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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF DEL NORTE

OLIVIA R., et al. ,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al. ,

Defendants.

Case No. CV231304

DEFENDANTS' OPPOSITION TO PLAINTIFFS' REQUEST FOR PRELIMINARY INJUNCTION

Date: February 13, 2024
Time: 9:30 a.m.
Dept.: Courtroom 4
Judge: The Honorable William H. Follett

Trial Date: Not set
Action Filed: December 14, 2023

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INTRODUCTION

Plaintiffs fail to carry their heavy burden to demonstrate a clear entitlement to a mandatory preliminary injunction requiring the state to impose a receivership over the Del Norte Unified School District (DNUSD or District) and to take other unspecified action to ensure that plaintiffs receive adequate special education services. Plaintiffs seek to circumvent required administrative procedures made available to address grievances regarding special education, based on misplaced allegations that state authorities have violated their rights to equal protection purportedly by "allowing" the District's special education services and support to fall short. Plaintiffs have no likelihood of success on the merits, and the balance of harms and public interest require that plaintiffs' request for extraordinary and mandatory preliminary relief be denied.

Plaintiffs fail to demonstrate any likelihood of success, first, because they fail to show that they exhausted available administrative remedies or should be excused from the exhaustion requirement. Second, plaintiffs have waived their claim alleging a violation of the state constitution's "free schools" guarantee as support for a preliminary injunction because they fail in their application for an order to show cause to address it. The claim lacks any merit, in any event, because the free schools clause cannot be construed to guarantee the alleged statutory rights plaintiffs seek to bootstrap into constitutional entitlements. And third, plaintiffs fail to support their equal protection claim by failing to provide necessary evidence of prevailing educational standards in DNUSD and elsewhere throughout the state by which the required comparison may be made.

Plaintiffs fail to establish a likelihood of irreparable harm if their requested mandatory preliminary injunction does not issue. Defendants already are overseeing the District to ensure that it resolves staffing shortages at the root of plaintiffs' grievances, and plaintiffs fail to identify any measures that the state appropriately could take beyond those the District already is pursuing. Further, plaintiffs fail to show that an order granting compensatory education would be insufficient to remedy their alleged harm. Finally, the strong public interest in preserving local control over the District and letting established mechanisms for state assistance and oversight run their course weighs heavily against imposing state and judicial control over the county's schools.

Plaintiffs' request for a preliminary injunction must be denied.

FACTUAL AND REGULATORY BACKGROUND

I. SUMMARY OF COMPLAINT AND RELIEF REQUESTED

Plaintiffs are six students who allege that DNUSD failed to provide them with behavioral aides or home and hospital educational services called for in their Individualized Education Programs (IEPs) and failed to adequately train aides. (Compl. ¶¶ 13-18.). Plaintiffs allege, or acknowledge, that the District is experiencing a "shortage" of special education services personnel and has supposedly "advised" some plaintiffs not to attend school. (Compl. ¶¶ 31-37). Plaintiffs do not allege they bring a class action on behalf of other students. Plaintiffs acknowledge that the District has offered "compensatory education" to three of the plaintiffs (Olivia R., Jonah B., and Shawn T.), but contend that the full amounts of such services were not provided or, in the case of plaintiff Jonah B., that the services were offered at times when he was scheduled for other classes. (*Id*. ¶¶ 41, 50, and 57.). Yet, plaintiffs have not sued the District. Rather, plaintiffs name as defendants only the State of California and state education authorities, including the State Department of Education (CDE), State Superintendent of Public Instruction Tony Thurmond, and the State Board of Education.

Plaintiffs allege three causes of action. In the first, plaintiffs allege violations of the "free school guarantee" under article IX, section 5, of the state Constitution. (Compl. ¶¶ 62-73.) The second alleges denials of plaintiffs' rights to equal protection under the state Constitution. (*Id.* ¶¶ 74-81.) The third asserts a derivative claim for declaratory relief. (*Id.* ¶¶ 82-84.) Each claim is founded on allegations that the District failed to provide plaintiffs, first, 180 days of instruction and, second, a "free appropriate public education" (FAPE) required under the federal Individuals with Disabilities Education Act (IDEA). (Compl. ¶¶ 69, 79, 83.)

