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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF DEL NORTE
BEFORE THE HONORABLE WILLIAM H. FOLLETT, JUDGE

OLIVIA R, et al.,
Plaintiffs,

-vs-

CASE NUMBER CV231304

STATE OF CALIFORNIA,
et al.,

Defendants.

_____ /

REPORTER'S TRANSCRIPT OF THE PROCEEDINGS
HELD ON FEBRUARY 13, 2024

APPEARANCES:

FOR THE PLAINTIFFS: MALHAR SHAH,
Attorney at Law
CYNTHIA L. RICE,
Attorney at Law
ERIN NEFF,
Attorney at Law

(Telephonic appearance): ALEXANDRA KENNEDY-BREIT,
Attorney at Law
Shatti Hoque,
Attorney at Law

FOR THE DEFENDANTS: JOSHUA SONDEIMER,
Deputy Attorney General

REPORTED BY: CAROL LEHMAN, CSR NO. 3500

1 Crescent City, California

February 13, 2024

2 P R O C E E D I N G S

3 THE CLERK: We have Court Call on the line.

4 THE COURT: Good morning. We will call the
5 matter of Olivia R versus, that's et al., versus the
6 State of California, et al. This is case number
7 CV231304. I will ask the attorneys to state your
8 appearances.

9 MR. SHAH: Mulhar Shah on behalf of the
10 Plaintiffs.

11 MS. RICE: Cynthia Rice also on behalf of the
12 Plaintiffs.

13 MS. NEFF: Erin Neff on behalf of the
14 Plaintiffs.

15 MR. SONDEIMER: Joshua Sondheimeer on behalf of
16 all the State Defendants.

17 THE COURT: Understand we have counsel on the
18 telephone also, Court Call?

19 COURT CALL: Yes, Your Honor.

20 MS. KENNEDY-BREIT: Alexandra Kennedy-Breit for
21 Plaintiffs.

22 MS. HOQUE: Shatti Hoque for Plaintiffs.

23 THE COURT: Is that all we have on the phone?

24 COURT CALL: That's all we have connected. We
25 have Shane Brun scheduled that has not connected at this
26 time.

27 THE COURT: All right. For attorneys that are
28 going to be appearing by telephone, any time you speak

1 I'm going to want you to, so we will have a record, state
2 your name so we will know who you are, okay?

3 Madam Court Reporter, if you need further
4 clarification feel free to let us know.

5 Talk about some preliminary things. First of
6 all, why is it we are here? The original documents that
7 were filed indicated it was going to be on today for a
8 hearing on whether or not the Court is going to issue an
9 OSC, but the later documents filed seemed to be
10 indicating we are actually going to be talking today
11 about whether or not the preliminary injunction will be
12 issued.

13 Does everybody agree that's why we are here,
14 whether or not a preliminary injunction will issue?

15 MR. SHAH: Yes, Your Honor.

16 MR. SONDEIMER: Yes, Your Honor.

17 THE COURT: I want to thank counsel for the
18 quality of your briefing. I was very impressed. I
19 read -- I'm going to say read everything that's been
20 filed and, however, there were some documents apparently
21 that came into the Court Friday just before close of
22 business and again this morning. I was not aware of any
23 of that until just shortly before the hearing.

24 I have not had a chance to read any of those
25 documents. Even though I was here most of the weekend I
26 didn't know they were sitting in the clerks' office. I
27 have not read the objections from the Attorney General or
28 the reply. When I say I haven't read them, I have looked

1 at them but not in a way that I am prepared to act upon
2 them, I just haven't had time.

3 So I don't know how that affects how you folks
4 see yourselves proceeding today. Mr. Attorney General,
5 what is your thoughts?

6 MR. SONDEHEIMER: Your Honor, I think we are
7 prepared to proceed. I think that, I am happy to make --
8 state our basis for your objection to the reply evidence
9 that the Plaintiff submitted orally, and if the Court
10 takes matter into submission hope the Court will address
11 our position on the papers.

12 THE COURT: Should I address one of the
13 Plaintiffs' counsel, Mr. Shah?

14 MR. SHAH: Yes, you can address me, Your Honor,
15 thank you. We are also happy to discuss the objections
16 orally. Plaintiffs believe that the motion can be
17 granted even taking the Defendants' objections at face
18 value and accepting them. So Plaintiffs would appreciate
19 the ability to first discuss the body of the Plaintiffs'
20 motion for preliminary injunction.

21 THE COURT: Okay. That seems to me to be
22 appropriate from what I have read. And there was also
23 lots and lots of other objections that have been made in
24 writing. I have gone through the objections, prepared to
25 rule on the vast majority of them if that becomes
26 necessary.

27 But I am also thinking that maybe it won't be
28 necessary and be glad to hear your thoughts on that, too,

1 that maybe the Court can make a decision for what's
2 before it today without having to go through all of the
3 objections. There is a few that I might want further
4 argument if I have to decide, but I'm not sure.

5 Anybody have a problem with that at this point?

6 MR. SHAH: No, Your Honor.

7 MR. SONDEIMER: No.

8 THE COURT: There were, I believe, three
9 requests to take judicial notice and I -- those I can
10 quickly tell you what my rulings are on those. If
11 anybody wants to argue those now would be happy to hear
12 your arguments if that would change my mind.

13 It's my intention to sustain the objection to
14 the ruling on the demurrer out of Contra Costa County.
15 Appears to me to be irrelevant, it is not precedent, in
16 the sense different parties, different issues. And it is
17 not something that can be cited as law. I think the
18 objection was well taken, so that is denied -- or that
19 objection is sustained.

20 It's my intention to sustain supplemental --
21 excuse me, to allow, take judicial notice in what appears
22 to be the school district documentation with regard to
23 the number of vacancies within the district under
24 Evidence Code Section 452, I think it's the i. The last
25 subdivision says Court can take judicial notice of facts
26 that are easily ascertainable and not really subject to
27 conveyance, so that's the ground I would take that, just
28 to say there are a number of openings.

