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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: 603501936743 Case No. RG20084386 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' DEMURRER TO PLAINTIFFS' AMENDED AND SUPPLEMENTAL COMPLAINT** Date: April 6, 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

Defendants demur to Plaintiffs' Amended and Supplemental Complaint (ASC), and seek an order to dismiss the Complaint without leave to amend. The Court previously sustained Defendants' demurrer to the original complaint because, among other things, Plaintiffs' claims regarding the alleged lack of access to distance learning and "the State's response during the pandemic," are now moot. (Order re Ruling on Demurrer, filed December 9, 2021 (Demurrer Order), at pp. 3-7.) The Court explicitly granted Plaintiffs leave to file *only* claims that are "not moot." Plaintiffs have failed to do so. Their ASC primarily bases its causes of action on the same moot allegations and claims that were in their original complaint and that were, in effect, ordered stricken by this court. Plaintiffs have failed to cure the defects in their original complaint, and failed to meaningfully meet and confer to avoid the need for this judicial review, and the ASC should now be dismissed without leave to amend.

Even beyond the fatal mootness defect, none of the seven amended causes of action states facts sufficient to constitute a claim. Each of Plaintiffs' three causes of action for violation of the Equal Protection Clause of the California Constitution fails because Plaintiffs have not sufficiently alleged a necessary element of each claim under controlling precedent. Additionally, the claims fail to the extent that they seek relief to make students whole for alleged harms from school closures and distance learning. Not only are these claims therefore entirely dependent upon the defective claims that the Court already ruled are moot, but Plaintiffs also have cited no authority, and Defendants are aware of none, that supports such relief for alleged violations of the equal educational rights of student, and such relief raises profound separation of powers concerns.

In addition, Plaintiffs' claim for violation of Education Code sections 43500 et seq. fails because those statutory provisions have expired, Plaintiffs lack a private right of action to sue under those sections in any event, and they fail to allege any statutory duty on the part of any Defendant to comply with the specific requirements in those sections that Plaintiffs allege were violated. Because the declaratory-relief claim is entirely derivative of Plaintiffs' other failed causes of action, it must fail for the same reasons. Finally, the taxpayer action must also be dismissed because it fails to allege exhaustion of administrative remedies, and does not state a

viable claim because the organizational Plaintiffs dispute *the manner* in which the State has chosen to administer its educational system. For at least these reasons, Defendants' demurrer to Plaintiffs' ASC should be sustained without leave to amend.

PROCEDURAL AND FACTUAL BACKGROUND

A. The Demurrer Order and Amended and Supplemental Complaint

Plaintiffs filed their lawsuit on November 30, 2020, during the middle of the 2020-21 school year. Due to the pandemic, and for the 2020-21 school year only, the Legislature had enacted temporary legislation authorizing school districts to provide "distance learning" instead of in-person instruction to students, and setting certain requirements related to distance learning. (See Ed. Code, § 43500 et seq.) Student Plaintiffs argued that Defendants had violated their constitutional rights by allegedly failing to provide them sufficient access to distance learning, including the necessary devices and connectivity, and by failing to provide academic and mental health supports to address the impacts of the pandemic. (*See, e.g.*, Plaintiffs' original Complaint ("Compl."), ¶¶ 2-5, 8-9, 142, 192-195, 202-203.) Plaintiffs also alleged various statutory claims, a derivative declaratory relief claim, and the organizational plaintiffs alleged a taxpayer claim.

Defendants demurred to the original complaint, arguing that the claims and relief requested were moot because they were premised on alleged deficiencies in remote learning during the Spring of 2020 and the 2020-21 school year, and that the relief they sought was related to distance learning and obtaining devices and connectivity to engage in distance learning, as well as requirements pertaining to "planning" for the "return" to in-person instruction. Defendants also demurred to each Cause of Action on the grounds that they failed to state a claim on the merits.

