost precious months of education to catch up. (*Id.* ¶¶ 9; 27, 35, 64, 150.) It has failed to assess the magnitude and nature of the learning losses (see, *e.g.*, *id.* ¶¶ 45, 52, 197, 242, 251, 256, 262), and failed to ensure that students receive additional instruction, support, or any other form of compensatory education to redress the loss of instruction time during the remote learning period (*id.* ¶ 4). And it has not implemented any plans or enforcement mechanisms to hold Local Educational Agencies ("LEAs") accountable to meet minimum resource or learning standards. (*Id.* ¶¶ 120, 154-61.) As a result, Black, Latinx, and low-income students are falling farther and

farther behind their peers. (*Id.* ¶ 4.)

Plaintiffs filed this action to compel the State to discharge its constitutional duties in November 2020, at the peak of the pandemic when almost no students were being provided with in-person instruction. When the State's demurrer was heard in December 2021, the remote learning statute had been repealed and most schools were offering in-person instruction. (Dem. Order at pp. 1-2.) Recognizing that the injunctive relief sought in the original complaint no longer applied to an in-person educational environment, but that "[t]he court cannot determine at the demurrer stage that the claims based on alleged discrimination and other theories related to addressing the lost learning and mental health consequences of the pandemic are moot," the Court granted Plaintiffs leave to amend to assert claims that are not moot. (*Id.* at p. 3.) On February 8, the Court granted Plaintiffs' leave to file the ASC, which alleges that the State has failed to act to remediate the lost learning and mental health consequences caused by its unlawful policies and practices during the period of remote learning. (Order Granting Leave to File Supp. Compl.)

III. PLAINTIFFS' CLAIMS ARE NOT MOOT

In response to this Court's demurrer ruling, Plaintiffs revised their complaint to address the Court's comments and focus on the current status of the State's pandemic response with respect to its constitutionally-mandated oversight and management of the education system. It is well-established that claims may be dismissed for mootness only if defendants meet their heavy burden of establishing that there is *no relief at all* that the Court can order that would remedy plaintiff's injuries. (*Parkford*, *supra*, 54 Cal.App.5th at pp. 721-22; see Dem. at p. 19 ["A 'moot' case is one in which 'the court cannot grant the plaintiff any effectual relief.'"] [citing *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573-74 [citation omitted]].) Because Plaintiffs' amended claims are directed to ongoing, redressable injuries, they are not moot. The Court can and should order the State to take action now and going forward to remediate the severe lost learning and mental health consequences caused by the State's unlawful actions and policies during the remote learning period.

Plaintiffs appropriately plead redressable claims for relief. Plaintiffs allege that, during the remote learning period the State failed to ensure that all students had equal access to a sound,

basic education and that these failures especially injured low-income students of color, causing disproportionate learning loss and mental health consequences and exacerbating existing achievement gaps. (See ASC ¶¶ 224-57, 261-63.) Plaintiffs further allege that the State has failed to take necessary action to redress Plaintiffs' injuries, including by failing to ensure provision of assessments, instructional or mental health supports, compensatory education, or development of plans to remediate learning loss. (See *id.* ¶¶ 264-65.) As redress for their injuries, Plaintiffs seek forward-looking injunctive relief *now* to remedy the learning loss and mental health consequences caused by the State's unlawful conduct during the remote learning period. (See *id.* ¶¶ 276-78.) The relief sought includes "individualized assessments [and] academic and mental health supports" (*id.* ¶ 276), "State- and LEA-level planning about remediating learning loss and other harms caused by the State's failure to ensure a basic education during the remote learning period" (*id.* ¶ 277), and "[c]ompensatory education to remediate learning losses Student Plaintiffs have sustained as a result of inadequate remote learning" (*id.* ¶ 278). Because this relief is available to redress Plaintiffs' injuries, the claims alleged in the ASC are not moot.[2]

Moreover, the State's position that the ASC's allegations about past inaction—which the State incorrectly characterizes as "allegations that the Court already deemed moot" (Dem. at p. 9)—misunderstands both the doctrine of mootness and the nature of Plaintiffs' claims. A *case* or *claim* can be moot if the court cannot grant the plaintiff any effective relief. (See *Parkford*, *supra*, 54 Cal.App.5th at p. 722.) Calling an *allegation* moot is meaningless. An allegation, by itself, is not a claim for relief and the mere fact that something occurred in the past does not mean that it is irrelevant to a justiciable claim. The ASC contains allegations regarding the State's failure to provide Student Plaintiffs with equal access to basic education during the remote