1 And then the best I can tell the Shaw decision
2 is is a published Court of Appeal decision which I think
3 the Court has to take judicial notice of under Evidence
4 Code 451, so would be my intention to take judicial
5 notice of that. Anybody want to be heard on any of those
6 rulings?

7 MR. SONDEHEIMER: Yes, Your Honor. Regarding the
8 Del Norte School District document, certainly the Court
9 can take judicial notice of an official public record but
10 not for the truth of the facts that are stated in the
11 record. And the Court indicated an intention to take
12 judicial notice of the underlying facts that are in --
13 that are in that document. It's a point in time
14 document, it's -- judicial notice of the facts that are
15 stated in the document, it is not appropriate --

16 THE COURT: I understand your argument, that's
17 generally the rule, but I believe the last subdivision of
18 Evidence Code Section 452 specifically says the Court can
19 take judicial notice of facts that are well-known or
20 easily ascertainable.

21 MR. SONDEHEIMER: I think the Court can take
22 judicial notice that the district reported that number of
23 vacancies. But whether that is actually true or whether
24 that's actually true as of today is -- the Court cannot
25 take judicial notice of that. With respect --

26 THE COURT: All right. I am willing to limit to
27 say I will take judicial notice to say that the district
28 has reported as of the date on the documents that there

1 was that many vacancies in the various categories and
2 withdraw distinction the school district misreported,
3 fine, but that's certainly what they reported. Want to
4 be heard, Mr. Shah?

5 MR. SHAH: No, Your Honor.

6 MR. SONDEIMER: If I may briefly, regarding the
7 Shaw case we are certainly prepared to address what, if
8 any, impact that case has. But it is Plaintiffs'
9 responsibility to put forward their points and
10 authorities and in the moving papers it's their burden.
11 And to -- we submit would be unfair for the Court to take
12 judicial notice to take argument on the Shaw case.

13 The Court can take judicial notice of its
14 existence, but we believe that Plaintiffs have waived
15 argument on the relevance of the Shaw case.

16 THE COURT: That is similar to your argument
17 that you made on the other papers that were received
18 today which I haven't thoroughly reviewed --

19 MR. SONDEIMER: It's similar, yes.

20 THE COURT: You are saying they should have
21 given us those authorities --

22 MR. SONDEIMER: It's their burden. They have
23 made the argument on it, if I may, just because it
24 doesn't provide us a fair opportunity to respond in
25 writing for the Court to give due consideration.

26 THE COURT: If at any point you want more time
27 to respond let me know, okay?

28 MR. SONDEIMER: Thank you.

1 THE COURT: That goes for the other documents
2 that -- it's my understanding we are going to go forward
3 today, but if anybody feels like they were prejudiced
4 because of late filed documents and wants additional
5 time, let me know that. And if I make any ruling from
6 the bench today that you think would change, if you had
7 more time to respond, let me know that, and I will hold
8 off making the final ruling, okay? That goes to both
9 sides.

10 MR. SONDEHEIMER: Thank you.

11 MR. SHAH: Thank you, Your Honor.

12 THE COURT: Counsel, I'm not sure how you see us
13 proceeding today, but what I thought we would do is I
14 would maybe tell you my thoughts -- preliminary thoughts.
15 I haven't decided how I'm going to rule, but I have some
16 thoughts that might help you focus your argument as to
17 the things that you think would make a difference to me.
18 If you would rather just make -- make your first
19 arguments first, that's fine. I will consider that.

20 But if you want to hear my thoughts on it first
21 I will tell you what my thoughts are.

22 MR. SHAH: Would appreciate your thoughts, Your
23 Honor.

24 MR. SONDEHEIMER: We agree.

25 THE COURT: I have spent most of the last week
26 familiarizing myself with the factual and legal
27 contentions. And I started -- I can say just started
28 doing my legal research into what I think complicated

1 areas of federal, state, and state both statutory and
2 constitutional law.

3 I was struck by Justice Jenkins' statement in
4 the campaign for quality education decision that was
5 cited in the moving papers where he said that education
6 is not a subject within the judiciary's expertise. I
7 have to tell you I feel that's true.

8 I have been a judge or lawyer for close to
9 forty-five years. Lot of the issues that are before me
10 in this case are new to me, and I'm trying my best to get
11 through them. And that's why I said I appreciated what I
12 thought was excellent briefs from you to help guide the
13 Court in making this decision.

14 It appears that the school -- local school
15 district has not been providing every student with the
16 services and education that they are entitled to under
17 the law, and that may be in dispute, but at least from
18 the facts that have been presented to me that's the
19 situation.

20 Sometimes it is absolutely disturbing from what
21 I have read as to the effects on some of the students.
22 If the allegations are true, and we are at the very early
23 stage in the litigation, most of this appears to be at
24 least largely due to staff shortages in the area of
25 special education teachers, various therapists, and
26 especially aide in the special classes

27 These shortages appear to have resulted in the
28 law not being complied with with regard to providing

1 services. However, the issuance of a preliminary
2 injunction as both sides pointed out is subject to the
3 sound discretion of the Court, and I at this point have
4 serious doubts as to whether granting the pendente lite
5 relief sought by the Plaintiffs is appropriate at this
6 time.

7 First ordering a receivership of the Del Norte
8 Unified School District appears to be an unusual if not
9 completely unprecedented drastic as well as extraordinary
10 remedy, and Plaintiffs may wish to focus my attention on
11 the authority for doing so.

12 But it appears not to be a practice that's
13 occurred. Seeing cases in my preliminary research which
14 indicates that that, you know, taking over school
15 district is sometimes done by the state board for
16 financial reasons and mismanagement, but I haven't seen
17 it for when the district has not provided educational
18 services.

