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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

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Plaintiffs,

v.

STATE OF CALIFORNIA, State Board of Education, State Department of Education, Tom Torlakson, in his official capacity as State Superintendent of Public Instruction, and Does 1-100,

Defendants.

Case No. BC685730

UNLIMITED JURISDICTION

OPPOSITION TO DEFENDANTS' DEMURRER TO COMPLAINT

Date: July 11, 2018
Time: 8:45 a.m.
Judge: Yvette M. Palazuelos
Dept.: 28

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I. INTRODUCTION

Defendants do not contest that the fundamental right to education necessarily includes access to literacy—the opportunity to read, write, and comprehend written material—or that an education without meaningful literacy instruction is tantamount to no education at all.[1] Without literacy, the prospects for participation in the democratic political system of the state and country are grim. As the California and United States Supreme Courts both have recognized, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Serrano v. Priest*, 5 Cal. 3d 584, 606 (1971) (*Serrano I*) (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). Children denied "a basic education" are set up for "a lifetime [of] hardship," and the "stigma of illiteracy will mark them for the rest of their lives." *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982).

Defendants devote a third of their brief to an irrelevant explanation of how the Local Control Funding Formula ("LCFF") and the Local Control and Accountability Plan ("LCAP") vest power in the districts. Defs.' Memorandum of Points and Authorities in Support of Demurrer to Complaint ("MPA") at 5-10 and Defs.' Request for Judicial Notice in Support of Demurrer to Complaint ("RJN") Exs. B, C, D. But Defendants never explain the legal significance of these programs, nor can they: the State has a nondelegable duty under the the California Constitution to ensure all California public school students receive an education. Regardless of what local programs the State establishes, it is ultimately responsible for guaranteeing the fundamental right to education. *See Serrano v. Priest*, 18 Cal. 3d 728, 765-66 (1976) (*Serrano II*) (reaffirming *Serrano I* based on California Constitution). "[T]he equal protection clause precludes the State from maintaining its common school system in a manner that denies the students of one district an education basically equivalent to that provided elsewhere throughout the State." *Butt v. State of California*, 4 Cal. 4th 668, 685, 687 (1992) (holding State's interest in "a policy of local control" was not "so compelling as to justify State tolerance of the extreme local educational deprivation" at issue). To the extent Defendants imply that they have met their constitutional obligation to provide access to literacy through LCFF/LCAP, that is a factual dispute not proper to consider on demurrer. On demurrer, the only question is whether Plaintiffs have sufficiently pled constitutional violations, which they have.

Defendants incorrectly claim that Plaintiffs have not established a common characteristic for violation of a fundamental right or identified a suspect classification. Plaintiffs adequately

[1.] Throughout the Complaint and this brief, Plaintiffs use "access to literacy," "basic education," and "reading, writing, and comprehension" interchangeably.

pled a classification having a shared trait: students who attend Plaintiffs' schools are destined not to meet state standards in literacy, year after year, and to fall desperately behind their peers at schools in the rest of the State. Defendants misrepresent the Complaint's allegations, arguing that the fact that "10 students, who attend or have attended three schools, cannot read at grade-level" is not a constitutional violation. MPA at 5, 12. But this characterization misses the Complaint's central allegation: that Plaintiffs' schools fail to provide access to literacy as demonstrated by the fact that the ***vast majority*** of students at Plaintiffs' schools fail to attain basic literacy—between 89 and 96 percent of students are well below the State's minimum standards. *See, e.g.*, Compl. ¶ 67 (96% of La Salle students failed to meet State's standards in English Language Arts), ¶ 80 (94% at Van Buren), ¶ 94 (89% at Children of Promise). As Student Plaintiffs illustrate, children who have the misfortune of attending these schools receive instruction well below the statewide standard of education delivered to most other children in the State.

Student Plaintiffs are also low-income, minority children, who have been discriminated against on the basis of a suspect classification. Compl. ¶¶ 14-23. The student populations at these schools are between 85 and 99 percent Latino or African American and between 90 and 98 percent socioeconomically disadvantaged. *Id.* ¶¶ 65, 78, 92. The state has failed to provide the impoverished children of color who attend these schools access to literacy. If these children lived in a different city or school district, they would have the opportunity enjoyed by the vast majority of California's wealthy and white students to attend schools at which there is an educational program to enable them to become literate. This kind of racial and wealth inequity in the public school system is precisely what *Serrano* and *Butt* aimed to put to an end.

The extreme crisis in literacy at Plaintiffs' schools is not the fault of Plaintiffs, their families, and their communities, as Defendants insinuate. MPA at 15 n.11. It is the failure of the State's system of education. Defendants point out that Plaintiffs' schools—in which 4%, 6%, and 11% of students meet state standards—are "not *the* lowest performing schools in the State," and that "some students at their schools demonstrate grade-level literacy." *Id*. at 14 & n.10. That these abysmally performing schools are not yet the very lowest performers is hardly a point in the State's favor. When only the tiniest fraction of children in a school can meet the State's own standards, the State clearly has not met its mandate to protect "the rights of its blameless students to basic educational equity." *Butt*, 4 Cal. 4th at 689. That wholesale deprivation of education is a sufficient basis for Plaintiffs' claims.