[2] The State's belief that the harms of the State's COVID-19 education policy will not "compound" because "distance learning is no longer authorized" (Dem. at p. 14), demonstrates a fundamental misunderstanding of Plaintiffs' claims and the nature of education. Because learning is cumulative, when past gaps in learning are not remediated, students will struggle to access future grade-level curriculum even when back in the classroom, causing them to fall farther and farther behind. (ASC ¶¶ 3-4.) A student who missed multiplication will not be able to do Algebra. The State's position is also fundamentally a factual dispute over the allegations in Plaintiffs' ASC and thus improper for a demurrer.

learning period because it was this unlawful conduct that caused Plaintiffs' injuries and gave rise to the need to remediate those injuries by implementing forward-looking injunctive relief.

IV. PLAINTIFFS ADEQUATELY ALLEGE THAT THE STATE HAS DENIED THEM EQUAL ACCESS TO EDUCATION

The State's demurrer rehashes the same arguments that have been soundly rejected by this Court and others analyzing similar claims. (*See* PI Order, entered June 5, 2021, at 2 (finding likelihood of success on the merits and therefore "that the claim[s] will survive a demurrer."); Dem. Order at pp. 3, 6; Plaintiffs' Request for Judicial Notice ("Plaintiffs' RJN") Exs. A-F.) The Court should reject them again.

A. Plaintiffs State a Claim for a Violation of Basic Educational Equality Under Article 1, Section 7(b) and *Butt v. State of California* (Count 3)

The right to an education in California is a "fundamental interest." (*Serrano v. Pries*, (1976) 18 Cal.3d 728, 767-68.) The California Supreme Court established in *Butt* that the fundamental right to a basic education guaranteed by Article I, Section 7(b) of the California Constitution is denied when the State's common school system denies its students an education "basically equivalent to that provided elsewhere throughout the State." (*Butte*, *supra*, 4 Cal.4that p. 685.) A student's education is not "basically equivalent" when "the actual quality of the [school's] program, viewed as a whole, falls fundamentally below prevailing statewide standards," thereby demonstrating "a real and appreciable impact on the affected students' fundamental California right to basic educational equality." (*Id.* at pp. 686-88.) "The State is the entity with ultimate responsibility for equal operation of the common school system." (*Id.* at p. 692.) Accordingly, the State is obliged to intervene "even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents," unless the State can demonstrate a compelling reason for failing to do so. (*Id.* at p. 681.)

Butt applied this standard to hold that the State's failure to remedy disparities in access to learning time offends the constitutional principle of equality. There, students challenged a school district's decision to end the school year six weeks early to make up for a budgetary shortfall. (*Id.* at p. 685.) The evidence reflected that losing six weeks of instruction time would cause students to miss, for example, "instruction in phonics, reading comprehension, creative writing,

handwriting skills, . . . all necessary for advancement to the second grade." (*Id.* at pp. 687-88 & n.16.) The California Supreme Court concluded that this loss of would "cause educational disruption sufficient to deprive District students of basic educational equality." (*Id.* at p. 692.)

Plaintiffs' pleadings are closely analogous to and track the requirements for relief set out in *Butt.* Plaintiffs allege, first, the State's failure to ensure students had the digital access and support needed to access education during the remote learning period and its ongoing failure to remediate the resulting learning loss and mental health challenges (the "State's COVID-19 education policy") has caused educational disruption depriving low-income students of color of basic education equality. (ASC ¶¶ 3-9, 240-42, 262.) Second, the education provided to these students during the remote learning period fell fundamentally below prevailing statewide standards and caused them to suffer disproportionate learning loss even greater than what the Supreme Court found unconstitutional in *Butt*. (*Id.* ¶¶ 248-52.) Third, the State has no compelling interest for its failure to correct the disparities and to ensure an equal education. (*Id.* ¶¶ 240-44.)