19 I am particularly reluctant to take such a step
20 when the district has not been a party to this action. I
21 have serious concerns about whether the Del Norte Unified
22 School District is indispensable and necessary party, and
23 I want to hear from counsel about that. And I expected I
24 will be asking if there's a resistance to joining the
25 school district that I want briefing as to whether or not
26 the -- it would be appropriate for the Court to order the
27 joining of the school district pursuant to Code of Civil
28 Procedure Section 389.

1 I question whether the district has been
2 accorded this due process rights to respond to the
3 allegations with regard to failure to provide services.
4 I also question whether the local school, the board and
5 the superintendent should have an opportunity to address
6 the problems rather than usurp that authority and tell
7 the state to do it.

8 I don't know at this point whether the local
9 board or superintendent have even been presented with the
10 extent of the deficiencies alleged in this action other
11 than those related to complaints that were formally filed
12 with the State Department of Education which I have gone
13 through the compliance improvement and monitoring
14 program.

15 Also the request is for an order to the State
16 Department of Education with or without receivership to
17 immediately take all actions necessary to ensure that all
18 disabled students with exceptional need receive full and
19 equal access to a program that meets the prevailing
20 education standards with the state.

21 To me that seems like a vague and broad order
22 at the pendente lite stage. Seems like the Court would
23 be saying, yeah, there's a problem. The state, you are
24 to figure out what that problem is and immediately to fix
25 it. This apparently is to be done without benefit of
26 pendente lite or evidentiary hearing resulting in
27 findings of fact to identify the problems that are to be
28 addressed.

1 And I realize as of this morning there is an
2 objection to Dr. Hernandez's declaration, but in his
3 declaration indicates that he has experience and working
4 with Court oversight of the L.A. School District in which
5 they had fifteen years of Court orders to fix the
6 problems, and they weren't able to do it in fifteen years
7 with Court oversight.

8 And again, that makes me wonder about if this
9 is really the best way to go about the problems, having
10 the Court order to be done, especially in what appears to
11 be a vague way. I understand why Plaintiffs are saying
12 they want a vague order as opposed to very specific
13 orders, but I don't think it gives much guidance.

14 But there is case law that says better tell the
15 state you figure it out, you are the experts, but to me
16 giving such a vague order really doesn't help. They are
17 already under -- under legal obligation to make sure the
18 services are provided. And they appear to be going --
19 doing that through their monitoring program that they
20 have, and so I have just serious doubts about the
21 vagueness of the requested order.

22 State does argue it has in compliance state
23 program already monitoring the local school district at
24 their mid-tier level of scrutiny and has a plan in place.
25 I am reluctant to think that this Court should at the
26 pretrial stage upend the department with as I indicated
27 vague order to do more about solving the problem.

28 It is not clear to me exactly at this stage,

1 again, don't have much of a record as to what the Court
2 would expect the department to do, and more importantly,
3 how the Court would enforce such an order, how am I going
4 to show they have the ability to do it if I don't know
5 more about what the situation is.

6 It further appears to me I have no record that
7 the state has a ready source of special education
8 teachers and aides that it could simply drop into this
9 district to solve what appears to be the biggest concern,
10 and that is to staffing shortages. I don't know where we
11 would would get those -- where the state would get those
12 people to immediately solve the problem.

13 Again, we are talking about immediate thing that
14 the district does have -- excuse me, the state has put in
15 place a corrective action plan, call it something
16 different, that requires the district to be working on
17 staffing. And it is seems to me in a lot of ways that
18 the local district might be in a better place for making
19 those decisions.

20 I don't know, again, I don't want to imply that
21 this untractable problem is not serious or that it's
22 unsolvable. However, I have serious reservations that
23 the way to do it is through this vague pretrial order
24 that is -- that would be made without input from the
25 district.

26 So those are my initial thoughts, and I will
27 allow counsel to address -- we will start with Mr. Shah.

28 MR. SHAH: Thank you, Your Honor. Your Honor, I

1 appreciate your thoughts and appreciate your pouring over
2 the extensive evidentiary record and making the
3 preliminary findings of the disturbing effects of the
4 staffing shortage on the students and families in this
5 courtroom. Very much appreciate you paying attention to
6 this issue.

7 I want to first start, Your Honor, with your
8 doubts regarding the relief in putting the district on a
9 receivership. Your Honor, the Plaintiffs believe in
10 finding the authority for placing the district on any
11 kind of receivership to come directly from the Butt
12 Court, Your Honor.

13 The Court at page 695 states that despite having
14 no statutory authority, the Court nevertheless has the,
15 quote, equitable authority to enforce its constitutional
16 judgments, to transfer to the superintendent of public
17 instruction, also the defendant here, the authority over
18 the districts -- the district board statutory authority
19 over the district.

20 So that is one place, Your Honor, in which
21 Your Honor has the authority to go ahead and place the
22 district on that receivership.

23 THE COURT: Counsel, I don't want to interrupt
24 your train of thought, but I think Butt is a lot
25 different case. In Butt talked about this, what they
26 were doing was an extraordinary remedy, but it was
27 different situation.

28 Basically came down to solving the issue by

1 ordering the state to make a loan of already appropriated
2 unexpended funds to stop a school district from closing
3 six weeks early that would have affected thirty-one
4 thousand five hundred students who were not going to be
5 able to finish, get the credits they needed to go to
6 college, they were going to be left without having
7 daycares for six weeks with the families, where those
8 kids going going to. Talked about extraordinary crisis
9 of a magnitude that was huge.

10 It was relatively easily solved by just
11 ordering the state to make a loan. It wasn't ordering
12 the state to go in and fix, you know, type of problems
13 that we are talking about.