The Court sustained the demurrer, with leave to amend seven causes of action, (Order re Ruling on Demurrer, filed December 9, 2021 (Demurrer Order), at pp. 2-10.) In particular, the Court sustained the demurrer to various causes of action based on mootness. (*Id*. at pp. 2-7.) For example, the Court held that the claims regarding "the State's response during the pandemic" appear to be moot, but that the claims regarding "the State's provision of academic and mental health supports to assist students in the aftermath of the pandemic might not be moot." (*Id*. at pp. 4, 7.) It also sustained the demurrers to some claims on other grounds, and granted leave to

amend to assert viable claims. (*Id*., at pp. 4-6, 8-10.) On February 8, 2022, the Court granted Plaintiffs leave to amend to state only claims that are not moot, consistent with its Demurrer Order. *(Ibid*.) Plaintiffs filed the operative ASC on February 9, 2022. In violation of the Demurrer Order, the ASC includes essentially the same moot allegations to support of their causes of action. (*See, e.g*., ASC ¶¶ 239-240.)

Defendants sought to meaningfully meet and confer with Plaintiffs on the deficiencies in their ASC, but Plaintiffs refused to amend the ASC. (Soichet Decl. ¶¶ 9-10.)

B. The State Has Taken and Continues to Take Unprecedented Action to Address the Impact of the Pandemic on Students

Since Plaintiffs filed this lawsuit in November 2020, the relevant circumstances have dramatically changed and improved. The State's statutory authorization for distance learning, which was limited to the 2020-21 school year expired, by operation of law, on June 30, 2021. (Ed. Code, § 43511, subd. (b)), and therefore all local education agencies (LEAs) in the State must be open for in-person instruction for the 2021-22 school year. As Plaintiffs concede, their districts have been open for in-person instruction, and they have received in-person instruction during the current 2021-22 school year. (ASC ¶¶ 3, 27, 34, 45, 51-52, 55, 64, 73, 79, 83.)

Recognizing the toll that the pandemic took on students, the State has taken and continues to take significant actions to provide unprecedented amounts of funding and support to school districts to address the impact on students, including any lost learning and the social, emotional and mental health of all students. For example, in June 2020, the State provided $5.3 billion to school districts to assist with the return to in-person instruction, and to address educational impacts due to school closures in spring 2020. (Senate Bill (SB) 98, "Education finance: education omnibus budget trailer bill," [filed with Secretary of State, June 29, 2020] (Reg. Sess. 2019-20).) Thereafter, in March 2021, the State incentivized school districts to safely re-open for in-person instruction for the balance of the school year by providing them $2 billion to support safe re-opening, and $4.6 billion for Expanded Learning Opportunities Grants to fund summer school and tutoring and mental health services, among other goals. (RJN Exs. 1, 11-13, 15, 26, 34, 40-42, 45-46; Assembly Bill (AB) 86, "COVID-19 relief and school reopening, reporting, and

public health requirements," (Reg. Sess. 2020-21), [enacted March 5, 2021]; Ed. Code, §§ 43520 et seq.) In the 2021-22 Budget Act, the State provided further significant funds tied to programmatic requirements to address the impacts of the pandemic, including approximately $20 billion for education and $6 billion for broadband. (RJN Exs. 1-3; Budget Act of 2021, 2021 Senate Bill (SB) 129, enrolled June 28, 2021 [Reg. Sess. 2021-22].) Assembly Bill (AB) 130 provided further funding for K-12 education programs (AB-130 Education Finance: education omnibus budget trailer bill; filed with Secretary of State July 9, 2021(2021-2022 Reg. Sess.); see also RJN, Exs 5-9.)

Since Plaintiffs initiated this lawsuit, additional federal funding has also issued through the American Rescue Plan Act of 2021—including over $15 billion for California—to assist school districts in combating learning loss caused by the pandemic and in expanding mental-health services. (H.R. 1319, section 2001, "Elementary and Secondary School Emergency Relief Fund," 117th CONGRESS, 1st Session, https://www.congress.gov/bill/117th-congress/house-bill/1319/text (last visited July 1, 2021); see also RJN Exs. 39.) The State has taken numerous additional actions designed to address the impacts of the pandemic on students' learning and mental health during the 2021-22 school year. (*See, e.g.*, RJN, Exs. 1-5, 11-20, 22-28, 29-47.) The proposed budget for the 2022-23 fiscal year contains substantial additional education funding to address the pandemic's impacts. (RJN, Exs. 6-10, 21, 48-50).

