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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.	**Reservation No. 284458662516** Case No. RG20084386 **DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION** [Notice of Motion and Motion; Separate Statement of Undisputed Facts; Request for Judicial Notice; Declaration of Elizabeth Lake; Declaration of Mary Nicely; Declaration of Malia Vella; Declaration of Mao Vang; Declaration of Chris Ferguson; and Index of Documentary Evidence filed concurrently herewith] Date: August 4, 2023 Time: 10:00 a.m. Dept: 23 Judge: The Honorable Brad Seligman Trial Date: September 5, 2023 Action Filed: November 30, 2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

Introduction 7

Procedural Background 8

Relevant Statutory Background 8

Relevant Facts 10

I. The State Took Urgent Action to Limit Harms from the Pandemic 10

II. The State has Provided Unprecedented Levels of Educational Funding to Address Harms Arising From the Pandemic 10

III. The State Has Worked Aggressively to Bridge The Existing Digital Divide and Provide Technology and Connectivity to Students 12

IV. The State Has Provided Tools And Resources to LEAs to Support Learning Acceleration And Mental Health Programs for Students 13

V. The State's Comprehensive Student Performance Assessment System Showed Comparable Declines Among Relevant Student Populations Following the Pandemic And Steeper than Usual Gains in 2021-22 14

VI. CDE Oversees LEAs' Accountability Through California's Tiered Education System Created by The Legislature 15

VII. California Has Been Recognized For its Efforts to Improve Student Outcomes on a Large Scale and to Address Inequities 15

Applicable Legal Standards 16

Argument 16

I. The State Cannot be Liable for Constitutional Violations Based on COVID-Mitigation Policies Necessary To Protect Student Health 17

II. Defendants Are Entitled to Summary Judgment on Plaintiffs' First and Second Causes of Action for Equal Protection Violations 18

A. Plaintiffs Cannot Demonstrate a Disparate Impact on Their Access to Education Based on Their Race or Wealth Status 19

1. Plaintiffs Are Not Similarly Situated to White, "Wealthier" Students for Purposes of the State's COVID-Mitigation Response 19

2. Plaintiffs are Unable to Demonstrate that Their Fundamental Right to Educational Equality Has Been Unconstitutionally Infringed 20

3. Plaintiffs Cannot Establish an Equal Protection Violation Premised on the State's Policy of School Closures in Spring 2020 23

4. Evidence of Statewide Assessment Results Undermines any Inference of Disparate Impact from School Closures and Distance Learning 23

5. Evidence of Plaintiffs' Own Experiences is Insufficient as a Matter of Law to Support an Inference of Disparate-Impact Discrimination 25

TABLE OF CONTENTS
(continued)

Page

B. Plaintiffs Cannot Demonstrate that the State Took "No Action" to Ameliorate the Effects of the Pandemic and Distance Learning on Students 26

C. The State's Robust Mitigation Response Indisputably Exceeds Any Required Standards to Remediate Disparate Impacts 27

III. Plaintiffs' "Basic Educational Equality" Claim Fails 28

IV. Plaintiffs' Fourth Cause of Action for Violation of Article IX Fails 29

A. Plaintiffs' Article IX Claim Is Foreclosed Under Controlling Authority 29

B. Plaintiffs Were Not Charged Fees to Access Distance Learning 30

V. Plaintiffs' Derivative Declaratory Relief Claim Fails 31

VI. Defendants Are Alternatively Entitled to Summary Adjudication 32

Conclusion 32

TABLE OF AUTHORITIES

Page

CASES

Aguilar v. Atlantic Richfield Co.
(2001) 25 Cal.4th 826 ... 15

Arcadia Unified School Dist. v. State Dept. of Education
(1992) 2 Cal.4th 251 ... 30, 31

Ball v. FleetBoston Financial Corp.
(2008) 164 Cal.App.4th 794 ... 31

Brown v. Smith
(2018) 24 Cal.App.5th 1135 ... 17

Butt v. State of Calif.
(1992) 4 Cal.4th at 668, 686 ... *passim*

Cal. Assn. for Safety Education v. Brown
(1994) 30 Cal.App.4th 1264 ... 29

Campaign for Quality Educ. v. State of Calif.
(2016) 246 Cal.App.4th 896 ... 22, 29

Carter v. CB Richard Ellis, Inc.
(2004) 122 Cal.App.4th 1313 ... 25

Collins v. Thurmond
(2019) 41 Cal.App.5th 879 ... *passim*

Darensburg v. Metro. Transp. Comm'n
(9th Cir. 2011) 636 F.3d 511 ... 25, 26, 28

French v. Davidson
(1904) 143 Cal. 658 ... 17

Hartzell v. Connell
(1984) 35 Cal.3d 899 ... 30, 31

Katz v. Regents of the U. of Cal.
(9th Cir. 2000) 229 F.3d 831 ... 19

Love v. Super. Court
(1990) 226 Cal.App.3d 736 ... 17

Mahler v. Judicial. Council of Cal.
(2021) 67 Cal.App.5th 82 ... 19, 25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

Martinez v. Newsom
(9th Cir. 2022) 46 F.4th 965 21

People v. Castel
(2017) 12 Cal.App.5th 1321 19

Robinson v. Adams
(9th Cir. 1987) 847 F.2d 1315 25

Serri v. Santa Clara Univ.
(2014) 226 Cal.App.4th 830 16

Srouy v. San Diego Unified School Dist.
(2022) 75 Cal.App.5th 548 .... 30, 31

Villafana v. County of San Diego
(2020) 57 Cal.App.5th 1012 .... 23, 25, 26, 28

STATUTES

California Education Code
§§ 2574 et seq. 8
§ 2574, subd. (b) 8
§§ 43500 *et seq.* 9
§ 43507 15
§ 43509 9
§ 43509, subd. (e)(1)(B) 9
§ 43509, subd. (e)(1)(B)(ii) 9
§ 43509, subds. (e)(1)(C)-(G) 10, 11, 12
§ 43511, subd. (a) 9
§§ 49010 et seq. 31
§ 49010, subd. (b) 31
§ 49011, subd. (b)(1) 31
§ 49013 31
§§ 52050 *et. seq.* 9
§ 52060 .... 9, 15

California Rules of Court
Rule 3.1350(f) 16

Code of Civil Procedure
§437c, subd. (c) 16
§437c, subd. (f)(1) 16
§437c, subd. (p)(2) 16

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

California Constitution Article IX §§ 1 and 5.. 29, 30, 31, 32

INTRODUCTION

Plaintiffs, nine current and former students of Los Angeles Unified and Oakland Unified school districts (LAUSD and OUSD, respectively), allege that defendants the State of California, the California Department of Education (CDE), the State Board of Education (SBE), and the State Superintendent of Public Instruction (SPI) (collectively, the State or defendants) violated their constitutional educational rights during the period of school closures and statutorily authorized distance learning necessitated by the COVID-19 pandemic (pandemic), from March 2020 through November 2020, by not providing them adequate devices, connectivity, and mental health and other supports to remediate learning loss. Plaintiffs initiated this lawsuit on November 30, 2020, even as this unprecedented public-health emergency was unfolding, scientific understanding of the full nature and extent of the crisis was evolving, and the State was in the midst of undertaking urgent action focused on protecting lives.