14 MR. SHAH: Certainly, Your Honor. Two
15 responses: The first is the comparison here, I recognize
16 that in that case there were thirty-one students --
17 thirty-one thousand students and the district shut down
18 as a whole, but the scope of the harness it's recognized
19 under the constitutional violation is that of the entire
20 group of students who are being impacted here, that being
21 the disabled students throughout the district.

22 Almost all of them are being impacted by the
23 staffing shortage, and you have lots of days of schools
24 that are actually worse here than they were in Butt, you
25 have -- some of my clients, Your Honor, have already
26 missed eight to ten weeks of school. By the end of the
27 school year they are going to miss about fifteen weeks.
28 They already only missed six weeks in the Butt case.

1 But the second, Your Honor, I recognize that in
2 Butt you are latching onto the fact there was already
3 appropriate money. There are tools here that the state
4 has admitted in its declarations that it has to fix the
5 problem. The CIM process, Your Honor, they can put the
6 district on a more intensive monitoring tier.

7 What they are doing right now is in that middle
8 tier telling the district without the assistance of any
9 technical assistance providers from the state to fix
10 their own problem, and they are leaving it to their
11 discretion. Your Honor, that is the problem is that this
12 district has for years as the factual record details been
13 experiencing this, since the COVID-19 pandemic, they
14 haven't been able to get themselves out.

15 What we are asking here, Your Honor, for the
16 state not to wait until the end of the year. They are
17 throwing in at this point, Your Honor, the towel on the
18 school year saying those students have to wait until the
19 end of the year when maybe the district, and they said
20 this in their declaration, that the district is aimed to
21 get the staffing crisis fixed by the end of the year.

22 Apparently if the district doesn't come back
23 with a good problem -- or solve the problem then they
24 might step in a little bit more, put them on more
25 intensive monitoring tier. We are asking that happen now
26 and these students not be forced to wait until the end of
27 the year, but there are tools.

28 THE COURT: I don't have a record before me

1 saying what those tools are that they were going to do
2 that would fix the problem now. I have serious doubts,
3 and nothing has come to my mind about what ability the
4 state has to fix the problem now. I wish we could. But
5 I just not -- I don't know what it is, I mean, putting
6 them on a higher tier, what was that going to do? I
7 don't have a record for that.

8 MR. SHAH: Certainly, Your Honor. Actually
9 discussed a little bit in the declaration, I believe it's
10 Shiyloh Duncan-Becerril, and in that she talks about the
11 more intensive monitoring, shows they have the ability to
12 provide technical assistance to the school district. I
13 recognize that doesn't mean that the problem is going to
14 be fixed tomorrow, but what it does mean the district
15 goes a lot faster than it is currently going in terms of
16 that kind of state intervention.

17 With what that means I believe the Butt Court
18 really stands for this precedence that the state cannot
19 be allowed to just sit idly by while it is waiting for
20 the district to try to figure out its own problem. Does
21 get me to your concern about whether or not the district
22 has been afforded the proper opportunity.

23 But Your Honor, there was a case in which the
24 state made that argument. They wanted the district to
25 come in as a party. Now my colleague and I have been
26 counsel on multiple cases like this where Court -- every
27 Court has rejected that stating the Court has the
28 ultimate duty to step in, fix the problem, they cannot

1 delegate that authority to the state.

2 Even the current monitoring process, the
3 monitoring tier on which the district is providing them
4 so much more authority than the state constitution allows
5 the state to provide them, when you have students who are
6 missing so many days of school, even the students in the
7 school, Your Honor, they are actually not getting
8 virtually any instruction at all in the classroom.

9 There's just one more point to this. There are
10 declarations in the record, I believe, I apologize not
11 remembering the name of the parent, where the parent
12 actually has been forced to change her schooling from
13 full-time college to part-time college. Just one example
14 of the parent who similarly has been forced to get
15 day-care has to take her son to the beach and to the
16 grocery store because he hits himself eighty times a day.

17 And the class of students, Your Honor, are --
18 they are more vulnerable than the students. They are
19 disabled students who because of their disability, being
20 a critical stage of their development, are not going to
21 recoup the skills through compensatory education the way
22 the non-disabled kids did in the Butt case.

23 Even more so, Your Honor, you have students at
24 the high school level who are not in school to get a
25 diploma. They are there to get the functioning skills,
26 cooking, cleaning, the ability to use the bathroom,
27 counting money, they are going to age out of the system
28 very soon. What they need are the skills to get out of

1 that system, be able to integrate with the community.

2 THE COURT: You said they are going to age out.
3 Doesn't the state have the ability to order that
4 compensatory education continue beyond the time that they
5 would normally not, that they would only age out --

6 MR. SHAH: They do have the ability to order
7 compensatory education, but district does not have the
8 ability to pay that right now. There are --

9 THE COURT: You say they don't have the
10 capacity, that's one of the things you want to change by
11 having the state take over. But as far as aging out my
12 understanding that's not really a limitation when it
13 comes to compensatory --

14 MR. SHAH: That's not a limit with respect to
15 compensatory education, but it is a demonstration for
16 however long it takes them to get that, reach that
17 compensatory education. They will not be in school, they
18 will be at home, not living independent life to which
19 they are entitled, at least the opportunity to live that
20 independent life.

21 My apologies, Your Honor. The next point that
22 I would like to address is your concern about the Butt
23 Court order, recognizing, of course, we made the request
24 for an order for the state to take all immediate steps
25 necessary because that was the exact language that was
26 used in Butt when the Court reached a separation of
27 powers concerns.

28 Recognizing, Your Honor, none of us are experts

1 in the day-to-day affairs of a school district,
2 recruiting staff, and that's why, Your Honor, we don't
3 ask for you to be looking at the day-to-day affairs of
4 the district but for the state that has recognized that
5 it has the tools to come in and do this, to come in,
6 actually do it.