Plaintiffs seek only what the California Supreme Court held in *Serrano* and *Butt* to be the

right of all children in California: the right not to be denied basic educational equality. When the Court in *Serrano* held that the State of California could not use a school finance regime that gave far more money to some schools than others, and when it held in *Butt* that the State could not permit a school district simply to close the schools six weeks early because of a shortage of funds, the Court recognized that the State of California must discharge its constitutional obligation to provide a common education by stopping such glaring inequities between schools. In this case, as in those, granting the declaratory and injunctive relief will not require the court to decide matters of educational policy. Rather, it will merely require that the State no longer turn a blind eye to the absolute failure of these three schools to educate their students, but instead fulfill its constitutional duty to these children and ensure that they are not deprived of an education.

II. FACTUAL ALLEGATIONS

The Complaint alleges not only that Student Plaintiffs are severely behind in their literacy, but also that Plaintiffs' schools do not provide students generally—not just Student Plaintiffs individually—a basic education.

A. Plaintiffs' Schools Have Not Delivered Access to Literacy.

The State's own data confirms the allegations in the Complaint that Plaintiffs' schools fail to provide access to literacy to Plaintiffs or the other children in their schools. Whereas 49% of children across the State were proficient or above in literacy as reflected by the state-wide California Assessment of Student Performance and Progress ("CAASPP") English Language Arts (ELA) exam in 2016-17, only 4%, 6%, and 11% of students at La Salle, Van Buren, and Children of Promise, respectively, met the proficiency standards. Compl. ¶¶ 67, 80, 94. At La Salle, in the whole school, only eight of 179 children tested were proficient or above: two third-graders, three fourth-graders, and three fifth-graders. *Id*. ¶ 67. At Van Buren, only 24 of 378 children tested met the State's standards: one fourth-grader, two sixth-graders, four third-, fifth-, and seventh-graders, and nine eighth-graders. *Id*. ¶ 80. At Children of Promise, not a single fifth-grader was proficient; only three sixth-graders met the standard, and in the other grades no more than five children met standards. *Id*. ¶ 94. Further, students' deficits start early and increase as they move through the grades. *See, e.g.*, *Id*. ¶¶ 17, 72, 74, 85, 88, 116. Plaintiffs old enough to take the CAASPP did not meet the state standards in ELA, often for multiple years, meaning that they did not have "the skills called for by the [Common Core] standards." *Id*. ¶ 61.[2] Plaintiffs' schools

[2] *See, e.g.*, Compl. ¶¶ 15, 74 (Katie T. did not meet standards in 3rd, 4th, or 5th grade); ¶¶ 16, 75, 117 (Sasha E. did not meet standards in 3rd grade); ¶¶ 17, 76 (Russell W. did not meet standards in 3rd, 4th, or 5th grade); ¶¶ 18, 85 (Dylan O. did not meet standards in 5th, 6th, or 7th grade); ¶¶

also lack the basic elements to provide access to literacy, such as adequate permanent teachers and staff, *id*. ¶¶ 75, 88, 89, 103, 120, 122, 124, 126; sufficient training and resources for remaining teachers, *id.* ¶¶ 111, 114, 124-27; and practices to promote parent involvement in literacy, *id.* ¶¶ 97-98, 113, 122. Moreover, this lack of access to literacy prevents students from accessing learning in other disciplines. *Id*. ¶¶ 39, 45, 47, 134.

The Complaint also shows the human toll of this data. For example, students with low literacy in Plaintiffs' schools frequently experience humiliation and distress. Some students cry when asked to read aloud, *id*. ¶ 91, or are embarrassed and afraid of not knowing words, *id*. ¶ 75. Students ask to use the bathroom during reading time or engage in behaviors to cause the teacher to remove them from the classroom. *Id*. ¶ 91. One such student, to avoid the embarrassment of reading out loud, would regularly announce, "I'm not going to read" and walk out of class. *Id*.

B. Defendants Are Aware of This Lack of Access to Literacy.

Defendants are aware of the crisis in literacy affecting certain disadvantaged children across California, which has been well-documented and is commonly known. *See Campaign for Quality Educ. v. State*, 246 Cal. App. 4th 896, 935 (2016) (Liu, J., dissenting to denial of petition for review) (discussing how "California's public schools were the envy of the nation" but the "decline of California's K-12 education system [by the early 1990s], as the student population has become more diverse, is well-documented" and that "[f]or two decades now, California has trailed most states on student achievement and education funding"). According to the State's own data, Plaintiffs' schools' literacy proficiency levels have stagnated or decreased since 2015.[3] Experts convened by Defendants in 2012 identified California students' track-record of persistent literacy shortfalls and "an urgent need to address the language and literacy development of California's underserved populations, specifically English learners, students with disabilities, socioeconomically disadvantaged students, and African-American and Hispanic students." Compl. ¶ 43. The State's experts warned that "many students will be at academic risk if improved approaches to literacy instruction are not an immediate and central focus of California's educational system." *Id*. These experts put together a plan to respond to the crisis, called the

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19, 86 (Bella G. did not meet standards in 3rd, 4th, or 5th grades); ¶¶ 20, 87 (Alex did not meet standards in 3rd grade); ¶¶ 23, 103 (Bernie M. did not meet standards in 3rd and 4th grade).