Now, two-and-a-half years later, the statutes authorizing distance learning have long since expired, the Governor has rescinded the emergency proclamations and all associated executive orders, and the State's multi-faceted program to address the educational impact of the pandemic has been long underway. That program includes: extraordinary levels of funding, coupled with planning and programmatic requirements to support Local Educational Agencies (LEAs) in providing to students academic and social-emotional supports to promote learning recovery and acceleration, and devices and connectivity; action by CDE and the SPI to narrow the pre-existing "digital divide" among students, particularly while distance learning remained broadly authorized; and CDE's provision to LEAs of numerous tools and resources to assist in the development of appropriate learning acceleration and recovery programs. Thus, the undisputed evidence of the State's robust and wide-ranging efforts to remediate the impact of the pandemic on students wholly belies plaintiffs' central contention in this case that the State has engaged in a so-called "policy of inaction."

Plaintiffs' constitutional claims further fail on essential threshold elements. In particular, plaintiffs are unable to establish the required foundational premise for this action: (1) the

existence of a state policy that has caused a disparate impact on plaintiffs because of their race or income status, or (2) that plaintiffs' educational experience fell below the "prevailing statewide standard" for public school education upon the State's return to in-person instruction. For at least these reasons, defendants are entitled to summary judgment.

PROCEDURAL BACKGROUND

Plaintiffs, who now consist of nine students who attended schools in the Los Angeles Unified School District (LAUSD) and Oakland Unified School Districts (OUSD) during the 2019-20 and 2020-21 school years, filed their original Complaint for Injunctive and Declaratory Relief (Complaint) on November 30, 2020. (UMF 1.) Since then, defendants have brought two demurrers, plaintiffs amended their complaint three times, and six plaintiffs have voluntarily dismissed their claims. By their Second Amended Complaint (SAC), filed on March 22, 2023, plaintiffs allege five causes of action. Defendants now move for summary judgment or, in the alternative, for summary adjudication on those claims.

RELEVANT STATUTORY BACKGROUND

There are approximately 1,000 school districts and 10,000 public schools serving over 6 million K-12 students in California. (UMF 2.) The State Legislature crafted through the Education Code[1] a K-12 education system that allocates funding to LEAs based on state priorities and ensures school accountability through a tiered-support system. The State funds its education system through the Local Control Funding Formula (LCFF). (§ 2574 et seq.) Each LEA is allocated base funding based on average daily attendance of students it serves. (§ 2574.) Each LEA also receives supplemental funding for each "unduplicated pupil," defined in statute as English learners, students eligible for free or reduced-price meals, or foster youth. (§ 2574, subd. (b).)

To ensure school accountability and, in particular, that LEAs use LCFF funds to address the State's educational priorities, one of the major components of the LCFF is the Local Control and Accountability Plan (LCAP). (§ 52050 *et. seq*.) LEAs are required to adopt an LCAP, which is a three-year plan for supporting positive student outcomes and addressing state priorities, as well as

[1] Unless otherwise noted, all Code citations refer to the Education Code.

any local priorities identified by the school district. (§ 52060.) State priorities that a district must address in an LCAP include pupil achievement, pupil engagement, and parental involvement and family engagement. (*Ibid.*, subd. (d).) To develop the LCAP, school districts are required to consult with interested stakeholders, including pupils, parents, and school personnel. (*Ibid.*, subd. (g).)

In response to the COVID-19 pandemic, and in anticipation of the continued impact of remote learning on students, the State made two significant changes to the existing educational accountability system under the Education Code. First, Senate Bill 98 (SB 98) allowed LEAs, consisting of school districts, charter schools, and county offices of education, to offer "distance learning" for the 2020-21 school year in lieu of in-person attendance while still receiving state funding. (See generally former §§ 43500 *et seq*.) Those provisions "bec[a]me inoperative on June 30, 2021," and thus the distance-learning authorization has expired. (Former § 43511, subd. (a).)

Second, the State established the requirement that each LEA adopt a Learning Continuity and Attendance Plan (Learning Continuity Plan) for the 2020-21 school year.[2] (Former § 43509.) The Learning Continuity Plan required each LEA to describe its distance-learning program, including how it would provide continuity of instruction during the school year to ensure that students had access to a full curriculum of substantially similar quality regardless of the method of delivery. (§ 43509, subd. (e)(1)(B).) The Learning Continuity Plan specifically required each LEA to describe how it would ensure access to electronic devices and connectivity for all students to participate in distance learning, assess student progress through live contacts and synchronous instruction, and measure student participation. (§ 43509, subd. (e)(1)(B)(ii).) LEAs were also required to address their plans for: (1) mitigating student learning loss resulting from COVID-19; and (2) monitoring and supporting student and staff mental health and social and emotional well-being. (§ 43509, subds. (e)(1)(C)-(G).)

[2] The Learning Continuity Plans were only in effect for the 2020-21 school year, and were a pandemic-related exception to the regular LCAP process. (Vella Dec., ¶ 16; Ferguson Dec., ¶ 8.) The existing statutory and regulatory schemes have been operative since the 2021-22 school year.

RELEVANT FACTS

I. The State Took Urgent Action to Limit Harms from the Pandemic

On March 4, 2020, Governor Gavin Newsom proclaimed a state of emergency to help California prepare for and limit the broader spread of COVID-19, and to begin implementing a series of COVID-mitigation policies (mitigation policies). (UMF 8.) As a result of public-health directives and emergency orders, schools closed for in-person instruction in March 2020. (*Ibid.*) Although overall reported deaths from COVID-19 in the 0-17 age group have been low, the group accounts for 23% of the State population and experienced 18% of reported cases. (UMF 9.)

Between March 2020 and November 2020, the State experienced a surge in case numbers of COVID-19 infections and deaths during the summer and again in the fall, which repeated in the fall and winter of 2021. (UMF 10.) As plaintiffs admit, "as of November 30, 2020, 51 out of California's 58 counties did not meet public health guidelines to reopen for in-person learning," and COVID-19 numbers justified school closures and the State's focus on keeping children safe and healthy. (UMF 11.) With the State's assistance, LEAs began reopening in the fall of 2020. (UMF 12.) LAUSD reopened in January 2021, while OUSD began the reopening process in October 2020 and was fully reopened in March 2021. (*Ibid*.) Governor Newsom terminated the state's COVID-19 State of Emergency on February 28, 2023. (UMF 13.)

II. The State has Provided Unprecedented Levels of Educational Funding to Address Harms Arising From the Pandemic

Since the start of the pandemic in March 2020, the State has provided unprecedented levels of funding to ensure educational access and address the impact of the pandemic on students. (UMF 14.) In total, LEAs have received over $36 billion in COVID-related funding, in addition to increased base funding through LCFF. (*Ibid*.)

Just three months after the start of the pandemic, in connection with enactment of SB 98, the State distributed $5.3 billion to LEAs to assist with the return to in-person instruction and to address the educational impact of school closures in the spring of 2020. (UMF 15.) The State allocated those funds on an equity basis, with an emphasis on ensuring that the greatest resources were made available to LEAs serving low-income and English learner students. (UMF 16.) LEAs

were permitted to use the funds for learning supports, to extend the instructional year, and for additional academic services such as intensive instruction to address gaps in core academic skills. (*Ibid*.) In February 2021, the State further incentivized school districts to safely re-open for in-person instruction by providing $2 billion to support safe re-opening and $4.6 billion in Expanding Learning Opportunities Grants to fund summer school, tutoring, and mental-health services. (UMF 17.) To be eligible for an Expanding Learning Opportunities Grant, LEAs were required to reopen for in-person learning and spend the funds in support of program services under a learning-recovery program. (*Ibid.*; Ferguson Dec., ¶ 9.)