7 The state, Your Honor, has never said it does
8 not have the remedy in this case. They have never said
9 they don't have the tools to come in and fix this
10 problem. They just said that they have a compelling
11 interest in allowing the district to manage its own
12 affairs.

13 That's exactly what the Butt Court and Serrano
14 Court and O'Connell Court have all rejected is the idea
15 that the district -- there is compelling government
16 interest in local control.

17 That's antithetical to the way the state
18 constitution, the way education works in California.
19 Your Honor, I have more than I can get to in terms of the
20 substance of the legal claim, but I recognize that
21 Your Honor might have some more questions for me and for
22 my opposing counsel on the remedies, so I would like to
23 stay there if Your Honor wishes.

24 THE COURT: Yes, I am primarily concerned at
25 this point with remedies.

26 MR. SHAH: Certainly, Your Honor.

27 MR. SHAH: That's it for me, Your Honor, right
28 now.

1 THE COURT: How do you folks intend to proceed
2 with regard to who is going to be speaking? Am I going
3 to have five attorneys speaking on your side? That is
4 not really what I want to do.

5 MR. SHAH: It will primarily be me, Your Honor.
6 My colleague might chime in, but it will just be the two
7 of us.

8 MS. RICE: Yes, Your Honor.

9 THE COURT: Did you have something?

10 MS. RICE: No, Your Honor. Rather than whisper
11 into my colleague's ear I might ask the Court to indulge
12 on my making specific argument, but normally it will be
13 Mr. Shah. Thank you, Your Honor.

14 THE COURT: Mr. Sondheimer?

15 MR. SONDHEIMER: Certainly, Your Honor. I guess
16 just for point of clarification did I understand that I
17 will limit my remarks at the moment to the issue of
18 remedy that the Court has raised? Does the Court
19 anticipate addressing other issues because I would like
20 to emphasize a few.

21 THE COURT: I want to hear what you have to say,
22 what you think is important, but I have read your briefs.
23 If you want to expand on that, by all means, feel free to
24 do that. As far as what's most -- what I think is really
25 critical today is remedies whether or not I'm going to
26 issue a preliminary injunction which is extraordinary
27 relief.

28 MR. SONDHEIMER: As the Court knows, we have

1 identified that the relief that the Plaintiffs are
2 requesting in this matter is indeed extraordinary
3 unprecedented relief. Identified statutory authority
4 that exists for the state to establish a receivership
5 over school districts for financial hardship.

6 There is complex system in place to even avoid
7 the state even needing to reach that stage, but
8 nevertheless, the authority exists, and I understand that
9 that authority has not been used for the last decade.

10 It's limited to that area, and that actually
11 ties in with another reason why the Butt -- circumstances
12 in the Butt case are distinguishable. That of course
13 involved financial hardship to a district and the state,
14 there's perhaps more of a justification for calling on
15 the state to step in to avoid the catastrophic
16 circumstances that the Court's already described.

17 Here there is no such authority giving the
18 state essentially a broad mandate to step in to take over
19 a district to make sure that it's fixing staffing
20 problems or specifically addressing the needs of students
21 with disabilities. So the Butt circumstances are quite
22 different from those here.

23 Plaintiffs are suggesting that the compliance
24 improvement monitoring process, CIM process as we refer
25 to it, the state could do more under that process. At
26 the same time their own declarant suggested that process
27 is insufficient, so I am hearing two things from
28 Plaintiffs on that. The point about the CIM process,

1 Your Honor, there is a system in place for the state to
2 oversee the district, make sure that it is doing what it
3 is required to do.

4 There are established criteria for, as we have
5 set out in some detail in our papers for what level of
6 monitoring is appropriate. So it's not sufficient to
7 just say, well, now we filed a lawsuit, we provided all
8 the declarations, now the state knows there's a big
9 problem here. There are established procedures and
10 criteria and the state has -- there's no showing that the
11 state is not following that process.

12 In fact, our showing is the state has -- is
13 aware that there's a staffing issue. The district has
14 represented that it is working on it, it's provided plan
15 to the state, those have been have been approved. So
16 there is process in place to address this.

17 And the Plaintiffs to say that the state is
18 sitting idly by is not correct. We have demonstrated
19 that some of the Plaintiffs and other students have
20 submitted complaints about the very issues they are
21 complaining about in this lawsuit. The state has
22 addressed those through -- by requiring corrective
23 actions of the district. The time for compliance for
24 most of those corrective actions has not yet begin to
25 run. It's --

26 THE COURT: I don't want to destroy your
27 thought -- or train of thought, but the nagging question
28 that I have is what happens come the end of the school

1 year and the school district has significantly fallen
2 short of increasing the staffing? What happens now? Are
3 we going to be stuck for going through another school
4 year? Are we going to put them on another improvement
5 plan at a higher level of scrutiny that is going to get
6 more time, lose another year? That's what really scares
7 me in this case.

8 MR. SONDEIMER: I understand the concern,
9 Your Honor, certainly. I can't speculate as to what the
10 state's action might be in that circumstance. However,
11 the Plaintiffs have -- their first line of course really
12 should be with the district itself which is responsible
13 for administering the special education system in the
14 district.

15 They have chosen to leap over that step and try
16 to hold the state responsible. Not only that but they
17 have also -- there are established procedures through due
18 process hearings as well that they have not availed
19 themselves of to address these problems.

20 And it's not sufficient for the Plaintiffs to
21 say, well, they can't fix all of the problems. Well, the
22 law does not require all Plaintiffs in unnamed -- all
23 members of an unnamed class to pursue due process
24 hearings to raise issues that are broader than those
25 raised in the individual Plaintiff's complaint.

26 So there are established remedies. Those
27 remedies are important, Your Honor, because as the Court
28 noted in the Hayes, in the Hayes case, the IDEA was

1 established to -- Congress intended that the act to serve
2 as a means which is local agencies could fulfill their
3 requirements under equal protection.