LEGAL STANDARD

In ruling on a demurrer, "the trial court examines the pleading to determine whether it alleges facts sufficient to state a cause of action under any legal theory, with the facts being assumed true for purposes of this inquiry." (*Campaign for Quality Educ. v. State of California* (2016) 246 Cal.App.4th 896, 904 (*Campaign*).) Conclusory assertions are not "facts" that the court must accept as true. (*Serrano v. Priest* (1971) 5 Cal.3d 584, 591 (*Serrano I.*) A court may also consider judicially noticeable matters that are outside the pleading. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) A demurrer is warranted if a complaint fails to sufficiently plead facts or if any essential element of a cause of action is negated. (*Rakestraw v. Cal. Physicians' Service*, (2000) 81 Cal.App.4th 39, 43.) "Leave to amend is properly denied if the facts and nature of

plaintiffs' claims are clear and under the substantive law, no liability exists." (*Campaign*, *supra*, 246 Cal.App.4th at p. 904.)

ARGUMENT

I. PLAINTIFFS' EQUAL PROTECTION CLAIMS FAIL.

Student Plaintiffs' amended causes of action for violation of California's Equal Protection Clause still fail to state a claim for relief. As a threshold matter, they are still based on moot allegations, and therefore fail to remedy the defect. Even on the merits, Plaintiffs fail to allege the necessary elements to state equal protection claims. Because they have twice failed to allege cognizable equal protection claims, those claims should be dismissed without leave to amend.

A. Plaintiffs Fail to State a Race-Based Disparate Impact Claim.

Plaintiffs fail to state a viable non-moot racial discrimination claim. The Court previously sustained Defendants' demurrer to Plaintiffs' racial discrimination claim with leave to amend, permitting leave to amend only to allege "claims" regarding the State's provision of academic and mental health supports to assist students in the aftermath of the pandemic might not be moot and "a Constitutional race discrimination claim that is not moot." (Demurrer Order at p. 4.)

In flagrant violation of this order, the amended cause of action contains numerous paragraphs containing allegations that the Court *already deemed moot*. (See ASC ¶¶ 239- 241, 242 [first sentence], 243.) For example, paragraph 239 asserts that "[s]tudent Plaintiffs lacked access to computers and the internet connections necessary to access their online classes and assignments, leading to a 'substantial disparate impact' on them." Paragraphs 240, 241, and 242 discuss the Digital Divide, and allege issues related to the alleged lack of supports during distance learning. (See ASC ¶¶ 240-242.) In addition, the ASC contains the same allegation regarding "de facto segregation" based on the "State's COVID-19 response to education," which Plaintiffs contend is "negatively affecting their schooling disproportionately to other students." (ASC ¶ 243.) The Court deemed the claims moot based on essentially the same allegations. Because Plaintiffs continue to seek only prospective injunctive relief and because distance learning is no longer authorized, this allegation is also moot pursuant to the Demurrer Order.

Even setting aside the moot allegations, and construing the claim to be based *solely* on Plaintiffs' allegation that "[n]ow that schools have returned to in-person learning, the State has still failed to ensure that Plaintiffs have access to the assessments, supports, and other resources that the [sic] need to catch up from the remote learning period" (ASC ¶ 242), the claim still fails to allege race-based disparate impact.

Plaintiffs rely on the standard for disparate impact claims set forth in *Collins v. Thurmond*. There, the court found that the plaintiffs' complaint had sufficiently alleged that the State adopted a "policy" that "has a substantial disparate impact on the minority 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 the policy when its impacts are identified." (*Id.* (2019) 41 Cal. App. 5th 879, 896-897, emphasis added.). By contrast, Plaintiffs' allegation here that State has failed to ensure that they have access to the assessments, supports, and other resources that they need to "catch up from the remote learning period" fails under *Collins* for at least three reasons.

First, *Collins* requires a clear articulation of a specific and established "policy" at issue. (*Id., supra,* 41 Cal. App. 5th at pp. 898-900 [allegations of racially discriminatory disciplinary proceedings sufficient to withstand demurrer].) Here, Plaintiffs have failed to identify any particular "policy," either of the State or school districts, related to the State's ongoing efforts to ameliorate the impacts of distance learning on students' academic and mental health that has had a substantial disparate impact on minority students.