[3.] Compl. ¶ 67 (La Salle's school proficiency levels in 2014-15, 2015-16, and 2016-17 were 3%, 2%, and 4%, respectively); ¶ 80 (Van Buren's school proficiency levels in 2014-15, 2015-16, and 2016-17 were 11%, 8%, and 6%); ¶ 94 (Children of Promise's school proficiency rates in 2014-15, 2015-16, and 2016-17 were 15%, 11%, and 11%).

Striving Reader's Comprehensive Literacy Plan ("SRCL Plan"), but it was never implemented. *Id*. ¶¶ 2, 46.

Contrary to Defendants' assertion, Plaintiffs do not depend on the SRCL Plan as the source of Defendants' obligations. MPA at 5. Defendants would have precisely the same obligations under the California Constitution whether or not they had commissioned the SRCL Plan. The SRCL Plan demonstrates that Defendants have been aware of the literacy crisis and its disproportionate impact on students of color, as well as a potential remedy, since at least 2012. *Id*. ¶ 43. That the SRCL Plan formed part of a failed federal grant application does not change its conclusions or recommendations. Defendants' abandonment of the Plan highlights their deliberate indifference—they commissioned an expert report that identified a crisis disproportionately affecting low income students of color; they used that report to apply for federal money; after not receiving the money, they shelved the report and failed to take any steps to implement its "urgent" recommendations. *Id*. ¶ 46.

III. PLAINTIFFS HAVE ADEQUATELY PLED THEIR CLAIMS

A. Plaintiffs Have Stated a Claim for Violation of a Fundamental Right

Defendants do not dispute that access to literacy is a fundamental right. Nor do they contest that the education they provide at Plaintiffs' schools falls below the prevailing statewide standard. Instead, they argue that Plaintiffs fail to allege (a) "any action by which defendants have created a 'classification'" or (b) "any class of persons who are being discriminated against." MPA at 13-14. Neither of these arguments has merit.

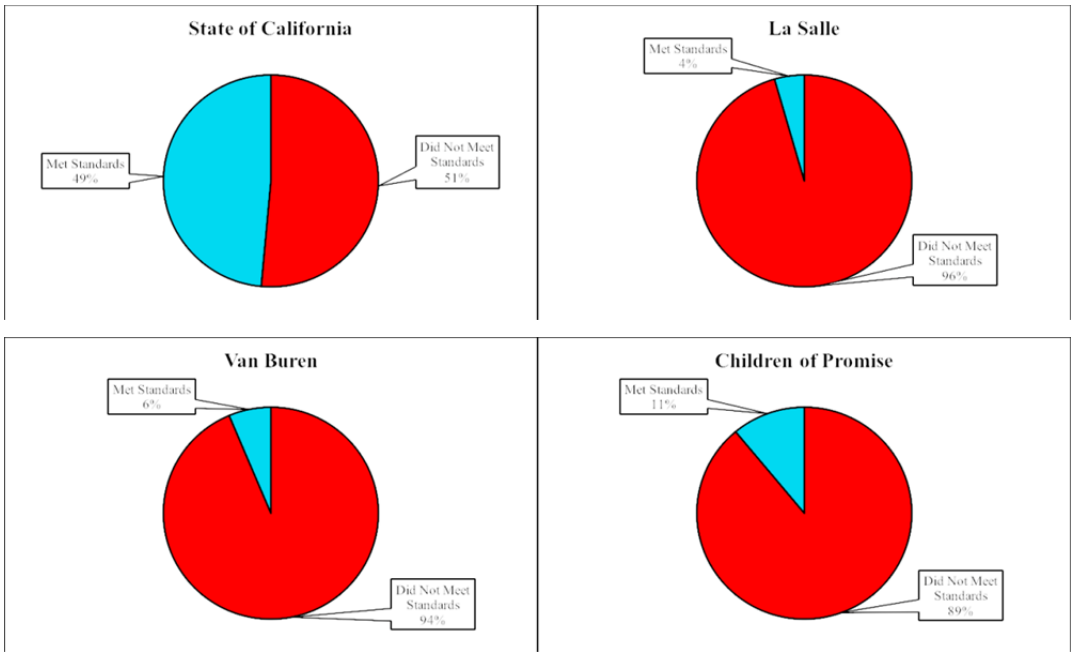
1. Defendants are denying students access to literacy.

Defendants do not contest that education is a fundamental right, nor do they contest that literacy is essential to a meaningful education, and for good reason. California courts have been explicit for decades that the right to education is a substantial right that "means more than access to a classroom." *Serrano I*, 5 Cal. 3d at 607. In *Serrano I*, the Court held that because of "the distinctive and priceless function of education in our society," its crucial role in the "participation in, and the functioning of, a democracy," and its function as "the bright hope for entry of the poor and oppressed into the mainstream of American society," education is a "fundamental interest." *Id*. at 609; *see also Serrano II*, 18 Cal. 3d at 764-66 . Subsequently, in *Butt*, the Court found an equal protection violation where a school district was planning to close its 44 schools for the last six weeks of instruction due to a budget shortfall. *Id*. at 674. The court held that the constitutional violation resulting from school closure derived not from the loss of

days per se but from the "real and appreciable impact on the affected students' fundamental California right to basic educational equality," including the loss of "instruction in phonics, reading comprehension, creative writing, handwriting skills, . . . all necessary for advancement to the second grade." *Id*. at 688 & n. 16; *see also O'Connell v. Superior Court*, 141 Cal. App. 4th 1452, 1482, 1465 (2006) ("all California children should have equal access to a public education system that will teach them the skills they need to succeed as productive members of modern society").