Contrary to the State's assertion that "plaintiffs fail to allege any facts showing they were deprived of a basic education as compared to all other students" (Dem. at p. 13), Plaintiffs plead detailed facts showing *students of color and students from low-income families*, including Plaintiff Students, have been deprived of a basic education due to the State's COVID-19 education policy, *as compared to their peers*. Specifically, Plaintiffs plead sufficient, non-conclusory allegations that the "actual quality" of education provided to Student Plaintiffs falls "fundamentally below prevailing statewide standards." (*Compare* Dem. at pp. 12-13, 15.) First, Plaintiffs allege that the State's COVID-19 education policy has denied low-income children and children of color access to an education basically equivalent to what white and wealthier students are in fact receiving. (ASC ¶ 4 ["These conditions were not prevailing, nor would they have been accepted, in wealthier, whiter communities."].) The ASC goes far beyond what is required at the pleading stage by supporting these allegations with extensive citation to data and reports. (See, *e.g.*, *id.* ¶¶ 140-45 [citing reports by Public Policy Institute of California, McKinsey, Policy Analysis for California Education, and others documenting that children of color and low-income children suffered more learning loss than their peers during the remote learning period], ¶ 171

[citing various sources establishing that "a severe Digital Divide disproportionately impacts low-income and minority students"], ¶ 138 [data reflecting that low-income students and students of color were more likely to be absent from remote school].) Second, the State specifically established minimum statewide standards for the provision of distance learning in Education Code § 43500 *et seq.*: "Distance learning shall include . . . access for all pupils to connectivity and devices adequate to participate in the educational program and complete assigned work," and "academic and other supports" including "mental health supports." (Cal. Ed. Code § 43503(b)(1), (3).) Because Student Plaintiffs lacked the required connectivity, devices, and supports, the education provided to them fell fundamentally below this standard. (ASC ¶ 141-42.)

The State also argues that Plaintiffs have not alleged that school districts are "refusing to redress alleged harms." (Dem at p. 14.) Even putting aside the fact that the ASC's allegations clearly demonstrate that school districts have not in fact addressed or remediated the identified educational disparities, such an allegation is not required because it is the *State* that has "ultimate responsibility for equal operation of the common school system" and must therefore intervene "even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents." (*Butt*, *supra*, 4 Cal.4th at pp. 692, 681; see also Plaintiffs' RJN Exs. A-F [rejecting the State's argument that it is the districts, and not the State, who have the duty to intervene to correct educational disparities].). The State's focus on the school districts', as opposed to its own, responsibilities, is indicative of the problem.

Finally, the State has requested judicial notice of a number of state records for the improper purpose of trying to dispute Plaintiffs' allegations by introducing a factual (and false) claim that "it is well-established that the State has already 'intervened' on a historic scale." (Dem. at p. 14, see also *id.* at pp. 10-11.) This is an improper attempt to transform the demurrer into a summary judgment motion, which this Court has already cautioned against. (Dem. Order at p. 2 ["The court is wary of permitting the use of judicial notice to turn the demurrer into a de facto motion for summary judgment."].) The State will have an opportunity to raise factual arguments at the appropriate stage of this proceeding; demurrer is not the proper vehicle.

B. Plaintiffs State a Claim for Discrimination on the Basis of Race and Wealth Under the Equal Protection Clause and *Collins v. Thurmond* (Counts 1 and 2)

Separate from and in addition to Plaintiffs' *Butt* claim, the Equal Protection Clause of the California Constitution prohibits the State from adopting a policy that "has a substantial disparate impact on the minority children of its schools, causing de facto segregation of the schools," that has "an appreciable impact to a district's educational quality," and where "no action is taken to correct that policy when its impacts are identified." (*Collins*, *supra*, 41 Cal.App.5th at pp. 896-97.) The State's affirmative duty to address racially disparate impacts in access to education is derived from California's recognition of the fundamental right to education: in order to preserve this right, the State must "alleviate segregation in the public schools" whether "de facto or de jure in origin." (*Id.* at p. 896 (citing *O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1465.)

The ASC tracks the requirements for relief set forth in *Collins* for stating a claim for discrimination on the basis of race and wealth. First, the effects of the State's distance learning policy during the remote learning period and its ongoing failure to remediate the resulting learning loss and mental health challenges have a substantially disparate impact on low-income students of color. (ASC ¶¶ 9, 167-68, 212-17.) Second, this disparate impact has caused de facto segregation of the schools and "an appreciable impact" on the education delivered to underserved students: extensive learning loss and mental health challenges, exacerbating the achievement gap between minority students and their more privileged peers. (*Id.* ¶¶ 238-43.) Third, the State has identified no compelling interest for its failure to take any action sufficient to correct the disparities and to ensure an equal education. (*Id.* ¶ 244.)