Second, even if Plaintiffs could somehow show a "policy," they cannot credibly allege that the State has taken "no action" to "correct" said policy when its alleged impacts were identified, and thus fail to state an essential element of this claim. (*Collins*, *supra*, 41 Cal.App.5th at pp. 896-897.) Indeed, Plaintiffs' legal theory here rests on their disagreement with the particulars of the State's robust response, an implicit concession that the State has not stood idly by that confirms Plaintiffs cannot plausibly plead this element of a claim under *Collins*. The State's ongoing, wide-ranging efforts to ameliorate the effects of the pandemic on students' educational progress include, but are not limited to:

- Unprecedented levels of funding for LEAs to address the impacts of school closures and the pandemic on students' academic achievement and mental health, and to incentivize and assist schools with bringing students back for in-person instruction (RJN, Exs.11-14, ; SB 98, (Reg. Sess. 2019-20), *supra*; AB 86 (Reg. Sess. 2020-21), *supra*; Ed. Code, §§ 43520 et seq.);

- The 2021-22 Budget Act, which added approximately $20 billion in funding for programs to address impacts of the pandemic on students and fundamentally reimagine education in California through socioemotional and other supports and services, particularly in schools serving the most disadvantaged students (RJN, Ex. 1-3; see also AB 130 (Regs. Sess. 2021-22); Ex. 5.)

- Requirements for LEAs to provide plans to describe how the funding will be spent to address impacts of the pandemic on students' academic progress and mental health. (RJN, Exs. 29-47; Ed. Code, §§ 43509; 43520-43525);

- Additional funding and support during the 2021-22 school year for students' mental health and learning. (RJN. Exs. 1-5, 11-20, 22-26, 29-47); and

- The proposed budget for FY 2022-23 substantially increases education funding to address the pandemic's impacts. (RJN, Exs. 6-10, 21, 27-28, 48-50.)

To be clear, *Collins* supports only a claim for *inaction* in the face of a complaint plausibly alleging that a policy has a disparate impact based on race; it decidedly does not support permitting Plaintiffs to litigate the sufficiency of the State's undisputed response while it is ongoing. Because Defendants have implemented—and continue to implement—substantial measures in a variety of contexts to address the various impacts of the unprecedented COVID-19 pandemic on students, Plaintiffs cannot show that the State failed to act to mitigate those impacts.

Finally, the Demurrer Order incorrectly analyzes this cause of action under the framework applicable to disparate *treatment* claims. (Demurrer Order, at pp. 3-4 ["sufficient reason for distinguishing between the two groups," "to treat the groups disparately," "where a statute or regulation makes distinctions involving inherently suspect classifications or fundamental rights"].) As discussed above, however, Plaintiffs chose to plead their racial discrimination cause of action as a disparate *impact* claim under *Collins*, and therefore the analysis for disparate *treatment* claims does not apply here. (See ASC ¶¶ 237-241, 243.) But even if this claim were for disparate *treatment* based on race, Plaintiffs fail to meet the requirements for a disparate treatment claim because the ASC does not allege that Defendants are *treating* Student Plaintiffs less favorably than other students. (See Demurrer Order at p. 3; *In re Brian J.* (2007) 150

Cal.App.4th 97, 125 [plaintiffs must first show that similarly situated groups are *treated* disparately].)[1] Thus, the ASC also fails to state a race-based disparate *treatment* claim.

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

Plaintiffs' amended wealth-based discrimination claim also fails. The Court previously sustained Defendants' demurrer to this claim and granted Plaintiffs leave to assert an amended cause of action that "must not be moot." (Demurrer Order, at p. 5.) Yet this cause of action is still based on moot allegations regarding the alleged lack of technology and connectivity during distance learning, confirming that Plaintiffs cannot state a viable claim. (ASC ¶ 250, 252.)

Even if the wealth-based discrimination claim were construed to be based *solely* on their allegation that "[n]ow that schools have returned to in-person learning, the State has still failed to ensure that Plaintiffs have access to the assessments, supports, and other resources that the need to catch up from the remote learning period" (ASC ¶ 251), it still fails. Plaintiffs have failed to include allegations relevant to an indispensable element of this claim: the prevailing "statewide standard" against which to assess whether Plaintiffs have been denied a basically equivalent education based on their low-income status.