The complaint seeks relief directing defendants to "take all actions necessary" to ensure that District students receive necessary education services, including placing the District "in a receivership" until it can meet alleged special education service requirements. (Compl. at pp. 26–27.) Plaintiffs request the same relief by their application for an order to show cause regarding a preliminary injunction. (Proposed Order to Show Cause (Prop. Order) at p. 3.)

II. REGULATORY BACKGROUND

A. Federal and State Law Provide for Local Control Over Special Education

The IDEA, 20 U.S.C. § 1400, et seq., and its implementing regulations, 34 C.F.R. § 300.1, et seq., set forth standards for educating students with disabilities that must be adhered to by states that choose to receive IDEA funding. (See 20 U.S.C. § 1400(d) [goals of chapter].) The IDEA provides that to receive such funding, participating states must provide assurances in a state plan that it has policies and procedures in effect to ensure that a FAPE is available to all eligible students with disabilities. (20 U.S.C. § 1412(a)(1).) A FAPE consists of special education and related services at public expense, under public supervision and direction, and without charge to the parent or student. (20 U.S.C. §§ 1401(9), (29).) Each student's special education instruction is based upon an IEP created for the student. (20 U.S.C. § 1414(d).)

California participates in the IDEA, and is charged with general supervisory responsibility for ensuring the provision of special education services in the state. (20 U.S.C. §§ 1412(a)(11)(A), 1401(32).) Congress left it to participating states to determine how these services will be provided directly, and contemplated that local educational agencies (LEAs) would be the principal providers. (See 20 U.S.C. §§ 1412(a)(11)(A) [(b) [requirements if state chooses to provide direct services]; 1413 [LEA eligibility for IDEA funds].) In California, LEAs include school districts, county offices of education, special education local plan areas (SELPA), or nonprofit charter schools participating in a SELPA. (Ed. Code, § 56026.3.) LEAs apply for funding from CDE for these services by submitting a plan that provides assurances of compliance with the IDEA. (20 U.S.C. § 1413(a).)

California law implementing the IDEA places primary responsibility for providing FAPE to eligible students on the LEA. (See Ed. Code, § 46205.) An LEA is generally responsible for providing an education to students residing within its jurisdictional boundaries. (Ed. Code, § 48200.) Moreover, the LEA is responsible for identifying students with disabilities, determining appropriate educational placements and related services through the IEP process, and providing needed special education and related services. (Ed. Code, §§ 56300, 56302, 56340, 56344(c).)

B. Administrative Remedies for Special Education Service Grievances

1. Due process evidentiary hearings

The IDEA provides parents the rights to request an impartial administrative "due process" hearing to address any complaint regarding the provision of a FAPE or determinations relating the identification, evaluation, or educational placement of child with a disability. (20 U.S.C. §§ 1415(b)(6)(A), (f)(1)(A).) The hearing must be conducted by a person who is impartial and independent from state education authorities. (*Id.* §§ 1415(f)(1)(A), (f)(3)(A).) In California, CDE meets this obligation by contracting with the Office of Administrative Hearings (OAH) for the services of administrative law judges (ALJ). (Ed. Code, § 56504.5(a).)

An OAH hearing includes rights to be accompanied by counsel; to disclosure of documentary evidence and witness lists; to present evidence and written and oral argument; to confront, cross-examine and compel the attendance of witnesses; to a record of the hearing; and to a final decision. (Ed. Code, § 56505(e).) The ALJ at OAH determines if there has been a denial of a FAPE to an individual student. (20 U.S.C. § 1415(f)(3)(E).) The ALJ may award appropriate relief, including compensatory education. (See *id.* §§ 1415(e)(2), (i)(2)(C)(iii); *Forest Grove v. T.A.* (2009) 557 U.S. 230, 243–244, fn. 11 [extending authority to administrative hearing officers]; *Student W. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 [compensatory education].) A parent or LEA aggrieved by the final administrative decision may seek judicial review of the decision. (*Id.* § 1415(i)(2)(A), (B).) A parent seeking relief available under the IDEA is required to pursue a due process hearing to finality before they are entitled to file suit in court on constitutional claims or other claims under federal law. (*Id.* § 1415(*l*).)