In July 2021, the State budget provided further funds tied to programmatic requirements to address the impacts of the pandemic and expand educational opportunities for all students in the multi-year funding plan. (UMF 18.) Outside of the K-12 context, the State budget also included substantial funding to transform California's behavioral-health system for children and youth, and to support a peer social-media network project for children and youth facing bullying. (*Ibid.*; Ferguson Dec., ¶ 11.)

The following year, covering the 2022-23 school year, the State allocated $7.9 billion in one-time Proposition 98 General Fund dollars to support the Learning Recovery Emergency Fund Block Grant, to further assist LEAs in establishing learning recovery initiatives through the 2027-28 school year. (UMF 19.) The State also increased levels of additional targeted funding, increasing Expanding Learning Opportunities Grant funding by $4 billion, and establishing an additional $7.94 billion Learning Recovery Emergency Fund (in addition to other funds) for LEAs to use over the next five years to support academic learning recovery and staff and pupil social and emotional well-being. (UMF 20.)

Between July 2020 and 2023, plaintiffs' school districts, LAUSD and OUSD, received significant COVID funds to address the impacts of the pandemic on student learning. (UMF 22.) For instance, in the 2020-21 school year, they used their allocated one-time funding and worked with community partners to ensure that each student in their district had access to a device and connectivity for distance learning. (*Ibid*.) The districts have also invested in learning recovery programs, such as tutoring, summer school programs, and extended learning days. (*Ibid*.)

As of the filing of this motion, the State is continuing to protect and prioritize its key investments in education. In May 2023, the Governor's Office released a May Revision for the 2023-24 Budget, which reflects the State's intent to continue to fund and design programs to address the impacts of pandemic on students' academic and mental health. (UMF 21.)

III. The State Has Worked Aggressively to Bridge The Existing Digital Divide and Provide Technology and Connectivity to Students

In addition to the State's extraordinary funding and programmatic efforts described above, CDE and the SPI have actively worked to address the pre-existing "digital divide." (UMF 24-27.) First, because CDE has access only to funds allocated by the Legislature for specific purposes, the SPI and CDE launched the Bridging the Digital Divide Fund (BDD) to raise money to purchase and distribute technology for schools and students in response to the initial school closures. (UMF 24.) Through the BDD, CDE distributed 45,884 laptops and facilitated the distribution of more than 73,000 computing devices throughout California, including to more than 16,000 homeless students and 2,000 foster students. (*Ibid.*; Nicely Dec., ¶¶ 7-8.)

CDE also created the Closing the Digital Divide Initiative, which focuses on identifying needed resources and partnerships to support distance student learning and equip students with devices and connectivity. (UMF 25.) As part of that initiative, the SPI created the Closing the Digital Divide Task Force, which the SPI oversees and which consists of members of California's Legislature. (UMF 26.) Through the Initiative, CDE collaborated with technology companies to make more than 500,000 computing devices available for students in need. (*Ibid.*; Nicely Dec., ¶ 11.) The task force also worked with other state agencies to secure $30 million in funds to subsidize service plans for hot spots and to provide school districts with both devices and hot spots. (UMF 25; Nicely Dec., ¶ 12, Exhibit 47.) Other state efforts to address the digital divide include Senate Bill 4 and Assembly Bill 14, which aim to reform broadband funding and increase money available to address connectivity gaps; hosting webinars to raise awareness of available funding for technology; and the State's retention of a researcher to assess gaps in technology access among school districts. (UMF 27.)

IV. THE STATE HAS PROVIDED TOOLS AND RESOURCES TO LEAS TO SUPPORT LEARNING ACCELERATION AND MENTAL HEALTH PROGRAMS FOR STUDENTS

Throughout the pandemic and through the present, CDE has supported LEAs in addressing the impact of the pandemic on students by providing tools and resources to support learning acceleration and recovery programs. (UMF 28.) For example, CDE hosted over 20 webinars designed to support students, distance learning, and learning acceleration programs. (UMF 29.)

CDE also provides support for the State's minority students specifically through equity-based programs such as CDE's Equity Mini Grant program and the California Community Schools Partnership Programs. (UMF 30.) For example, through the Equity Mini Grant Program, CDE has awarded $240,000 in grants to fund local efforts to address equity and opportunity gaps through transportation services, internet connectivity, one-on-one academic instruction, small group tutoring, and home visits, among other programs. (*Ibid.*; Vella Dec., ¶ 30.)

In addition, although not required by statute or provided for in CDE's general fund, CDE and the SPI have also spearheaded various efforts to provide mental health supports and services to California's students. (UMF 31.) These include direct outreach to students, through webinars for example, along with funding to support and expand the availability of mental health resources. (*Ibid.*; Vella Dec., ¶¶ 33-45.)

V. THE STATE'S COMPREHENSIVE STUDENT PERFORMANCE ASSESSMENT SYSTEM SHOWED COMPARABLE DECLINES AMONG RELEVANT STUDENT POPULATIONS FOLLOWING THE PANDEMIC AND STEEPER THAN USUAL GAINS IN 2021-22

Student achievement is assessed and measured statewide in California through the California Assessment of Student Performance and Progress (CAASPP) system. (UMF 32.) The CAASPP system is comprised of various assessments, including the Smarter Balanced Summative Assessments (Smarter Balanced Assessments), which are comprehensive end-of-year tests for English language arts and math administered to all California students in certain grade levels. (*Ibid.*; Vang Dec.,¶ 4.) The Smarter Balanced Assessments align with Common Core State Standards, which are educational standards that have been adopted by a number of states and describe what students should know and be able to do in each subject, by grade level. (*Ibid.*)

The Legislature waived assessment requirements for LEAs for the 2019-20 school year due to school closures during the pandemic. (UMF 33.) During the 2020-21 school year, LEAs could use other local assessments and tests rather than administer the statewide CAASPP assessments. (UMF 34.) Accordingly, only 740,000 students—less than 25% of California's assessment-eligible students—completed the Smarter Balanced Assessments in both English language arts and math that school year. (*Ibid*.) Full statewide participation in CAASPP testing returned in 2021-22 for the first time since 2018-19. (UMF 35.)

Statewide, the overall percentage of all students meeting or exceeding standards on the 2021-22 Smarter Balanced Assessments declined by four percentage points (from 51 percent to 47 percent) for English language arts (ELA), and seven percentage points (from 40 percent to 33 percent) for math when compared to students who took the tests in 2018–19. (UMF 36.) Of particular relevance here, a comparison of scores between the two test administrations for White, Black and Latinx student groups shows that all three groups had similar declines in the percentage of students meeting and exceeding standards between 2021-22 and 2018-19. (UMF 37.) Similarly, a comparison of scores between the two test administrations for students classified as economically disadvantaged and not economically disadvantaged shows that both groups had similar declines in the percentage of students meeting and exceeding standards between 2021-22 and 2018-19. (UMF 38.)