4 The requirement of exhaustion of remedies is not
5 just bureaucratic check-off-the-box requirement. It's
6 Congress intended that student -- putting in place
7 mechanisms in the IDEA, now enforced through state law as
8 well, to provide a remedy for students who believe that
9 they are not receiving the services that they are
10 entitled to.

11 So Plaintiffs are essentially seeking to double
12 leapfrog by agreeing this action not seeking relief
13 through established procedures that are provided under
14 law, not seeking relief against the district but instead
15 going straight after the state.

16 THE COURT: I was going to ask you your position
17 is still that there has to be an exhaustion of
18 administrative remedies, you argued that. And of course
19 in their reply which you didn't get a chance to respond
20 to they said that doesn't apply, this is a state
21 constitutional issue and IDEA doesn't apply.

22 Is it still your position that administrative
23 relief does have to be exhausted? Hayes seems to say
24 that but --

25 MR. SONDEIMER: Your Honor, Hayes, well, I will
26 be happy to address all of the arguments that Plaintiffs
27 have raised, but with respect to Hayes if you are
28 referring to the Plaintiffs suggestion Hayes suggested

1 constitutional issue can exhaust --

2 THE COURT: I believe you already have stated
3 constitutional issue, clear under federal constitution I
4 think --

5 MR. SONDEHEIMER: Hayes and the other case, the
6 other authority cited by Plaintiff simply establishes
7 when there is a facial challenge to a policy or statute
8 that exhaustion is not required.

9 But that's not the circumstances here, and the
10 Plaintiff is not alleging there is any state policy
11 involved here.

12 In fact, let's see, in the Grossmont, Your
13 Honor, in Grossmont Union High School District versus
14 Department of Education, 2008 case at 169 Cal.App.4th,
15 869, the opinion side is page 885, the Court rejects the
16 claim that exhaustion administrative remedies is not
17 required. Also case involving state mandate so it
18 involved constitutional issue. So --

19 THE COURT: Specifically talked about
20 constitutional issues you said?

21 MR. SONDEHEIMER: Yes, it rejected the claim that
22 exhaustion administrative remedies was not required in
23 connection with the constitutional claim related to the
24 unfunded mandates.

25 THE COURT: I have not read that.

26 MR. SONDEHEIMER: Just briefly as well about a
27 preliminary remedy shouldn't require that -- should
28 provide specificity so the department would know what it

1 must do to comply in the interim while the case proceeds
2 to ruling on the merits. The Plaintiffs not only have --
3 are requesting vague relief but have not identified, I
4 think the Court already indicated what specific steps the
5 state could take to remedy the problem while this case
6 remains pending until final decision merits.

7 We appreciate the Court's comments and its
8 understanding of the issues with respect to the mandate.
9 Thank you.

10 THE COURT: Mr. Shah?

11 MR. SHAH: Yes, Your Honor. I want to get also
12 to the exhaustion argument if I may but first address the
13 opposing counsel's points to the relief. First,
14 Your Honor, opposing counsel is incorrect that Butt was
15 limited in terms of the ability to put a district on
16 receivership only to financial problems.

17 As I stated earlier there was no statutory
18 authority there that was used to have the superintendent
19 take control over the Board of Education. They were
20 trying to manage the affairs of the district that made
21 them spend money irresponsibly.

22 Similarly here there is evidence in the record
23 that the district is not only having a difficulty with
24 retaining recruiting staff but that the culture of the
25 district is causing significant burnout in the district
26 and that they are not using and not appropriating staff
27 appropriately or efficiently.

28 They are rotating aides throughout the various

1 school sites, depriving specific disabled students of
2 their right to one-on-one aides and their classroom aides
3 actually causing a lot more disruption than it would to
4 keep them, have them stay put.

5 As Your Honor might know it is established in
6 the declarations disabled students, especially students
7 with intellectual disabilities like autism, they thrive
8 on consistency. They are being subjected to more trauma
9 by having the aides taken away from them.

10 The culture of the district, Your Honor, is
11 something that is going to -- it can change right away or
12 at the very least, Your Honor, can be solved more quickly
13 if the state were forced to take some control over the
14 school district.

15 THE COURT: Mr. Shah, I think this gets to the
16 crux of the issue we have today, what could the state do.
17 As you point out, I say you in the declarations, we
18 are -- this is a remote area. You can't find more remote
19 area in California, we are at the very edge on the west,
20 very edge on the north, hundreds of miles from the large
21 cities, and the declarations established that for
22 whatever reason they can't fill positions.

23 And nothing has been pointed out to me to
24 indicate where those positions are going to come from.
25 Does the state have the ability to get people who I
26 assume are not paid much as instructional aides which
27 seems to be the biggest problem. Where are those aides
28 going to come from, other than locally, I would think.

1 It's just not -- I just didn't find anything in
2 the record indicating that it's better for us to tell the
3 state to do it as opposed to have the state give
4 supervision and oversight and maybe some technical
5 assistance to -- for the local district to try to fill
6 those positions.

7 MR. SHAH: Certainly, Your Honor. If Your Honor
8 wants to force the state, ask -- order the state to
9 provide more technical assistance, Plaintiffs would be
10 very much on board with that plan. Again, the current
11 monitoring tier formulated is not visualized.

12 The state has told the district to create a
13 plan and to fix the problem. They have identified one
14 root cause which is the existence of their personnel
15 commission, then they have looked at that plan said you
16 are good to go. They haven't used the benefit of
17 educational experts who like Dr. Hernandez who can come
18 in, tell the district exactly what kind of recruiting
19 they should be doing, what kind of partnerships they
20 could be making with local and national universities to
21 funnel individuals in.