The California Supreme Court has emphasized that not all "disparities in educational quality or service" give rise to constitutional claims. (*Butt v. State of California* (1992) 4 Cal.4th 668, 686.) Thus, a finding of "constitutional disparity" may not be made unless the actual quality of a particular district's program, "viewed as a whole, falls fundamentally below prevailing statewide standards." (*Id*. at pp. 686-687.) Applying this standard, the *Butt* court then ruled that the evidence established a "prevailing statewide standard" where "virtually every established school district in California operated for at least 175 days during the 1990-1991 school year," while the Richmond Unified School District (RUSD) would have operated for six fewer weeks. (*Id*. at p. 687 & fn. 14.)

Here, Plaintiffs conclusorily allege that "[b]y failing to provide Student Plaintiffs with sufficient access to remote instruction, 'the actual quality' of the education of Student Plaintiffs

[1] Indeed, the State allocated the federal ESSER I pandemic-related funds to LEAs based on their Title I appropriation, meaning the funds were targeted to low-income students. (RJN, Exs. 36-39.)

and those similarly situated 'viewed as a whole, [will] fall[] fundamentally below prevailing statewide standards.'" (ASC ¶ 252 [citing *Collins*, 41 Cal. App. 5th at 898 (quoting *Butt*, 4 Cal. 4th at 686-87)].) Not only is the claim about lack of sufficient access to remote instruction moot, but Plaintiffs also allege no facts demonstrating the existence of any "prevailing statewide standard" regarding "the actual quality" of education in relation to the State's efforts to address the impacts of the pandemic and distance learning on students now that they have returned to in-person instruction. The conclusory assertion that a prevailing statewide standard exists without any accompanying allegations regarding the details about its content is inadequate to survive demurrer. (*Serrano I*, *supra*, 5 Cal.3d at p. 591.) Thus, Plaintiffs fail to allege an indispensable element of their claim.

C. Plaintiffs' Equal Protection Claim Under Article I, Section 7 Fails.

Plaintiffs' fundamental interest claim under the California Constitution fails because it is premised on moot allegations incorporated by reference in the claim. (ASC ¶ 253.)

To the extent Plaintiffs' claim is interpreted to be based *solely* on their allegation that "[n]ow that schools have returned to in-person learning, the State has still failed to ensure that Plaintiffs have access to the assessments, supports, and other resources that the need to catch up from the remote learning period" (ASC ¶ 256), it still fails because Plaintiffs do not, as required, allege any type of appropriate comparator group by which this court would be able to infer disparate treatment under the challenged policies.

Plaintiffs allege their fundamental interest claim only on behalf of Student Plaintiffs, and vaguely state that Defendants have violated the rights of Student Plaintiffs in comparison to "all other citizens." (ASC ¶ 257.) As with their claim for wealth discrimination discussed above, Plaintiffs fail to allege any facts showing they were deprived of a basic education *as compared to all other students*, which would be the only relevant comparator group. Essentially, this claim amounts to an entirely conclusory allegation, wholly lacking in supporting factual allegations, that the State has specifically denied Student Plaintiffs a basically equivalent education in contrast to all other students in their schools and districts, in addition to students in all other districts in the State. Such overbroad, vague, and conclusory allegations are insufficient to survive demurrer.

(See *Rakestraw*, *supra*, 81 Cal.App.4th at p. 43; see also *Campaign*, *supra*, 246 Cal.App.4th at p. 904.) Thus, this claim bears no resemblance to *Butt*, *supra*, 4 Cal.4th at p. 687 & fn. 14, in which RUSD would have operated for six fewer weeks than nearly every other district, thus depriving all RUSD students of a basically equivalent education provided to students in the other districts.