The State's demurrer rehashes two arguments that the Court has already rejected (PI Order at p. 2; Dem. Order at p. 3), which rest on a reading of *Collins* that neither the facts nor the analysis of that decision supports. First, the State asserts that the ASC does not identify a particular "policy" that has a "substantial disparate impact." (Dem. at p. 10 [citation omitted].) But the ASC explicitly identifies the State's COVID-19 education policy as having a disproportionate impact on students of color and students from low income families. (ASC ¶ 240.) The State's COVID-19 education policy included, *inter alia*: (1) failure to ensure that

students had access to necessary devices and connectivity during the remote learning period despite knowing that Black, Latinx and low-income students disproportionately lacked digital access (*id.* ¶ 240); and (2) failure to remediate the learning loss and mental health consequences of the remote learning period despite knowing that minority students were disproportionately impacted (*id.* ¶¶ 241-42). The State's policy and practice of inaction here is closely analogous to the conduct in *Collins*, in which the State "became aware of a discriminatory impact in the punishments imposed by the local-level defendants and failed to take adequate *curative* action." *Collins*, *supra*, 41 Cal.App.5th at p. 895.)

Second, the State claims that Plaintiffs have failed to allege that the State has taken "no action" to correct these disparities. Not so. The ASC repeatedly alleges that the State has failed to take any action sufficient to correct the disparities and to ensure equal access to education. (ASC ¶¶ 3, 9, 120, 130, 154, 167-68, 170.) The State attempts to dispute these allegations by requesting judicial notice of a number of state records. (Dem. at pp. 9-11.) But this is an improper attempt to transform this demurrer into a summary judgment motion and is not appropriate at this stage of the proceeding. And the State dramatically misinterprets *Collins* to the extent it suggests that a disparate impact claim cannot be sustained where the State has taken *any* remedial action whatsoever, no matter how trifling or ineffective (*Id.*) This position would lead to absurd results at odds with the core purposes of California's Equal Protection Clause. *Collins* recognizes that longstanding "California constitutional principles require" the State "to *correct* basic 'interdistrict' disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents." (*Collins*, *supra*, 41 Cal.App.5th at p. 897 [quoting *Butt*, *supra*, 4 Cal. 4th at p. 681] [emphasis added].) Nowhere did *Collins* purport to modify the elements required to plead a disparate impact or *Butt* claim, nor could a Court of Appeal overrule existing Supreme Court precedent even if it wished to. The duty is "to correct," not to merely take a step in that direction.

Finally, the State's argument that the ASC fails to include allegations relevant to the prevailing "statewide standard" (Dem. at p. 12), is incorrect for two reasons. First, as discussed above, Plaintiffs sufficiently allege that the education provided to low-income students of color,

"viewed as a whole, falls fundamentally below prevailing statewide standards." (See Subsection IV.A., *supra.*) Second, in order to plead a disparate impact claim based on membership in a protected class, at the demurrer stage it is sufficient to allege that students have been subjected to discrimination that has resulted in de facto school segregation. The *Collins* court made clear that because "racial segregation of any kind in school harms students by depriving them of an equal educational opportunity . . . *[f]or purposes of stating a claim*, it is reasonable to conclude that students [who have been subject to discrimination] are receiving an education that is fundamentally below the standards provided elsewhere throughout the state[.]" (*Collins*, *supra*, 41 Cal. App. 5th at pp. 899-99, 921 [emphasis added].) While *Collins* was decided in the context of racial discrimination, its analysis applies no less to wealth-based discrimination claims because, as this Court has recognized, wealth is likewise a suspect classification subject to strict scrutiny under the California Constitution. (Dem. Order at p. 5 [citing *Vergara v. State of California* (2016) 246 Cal.App.4th 618, 648].) In short, to state a *Collins* claim under California's Equal Protection Clause, it is sufficient to allege a wealth-based disparate impact resulting in de facto school segregation.

C. Plaintiffs Seek Available Relief

The State does not support its contention that the relief requested by Plaintiffs is "not available as a matter of law" with a single citation to any legal authority. (Dem. at pp. 15-16). Nor could they. Plaintiffs seek precisely the form of relief that was approved in *Butt v. State of California* (1992) 4 Cal.4th 668, 694-97: a declaration that the State has violated its constitutional duties (ASC ¶ 275) and an injunction directing the State take appropriate actions necessary to cure the identified violations. (*Id.* ¶¶ 276-78). The *Butt* Court made clear that courts may, consistent with separation of powers principles, exercise their equitable authority to order the State to take the specific actions necessary to cure constitutional deficiencies. *Butt*, *supra*, 4 Cal. 4th at p. 697.) Moreover, as discussed further in Section VII, *infra*, compensatory education is a well-established equitable remedy available to redress past violations of educational rights