22 There is no guarantee that's happening,
23 Your Honor, because you don't have the experts on the
24 ground to come in and do that. And because of that,
25 Your Honor, they have only proofed that plan, they
26 haven't done anything more. Again to your -- in response
27 to your question of what will happen at the end of the
28 school year if the district ends, not coming up with good

1 plan are we going to have to go through this next school
2 year? The state hasn't provided a response to that.
3 That's the reason, Your Honor, why we want them to
4 ratchet up the monitoring tier right now.

5 Again, Your Honor, if Your Honor doesn't feel
6 comfortable with putting the district on a receivership
7 which we still very much believe because of the culture
8 of the district and the fact that recruiting individuals
9 to rural area is a statewide concern.

10 If Your Honor doesn't feel comfortable that --
11 to put them on higher monitoring tier, not wait until the
12 end of the school year to do that --

13 THE COURT: I also don't have any proof what the
14 state is doing and the level of supervision and level of
15 monitoring is going on will not be sufficient. I am kind
16 of guessing whether -- I don't have a crystal ball to
17 tell me if that's going to work or not. I would think
18 the very fact that this lawsuit is going on might be
19 additional incentive to the district if the district
20 isn't already incentivized enough.

21 MR. SHAH: We have in the record are two things
22 that address -- one is the declaration of Dr. Hernandez
23 talking about how the current system oversight is really
24 non-existent, it's very lax. And that what is required
25 to ensure that staffing concerns are changed in that
26 culture of burnout is changed for staff is to ensure
27 there is more third party oversight.

28 The very least, Your Honor, there is evidence

1 that providing more technical assistance, providing more
2 third party oversight will put a plan in place that will
3 be better solidified to get to that concern, Your Honor.

4 THE COURT: Mr. Shah, big concern I have now is
5 you're asking the Court to make that decision now at
6 pretrial level based upon the declaration by one person
7 as opposed to Department of Education that presumably has
8 some expertise in this issue. And the department with
9 its experts is indicating this is what we need to do.

10 You are asking me at the pretrial level without
11 benefit of cross-examination, even live testimony, say
12 no, that's not sufficient. I am very hesitant to do
13 that.

14 MR. SHAH: Understand your concern, Your Honor,
15 if I can maybe frame it a different way. We are not
16 asking for Your Honor to do is for -- is to make a
17 judgment about what the proper plan is. It's to not
18 allow the state to just wait -- the record is clear that
19 the district has gotten itself into this crisis and they
20 have not remedied it at this point.

21 What the state is doing is saying, go ahead,
22 district, we want you to fix it, go fix it. That's what
23 is happening. I think would be very reasonable for
24 Your Honor to say that doesn't seem sufficient here given
25 how long this crisis has gone on. I want you to do more,
26 I want you to do more right now.

27 That feels to us, Your Honor, like you are not
28 making any kind of technical evaluation of what is a good

1 plan, what is a bad plan, more telling the state what
2 they have been doing up to this point is just the same,
3 that they need to be doing more.

4 Frankly, Your Honor, to the Defendants' point
5 of having to put the state on notice and given the
6 opportunity to fix the problem, they have had notice of
7 this now for at least a year, and the very remedy that
8 they are ordering the district to provide compensatory
9 education are ones that they know the district does not
10 have the capacity to do.

11 I would like to get Your Honor to the
12 exhaustion argument, but I don't want to do that if
13 you --

14 THE COURT: No, that's fine.

15 MR. SHAH: Thank you, Your Honor. One second,
16 please.

17 Your Honor, now the Plaintiffs have, of course,
18 made the argument and you have heard it from the
19 Defendants' response that the IDEA plain language does
20 not apply to -- does not apply to state constitutional
21 claims. But Your Honor, let's say we live in the world
22 where it applies. We have met three exceptions to
23 exhaustion well-established.

24 First is that exhaustion administrator remedies
25 here would be futile. As I just stated the very remedies
26 that the department seek to have the Plaintiffs get from
27 the office of administrative hearings is compensatory
28 education.

1 You have three Plaintiffs who are owed
2 compensatory education right now who the district has not
3 been able to provide that compensatory education to.

4 One student, Shawn T is a Plaintiff, he has been
5 owed compensatory education for over a year now, has not
6 received all of his hours because they don't have the
7 staff to provide it. For that reason it would be futile
8 for every single student to go to the office of
9 administrative hearings to exhaust the remedies.

10 The second exception is very-well related, the
11 emergency exception recognized by the 3rd Circuit and the
12 9th Circuit Court of Appeals. And there, Your Honor, the
13 Court stated that even though there is going to be
14 immediate mental harm to a student, that is sufficient to
15 show to meet the exception to exhaustion.

16 That is what Plaintiffs have done here. They
17 have shown that compensatory education at these critical
18 ages of development is not going to be enough to remedy
19 the harm. They need to get the problem fixed sooner
20 rather than later, not just to rely on compensatory
21 education.

22 The third point, Your Honor, is the systemic
23 exception. Now, Your Honor, I have been counsel now in
24 three cases with the state, has the exact same argument.
25 They have pointed to the 9th Circuit cases they cited,
26 said that the 9th Circuit has never applied to systemic
27 exception.

28 First of all, federal reading of what is the

1 systemic issue is more narrow than what it is in state
2 law. We continue to argue that state law exceptions
3 apply, but even looking at the federal cases they cite,
4 Hoeft, H-o-e-f-t, at 1305, the Court there was concerned
5 with eligibility criteria attacks. In Student Aid versus
6 San Francisco Unified School District at page 1082 they
7 were concerned with timing evaluations and taylorred
8 services.

9 Here you have Plaintiffs who are not receiving
10 every component of their education, physical therapy,
11 speech therapy, occupational therapy, behaviorial
12 services, the actual academic instruction and access to
13 the least restrictive environment.