Additionally, Plaintiffs argue that the harms of distance learning will "compound" unless the state "intervene[s]," (ASC ¶ 256), but distance learning is no longer authorized. And the facts alleged here differ materially from the cases in which courts have held that an order compelling State intervention to redress educational disparities was warranted. For example, the California Supreme Court has found a duty to intervene when students in certain school districts are being deprived of educational opportunities and resources available in other school districts and the districts were unable to redress the alleged harm. (*See, e.g.*, *id., supra*, 4 Cal.4th at p. 685 [noting RUSD's "decision to close early was a desperate, unplanned response to the District's impending insolvency"]; *Serrano I, supra,* 5 Cal.3d at pp. 594, 598; *Serrano v. Priest* (1976) 18 Cal.3d 728, 769, 777 (*Serrano II*) [state funding statutes that systematically discriminated against poorer school districts violated the rights of students residing in those disfavored districts because poorer school districts had limited ability to raise additional local revenue].) Plaintiffs have not alleged facts demonstrating that LAUSD and OUSD, whose schools Student Plaintiffs attend, are refusing to redress alleged harms to students caused by distance learning when brought to their attention, as in *Collins*. (*Id.*, *supra*, 41 Cal.App.5th at pp. 896-897.) Also, as discussed above, the State already is taking unprecedented action to address the pandemic's learning and mental health impacts for students across the State. These are not the "extreme circumstances" that the California Supreme Court has held may trigger the State's duty to intervene to prevent unconstitutional discrimination at the local level. (*Butt*, *supra*, 4 Cal.4th at p. 688.)

Viewed differently, even assuming the State's duty to intervene was triggered due to harms caused by its pandemic response, it is well-established that the State has already "intervened" on a historic scale. Plaintiffs seek to have the courts micromanage the particulars of that response, displacing the constitutional role of the Legislature, Governor, and state agencies to implement K-12 education policy with Plaintiffs' view of how the state educational system should be structured

and programs designed. The Supreme Court has repeatedly cautioned against such an outcome in its educational cases. (*Butt, supra*, 4 Cal.4th at pp. 695-696; [noting propriety of order to take action without dictating particulars]; *Serrano II, supra*, 18 Cal.3d at pp. 776-777 [striking down statute but not specifying what should replace it].) This Court should also decline Plaintiffs' attempt to convert what has, viewed historically, been an extraordinary claim for relief against the State into a legal theory where the State becomes the de facto defendant of first resort without any allegation or evidence that the school districts allegedly responsible for the harm are incapable of redressing it, and even where the State has already taken and continues to take responsive action.

Furthermore, Plaintiffs fail to allege a viable prevailing statewide standard applicable to this claim under *Butt.* (4 Cal.4th at pp. 686-687.) They allege that the State "has established the content standards and other commitments of care and services to elementary and high school students, defining the education to which students are entitled." (ASC ¶ 255.) There is no legal support for that argument that the State's content standards establish a prevailing statewide standard. The prevailing statewide standard must be determined based on students' "actual" education, not on state academic standards that set forth the grade-level expectations for student knowledge. (*See Butt, supra,* 4 Cal.4th at pp. 686-687.)

D. Plaintiffs' Requested Relief Is Not Cognizable.

The equal protection claims fail for the additional reason that the relief Plaintiffs seek—an injunction directing individualized remediation of alleged harms caused by distance learning for each impacted student—is not available as a matter of law. As pled, these claims do not challenge the constitutionality of "the State's provision of academic and mental health supports to assist students in the aftermath of the pandemic," which this Court concluded "might not be moot." (Demurrer Order at p. 4.) Rather, these claims rest on the theory that Defendants are constitutionally required to take specific actions to allow students "to catch up" from impacts of remote learning. (See, e.g., ASC ¶ 242.) As pled, these claims are therefore derivative of and entirely dependent upon the claims that the Court concluded are moot.

Moreover, no appellate authority supports the availability of such relief for alleged violations of the equal educational rights of students (in contrast to caselaw that establishes a duty

to intervene or stop unconstitutional conditions in limited extraordinary circumstances). Indeed, the degree to which the Court would be required to direct the particulars of the State's response under the prayed-for relief, and become embroiled in directing the Legislature to make appropriations, is difficult to reconcile with cautionary language the Supreme Court has included in the rare cases where it has identified unprecedented deprivations or disparities that necessitated court intervention. Because Plaintiffs' requested relief raises profound separation of powers concerns, the Court should decline Plaintiffs' invitation to endorse such an unprecedented expansion of existing doctrine.