2. Compliance complaints

Federal law and implementing state regulations also provide parents a complementary dispute resolution mechanism under which parents may file a compliance complaint against an LEA with the CDE alleging a violation of federal or state special education law, including a failure to provide services required by a student's IEP. (34 C.F.R. §§ 300.151-300.153; Cal. Code Regs., tit. 5, §§ 3200–3204.) Upon receipt of a proper complaint, the CDE must, within 60 days, investigate and issue a written decision. (34 C.F.R. § 300.152(a)(1)–(5); Declaration of Ana Marsh (Marsh Decl.)

¶¶ 6–8.). If CDE determines the LEA is not in compliance with legal requirements, CDE may order the LEA to take corrective actions. (34 C.F.R. § 300.151(b); Marsh Decl. ¶ 8.) Either party may seek reconsideration of CDE's decision. (Cal. Code Regs., tit. 5, § 3204.) However, the IDEA does not provide for judicial review of the decision. (*Fairfield-Suisun Unified School Dist. v. Cal. Dept. of Ed.* (9th Cir. 2015) 780 F.3d 968, 970–971.)

III. AS PART OF ITS OVERSIGHT PROCESSES, CDE ALREADY IS SEEKING TO ENSURE DNUSD ATTAINS FULL STAFFING AND HAS ORDERED THE DISTRICT TO TAKE CORRECTIVE ACTIONS ON RECENT COMPLIANCE COMPLAINTS

CDE maintains a robust program for monitoring LEA support for students with disabilities pursuant to IDEA requirements. (See 20 U.S.C. §§ 1416–1418.) This program, called the Compliance Improvement and Monitoring (CIM) process, focuses on student outcomes and begins with an annual review by CDE of performance indicators and student files for students with disabilities for most LEAs (every three years for small LEAs) to determine an appropriate level of monitoring and support to be provided by CDE under the CIM criteria. (See Declaration of Shiyloh Becerril-Duncan (Becerril-Duncan Decl.) ¶¶ 4–11.) If an LEA is identified under the criteria as needing assistance or intervention to meet requirements to support special education, the LEA must participate in the CIM process. (*Id.* ¶¶ 5–8.) The LEA must identify its key weaknesses in providing special education services, identify root causes of the problems, and develop and implement an action plan to address those issues, all subject to CDE review and approval. (*Id.* ¶ 6.) The degree of monitoring and assistance to be provided by CDE depends upon the extent to which the LEA is failing to meet performance targets in relation to other LEAs, has been found to be out of compliance with special education requirements, and/or has been flagged for concerns over racial or ethnic disproportionality in aspects of its special education program. (*Id.* ¶ 7.)

Under the CIM framework, DNUSD has been designated as "Need[ing] Assistance," placing it in the middle-level "targeted monitoring" category. (Becerril-Duncan Decl. ¶ 22.) Within that mid-level tier, the District is designated in the more rigorous monitoring and support sub-level of three sub-levels falling under this designation. (*Ibid.*) In the CIM process, the District identified recruitment as a key priority and committed in its action plan, submitted on December 12, 2023, days before plaintiffs filed this action, and approved by CDE days later on December 18, 2023, to

new and focused efforts to provide training and achieve full staffing for special education services by May of this year. (*Id.* ¶¶ 13–16.)

In addition to overseeing DNUSD's efforts through the CIM process, CDE has investigated complaints by parents of eight DNUSD students, including three plaintiffs, filed since the beginning of the 2021-2022 school year regarding alleged noncompliance with IEP or special education procedures or requirements. CDE has ordered the District to take corrective actions in six of those matters in which it found the allegations substantiated. (See Marsh Decl. ¶¶ 12, 15–33 & Exhs. A-F.) Those corrective actions have included requiring the District to demonstrate: that it has a plan to hire or has assigned needed aides or teachers; that necessary trainings have been provided for relevant staff; that = staff have been notified of CDE's findings of noncompliance and reminded of their obligations to provide services and support designated in the student's IEPs; that it has made efforts to secure the return of a student to school; that it has plans for monitoring attendance by assigned aides; and/or that compensatory education ordered by CDE has been provided. (*Ibid.*) Notably, all but one of the six complaints from which CDE ordered corrective action were received just within the past four months, the other being filed less than one year ago, and most of the deadlines by which the District is required to demonstrate compliance have not yet passed. (*Ibid.*)

Beyond these measures, defendants, recognizing that teacher shortages are a problem for LEAs throughout the state due to factors outside of state control, have undertaken a host of initiatives and secured or provided billions of dollars in increased funding for grants, incentives, and other programs to help attract and recruit more individuals into teaching and other education support positions, as well as training for positions provided support for special education. (See accompanying Declaration of Mary Nicely, ¶¶ 3–11.)