V. PLAINTIFFS STATE A CLAIM FOR A VIOLATION OF ARTICLE IX'S FREE SCHOOL GUARANTEE (COUNT 4)

The free school guarantee in Article IX, Sections 1 and 5 of the California Constitution requires the State to cover all expenses for resources and activities constituting "an 'integral fundamental part of the elementary and secondary education.'" *Hartzell v. Connell* (1984) 35 Cal. 3d 899, 905 [citation omitted].) Plaintiffs allege that the State's failure to cover the cost of digital devices, connectivity,[3] and mental health support[4] during the remote learning period violated this constitutional guarantee. (ASC ¶¶ 260-63.) During the remote learning period, students who lacked digital access, in particular students whose families could not afford adequate devices and connectivity, could not participate in remote learning and were therefore denied access to education entirely. (*Id.* ¶ 2.) Student Plaintiffs and similarly-situated students were injured by the State's failure to ensure access to remote learning: they suffered severe learning loss and mental health consequences as a result. (*Id*. ¶¶ 6, 151, 264-65.) The ASC seeks a "post-pandemic remedy"—in the form of assessments, instructional and mental health supports, development of plans to remediate learning loss, and compensatory education—to remediate the "injury during the pandemic." (Dem. at p. 7; see also ASC ¶¶ 276-78.)

As this Court recognized, Plaintiffs' free school cause of action seeks *access to education*, not an education of "some quality." (Dem. Order at p. 6.) For this reason, the State's continuing reliance on *Campaign for Quality Education v. State* (2016) 246 Cal.App.4th 896 is misplaced. (Dem. at p. 16.) The Plaintiffs in *Campaign* were seeking an increase in school funding levels to ensure that students received schooling of a particular level of educational quality, not access to the necessary elements of education itself, including mere presence in the (virtual) classroom. (*Campaign*, *supra*, 246 Cal.App.4th at p. 934 (dis. opn. of Liu, J.) [California Constitution does

[3] The State acknowledges that the free school guarantee requires that all students in California have free access to digital devices and internet connectivity to access distance learning. (ASC ¶¶ 125, 152, 260.) The California Department of Education states on its website: "[T]he California Constitution prohibits LEAs from requiring students to purchase devices or internet access, to provide their own devices, or otherwise pay a fee as a condition of accessing required course materials under the free schools guarantee." (*Id*. ¶ 148.)

[4] Plaintiffs have alleged that mental health supports are an integral and fundamental part of education (ASC ¶ 129, 157) and that students of color and students from low-income families do not receive the mental health supports necessary to learn (*Id*. ¶¶ 167-68). This allegation is sufficient to state a claim at the demurrer stage.

"not provide for an education of 'some quality' that may be judicially enforced"].) Students who lacked digital access during the remote learning period received no education at all. Likewise, a student with unaddressed mental health needs, or who has missed out on prerequisite lessons due to learning loss, will not be able to take in new material.[5]

Finally, contrary to the State's claim (Dem. at p. 17), Plaintiffs were not required to exhaust this claim. California Education Code 49013(a) provides an administrative process for bringing claims of non-compliance with Article 5.5 of the Education Code. (Ed. Code §49013, subd. (a) ["A complaint of noncompliance *with the requirements of this article* may be filed . . ."].) Section 49013(a) does not apply to claims, like this one, brought solely under Article IX of the California Constitution.

VI. PLAINTIFFS STATE A TAXPAYER CLAIM (COUNT 7)

Organizational Plaintiffs Community Coalition and The Oakland REACH have adequately pled a taxpayer claim under California Civil Procedure Code section 526a by alleging "specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Waste Mgmt. of Alameda Cty., Inc. v. Cty. of Alameda* (2000) 79 Cal.App.4th 1223, 1240.) Organizational Plaintiffs' taxpayer claim challenges state actions that violate the California Constitution. (*Compare* ASC ¶ 270 ["The taxpayer claim is based on the State's illegal expenditure of funds to administer an education system that engages in both racial and wealth discrimination, and that fails to provide equal access to a basic education in violation of the state constitution"]; see Dem. Order at p. 10 ["Cases that challenge the legality or constitutionality of government actions fall squarely within the purview of section 526a."].)