II. PLAINTIFFS' ARTICLE IX CLAIM FAILS.

The Court previously sustained Defendants' demurrer to Plaintiffs' Article IX claim with leave to amend. Specifically, the Court agreed that under *Campaign for Quality Educ. v. State of California* (2019) 246 Cal.App.4th 896, there is no private right of action to a claim under Article IX for an education of "some quality." (Demurrer Order, at pp. 6-7.) While the Court permitted Plaintiffs leave to amend their claim to allege that the alleged "lack of remedial education and mental health supports in the aftermath of the pandemic is a violation of the California Constitution and the claim must not be moot," Plaintiffs failed to do so. (*Id.* at p. 7.)

First, Plaintiffs' allegations in support of their Article IX claim are based on events that took place during the 2020-21 school year. (ASC ¶ 261.) "[C]laims regarding the lack of access to distance learning during the pandemic appear to be moot." (Demurrer Order, at p. 6.)

Second, Plaintiffs' attempt to transform their Article IX claim into one based on an alleged "lack of an equal system open to Student Plaintiffs on equal terms to higher-income students and non-minority students," does not cure the claims' infirmities under *Campaign.* This now reads as an equal protection claim, duplicative of the three different equal protection claims already pled, and not cognizable under Article IX. Moreover, Plaintiffs' claims that Defendants have not provided sufficient "training for necessary life skills," "covered expenses for resources/activities," "instructional time," or "access to teachers" (ASC ¶¶ 260, 263), are claims of a denial of an alleged right to a specific level of educational quality, the academic results

produced, or a minimum education funding, which are not cognizable under Article IX. (*Campaign.*, *supra*, 246 Cal.App.4th at pp. 902-03.)

Third, Plaintiffs cannot state an Article IX claim based on a lack of access to "the assessments, supports, and other resources that the[y] [*sic*] need to participate in school" "now that schools have returned to in-person learning." (ASC ¶¶ 262-263.) Among other deficiencies, Plaintiffs fail to describe which "assessments, supports, and other resources" constitute an integral component of public education under Article IX or how they constitute conditions for educational participation.[2]

Fourth, the claim for alleged lack of "assessments, supports, and other resources" still fails because Plaintiffs do not allege that they exhausted administrative remedies under Education Code section 49013, as required for allegations that schools charged improper "pupil fees" for "supplies, materials, and equipment" needed to participate in educational activities. (*See*, e.g., Ed. Code § 49011, subd. (b)(1); *id.* § 49013.) Plaintiffs' Article IX claim should be dismissed.

III. PLAINTIFFS' CLAIM UNDER EDUCATION CODE SECTION 43500 *ET. SEQ.* FAILS.

Plaintiffs fail to state a claim against Defendants for violation of Education Code sections 43500 *et seq.* Those provisions all expired by their own terms on June 30, 2021. (*Id.*, § 43511, subd. (b).) First, "[i]t is well settled that, as here, when an action is dependent upon a statute which is later repealed, the action cannot be maintained." (*Los Angeles Unified School Dist. v. State of California* (1991) 229 Cal.App.3d 552, 556.) "The repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause." (*In re D.B.* (2018) 24 Cal.App.4th 252, 263.) Because sections 43500 *et seq.* contain no savings clause, Plaintiffs' claim fails.

Second, even if Plaintiffs could state a claim under the repealed sections 43500 *et seq.*, it fails because those statutes did not create a private right of action. A statute only creates a private right of action when the Legislature has ***clearly manifested*** an intent to create a private right of action. (*San Diegans for Open Gov. v. Public Facilities Finance Authorities of City of San Diego*

[2] "Mental health supports" are not integral components of public education under Article IX, nor do they constitute conditions for educational participation. (*Arcadia Unified School Dist. v. State Dept. of Education (*1992) 2 Cal.4th 251, 262-263 [*Hartzell v. Connell* (1984) 35 Cal.3d 899, "did not extend [an] expansive understanding of the free school clause beyond the realm of educational activities to noneducational supplemental services"].)

(2019) 8 Cal.5th 733, 742, original emphasis; *see also Lu v. Hawaiian Gardens Casino, Inc*. (2010) 50 Cal.4th 592 [Plaintiffs bear heavy burden of persuasion to show Legislature in fact created such a right absent stated legislative intent to permit individuals to sue.]) There is no language in sections 43500 *et seq*. that permits individuals to sue for its alleged past violations.