APPLICABLE LEGAL STANDARDS

Plaintiffs request a mandatory preliminary injunction directing defendants to "take all actions necessary" to ensure that DNUSD students receive necessary special education services, including establishing a receivership over the District. (Prop. Order at 3.) Because the general purpose of a preliminary injunction is to "preserve the status quo pending a determination on the merits of the action," courts will issue mandatory preliminary relief that alters the status quo "only in those

extreme cases where the right thereto is clearly established." (*Brown v. Pacifica Found., Inc.* (2019) 34 Cal.App.5th 915, 925 (*Brown*) [cleaned up].) Requests for mandatory preliminary relief, thus, are "rarely granted." (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048.)

In general, in determining whether to issue a preliminary injunction, the Court must assess: (1) the likelihood that plaintiffs will prevail on the merits, and (2) the relative harm the parties will suffer in the interim if an injunction does or does not issue. (*Brown*, *supra*, 34 Cal.App.5th at p. 925.) In assessing the balance of harms, "consideration of public policy is not only permissible but mandatory." (*O'Connell v. Superior Court* (2006)141 Cal.App.4th 1452, 1471.) The burden is on the plaintiff to support issuance of the preliminary injunction. (*Id.* at p. 1481.)

A court generally may not, in ruling on a request for a preliminary injunction, grant the ultimate relief requested by the plaintiff and thereby "effectively decide[] the merits" of the plaintiffs' claims. (*Yee v. Am. Nat. Ins. Co.* (2015) 235 Cal.App.4th 453, 458.)

ARGUMENT

I. Plaintiffs Have No Likelihood of Success on the Merits of Their Claims

A. Plaintiffs Fail to Demonstrate that They Exhausted Required Remedies

Because each of plaintiffs' causes of action seek relief for the denial of a FAPE, they were required to pursue a due process administrative hearing as a mandatory prerequisite to filing their lawsuit. Plaintiffs bear the burden of demonstrating exhaustion or any excuse from the exhaustion requirement. (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345; *Westinghouse Elec. Corp. v. County of Los Angeles* (1974) 42 Cal.App.3d 32, 37.) Plaintiffs fail, however, to show that they exhausted these remedies or are excused from having to do so. Their claims, therefore, cannot succeed.

The IDEA requires that a plaintiff bringing suit under the U.S. Constitution or federal law, when "seeking relief that is also available under" the IDEA, first exhaust their administrative remedies by pursuing a final administrative claim. (20 U.S.C. § 1415(*l*); *Fry v. Napoleon Community Schools* (2017) 580 U.S. 154, 161 (*Fry*).) A claim is considered to seek relief "also available under" the IDEA where it "seeks relief for the denial of a FAPE" or where the "gravamen" of the claim involves a denial of a FAPE. (*Fry*, *supra*, 580 U.S. at pp. 168, 169.) If a

party fails to exhaust this remedy the complaint must be dismissed. (See *Paul G. by and through Steve G. v. Monterey Peninsula Unified School Dist.* (9th Cir. 2019) 933 F.3d 1096, 1102 (*Paul G.*).) The exhaustion requirement furthers purposes including maintaining primary responsibility of agencies over programs they are charged with administering, respecting the "traditionally strong" local interest in education, allowing for the "exercise of discretion and educational expertise" by state officials, ensuring a "complete factual record," and "promot[ing] judicial efficiency." (*Hoeft v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1303 (*Hoeft*).)

The exhaustion requirement also applies to claims alleged under the state constitution or other state law. A party in a state participating in the IDEA "must exhaust their administrative remedies under the act before resorting to judicial intervention." (*Hayes v. Com. on State Mandates* (1992) 11 Cal.App.4th 1564, 1589 [referring to Act under former title].)[1] It is a "'fundamental rule of procedure . . . binding upon all courts'" that "'where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" (*Campbell v. Regents of Univ. of Cal.* (2005) 35 Cal.4th 311, 321, quoting *Abelleira v. Dist. Court of Appeal* (1941) 17 Cal.2d 280, 292, 293.)