CDE also compared data from the limited administration of the 2020–21 Smarter Balanced Assessments to the results of the same students in 2021-22. (UMF 39.) That cohort analysis showed steeper-than-normal achievement gains at most grade levels between the two years as compared with typical growth from prior years. (*Ibid*.)

VI. CDE Oversees LEAs' Accountability Through California's Tiered Education System Created by The Legislature

As set forth above, the accountability system created by the Legislature requires LEAs to submit LCAPs to address how they are using the state funding to address specific state priorities. (§ 52060; UMF 23.) And, during the distance-learning period, LEAs were also required to prepare and submit Learning Continuity Plans. (§ 43507; UMF 23.) In addition to these

accountability requirements, the State conditioned allocation of one-time COVID funds on their use for programs dedicated to student-learning acceleration and recovery, required LEAs to provide reports substantiating use of the funds, and conducted an audit of the funds. (UMF 23.)

VII. California Has Been Recognized For its Efforts to Improve Student Outcomes on a Large Scale and to Address Inequities

In 2022, California was awarded the Frank S. Newman Award by the Education Commission of the States, which recognizes states enacting innovative education reforms or implementing programs that go beyond marginal or incremental changes to improve student outcomes on a large scale. (UMF 40.) California was selected for this award in recognition of its coordinated approach to educating all students from preschool to postsecondary, as well as its historic financial investments to ensure educational equity. (*Ibid*.) Notable programs highlighted by the award include the LCFF, which the award described as "one of the nation's most equitable formulas, (because it) distributes funding to the schools with the greatest needs and gives more flexibility to districts to respond to local challenges and opportunities." (*Ibid*.; Vella Dec., ¶ 46.) The award also highlighted California's large investment to scale summer, and before- and after-school programming, and to provide all public-school students with two free meals and day, regardless of family income status. (*Ibid*.)

APPLICABLE LEGAL STANDARDS

A motion for summary judgment should be granted if the papers show that there is no triable issue as to any material fact (Code Civ. Proc., §437c, subd. (c)); summary adjudication is appropriate if the motion "completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (*Id.*, subd. (f)(1).) A defendant meets its burden if it shows that one or more of the elements of the cause of action cannot be established, or that there is a complete defense. (*Id.*, §437c, subd. (p)(2); *Serri v. Santa Clara Univ*. (2014) 226 Cal.App.4th 830, 859.) To overcome summary judgment, the plaintiff "must set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 849 (citations).) Thus, it is not

enough for a plaintiff to merely assert that a fact is disputed without citation to evidence that actually controverts the factual statement. (Cal. Rules of Court, rule 3.1350(f).)

ARGUMENT

Defendants are entitled to summary judgment because plaintiffs are unable to establish the foundational premise for their discrimination claims: unlawful discrimination by the State against the plaintiff group. Plaintiffs cannot show that the State's COVID-mitigation policies in spring 2020 were unconstitutional because those policies were urgently compelled by the State's obligation and duty to protect public health in the face of a deadly and highly transmissible virus. Nor can plaintiffs demonstrate that those policies otherwise implicate an equal protection violation, or that they in fact resulted in a disproportionate adverse impact on the plaintiff group because of their race or income status—much less a disparate impact of such a magnitude as to subject plaintiffs to an education that falls "fundamentally below" the prevailing statewide educational standard. (*Butt v. State of Calif*. (1992) 4 Cal.4th at 668, 686 (*Butt*).)

Further, even if plaintiffs were able to show an unlawful substantial disparate impact, their equal protection claims must fail because they cannot establish that the State took "no action" to remediate those adverse effects. (*Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 896-897 (*Collins*); see also *Butt, supra,* 4 Cal.4th at p. 688.) Quite to the contrary, the evidence is both profuse and undisputed that the State undertook extraordinary and historic measures to remediate the pandemic-related impacts experienced by California's students and, in particular, by low-income and other disadvantaged students—and continues to undertake such measures to this day. This lawsuit lacks both legal and evidentiary merit, and summary judgment is appropriate.

I. THE STATE CANNOT BE LIABLE FOR CONSTITUTIONAL VIOLATIONS BASED ON COVID-MITIGATION POLICIES NECESSARY TO PROTECT STUDENT HEALTH

To the extent plaintiffs—wholly failing to acknowledge the highly transmissible and often fatal virus then rampaging through this State and its schools—seek to establish liability based on their allegations that the State's policies of school closures and distance learning were unconstitutional, or implemented in an unconstitutional manner, those claims must be rejected.

The challenged policies were not only warranted, but compelled by the State's obligation to act against a public-health emergency never before seen in our lifetimes. (SAC, ¶¶ 120-125).

Plaintiffs include vague and shifting characterizations in their pleadings and discovery responses as to the precise state "policies" that they blame for the alleged denial of equal educational access—which conflate the "harm," "policies," and alleged state "inaction" at issue. Nevertheless, read in context, it is clear that those policies were school closures (March 2020-June 2020), followed by distance learning (July 2020-November 2020). (UMF 5, 8; SAC, e.g., ¶¶ 6-7, 9, 152, 229, 242, 256.) And, because school closures and distance learning were mandated, as a constitutionally permissible exercise of the State's police powers, by the urgent need to protect public health during a statewide public-health emergency, those policies cannot be found to have violated plaintiffs' right to equal educational access.

As set forth above, the pandemic was sudden, widespread, and deadly, resulting in the Governor's proclamation of a State of Emergency to protect public health and safety. California courts have consistently found for more than a century that "(t)he adoption of measures for the protection of the public health is universally conceded to be a valid exercise of the police power of the state." (*Love v. Super. Court* (1990) 226 Cal.App.3d 736, 740; *French v. Davidson* (1904) 143 Cal. 658, 662 [if state public-health mandate is properly within state's police powers, it is of no matter "that it prevents a person from doing something that he wants to do, or that he might do if it were not for the regulation"]; *Abeel v. Clark* (1890) 84 Cal. 226, 231 [upholding state law that required schools to exclude any "child or person" who was not vaccinated against smallpox; observing that Legislature was vested with "large discretion" not readily subject to "control by the courts"].) The California Court of Appeal affirmed that: "The right of education, fundamental as it may be, is no more sacred than any of the other fundamental rights that have readily given way to a State's interest in protecting the health and safety of its citizens, and particularly, school children." (*Brown v. Smith* (2018) 24 Cal.App.5th 1135, 1147.) In sum, the law is clear that the State may implement measures to protect public health even when such measures may infringe upon other rights or entitlements.

Thus, here, plaintiffs' allegations that the State's policies of school closures and distance learning unconstitutionally infringed on plaintiffs' right to equal access to education must fail for at least the reason that the State was entitled and, indeed, *obligated* to take swift and decisive action to institute measures to protect all of California's student population. As much as plaintiffs seek to ignore the unprecedented context that necessitated the challenged policies, it should not be forgotten that at the end of the 2019-20 and start of the 2020-21 school years the State was taking required action to respond to a worldwide pandemic, and to protect the lives of students, teachers, school staff, and the public.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' FIRST AND SECOND CAUSES OF ACTION FOR EQUAL PROTECTION VIOLATIONS

Plaintiffs' lawsuit alleges disparate-impact discrimination: that the State's pandemic response has caused "Black, Latinx, and low-income students" to disproportionately suffer a vastly inferior education as compared to "wealthier, whiter" students. (SAC, ¶ 4.) Even if the State's mitigation policies were not otherwise constitutional, this claim fails because plaintiffs are unable to establish a disparate impact as a result of those policies.