Exhaustion of administrative remedies is not required because Plaintiffs' taxpayer claim is based solely on the State's actions that affect matters outside the control of the individual school districts. (See Dem. Order at p. 10.) Organizational Plaintiffs are not challenging policies or practices that could have been addressed by individual school districts. Rather, Plaintiffs challenge the *State*'s COVID-19 education policy, including, but not limited to, the State's failure

[5] Because any relief that would issue under Plaintiffs claim that the State violated California Education Code § 43500 (Count 5), Plaintiffs do not object to dismissing this cause of action.

to ensure that students had access to the connectivity and devices required to access school (ASC ¶¶ 39, 52, 55, 84, 143, 167-68), the State's failure to develop a statewide plan to remediate the learning loss caused by the State's inaction during the pandemic (*id.* ¶ 9), and the State's failure to develop a statewide system of monitoring, accountability, and enforcement to ensure that LEAs met minimum resource and learning standards (*id.* ¶¶ 120, 154-61).

VII. STUDENT PLAINTIFFS WHO HAVE COMPLETED TWELFTH GRADE HAVE JUSTICIABLE CLAIMS BECAUSE THEY MAY SEEK THE REMEDY OF COMPENSATORY EDUCATION

Student Plaintiffs Natalia T. and Daniel A. have an active controversy against the State even though they have completed twelfth grade because they have sought and are entitled to the equitable remedy of compensatory education. (ASC ¶ 278.) Compensatory education provides "services prospectively to compensate for a past deficient program." (*Dept. of Health Care Servs. v. Off. of Admin. Hearings* (2016) 6 Cal.App.5th 120, 152; see also *White v. State of California* (1987) 195 Cal.App.3d 452, 468-69.) As discussed in Section III *supra*, and as the State concedes (Dem. at 19), a claim may be dismissed as moot only if the State can meet its burden of establishing that no effective relief at all may be granted. It cannot do so here.

Compensatory education remains available after a student "ages out" of eligibility for a school. Courts routinely award compensatory education to young people who have completed the twelfth grade and/or are over the age of 21. (See, *e.g.*, *Ferren C. v. Sch. Dist. of Phila.* (3d Cir. 2010) 612 F.3d 712, 718-19; *Bd. of Ed. of Oak Park & River Forest High Sch. Dist. 200 v. Ill. State Bd. of Ed.* (7th Cir. 1996) 79 F.3d 654, 656; see also *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497 [recognizing that a district court's "fact-specific analysis" could lead to an award of compensatory education to a student who had graduated from high school].) Denying students a remedy for past violations after they have aged out would incentivize educational agencies to evade their legal responsibilities by engaging in delay tactics to lengthen the legal process and run out the clock. (See, *e.g.*, *Jefferson Cty. Bd. of Ed. v. Breen* (11th Cir. 1988) 853 F.2d 853, 858 ["Providing a compensatory education should serve as a deterrent against states unnecessarily prolonging litigation in order to decrease their potential liability."]; *Pihl v. Mass. Dept. of Ed.* (1st Cir. 1993) 9 F.3d 184, 189-90.)

While the compensatory education doctrine has primarily arisen in the context of the federal Individuals with Disabilities in Education Act (IDEA), the remedy is not unique to the IDEA. In an analogous case decided just weeks ago, the Ninth Circuit held that claims brought under the Administrative Procedure Act alleging that the federal government had failed to provide legally-required education were not moot although the students were no longer eligible to attend the school because the students had sought the remedy of compensatory education. (*Stephen C. v. Bureau of Indian Ed.* (9th Cir., Mar. 16, 2022, No. 21-15097) 2022 WL 808141, at *2.)

Finally, as discussed in greater detail in Plaintiffs' concurrently-filed Opposition to Defendants' Motion to Strike ("MTS Opp."), even if these claims were moot, they would fall squarely within the well-recognized "public interest" and "inherently transitory" exceptions to the mootness doctrine, (*See* MTS Opp. at p. 15 (citing *DeRonde v. Regents of Univ. of Cal*. (1981) 28 Cal.3d 875, 880 and *Mendoza v. Tulare* (1982) 128 Cal.App.3d 403, 412).)

VIII. PLAINTIFFS STATE A CLAIM FOR DECLARATORY RELIEF (COUNT 6)

This Court has recognized that the declaratory relief sought (ASC ¶ 275) is "derivative of the other claims," and, therefore, "if a State action violates the state constitution or a state statute, then plaintiffs may seek related prospective declaratory relief." (Dem. Order at p. 8).

IX. CONCLUSION

For the foregoing reasons, Defendants' demurrer should be overruled. In the alternative, Plaintiffs seek leave to amend to cure any identified deficiencies.

Dated: April 4, 2022

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