Plaintiffs' failure to demonstrate that they exhausted their IDEA administrative remedies, therefore, is fatal to their claims. As plaintiffs expressly seek relief relating to alleged denials of a FAPE, their action indisputably "seeks relief under the [IDEA]" and is necessarily subject to the Act's exhaustion requirement. (See Complt. ¶¶ 67–68, 79, 83, and p. 26; see also Pl.'s Mem. iso Ex Parte App. for OSC (Mem.) at 16–18; see *Paul G.*, *supra*, 933 F.3d at p. 1101.) Although plaintiffs recite in their complaint that there is no "clear, alternative remedy" available to them (Complt. ¶¶ 73, 81), they fail to demonstrate any basis in their moving papers for excuse from the exhaustion requirement. Plaintiffs, thus, have failed to meet their burden to demonstrate that they have satisfied the exhaustion requirement and have waived any argument on this issue. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793 [where movant fails to include "'legal argument with citation of authorities on the points made . . . the court may treat it as waived' [citations]"].)

[1] See Education of the Handicapped Act Amendments of 1990, Pub. L. 101–476, § 901 (October 30, 1990) 104 Stat 1103 [renaming provisions as the IDEA].)

Only one of the plaintiffs' parents, Shawn T., alleges that they pursued a special education compliance complaint, and plaintiffs do not allege, in any event, that pursuit of this process satisfies the administrative exhaustion requirement, nor could they here, as exhaustion would serve purposes noted above beyond simply notifying CDE of local noncompliance and affording an opportunity to order correction. (*Hoeft*, *supra*, 967 F.2d 1298, 1308.) CDE, in any event, ordered corrective action on plaintiffs' complaints, and the time for the District's completion of most of those actions has not yet expired. (Marsh Decl. ¶¶ 12, 15–33.)

Further, any argument that administrative remedies are inadequate because they do not provide for class-wide or allegedly "systemic" relief, likewise, would fail. Courts have squarely rejected the argument that the IDEA's required administrative processes are inadequate to address broad injunctive relief. (See *id*., 967 F.2d at pp. 1307–1309.) Moreover, the exception to exhaustion for supposedly "systemic" issues is narrowly applied only to claims concerning the IDEA's dispute resolution procedures themselves, or calls for restructuring the education system itself to comply with the dictates of the IDEA. (*Paul G*., 933 F.3d at 1101-1102.) And, as the Ninth Circuit recently observed: "To our knowledge, no published opinion in this circuit has ever found that a challenge was systemic and exhaustion not required." (*Student A v. San Francisco Unified School District* (9th Cir. 2021) 9 F.4th 1079, 1085.)

Because plaintiffs fail to argue or establish that they satisfied or are entitled to be excused from the exhaustion requirement, they lack any likelihood of success on their claims and, on at least this basis, the Court must deny plaintiffs' application. Nevertheless, defendants address plaintiffs' likelihood of success on their individual causes of action below.

B. Plaintiffs Have No Likelihood of Success on Their "Free Schools" Claim

Plaintiffs in their application in support of a preliminary injunction neither refer to or discuss their first cause of action alleging violations the free schools guarantee of article IX, section 5 (section 5) of the state Constitution, nor do they contend that they have a likelihood of success on that claim. Accordingly, plaintiffs have waived any argument in support of their preliminary injunction based on section 5. (*People v. Stanley*, *supra*, 10 Cal.4th at p. 793.) Despite this failure, even if the Court chooses to consider this claim, plaintiffs cannot demonstrate any likelihood of

success on it because they concede that section 5 is being met, and a claim under section 5 cannot be premised on a district's alleged failure to meet statutory standards or to ensure that plaintiffs' education meets a particular qualitative standard.

Section 5 provides, in its entirety: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year." (Cal. Const., art. IX, § 5.) Article 5 has been referred to as the "free schools guarantee" because it generally mandates state support for a free public education system. (See *Hartzell v. Connell* (1984) 35 Cal.3d 899, 911.) The provision also has been interpreted to require a standardized education system throughout the state. (See *Serrano v. Priest* (1971) 5 Cal.3d 584, 596.) However, the free schools guarantee has never been interpreted to "mandate K–12 education individually tailored to each student's specific and particularized needs." (*Levi v. O'Connell* (2006) 144 Cal.App.4th 700, 708.) Plaintiffs concede that the Legislature has met its obligation to provide for a system of common schools under section 5, acknowledging that "[t]he Legislature has provided for such a system." (Complt. ¶ 64.) Plaintiffs' concession is fatal to their claim under this provision. (See *Collins v. Thurmond* (2019) 41 Cal.App.5th 879, 901 (*Collins*) [sustaining demurrer to section 5 claim where plaintiffs admitted that "free schooling is being provided"].)