First, because the plaintiff group is not similarly situated to plaintiffs' chosen comparator group of white, "wealthier" students, no cognizable constitutional claim is even implicated. Moreover, even if plaintiffs could clear this initial hurdle of establishing a valid comparison for purposes of their equal protection claim, they cannot show that any state policy has caused them to receive an education vastly inferior to that received by the majority of students in the State or by their chosen comparator group; or that the State has failed in its constitutional obligation to take action to mitigate the impact of the State's school-closure and distance-learning policies on students. Accordingly, defendants are entitled to judgment on plaintiffs' equal protection claims.

A. Plaintiffs Cannot Demonstrate a Disparate Impact on Their Access to Education Based on Their Race or Wealth Status

1. Plaintiffs Are Not Similarly Situated to White, "Wealthier" Students for Purposes of the State's COVID-Mitigation Response

It is well-established that "the first prerequisite" to a meritorious claim under the equal protection clause is a showing that the State has adopted a classification that "affects two or more

similarly situated groups in an unequal manner." (*Collins*, *supra*, 41 Cal.App.5th at p. 893 (citations omitted).) If the two groups are not similarly situated, or if they are not being treated differently for purposes the law challenged, there is no equal protection violation. (*Id*.; *People v. Castel* (2017) 12 Cal.App.5th 1321, 1326.) According to plaintiffs' own allegations, plaintiffs are not similarly situated to their chosen comparator group for purposes of the State's mitigation policies.

Plaintiffs themselves allege that, because "Black, Latinx, and low-income students" are "historically disadvantaged populations" as compared to their chosen comparator group of white students from "wealthier communities," plaintiffs have suffered disproportionately from the State's response to the pandemic and efforts to remediate the impacts of the pandemic. (See, e.g., SAC ¶¶ 131-137, 170.) Thus, these are not student groups with otherwise equal means and opportunities for whom a valid comparison of academic performance and other related factors would be possible; rather, by their own admission, plaintiffs, historically and well before the pandemic, have contended with "long-standing structural and systemic barriers" to education having nothing to do with the State's pandemic response. (*Id*. at ¶ 133.)

Indeed, this Court recognized plaintiffs' flawed theory of liability when it previously ruled that plaintiffs cannot successfully assert violations of basic educational equality to the extent such a claim is tied to support that some students receive as a result of the wealth of their families.[3] In other words, the State cannot be held responsible for unequal educational access that is caused by factors *other than* the State's challenged pandemic response. (*Mahler v. Judicial Council of Cal*. (2021) 67 Cal.App.5th 82, 113-115 [it is plaintiffs' burden to demonstrate "a causal connection between the challenged policy and a significant disparate impact on the allegedly protected group"]; *Katz v. Regents of the U. of Cal*. (9th Cir. 2000) 229 F.3d 831, 836; see also *Butt*, *supra*, 4 Cal.4th at p. 686 ["principles of equal protection have never required the State to remedy all ills"].)

[3] See this Court's ORDER re: Ruling on Submitted Matter dated June 7, 2022, relating to defendants' Demurrer to Plaintiffs' Amended and Supplemental Complaint.

Here, plaintiffs cannot demonstrate that they are similarly situated to their chosen comparator group because their theory of disparate impact, or harm, from the challenged policies is premised on the material differences in life circumstances between the two groups.

2. Plaintiffs are Unable to Demonstrate that Their Fundamental Right to Educational Equality Has Been Unconstitutionally Infringed

Plaintiffs are unable, under the controlling analyses of *Butt* and *Collins*, to demonstrate that that their fundamental right to educational equality has been unconstitutionally infringed.

The California Supreme Court in *Butt* held that the state constitution prohibits maintenance and operation of the public school system in a way that "denies basic educational equality to the students of particular districts." (*Butt*, *supra,* 4 Cal.4th at pp. 685-86.) This was based on the Court's recognition that federal and California law hold that "heightened scrutiny" applies to State-maintained discrimination against a suspect class or "a fundamental right or interest," and that, for purposes of a state equal-protection claim, public education is such a fundamental interest. To demonstrate an unconstitutional infringement of the right to "basic educational equality," the *Butt* Court held that plaintiffs must show more than mere educational disparity; rather, they are required to show that "the actual quality of the district's program, viewed as a whole, falls fundamentally below prevailing statewide standards." (*Id*. at pp. 686-87, 703-04.) The Court ruled that the plaintiffs in *Butt* had met this standard by preliminarily showing that their school district's significant truncation of its school term "would cause an extreme and unprecedented disparity in educational service and progress" that "would have a real and appreciable impact on the affected students' fundamental California right to basic educational equality." (*Id*. at pp. 687-88.)

Subsequently, in *Collins*, the Court of Appeal expanded upon the *Butt* "basic educational equality" doctrine by applying it to a disparate-impact theory of liability premised on claims that a school disciplinary program was disproportionately harming students on the basis of race. (*Collins*, *supra,* 41 Cal.App.5th at p. 900.) The court held that, to prevail on such a claim, the plaintiffs must show that the challenged state policy has "a substantial disparate impact" on minority students "causing de facto segregation of the schools and an appreciable impact to a

district's educational quality, and no action is taken to correct that policy when its impacts are identified. (*Id*. at pp. 896–97.) The appellate court further explained that "it is reasonable to conclude" that students who are subject to "de facto racial segregation" due to racially discriminatory practices are receiving an education that is "fundamentally below the standards provided elsewhere throughout the state where the legal proscriptions on such discriminatory practices are being enforced." (*Id*. at p. 899.)

Here, plaintiffs cannot satisfy the *Butt* or *Collins* standards. Initially, they fail even to identify or articulate an actionable "state policy" that has purportedly caused a disparate impact. Plaintiffs vaguely allege in their complaint that this policy was "the State's COVID-19 response to education." (SAC ¶ 240); and by their interrogatory responses, plaintiffs stated only that the challenged "policies" are the State's alleged failures to provide adequate devices and supports during school closures and remote learning. (UMF 5.) But, conclusory assertions of the State's supposed "failure" to take certain actions fails to describe an actionable state "policy." (See, e.g., *Martinez v. Newsom* (9th Cir. 2022) 46 F.4th 965, 971 [rejecting assertions of "policy of inaction" where plaintiffs' characterizations of such were wholly conclusory and unsubstantiated by facts].) Accordingly, despite plaintiffs' allegations of "failures," it is clear that the only relevant state policies for purposes of analyzing plaintiffs' claims are (1) the school closures in spring of 2020, and (2) the distance-learning authorization for the 2020-21 school year.

Furthermore, for plaintiffs to satisfy the second element of their equal-protection claim, showing either a "real and appreciable" impact on the quality of education received by the plaintiff group (see *Butt, supra,* 4 Cal.4th at p. 688), or a "substantial disparate impact" on the quality of education received by minority students (see *Collins, supra*, 41 Cal.App.5th at p. 899), they are required to show that "the actual quality of the district's program, viewed as a whole*, falls fundamentally below prevailing statewide standards*." (*Butt, supra*, 4 Cal.4th at pp. 686-687, emphasis added; see also *Collins,* 41 Cal.App.5th at p. 899.) Without such a showing—establishing both the *actual* prevailing standard statewide, and that the education received by the plaintiff group falls "fundamentally below" that standard—this claim must fail. (*Butt,* 4 Cal.4th at pp. 686-88; *Collins*, *supra*, 41 Cal.App.5th at p. 899.) Plaintiffs have made no such showing.