Literacy is essential to a meaningful education; it is a prerequisite for all of those functions enabled by education which make it a fundamental right in the eyes of the California Supreme Court—voting, *Serrano I*, 5 Cal. 3d at 608, political participation, *Hartzell v. Connell*, 35 Cal. 3d 899, 907–08 (1984), participation in institutional structures such as businesses and unions, *id.*, and the "opportunity to compete successfully in the economic marketplace," *Serrano I*, 5 Cal. 3d at 609, to name just a few. As the U.S. Supreme Court recognized, withholding access to literacy would "impose a lifetime [of] hardship" on children and thereby "foreclose the means by which that group might raise the level of esteem in which it is held by the majority." *Plyler*, 457 U.S. at 222-23. It further creates a system of "haves" and "have nots," where the latter group faces an increased risk of incarceration, as well as significant barriers to economic self-sufficiency. Compl. ¶¶ 6, 51, 53-54, 59,

The Complaint alleges that Defendants violate the fundamental right to education of students at Plaintiffs' schools by denying them access to literacy. *See* Compl. ¶¶ 65-70, 78-83, 92-99. Defendants' assertion that "the fact that ***some students*** do not read at grade level is not a constitutional violation" wholly misconstrues Plaintiffs' claims. MPA at 12 (emphasis added). It is true that Student Plaintiffs do not read close to grade level; for example, Ella T. is already more than two grades behind in second grade, and Dylan O. was almost six grades behind as a seventh grader. Compl. ¶¶ 72, 116, 85. But Plaintiffs' claim is a far more extreme situation: Plaintiffs' schools ***as a whole*** fall well below the State's standards. *Id*. ¶¶ 65-70, 78-83, 92-99. The State created the CAASPP exam "specifically to gauge each student's performance . . . as they develop – grade by grade – the skills called for by the standards, including the ability to write clearly, think critically, and solve problems." *Id*. ¶ 61. Forty-nine percent of children in the State scored proficient or above on the CAASPP ELA in 2016-17. But, as the figures below illustrate, only 4%, 6%, and 11% of students at Plaintiffs' schools met the proficiency standards. *Id*. ¶¶ 67, 80, 94.



The single fourth grader at Van Buren, two third graders at La Salle, and three sixth graders at Children of Promise who were proficient in literacy defied the odds when they met the State's standards. Compl. ¶¶ 67, 80, 94.

Defendants' failure to provide students at Plaintiffs' schools access to literacy rises to the level of a constitutional violation because the quality of those schools' programs "falls fundamentally below prevailing statewide standards." *Butt*, 4 Cal. 4th at 686-87. Thus, the Complaint does not ask Defendants to "remedy all ills or eliminate all variances in service" as Defendants contend. MPA at 15. Rather, the Complaint asks that Defendants fulfill their constitutional mandate to ensure that students at Plaintiffs' schools have access to literacy, the basic building block of education.

2. Plaintiffs have adequately alleged a classification.

Defendants rely on the Court of Appeal's opinion in *Vergara v. State* to assert that an equal protection claim requires that the "class of persons who are being discriminated against" be "identifiable by a shared trait other than the violation of a fundamental right." MPA at 13-14 (citing *Vergara*, 246 Cal. App. 4th 619, 647 (2016)[4]). Even assuming an equal protection claim requires a common characteristic, Plaintiffs have adequately alleged a classification. In *Vergara*, nine students challenged provisions of the Education Code pertaining to teacher

[4] This holding was sharply criticized by two California Supreme Court justices and is inconsistent with binding California Supreme Court precedent. *See Vergara*, 246 Cal. App. 4th at 652 (Liu, J., dissenting from denial of petition for review) and *id.* at 652 (Cuéllar, J., dissenting from denial of petition for review).

tenure, dismissal, and seniority, arguing, in relevant part, that those statutes denied equal protection to "an 'unlucky subset' of students within the population of students" by assigning them to "grossly ineffective teachers." 246 Cal. App. 4th at 645. The Court of Appeal rejected the equal protection claim, holding that this "unlucky subset" was "not an identifiable class of persons sufficient to maintain an equal protection challenge" because the group was randomly constituted and in flux:

> The chance that this will happen to any individual student, however, is random, as the challenged statutes do not make any one student more likely to be assigned to a grossly ineffective teacher than any other student. Thus, the unlucky subset is nothing more than a random assortment of students. Moreover, because (according to the trial court's findings) approximately 1 to 3 percent of California teachers are grossly ineffective, a student in the unlucky subset one year will likely not be the next year, meaning that the group is subject to constant flux.