Moreover, plaintiffs improperly based their section 5 claim on allegations that they have been denied a purported "right" to 180 days of education and to a FAPE. (See Complt. ¶¶ 69, 72.) Plaintiffs claim a purported "right" to 180 days of school based on Education Code section 46200. (Complt. ¶ 66.) But plaintiffs mischaracterize this statute, which provides that if any school district offers less than 180 days of instruction during a school year, the State Superintendent must withhold certain funds from a district's "local control funding formula grant apportionment" for each missing day. (Ed. Code, § 46200.) The statute does not guarantee students any statutory "right"—much less any constitutional right—to 180 school days; it simply creates a penalty for districts that provide less. (*Ibid.*)

And while students eligible for special education services are entitled to a FAPE under the IDEA and Education Code, to receive a FAPE, this right is not guaranteed by section 5 of the state Constitution. The meaning or scope of a constitutional provision cannot be defined by

requirements of state statutory law. (See *Campaign for Quality Ed. v. State* (2016) 246 Cal.App.4th 896, 918 (*CQE*) [Siggins, J. concurring] [rejecting argument that academic standards found in the Education Code "inform" an alleged "constitutional right to a quality education"].) A plaintiff "cannot bootstrap a claim of a statutory violation into a claim of a [constitutional] violation." (*People v. Belmares* (2003) 106 Cal.App.4th 19, 28 (*Belmares*).)

Plaintiffs ultimately allege that they are receiving an inadequate education—one purportedly falling below "prevailing statewide standards." (Complt. ¶¶ 68–70; Mem. at 18–19.) However, California courts have squarely rejected claims that sections 1 or 5 of article IX guarantee rights to a public education meeting any particular level of adequacy or quality. (*Collins*, *supra*, 41 Cal.App.5th at p. 901 [sections 1 and 5 "do not guarantee a right to any particular quality or level of education"]; *CQE*, 246 Cal.App.4th at pp. 902–903 [sections 1 and 5 "do not include qualitative or funding elements that may be judicially enforced by the courts"].)

For these reasons, plaintiffs have no likelihood of success on their first cause of action.

C. Plaintiffs Have No Likelihood of Success on Their Equal Protection Claim Because They Fail to Demonstrate that Their Education Falls Below Prevailing Standards Being Met Elsewhere in the State

Plaintiffs likewise have no chance of success on their second cause of action asserting violations of their rights to "basic educational equality" under the state Constitution because they improperly seek to base their claim, which requires proof of substantial inter-district disparities, on alleged violations of statutory requirements, standing alone. Plaintiffs mischaracterize or misunderstand the nature of, and proof necessary to support, a claim for violation of basic educational equality under *Butt v. State* (1992) 4 Cal.4th 668.

"As its name suggests, equal protection of the laws assures that people who are '"similarly situated for purposes of [a] law"' are generally treated similarly by the law." (*Vergara v. State* (2016) 246 Cal.App.4th 619, 644, quoting *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Thus, an equal protection claim requires proof that two or more similarly situated groups are being treated in an unequal manner. (*Ibid.*) In *Butt*, the Court held that the equal protection clauses of the state Constitution guarantee California students a right to "basic educational equality." (*Butt, supra,* 4 Cal.4th at p. 685.) The Court recognized, however, that although the state bears ultimate

responsibility for the public education system, school governance has historically been assigned to local school districts. (*Id.* at pp. 680–681.)

Consistent with the state's tiered system of responsibility, the state may be responsible for denying basic educational equality only if it "denies the students of one district an education basically equivalent to that provided elsewhere throughout the State." (*Butt, supra,* 4 Cal.4th at pp. 680–685.) Thus, establishing a denial of this right requires a comparison between the education being provided in the plaintiffs' district and the "prevailing statewide standards" being "provided elsewhere throughout the state." (*Butt, supra,* 4 Cal.4th at pp. 686–687.) Because the state Constitution, however, "does not prohibit all disparities in educational quality or service," or require the state "to remedy all ills or eliminate all variances in service," an equal protection violation may be found only where the "actual quality" of the district's program "viewed as a whole, falls fundamentally below" that being provided elsewhere throughout the state. (*Id.* at p. 686.)