In this case, plaintiffs have never alleged any facts, or produced any evidence, demonstrating the "prevailing statewide standard" for public education at any relevant point in time: during the school-closure (March-June 2020) or distance-learning (2020-21) periods, or after the return to in-person instruction (beginning in 2021-22). (UMF 4.) Instead, in response to specific discovery requests, plaintiffs responded only with the circular and conclusory assertions that the prevailing statewide standard is whatever would be "sufficient" to ensure educational access. (See *Ibid*.) These otherwise unilluminating answers reveal plaintiffs' fundamental misunderstanding of the relevant legal standard: the "prevailing statewide standard" is not whatever level or quality of educational programs and services would be "sufficient," in plaintiffs' or someone else's opinion; it is rather *the reality of the level and quality of services actually being provided*. (*Butt, supra,* 4 Cal.4th at pp. 686-87; *Collins, supra,* 41 Cal.App.5th at p. 898.) Indeed, plaintiffs' apparent attempt to reframe the standard here to require an adequate, qualitative minimum level of education for individual students is definitively foreclosed by binding legal precedent. (*Campaign for Quality Educ. v. State of Calif*. (2016) 246 Cal.App.4th 896, 908 (*CQE*).)

Because plaintiffs are unable to establish the prevailing statewide standard, or the standard of education afforded to their chosen comparator group, their equal protection claim fails.

3. Plaintiffs Cannot Establish an Equal Protection Violation Premised on the State's Policy of School Closures in Spring 2020

To the extent that plaintiffs premise their disparate-impact claim on the State's "school closure" policy during the spring of 2020, that claim fails as a matter of law. This is because it is undisputed that the State's school-closure policy applied to all students in an equal manner. [4]

A claim of denial of "equal protection," by definition, alleges *unequal treatment*, either on the face of the challenged policy or in its effects. Here, the only applicable policy was the statewide policy of school closures that caused all schools to close to in-person instruction and

[4] Some schools, on their own initiative, implemented some form of remote learning or alternate instruction during this time period, but actions by individual schools were not pursuant to the State's school-closure policy. And plaintiffs failed to adduce any evidence establishing the extent or nature of such services offered by school districts across the state.

waived instructional-minutes requirements from mid-March 15, 2020, through the end of the 2019-20 school year. However, a policy that applies uniformly to all people subject to that policy with the same results cannot constitute disparate treatment or be said to cause a disparate impact.[5] (UMF 5; see, e.g., *Villafana v. County of San Diego* (2020) 57 Cal.App.5th 1012, 1018 (*Villafana*).) In other words, under the State's temporary policy of school closures at the onset of a once-in-a-century pandemic, the plaintiff group was treated, and impacted, identically to every other student in the state. Accordingly, plaintiffs cannot establish a constitutional violation premised on the State's school-closure policy.

4. Evidence of Statewide Assessment Results Undermines any Inference of Disparate Impact from School Closures and Distance Learning

In addition to plaintiffs' failure of proof, undisputed evidence of statewide assessment results flatly undermines plaintiffs' claims. Specifically, pre- and post-distance-learning scores on the statewide Smarter Balanced Assessment in ELA and mathematics show that the pre-pandemic achievement gaps between Black and Latinx students as compared to white students, and between students of differing economic status, remained about the same, instead of widening, as would be expected if plaintiffs' allegations of disparate impact were correct.

While Smarter Balanced Assessment results are just one among multiple measures of students' academic progress, they provide important information for assessing student progress across schools, districts, and student groups, and are regularly relied on by educators for that purpose. (Vang Dec., ¶ 23.) For purposes of comparing the percentage-points change for each student group across all grade levels, CDE typically uses the combined percentage of students who met and exceeded standards in each group. (UMF 35; Vang Dec., ¶ 17.)

Relevant here, while statewide the overall percentage of students meeting or exceeding standards declined between the 2018-19 and 2021-22 school years, that decline was consistent between the relevant student groups.[6] (UMF 36-38.) Specifically:

[5] In *Butt*, the challenged policy applied to a single district. (*Butt, supra*, 4 Cal.4th at p. 687.)

[6] Notably, CDE rounded up or down to the nearest whole number when determining the percentage decline for each group and does not consider the difference of one or two percentage points to be statistically significant. (UMF 36; Vang Decl., ¶¶ 17, 21.)

- For white students, the percentage meeting or exceeding standards declined by 5 percentage points in English language arts and 6 percent in math;
- For Black students, the percentage meeting or exceeding standards declined by 3 percentage points in English language arts and 5 percent in math;
- For Latinx students the percentage meeting or exceeding standards declined by 5 percentage points in English language arts and 7 percent in math. (UMF 37; Vang Dec.,¶¶ 19-20.)

And,

- For economically disadvantaged students, the percentage of students meeting and exceeding standards declined by 4 percentage points in ELA and 6 percentage points in math; and
- For not economically disadvantaged students, the percentage of students meeting or exceeding standard declined by 5 percentage points in ELA by 7 percentage points in math. (UMF 38; Vang Decl, ¶ 22.)

These results reflect a similar decline between the three racial groups and two wealth-based groups, as measured by the percentages of students meeting and exceeded standards. Thus, while the scores demonstrate an impact on student achievement across the board, they do not show a widening of the pre-pandemic racial or wealth-based achievement gap after, or as a result of, the State's pandemic-related policies sufficient to support plaintiffs' claims. In particular, this evidence contradicts plaintiffs' assertions that the State's mitigation policies caused a substantial disparate impact on them and other Black and Latinx students, or on other economically disadvantaged students.

5. Evidence of Plaintiffs' Own Experiences is Insufficient as a Matter of Law to Support an Inference of Disparate-Impact Discrimination

Even if each and every one of the nine named individual plaintiffs in this case could show that they lacked access to education during distance learning, any such showing would be wholly inadequate to support any inference of unlawful discrimination.

The "mere fact that each person affected by a practice or policy is also a member of a protected group does not establish a disparate impact." (*Villafana, supra*, 57 Cal.App.5th at p. 1017; see also *Carter v. CB Richard Ellis, Inc*. (2004) 122 Cal.App.4th 1313, 1326 (*Carter*).) To support an inference of disparate impact, a plaintiff must employ an "appropriate comparative measure" that takes into account "the correct population base" and its "makeup" based on the protected classifications alleged to be at issue. (*Villafana, supra,* 57 Cal.App.5th at p. 1017; *Darensburg v. Metro. Transp. Comm'n* (9th Cir. 2011) 636 F.3d 511, 519-20 (*Darensburg*).) The "correct population base" cannot be a "subset" of the population to whom the challenged practice or policy applies, but is the *entire population* affected by the policy. (*Villafana, supra,* 57 Cal.App.5th at p. 1018; *Carter, supra,* 122 Cal.App.4th at pp. 1325-26; *Darensburg, supra,* 636 F.3d 511 at p. 520.) Proof of the required "substantial, adverse impact" because of a plaintiff's membership in a protected group is "usually accomplished by statistical evidence" establishing the relevant factors. (*Mahler v. Jud. Council of Calif.* (2021) 67 Cal.App.5th 82, 113; *Robinson v. Adams* (9th Cir. 1987) 847 F.2d 1315, 1318.)