Id. at 648. Plaintiffs here are not "unlucky" or a "random assortment of students." *Id*. Rather, Plaintiffs attend schools that do not provide them and their classmates access to literacy. As is evident from the schools' achievement data, attending those schools makes it all but a foregone conclusion that a student will not achieve literacy proficiency. Nor are these students likely to gain access to literacy in a subsequent year; in recent years, proficiency scores at one school have increased minimally and decreased at the other two schools. Compl. ¶ 67 (La Salle – 3%, 2%, 4%), ¶ 80 (Van Buren – 11%, 8%, 6%), ¶ 94 (Children of Promise – 15%, 11%, 11%).

In short, the class here is identifiable as students attending or recently attending Plaintiffs' schools. "If a voter's address may not determine the weight to which his ballot is entitled, surely it should not determine the quality of his child's education." *Serrano I*, 5 Cal.3d at 613; *id.* (noting that "the high court has held that accidents of geography and arbitrary boundary lines of local government can afford no ground for discrimination among a state's citizens"). Thus, this case resembles *Butt*, where the class discriminated against was all children in the district, or *Serrano I*, where the class was "all public school pupils in California, except children in that school district . . . which . . . affords the greatest educational opportunity of all schools districts within California," 5 Cal. 3d at 589.

To the extent that Defendants argue that only "interdistrict" disparities and not "intra-district" disparities are cognizable under the California Equal Protection doctrine, MPA at 15, this is without basis in law or reason. The State is obligated to "provide for a system of common schools" under the Constitution. Cal. Const. art. IX, § 5. Courts have found equal protection violations with respect to classes not defined at the district level. *See, e.g., O'Connell,* 141 Cal.

App. 4th at 1465, 1461 ("high school students in California public schools who are scheduled to graduate with the class of 2006 and who have satisfied all of their requirements for graduation except for passing the CAHSEE" was adequately pled class). The right to access an education is "a uniquely fundamental personal interest" that belongs to each student, and "the existence of this local-district system has not prevented recognition that the State itself has broad responsibility to ensure basic educational equality under the California Constitution." *Butt*, 4 Cal. 4th at 681. If the district in *Butt* had decided to close some but not all of its schools, those students in the closed schools would have the exact same basis for an equal protection violation as if the whole district had been shuttered.

Finally, Defendants' attempt to distinguish this case from *Butt* because not "every current and former student at the three identified schools is unable to read at grade level" fails. MPA at 14. As discussed above, this ignores the Complaint's allegation that Plaintiffs' schools as a whole do not deliver access to literacy. In any event, the fact that a handful of students are proficient is not legally significant to the analysis. *See Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 35 (2001) ("where an individual is denied an opportunity or benefit or otherwise suffers a detriment as a result of a [discriminatory] governmental scheme, it is no answer that others of his or her [group] secured the opportunity or benefit or avoided the detriment."). Nor is it legally significant that, as Defendants point out, there exist schools in the state that are lower performing than Plaintiffs'. MPA at 14 n.10. That other students may also have an equal protection claim has no bearing on whether Plaintiffs have one. *See, e.g.*, *Woods v. Horton*, 167 Cal.App. 4th 658, 671 (2008) (equal protection rights are "individual rights").

3. Plaintiffs have adequately alleged state action.

Defendants' argument that Plaintiffs have not alleged any "action" on the part of Defendants that "affects two similarly situated groups in an unequal manner" or any "classification that the State has adopted that affects two similarly situated groups in an unequal manner" also fails. MPA at 13. The California Supreme Court rejected a similar argument in *Butt*. There, the State argued that because it had "fulfill[ed] its financial responsibility for educational equality by subjecting all local districts, rich and poor, to an equalized statewide revenue base," its "refusal to intervene" to prevent a district from closing its doors six weeks prematurely was therefore not actionable. *Butt*, 4 Cal. 4th at 679-80. The Court disagreed, holding that "California constitutional principles require State assistance to correct basic 'interdistrict' disparities in the system of common schools, even when the discriminatory effect

was not produced by the purposeful conduct of the State or its agents." *Id.* at 681. "[T]he absence of purposeful conduct by the State would not prevent a finding that the State system for funding public education had produced unconstitutional results." *Id.* at 682; *see also Serrano I*, 5 Cal. 3d at 603-604.[5]

In any event, the Complaint alleges that State action has exposed students to violation of their fundamental right to education by failing to take "sufficient steps to ensure that a literacy education is available to all children." Compl. ¶ 2. Similar to *Serrano I*, Defendants:

- are responsible for, among other things, educating all California public school students, determining the policies governing California's schools, administering and enforcing the laws related to education, and ensuring that districts comply with the California Constitution, Compl. ¶¶ 8-11;
- have direct control over the Inglewood Unified School District, charter authorizer of Children of Promise, Compl. ¶¶ 8, 131;
- "drew the school district boundary lines" that define Plaintiffs' home school, *Serrano I*, 5 Cal. 3d at 603;
- require school attendance, Cal. Educ. Code § 48200;
- monitor student, school, and district performance, e.g. *id.* §§ 52052, 52059, 52060;
- assume control of failing school districts, *id*. § 41326;
- and permit charter schools to operate with little oversight or accountability, Compl. ¶¶ 128-29; *e.g.*, Cal. Educ. Code §§ 47604.5, 47607.3, 47610, 47605.