Plaintiffs' complaint and application for a preliminary injunction, however, are devoid of any allegations or evidence sufficient to establish the prevailing statewide standards for special education services actually being provided in other districts throughout the state-by which a claim against the State alleging a constitutional disparity must be measured. Plaintiffs offer no evidence of prevailing standards regarding staffing and training of special education aides, teachers, or other relevant special education professionals in districts elsewhere throughout the state, or of performance measures for students with disabilities in other districts statewide. Additionally, plaintiffs fail to offer evidence that would demonstrate the quality of education being provided by DNUSD to students with disabilities, "viewed as a whole." (*Butt, supra,* 4 Cal.4th at p. 686.) Thus, plaintiffs fail to demonstrate that the District's program falls "fundamentally below" that being provided elsewhere throughout the state, as necessary to support their claim. (*Ibid.*)

Defendants' evidence, on the other hand, indicates that the quality of education being provided to students with disabilities by DNUSD "viewed as a whole" does not fall "fundamentally below" that being "provided elsewhere throughout the state." (*Butt, supra,* 4 Cal.4th at pp. 685, 686–687.) As noted above, the District's performance data utilized for the CIM process places DNUSD in a middle tier for monitoring and support. (See Becerril-Duncan Decl. ¶ 12.)

Plaintiffs seek to circumvent their evidentiary burden under *Butt* by arguing that two separate alleged statutory requirements—one purportedly entitling students to 180 days of instruction each year, and the other, provision of a FAPE—each constitutes a "prevailing statewide standard" that defendants have violated by allegedly "allowing" DNUSD to fail to meet those requirements. (Mem. at 16–19.) Plaintiffs' allegations fail to support a cognizable claim for a violation of basic education equality by the state. The Court in *Butt* made clear that statutory requirements, standing alone, are not "prevailing" statewide education standards, and that such standards must be established by evidence of the services or opportunities actually being provided by districts throughout the state. (*Butt, supra,* Cal.4th. at p. 687 & fn 14.) Specifically, in *Butt*, the Court noted that a state statute required districts to provide at least 175 days of instruction to receive state funds, absent special circumstances. (*Id*. at p. 687, fn. 14.) However, the Court underscored that the statute was not competent evidence of the prevailing statewide standard regarding instruction days, concluding that there was "no evidence" in the trial court record "of the prevailing term length in California." (*Ibid*.) The Court concluded that a minimum of 175 days was, in fact, the prevailing statewide standard, however, by taking judicial notice of copies of school district certifications that indicated "that virtually every established school district in California operated for at least 175 days during the 1990–1991 school year." (*Ibid*.) Thus, under *Butt*, evidence of actual practice, not statutory requirements, must be provided to demonstrate prevailing statewide standards. Plaintiffs fail to provide any. Further, as noted in the previous section, statutory requirements cannot, consistent with constitutional principles, be bootstrapped into constitutional guarantees. (See *CQE*, 246 Cal.App.4th at p. 918 [Siggins, J. concurring]; *Belmares*, *supra*, 106 Cal.App.4th at p. 28.)

The statutes on which plaintiffs rely, in any event, are insufficient to establish prevailing statewide standards. As discussed in the preceding section, Education Code section 46200 does not entitle students to 180 days of instruction each year. And the requirement to provide a FAPE to eligible students is too vague and individualized to the particular needs of each qualifying student to establish a prevailing statewide educational standard. (See *Bd. of Ed. of Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 198 [attempting to define FAPE standard under IDEA in terms of equal opportunity would present "an entirely unworkable standard requiring

impossible measurements and comparisons"].) The IDEA is intended to "open the door" of public education to students who had previously been excluded, but the requirement that students with disabilities be provided a FAPE does not "guarantee any particular level of education" nor promise "any particular [educational] outcome." (*Id*. at p. 192.)