Thus, even if plaintiffs are treated as acting in some sort of representative capacity for all Black, Latinx, and low-income students in the State (even though this is not a class action), evidence limited to the educational experience of nine students in just two districts would still be grossly inadequate to support any reliable inferences about students' educational experience statewide. This is because there are approximately 1,000 school districts and 10,000 public schools serving over 6 million K-12 students in California. (UMF 2.) That is, with evidence limited to only a fraction of the State's student population, plaintiffs are unable to support an inference that a *state* policy with *statewide* application adversely impacted them because of their race and/or income, as opposed to any number of other factors that may impact a student's educational experience.[7] As explained above, this is because plaintiffs' evidence must be drawn from the student population statewide, since it is the entire student population that is the "total

[7] For instance, multiple students in the plaintiff group experienced significant personal stress unrelated to school during the pandemic that likely impacted their education. This includes the death of family members and their parents losing jobs. (See, SAC ¶¶ 20, 29, 65, 71, 74, 81.)

group" to which the challenged statewide mitigation policies applied. (*Villafana, supra*, 57 Cal.App.5th at p. 1018; *Darensburg, supra*, 636 F.3d at p. 520.)

For all of these reasons, plaintiffs are unable to demonstrate that, on the basis of their race or wealth status, the State's mitigation policies caused them to suffer unequal educational access, and thus defendants are entitled to judgment on plaintiffs' equal protection claims.

B. Plaintiffs Cannot Demonstrate that the State Took "No Action" to Ameliorate the Effects of the Pandemic and Distance Learning on Students

Even if plaintiffs could show a discriminatory disparate impact that caused them to receive an education substantially below the prevailing statewide standard, they indisputably cannot show that the State has taken "no action" to remediate the impacts of school closures and distance learning—a required element of their claims. (*Collins, supra,* 41 Cal.App.5th at pp. 896-897.)

As set forth above, under *Collins*, the second required element of a state equal protection claim in the public-education context is that "*no action* is taken to correct that policy when its impacts are identified." (*Collins, supra,* 41 Cal.App.5th at pp. 896-97, emphasis added.) In stark contrast to the facts alleged in the *Collins* case (which involved a ruling on demurrer), and as established by the undisputed evidence submitted in support of this motion, plaintiffs cannot plausibly show that California took "no action" to remediate the effects of its necessary public-health measures, including temporary school closures and distance learning. To the contrary, the undisputed evidence establishes that the State appropriated and allocated unprecedented levels of funding tied to programmatic requirements to address pandemic-related impacts, went above its statutory mandate to procure and distribute devices to students in need, and provided myriad tools and resources to support academic and social-emotional programs to address the impacts of the pandemic on students, and in particular on disadvantaged students. (See UMF 14-31.)

In sum, although presented under the guise of an argument that the State has failed to satisfy its minimum constitutional obligations, plaintiffs are actually asking this Court to redefine equal protection doctrine in the K-12 context to require the State to remedy "all ills," including those that are not tied to the school system, and to mandate "variances in service" designed to overcome any disparities in student outcomes, notwithstanding the Supreme Court's admonition

to the contrary. (*Butt*, *supra*, 4 Cal.4th at p. 686.) As a matter of policy, defendants agree with plaintiffs, and it is, in fact, the policy of the State to try to eliminate such disparities, as reflected in the LCFF and other elements of state law, and in the actions the Governor, Legislature and the State educational defendants have taken to support students and schools.[8]

C. The State's Robust Mitigation Response Indisputably Exceeds Any Required Standards to Remediate Disparate Impacts

Even if the State must do more than simply avoid taking "no action" to address a disparate impact, the undisputed evidence of the State's unprecedented and far-reaching efforts to combat the effects on students of the pandemic and distance learning far exceeds any arguable standard for what might constitute constitutionally adequate state action here.

Elsewhere plaintiffs have argued that the State is in fact required to take more than "de minimis" action to ameliorate a disparate impact caused by a state policy. Even if the Court agrees with this proposed formulation, despite its lack of support in *Collins* or any other case law, there simply can be no reasonable dispute that the State's full-throated mitigation program, as amply evidenced in support of this motion, surpasses anything that would ever be minimally required of the State's constitutional duty to act. (See, e.g., UMF 14-31.)

III. PLAINTIFFS' "BASIC EDUCATIONAL EQUALITY" CLAIM FAILS

Purportedly distinct from their race and wealth-based discrimination claim, plaintiffs separately allege in their third cause of action a denial of their right to a "basically equivalent" education under the *Butt* case. (SAC, ¶¶ 228, 230.) Defendants are entitled to judgment on this claim for the same reasons judgment must be awarded to them on the race and wealth claims.

As previously noted, a *Butt*-style "educational disparity" claim is similarly actionable only where the plaintiffs can show that "the district's program … falls fundamentally below prevailing statewide standards." (*Butt*, *supra*, 4 Cal.4th at pp. 686–87.) As established above, plaintiffs have adduced no evidence, or even coherently defined, the necessary prevailing statewide standard to support this claim. Plaintiffs do, however, point to the experience of white, "wealthier" students.

[8] Despite being repeatedly asked in discovery, plaintiffs have never disclosed what precise state actions they believe would have constituted a sufficient response. (UMF 4-5.)

To the extent that plaintiffs are suggesting that the educational experience of white, "wealthier" students represents the prevailing statewide standard—for which, again, plaintiffs have provided no evidence—this claim is actually duplicative of plaintiffs' first two causes of action. Thus, for the same reasons fully explained above, defendants are entitled to judgment on this claim.

To the extent plaintiffs seek to argue that, under their *Butt* claim, they are permitted to confine their evidentiary showing to the two districts where they matriculated, this argument must be rejected. First, unlike in *Butt*, in which the actions of a single school district (as opposed to the entire state) were being challenged on a disparate *treatment* theory, plaintiffs here challenge facially neutral state policies with statewide application based on a disparate *impact* theory of liability. Thus, as detailed above, plaintiffs must support their claim with evidence drawn from the entire population to whom the challenged statewide policies apply—students in every school district throughout the state. (*Villafana, supra,* 57 Cal.App.5th at p. 1018; *Darensburg, supra,* 636 F.3d at p. 520.)

Second, notwithstanding that *Butt* dealt with a facially discriminatory policy, it nevertheless also held that an equal protection "educational disparity" claim must be supported by a comparison to the standard of education *actually* being "provided elsewhere throughout the State" and to the "prevailing statewide standards." (*Butt, supra,* 4 Cal.4th at pp. 685, 687 [holding school district's significant truncation of school term as compared to length of term being "provided everywhere else in California" violated right to basically equivalent education].) Accordingly, neither the facts nor the law under *Butt* support any argument that plaintiffs may substantiate their "educational equality" claim with evidence drawn from only their own school districts. Thus, defendants are entitled to summary judgment on plaintiffs' third cause of action.