Defendants also incorrectly assert that Plaintiffs "have not alleged that any of the three districts is unable or unwilling to intervene to assist students at the three schools that Plaintiffs currently or formerly attended." MPA at 15-16. While Defendants argue that "[n]one of the Student Plaintiffs allege they have sought any assistance or relief from their school or school districts," *id.* at 11, Plaintiffs allege that they sought assistance but were rebuffed. Compl. ¶¶ 89, 117, 119.[6] Given the school-wide scope of the issue, individual pleas for assistance have proven

[5] *California State Employees' Ass'n v. State of California*, 32 Cal. App. 3d 103 (1973), is inapplicable to this case. It concerned the issue of whether the courts have "authority to compel a separate and equal branch of state government to make appropriation of funds" and held that they do not. *Id.* at 108. "[W]hen the Legislature fails to make an appropriation, we cannot remedy that evil." *Id.* at 109. Here, Plaintiffs do not seek not funding but respect for a fundamental right.

[6] Defendants also complain that Plaintiffs did not use the LCAP complaint process. MPA at 5. But Defendants do not argue that an LCAP complaint is a prerequisite to filing suit, nor would the LCAP complaint process be capable of providing a remedy.

futile.[7] In any event, the ability or willingness of the districts to intervene upon receipt of complaints or demands is not relevant to determining whether the State met its constitutional obligation, and is further an issue of fact not appropriate for demurrer.

Thus Defendants cannot avoid responsibility at the demurrer stage for their failure to provide Plaintiffs and other students at Plaintiffs' schools an education equivalent to that provided elsewhere throughout the State. *Butt*, 4 Cal. 4th at 685.

B. Plaintiffs Have Stated a Claim for Violation of Suspect Classification

Defendants do not argue that there is no disparate impact on poor and minority students. Instead, they argue that Plaintiffs have not alleged a suspect classification. MPA at 16. The Complaint, however, alleges that Defendants discriminate against poor and minority students by failing to intervene to ensure their access to literacy. Plaintiffs identify as African American, Latino, and multi-racial and are low-income students.[8] Compl. ¶¶ 14-23. Plaintiffs attend schools serving predominantly low-income, African-American, and Latino students. *See Vergara*, 256 Cal.App. 4th at 649; Compl. ¶ 65 (98% of students at La Salle are African American or Latino, and 95% of students are socioeconomically disadvantaged), ¶ 78 (85% of students at Van Buren are African American or Latino and 90% are socioeconomically disadvantaged), ¶ 92 (99% of students at Children of Promise are African American or Latino and 93% are socioeconomically disadvantaged).

California law deems both race and wealth "suspect classifications." *See Butt*, 4 Cal. 4th at 680 (race); *Serrano I*, 5 Cal. 3d at 617 (wealth); *Serrano II*, 18 Cal. 3d at 765-66 (same). In disparate impact cases where the challenged action "impinges a fundamental right," "strict scrutiny will apply, irrespective of motive or intent." *Vergara*, 246 Cal. App. 4th at 648The Complaint adequately alleges facts sufficient to support a claim of disparate impact on racial groups, Compl. ¶¶ 5, 60-105, 146, 133, and on low-income students, *id*. Figs. 2, 8, 9, ¶ 83.

[7] Defendants also argue that the cause of Plaintiffs' lack of literacy lies with the students or their communities—"physical, neurological, emotional, cultural, environmental" factors. MPA at 15 n. 11. The false and offensive notion that entire schools of children are unable to learn to read because of biology and community is a factual issue that is inappropriate on demurrer. *McKenney v. Purepac Pharm. Co.*, 167 Cal. App. 4th 72, 78 (2008).

[8] Defendants assert that "there is no allegation in the Complaint regarding any Student Plaintiff's wealth," MPA at 16. But Plaintiffs allege that students attend schools that serve virtually all low-income students, which is a fact from which the reasonable inference of their poverty may be drawn. *See, e.g., Bush v. California Conservation Corps*, 136 Cal. App. 3d 194, 200 (1982) ("In assessing the sufficiency of a demurrer, all material facts pleaded in the complaint and those which arise by reasonable implication are deemed true."). Should the court deem these allegations to be insufficient, Plaintiffs will amend.

Indeed, Defendants' own experts identified the disproportionate impact of the State's literacy regime on "socioeconomically disadvantaged" and "African-American and Hispanic" students. *Id*. ¶ 43.