Therefore, plaintiffs have no likelihood of success on their second cause of action.[2]

II. PLAINTIFFS FAIL TO DEMONSTRATE THAT THEY WILL BE IRREPARABLY HARMED IF A PRELIMINARY INJUNCTION IS NOT ISSUED

Plaintiffs fail to and cannot demonstrate that they will be irreparably harmed if defendants are not enjoined before this action can be decided on the merits. Plaintiffs fail to identify any appropriate actions defendants reasonably could undertake that would provide relief for plaintiffs while the action remains pending beyond those DNUSD already has committed to under the CIM process and the corrective actions CDE has ordered pursuant to the compliance complaint process. (See Becerril-Duncan Decl. ¶ 16; Marsh Decl. ¶¶ 12, 15–33.) Plaintiffs fail to identify any "quick fixes" for the District's staffing shortage, or to demonstrate why imposing a receivership over the District is necessary to resolve the shortage or capable of doing so.

Further, the availability of compensatory education to address any learning loss plaintiffs may incur while their action remains pending "'weighs heavily against a claim of irreparable harm.'" (*Los Angeles Memorial Coliseum Com. v. Nat. Football League* (9th Cir. 1980) 634 F.2d 1197, 1202, quoting *Sampson v. Murray* (1974) 415 U.S. 61, 90.) Compensatory education is designed to "make up for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of IDEA.'" (*R.P. ex rel. C.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1125, quoting *Reid ex rel. Reid v. D.C.* (D.C. Cir. 2005) 401 F.3d 516, 518.) And because plaintiffs "did not submit any evidence to show that compensatory education would be insufficient to remedy their anticipated harms," they "have not met their burden of demonstrating a likelihood

[2] Plaintiffs' third cause of action for declaratory relief is "wholly derivative" of their first two causes of action and, thus, unlikely to succeed for all the reasons discussed in the Argument above. (See Complt. ¶ 83; *Ball v. FleetBoston Fin. Corp.* (2008) 164 Cal.App.4th 794, 80.)

of irreparable harm absent an injunction." (*N.D. v. Reykdal* (W.D. Wash., Sept. 29, 2023, No. 2:22-CV-01621-LK) 2023 WL 6366045, at pp. *9, 10.)

III. THE BALANCE OF HARMS AND PUBLIC INTEREST FAVOR DEFENDANTS

In contrast, a preliminary injunction and state receivership of DNUSD is decidedly not in the public interest and would be harmful to defendants, DNUSD, and the public. Such an injunction would, for one, improperly interject the Court and the state into the local administration of DNUSD schools, contrary to strong state policy to "strengthen and encourage local responsibility for control of public education," in the absence of a sufficient showing that judicially mandated state intervention and control is necessary or appropriate. (Ed. Code, § 14000.) The Legislature has authorized state receivership over school districts only as a condition of an insolvent LEA's request for an emergency loan, and has established a detailed system of fiscal oversight by CDE of LEA finances intended to avoid districts falling into financial distress and any need for any such emergency appropriation requests. (See Ed. Code, §§ 41325, 42127.6.) Granting plaintiffs' requested preliminary injunction, including a mandated receivership over DNUSD, would contravene clear state policy to avoid imposing state control over school districts unless necessary to help ensure an LEA's return to fiscal solvency.

A preliminary injunction, further, would interfere with state policy, reflected in established administrative processes including the CIM process and compliance complaints, providing for oversight of special education programs by officials with relevant knowledge and expertise. The IDEA grants states substantial discretion in determining how to best monitor and enforce its requirements. (See, e.g., *A.A. v. Bd. of Ed., Central Islip Union Free Sch. Dist.* (E.D.N.Y. 2003) 255 F.Supp.2d 119, 125–127, *aff'd* (2d Cir. 2004) 386 F.3d 455, 459.) And "principles of comity and separation of powers place significant restraints on courts' authority to order . . acts normally committed to the discretion of other branches or officials." (*Butt, supra,* 4 Cal.4th at p. 695.)

CONCLUSION

For the reasons set forth above, plaintiffs fail to clearly establish any right to preliminary injunctive relief, as they must to support their requested mandatory preliminary injunction. Accordingly, plaintiffs' request for a preliminary injunction should be denied.

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Respectfully submitted,

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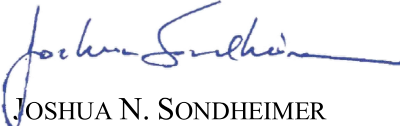

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