Third, Plaintiffs' claim also fails because, by their express terms, none of the provisions of sections 43500 *et seq.* which Plaintiffs allege Defendants violated mandated any actions to be taken by the State. Those provisions only impose duties only upon LEAs, the governing board of school districts, county boards of education, and the governing bodies of a charter schools. (ASC ¶ 265 [alleging violations of Ed. Code §§ 43501, 43503, subd. (b) & 43509, subd. (b); see also Ed. Code § 43501 ["the minimum schoolday ***for a[n LEA]***…."]; *id.* § 43503, subd. (a)(1) [[*LEA]* ***that offers distance learning shall comply …"***]; *id.* § 43509, subd. (b) ["***The governing board of a school district, a county board of education, and the governing body of a charter school*** shall…"].) Thus, any claim Defendants violated these statutes is without merit.

IV. PLAINTIFFS' DECLARATORY RELIEF CLAIM FAILS.

Plaintiffs' claim for declaratory relief also fails. It is entirely derivative of Plaintiffs' other defective claims that fail for the numerous reasons described above and must, for those same reasons, likewise fail. (ASC ¶ 266; *Ball v. FleetBoston Financial Corp.* (2008) 164 Cal.App.4th 794, 800.) The Court should sustain the demurrer as to this claim without leave to amend.

V. THE ORGANIZATIONAL PLAINTIFFS' TAXPAYER CLAIM FAILS.

The Court previously sustained Defendants' demurrer to the organizational Plaintiffs' taxpayer claim and should do so again. (Demurrer Order, at pp. 9-10.)

First, the Court agreed that, under *Collins*, *supra*, 41 Cal.App.5th at p. 912, discrimination-based taxpayer claims require exhaustion administrative remedies. (*Ibid.*) The Court permitted Plaintiffs leave to amend this claim to allege "more clearly [that it is] based on actions by the State that affect matters outside the control of individual school districts." (*Ibid.*) Plaintiffs have failed to do so. The only difference between Plaintiffs' original taxpayer claim and their amended taxpayer claim is a single allegation that "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." (Compare ASC ¶ 270 with Compl. ¶ 234.) But this wholly conclusory allegation is insufficient to establish that Plaintiffs' claims concern matters beyond the local control, and is thus insufficient to excuse exhaustion of administrative remedies at the local level.

Second, the Court concluded that the taxpayer claim would fail where, as here, "the real issue is a disagreement with the manner in which government has chosen to address a problem." (Demurrer Order at p. 10 [citing *California DUI Lawyers Association v. California Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247, 1258.) As set forth herein, because Plaintiffs dispute ***the manner*** in which the State has chosen to administer its educational system, those disputes do not rise to the level of a constitutional or statutory violation by the State. (*Id*., pp. 9-10.) The Court should dismiss the taxpayer claim without leave to amend.

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

Plaintiffs Natalia T. and Daniel A. should be dismissed from this case as no live controversy exists with respect to these Plaintiffs and their claims are moot. A "moot" case is one in which "the court cannot grant the plaintiff any effectual relief." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573-74 [citation omitted].)

The ASC states that Natalia T. is in college (ASC ¶ 85) and, thus, no longer attends a K-12 school. Similarly, the ASC alleges that Daniel A. attended twelfth grade in 2020-2021 (ASC ¶ 94) and is silent about his current status, leading to the inference that he, too, no longer attends a K-12 school. Because the ASC seeks only prospective relief available to K-12 students—namely the remediation of alleged harms of distance learning—the Court cannot grant either of these Plaintiffs any effectual relief. Nor are they entitled to the requested declaratory relief because it is designed to help only K-12 students. (ASC ¶ 275.) Declaratory relief would thus be futile as to them. (*See, e.g*., *Pittenger v. Home Sav. & Loan Ass'n* (1958) 166 Cal.App.2d 32, 36 [no basis for declaratory relief "where the controversy is or has become moot and no actual controversy exists relating to their legal rights and duties"].) Thus, these two students should be dismissed.

CONCLUSION

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

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Respectfully submitted,

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