The fact that "the 10 Student Plaintiffs do not share a race" does not negate Plaintiffs' discrimination claim. MPA at 16. California courts recognize what common sense dictates, that a system can discriminate against multiple groups. *See, e.g.*, *Crawford v. Bd. of Educ.*, 17 Cal. 3d 280, 297, 310 (1976) (affirming that segregated schools in Los Angeles violated equal protection of "minority children," including Black and Mexican-American student plaintiffs,); *Vergara*, 246 Cal. App. 4th at 649 (noting equal protection claim could be stated regarding discrimination toward "schools predominantly serving low-income and minority students") Under California law, strict scrutiny is appropriate for all racial categories, including where a child is "multi-ethnic." *In re Santos Y.*, 92 Cal. App. 4th 1274, 1321 (2001); *see also, e.g., Brooks v. Skinner*, 139 F. Supp. 3d 869, 891-92 (S.D. Ohio 2015) (rejecting school district's motion to dismiss biracial students' § 1983 equal protection claim)

Defendants also assert, again, that Plaintiffs have failed to allege any discriminatory action or how the State's inaction "caused" Plaintiffs harm. MPA at 16. As discussed above, the Complaint adequately alleged state action, *see supra* Section III.A.3, including the State's refusal to intervene to ensure the provision of literacy in its "system of public schools." *See, e.g.*, Compl. ¶¶ 1-2, 8-11 46; *see also Butt*, 4 Cal. 4th at 680. Further, proving causation is an issue for trial, not for the demurrer. *See, e.g.*, *Serrano I*, 5 Cal. 3d at 617–18 (overruling demurrer where plaintiff children alleged that the public school financing system caused harm by "produc[ing] substantial disparities among school districts in the amount of revenue available for education."). *Vergara*, Defendants' sole support, was decided after an eight-week trial. 246 Cal. App. 4th at 627. Thus, Defendants cannot avoid responsibility at this stage for the disparate impact of their actions (or inactions) on poor and minority students.

C. Plaintiffs Adequately Allege a Taxpayer Claim.

Defendants' only argument that Plaintiffs do not state a taxpayer claim under Section 526a, based on a purported failure to allege facts showing "wasteful or illegal expenditures," is unavailing. MPA at 17 (citing *Humane Society of the United States v. State Bd. of Equalization*, 152 Cal. App. 4th 349, 355 (2007)). Taxpayer standing is construed liberally. *Waste Mgmt. of Alameda Cnty., Inc. v. Cnty. of Alameda*, 79 Cal. App. 4th 1223, 1240 (2000). Alleging wrongful government spending is enough to establish standing. *See Humane Soc'y*, 152 Cal. App. 4th at

361; *see also Harman v. City & Cnty. of San Francisco*, 7 Cal. 3d 150, 159-60 (1972). Specifically, Plaintiffs allege that Defendants expend substantial resources in California schools but fail to fulfill their duty to uphold Plaintiffs' constitutional rights, with the result that government funding of the system is unlawful and constitutes an illegal expenditure of funds. *Id.* This states a taxpayer claim under Section 526a. *See, e.g.*, *Hector F. v. El Centro Elementary Sch. Dist.*, 227 Cal. App. 4th 331, 333 (2014) (upholding taxpayer's standing to sue a district for failure to develop and implement "comprehensive school safety plans," where the school had a duty to do so); *Serrano I*, 5 Cal. 3d at 618 (upholding taxpayers' standing to challenge the state's financing system as depriving students of their right to education).

D. Plaintiffs Adequately Allege Their Entitlement to Declaratory Relief.

Defendants argue that the declaratory judgment claim is wholly derivative to the other claims and, therefore, fails as well. MPA at 17-18 (citing *Ball v. FleetBoston Fin. Corp*, 164 Cal. App. 4th 794, 800 (2008)). As Plaintiffs have properly alleged claims for equal protection violations, declaratory relief is proper.

E. California Is Properly Named as a Defendant.

Defendants' claim that the State is not a proper defendant, MPA at 18, has no merit and has repeatedly been rejected by courts. *See, e.g., Cruz v. State of California*, No. RG147139, slip op. 2 (Alameda Super. Ct. Sept. 26, 2014) (rejecting State's contention that it was not a proper party); *Doe v. State of California*, No. BC445151, slip op. 11 (L.A. Super. Ct. Jan. 26, 2012) (same) (Request for Judicial Notice ("RJN"), Exhibit 1); *Robles-Wong v. State of California*, No. RG10-515768, slip op. 4-5 (Alameda Super. Ct. Jan. 14, 2011) (same). The State is a party against whom Plaintiffs have pled a "right to relief" and is therefore appropriately joined. Cal. Civ. Proc. Code § 379(a)(1). *Butt*, in which the State was a named defendant and the only one to appeal, is dispositive of this issue. 4 Cal. 4th at 681, 685, 692. Neither case cited by Defendants holds, as they assert, that the State is never a proper defendant. MPA at 18 (citing *Serrano II* 18 Cal. 3d at 752 (deciding whether Legislature or Governor were indispensable parties, not whether State would be a proper defendant) and *State v. Superior Court*, 12 Cal. 3d 237, 255 (1974) (finding relief available only from Commission, not from State)). The State is ultimately responsible for public education, and is properly named as a defendant in this case.

F. The Complaint Does Not Violate the Separation of Powers Doctrine

Defendants argue that the Complaint should be dismissed because the ***requested remedy*** purportedly violates the separation of powers doctrine, and because that remedy is a legislative

policy decision not suitable for adjudication by the court. MPA at 18-19. As a threshold matter, this argument is "premature" because "'a demurrer tests the sufficiency of the factual allegations of the complaint rather than the relief suggested in the prayer of the complaint.'" *Yanting Zhang v. Superior Court*, 57 Cal. 4th 364, 381 n. 10 (2013) (quoting *Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 4th 1547, 1562 (1996)). As set forth above, the Complaint states a claim for equal protection violations of both a fundamental right and as to a suspect classification.