IV. Plaintiffs' Fourth Cause of Action for Violation of Article IX Fails

A. Plaintiffs' Article IX Claim Is Foreclosed Under Controlling Authority

By their operative complaint, plaintiffs have recast their claims under Sections 1 and 5 of Article IX of the California Constitution (the "common schools" clause) as an exact reiteration of their equal protection claims, alleging a discriminatory denial of access to education. (SAC, ¶¶ 233-236.) Specifically, plaintiffs allege that defendants have "failed to provide an equal system

open to Student Plaintiffs on equal terms to high-income students and non-minority students" and to "provide an education that will teach students Plaintiffs the skills they need to succeed as productive members of society." (SAC, ¶ 236.) But because the common-schools clause narrowly provides only a guarantee "that a free school be kept up and supported at least six months a year," this claim necessarily fails.[9] (See *Collins, supra,* 41 Cal.App.5th at p. 902.)

As in *Collins*, plaintiffs' Article IX allegations here "all focus upon the recognized importance of a student's right to an adequate education and the differences in education allegedly being provided" on the basis, in this case, of race and income status. (*Collins, supra,* 41 Cal.App.5th at p. 901.) However, "as they relate to a common-schools claim, these arguments miss the point," since there is no allegation, or evidence, that the "free schooling" guaranteed by Article IX is being denied to plaintiffs. (*Id*. at pp. 901-902; see also *Butt, supra*, 4 Cal.4th at p. 685 [noting that claim of disparate denial of basically equivalent education properly cognizable under equal protection clause as opposed to Article IX].) As in *Collins*, plaintiffs instead argue that their educational experience is "woefully inadequate in light of various factors," which they allege includes "access to the assessments, supports, and other resources that the need to participate in school." (SAC, ¶ 262.) The Article IX provisions they rely upon, however, "do not guarantee a right to any particular quality or level of education." (*Collins, supra,* 41 Cal.App.5th at p. 902; see also *CQE, supra,* 246 Cal.App.4th at p. 908.) With "no possibility" that plaintiffs can establish "a violation of the one necessary requirement of the common schools clause, that a free school be kept up and supported at least six months a year, their complaints about equality between the educational offerings of the various school settings involved do not raise a common schools cause of action." (See *Butt, supra*, 41 Cal.App.5th at p. 902.)

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[9] Section 1 of Article IX "is general and aspirational, but makes no provision for how the Legislature is to achieve its goal except to use all suitable means." (*CQE, supra,* 246 Cal.App.4th at p. 908.) Section 5, although "more concrete—the assignment of a specific task with performance standards," does not "delineate or identify any specific outcome standards to be achieved by the [Legislature's] performance of its duty to provide for a system of common schools." (*Ibid*.)

B. Plaintiffs Were Not Charged Fees to Access Distance Learning

To the extent plaintiffs allege that defendants violated Article IX's free school clause based on an alleged lack of access to devices, connectivity, and mental health services during distance learning, this claim fails under the seminal case of *Hartzell v. Connell* (1984) 35 Cal.3d 899 (*Hartzell*). In particular, plaintiffs cannot establish that the State or their school districts charged them for devices, hotspots, or mental health services. (UMF 6-7.)

Plaintiffs allege that, during the period of remote learning, the State "did not provide Black and Latinx students from low-income families with the devices and connectivity that they needed to access school" and "with the academic and mental health supports that they needed in order to learn." (SAC, ¶ 234.) However, California courts only recognize a free-school-guarantee claim where the State or school district conditions access to a program that is integral to education upon payment of a fee. (See, e.g., *Hartzell*, *supra,* 35 Cal.3d at pp. 905, 911-913 [imposition of fees for participation in extracurricular activities offered by district violates free school guarantee because they were integral to education program]; *Srouy v. San Diego Unified School Dist.* (2022) 75 Cal.App.5th 548, 561-564 (*Srouy*) [district's refusal to reimburse student for costs of defending against lawsuit arising from injury during football game did not violate free school guarantee because it was not "educational in character"]; *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 262-264 [State did not violate free school guarantee by charging fee for school bus transportation since it was not necessary element of education] (*Arcadia*); *Cal. Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1277-1280 [requiring fees to participate in district's drivers training classes violated free school guarantee because drivers training is educational in character].) Here, plaintiffs cannot show that their access to devices and other supports was ever conditioned upon their payment of a fee. (SAC, ¶¶ 20-93, 232-236.) Indeed, plaintiffs admit that they were not charged for their devices and/or wireless hotspots; and they do not allege that their school districts conditioned the provision of mental health services or other services upon payment. (UMF 6.) Moreover, LAUSD and OUSD provided students with options to obtain internet access, wireless hotspots, digital devices and other services free of charge, flatly belying plaintiffs' otherwise defective claim. (UMF 22.)

Furthermore, to the extent this claim is premised, specifically, on the alleged denial of "mental health supports," it additionally fails because such supports are not integral components of public education under Article IX; nor do they constitute conditions for educational participation. (*See, e.g.*, *Srouy, supra,* 75 Cal.App.5th at pp. 621-622; see also *Arcadia, supra*, 2 Cal.4th at pp. 262-263 [*Hartzell* "did not extend [an] expansive understanding of the free school clause beyond the realm of educational activities to noneducational supplemental services"].)

Finally, defendants must be awarded judgment on this claim for the further reason that plaintiffs failed to exhaust administrative remedies. Under Education Code section 49013, an allegation that schools charged improper "pupil fees" for "supplies, materials, and equipment" needed to participate in educational activities requires the complainant to submit a complaint through the Uniform Complaint Procedures. (*See*, e.g., §§ 49011, subd. (b)(1), 49013.) Section 49010 et seq. codifies Article IX's provisions, and thus encompasses claims brought under that article. (§ 49010, subd. (b) (citing *Hartzell, supra*, in defining "pupil fee").) Because plaintiffs have not submitted a complaint under the UCP, they have failed to exhaust their mandated administrative remedies. (UMF 7.) For all of these reasons, defendants are entitled to summary judgment on plaintiffs' Article IX claim.

V. PLAINTIFFS' DERIVATIVE DECLARATORY RELIEF CLAIM FAILS

Plaintiffs' claim for declaratory relief is derivative of plaintiffs' merits claims, and thus it fails for the same reasons fully set forth above. (SAC ¶ 237; *Ball v. FleetBoston Financial Corp*. (2008) 164 Cal.App.4th 794, 800.) As previously noted, this case's total lack of either factual or legal merit proves that what it is really about is plaintiffs' personal disagreement with the particulars of the State's robust response, which is, of course, insufficient to overcome summary judgment. Thus, defendants are entitled to judgment on plaintiffs' declaratory-relief claim.

VI. DEFENDANTS ARE ALTERNATIVELY ENTITLED TO SUMMARY ADJUDICATION

In the alternative, for the same reasons, defendants are entitled to summary adjudication on each of plaintiffs' causes of action, separately, for: race and wealth discrimination (UMF 41-106); denial of "educational equality" (UMF 107-139); violation of Article IX (UMF 140-143); and declaratory relief (UMF 144-183).

CONCLUSION

For the foregoing reasons, defendants are entitled to summary judgment. In the alternative, defendants are entitled to summary adjudication on each cause of action.

Dated: June 15, 2023

Respectfully submitted,

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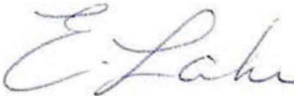

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