Furthermore, the requested relief, which Defendants mischaracterize, does not violate the separation of powers. The Complaint demands that Defendants meet their obligation to ensure that Plaintiffs have access to literacy. As in *Butt*, "the State's plenary power over education includes ample means" to remedy such constitutional violations. 4 Cal. 4th at 692. Defendants may "ensure 'by whatever means they deem appropriate" that Plaintiffs "receive their educational rights;" "how these defendants accomplish this is up to the discretion of defendants." 4 Cal. 4th at 694, 697 & n. 24.

Contrary to Defendants' assertion, MPA at 19, Plaintiffs do not seek a specific "manner" of teaching literacy as a remedy. The Request for Relief is not proscriptive. It seeks injunctive relief ensuring access to literacy, such as through "implementation of research-based programs for literacy instruction and intervention," and it provides examples of general principles of literacy instruction that those programs might include—such as "appropriate literacy instruction at all grade levels," or "appropriate screening for literacy problems,"—without specifying any particular feature or pedagogical program. Compl. at 57. What Defendants refer to as the "factors" necessary to providing access to literacy are merely one means—a means that Defendants' own experts articulated—among many possible means that Defendants could use to meet their constitutional obligation to provide access to literacy. This is evident even in the section's title (asking the State "to Implement Its Own Remedies *or the Equivalent*"). Compl. at 52 (emphasis added). Such requested relief does not violate the separation of powers and has been repeatedly approved by courts. *See, e.g.*, *Butt*, 4 Cal. 4th at 694 (approving as not violating separation of powers doctrine an order that found constitutional violation and deferring to "the discretion of the defendants" in fashioning relief); *Serrano II*, 18 Cal. 3d at 751-52 (affirming as consistent with separation of powers doctrine an order that declared existing school finance system unconstitutional and retained jurisdiction to allow relief in the event state actors failed to implement compliant system); *Doe v. State of California*, No. BC445151, slip op. 2, 8 (L.A. Super. Ct. Jan. 26, 2012) (RJN, Ex. 1) (holding that plaintiffs seeking injunction directing

development of a system to prevent unconstitutional student fees sought compliance with "existing duties under the law" and not a legislative remedy); *cf O'Connell*, 141 Cal. App. 4th at 1473-76 (discussing appropriate use of injunctive relief in view of separation of power concerns).

To the extent Defendants argue that the factors are already implemented and being utilized, such as, through State Priorities providing guidance to local school districts, MPA at 18, this is an issue of fact not appropriate for demurrer. Moreover, this attempt to evade constitutional obligations through local control has already been rejected by the Court. *Butt*, 4 Cal. 4th at 681 ("Local districts are the State's agents for local operation of the common school system, and the State's ultimate responsibility for public education cannot be delegated to any other entity") (internal citations omitted).

Defendants also argue that the Complaint raises issues of the "quality of education" or "academic results" and is not actionable. MPA at 18-19. But the gravamen of the Complaint is not that Plaintiffs are entitled to a certain academic result. Instead, unlike most children in the State, Plaintiffs do not have the opportunity to achieve literacy because they attend schools that do not provide them access to literacy. Compl. ¶¶ 146-147. The cases cited by Defendants do not address a situation where, as here, the program as a whole "falls fundamentally below prevailing statewide standards." *Butt*, 4 Cal. 4th at 687; *cf Campaign for Quality Education*, 246 Cal. App. 4th at 904 n. 3 (not an equal protection case but brought under entirely different constitutional provision); *Wells v. One2One Learning Foundation*, 39 Cal. 4th 1164, 1210-1213 (2006)(not an equal protection case but brought under the California False Claims Act).

Plaintiffs seek an order requiring Defendants to comply with their constitutional duties, not a policy decision, and arguments as to remedy do nothing to undermine Plaintiffs' claims.

IV. CONCLUSION

Defendants have ultimate responsibility for ensuring that ***all*** students receive their fundamental right to an education. They cannot shirk this duty by pointing to local control, or by blaming Plaintiffs, their families, or their communities. The Complaint demonstrates that Student Plaintiffs are receiving an education that falls well below the statewide standard and establishes Plaintiffs' equal protection claims, including violation of a fundamental right to education and violation of a suspect class.[9]

[9] To the extent that any claims are not sufficiently alleged, Plaintiffs request leave to file an amended complaint.

Dated: June 15, 2018

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PROOF OF SERVICE

I declare that I am employed with the law firm of Morrison & Foerster LLP, whose address is 425 Market Street, San Francisco, California 94105. I am not a party to the within cause, and I am over the age of eighteen years.

I further declare that on June 15, 2018, I served a copy of:

OPPOSITION TO DEMURRER TO COMPLAINT

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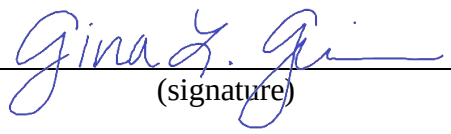
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Francisco, California, this 15th day of June, 2018.

Gina L. Gerrish
(typed)


(signature)