14 If this is not a case, Your Honor, that concerns
15 every aspect of the special education system and requires
16 an entire restructuring. Frankly, not sure what would,
17 and the Defendants don't explain what kind of case would,
18 they seem to be making the same argument --

19 THE COURT: Can you give me the cite of that
20 case?

21 MR. SHAH: The latest case that I just cited?

22 THE COURT: Yes.

23 MR. SHAH: Student Aid versus San Francisco
24 Unified School district. That is 9 F.4th 1079. That's
25 the 9th Circuit case refusing to apply the systemic
26 exception and holding that the Plaintiffs were not
27 seeking an entire restructuring in the special education
28 system.

1 The cases that we cited, Your Honor, including
2 Tiernan and I think it was Doby Superior Court,
3 Your Honor, I don't have it off the -- these are both
4 cases that are California Appellate Court decisions
5 applying California exhaustion law.

6 Both of those cases state that where the
7 administrative hearings were designed only to a court
8 individualized relief and Plaintiff is seeking wholesale
9 systemic relief, those are situations where exhaustion is
10 excused. They don't go -- they are not requiring this
11 nuance analysis that sometimes the 9th Circuit can
12 require.

13 The reason we cited those, Your Honor, is
14 because now federal law by its plain language does not
15 require exhaustion of state -- of any state claims.
16 State law might provide a requirement as the Defendant
17 tries to argue, but if they are going to argue state law
18 requirements exhaustion then they should be limited to
19 state law exceptions.

20 It doesn't make sense to apply state law instead
21 of exhaustion law and to pull from the federal cases as
22 to the --

23 THE COURT: As far as the perhaps the facts of
24 the Tiernan case, was the systemic problem that was being
25 attacked was that districtwide or statewide?

26 MR. SHAH: It was not an education case.
27 Tiernan involved a university employee who was not
28 required to exhaust her constitutional claim for unlawful

1 termination because the body lacked authority to address
2 the duty to enact regulations regarding notice around due
3 process.

4 Knoff was the other case, Knoff versus City of
5 San Francisco, K-n-o-f-f, held that the Plaintiff
6 taxpayers who challenged tax assessor's preferential
7 treatment did not need to exhaust because they sought to
8 correct wholesale deficiencies in the system that the
9 office of administrative hearings, the exhaustive body
10 could not concern.

11 The final point that I want to get back to with
12 respect to the order, Your Honor, is that this school
13 district has been on this current level of monitoring,
14 it's in the declarations, for 2022 and 2023 school years.
15 It hasn't gotten better, it has gotten worse as the
16 declarations have shown. Even more reason for Your Honor
17 to look at what they have done and say it doesn't look
18 like it is working, I need you to do more in this school
19 district.

20 The very order that we are asking Your Honor to
21 do still is consistent with the public interest. The
22 state has not identified any prejudice that it would
23 experience here for -- from an order requiring them to do
24 more. You would still, Your Honor, be providing them
25 with discretion about how exactly to go about providing
26 the technical assistance, and that's consistent with the
27 case of American Indian Model Schools at page 295 where
28 the Court held that an injunction is in the public

1 interest if it is giving the public entity discretion
2 over how they can go ahead and regulate the district.

3 I would, Your Honor, appreciate the ability to
4 speak about the equal protection claims, how we have met
5 that standard with your indulgence.

6 THE COURT: Of course.

7 MR. SHAH: If, indeed, the state is allowed to
8 continue its passive approach to remedying the staffing
9 crisis it will continue to deprive disabled students to
10 their right to education. Each of these is independently
11 sufficient to establish constitutional violation.

12 First, of course, through denial of the hundred
13 and eighty days of instruction; second, through the
14 denial of the very tool that the state created to ensure
15 that disabled students can access an education, a FAPE.
16 With respect to the first, Your Honor, I will be saying
17 FAPE, F-A-P-E, instead of free appropriate public
18 education.

19 Your Honor, with respect to the one hundred
20 eighty-day requirement. Three quick points that I want
21 to make. First so the record is a clear that here as in
22 Butt the -- not only is the access to the full days of
23 instruction critical to ensuring disabled students can
24 access the basic components of an education like phonics
25 and handwriting function, but the loss of school days
26 have already deprived them to access to those various
27 schools throughout the district.

28 The students are either being turned away from

1 the school doors or they are experiencing incredible
 2 learning loss. They are sitting in classes where there
 3 is virtually no instruction happening at all. And that
 4 brings me to the second point which is the Defendants do
 5 not explain why this is not the statewide standard in
 6 California.

7 Not only have we, of course, cited the Shaw
 8 versus Los Angeles Unified Schoold district case at 95
 9 Cal.App.5th at page 786 where the Court stated that state
 10 statutes can set the prevailing statewide standard and
 11 that the legislature is in the business of doing so.

12 But equally to the point the statute here is
 13 the exact same kind as the one in Butt. It takes away
 14 money from school districts for not providing the full
 15 days of instruction. And in Butt at page 686 the Court
 16 stated, quote, that the statute, quote, strongly
 17 encourages a term of at least one hundred and
 18 seventy-five days. It's the exact same kind of
 19 operation, it still sets the prevailing statewide
 20 standard.

21 That brings me, Your Honor, to the second state
 22 standard that is the right to a free appropriate public
 23 education. Again, the Defendants do not contest that the
 24 special education services and supports guaranteed by a
 25 FAPE are the essential and irreplaceable components of
 26 access to an education for disabled students just like in
 27 Butt. They ensure they can get the basic components of
 28 an education.

1 And the Defendants' reliance on Rowley is not
2 only misplaced, Rowley actually turns in favor of
3 Plaintiffs. Rowley stated FAPE cannot guarantee, quote,
4 strict equality. It cannot quote maximize the potential
5 of disabled students. That is at page 188 through 89.
6 But then it goes on on to say FAPE does guarantee equal
7 access. That's at page 200.

8 Butt at page 686 cites this exact language. It
9 says that the state constitution cannot guarantee, quote,
10 strict equality but can guarantee equal access. For that
11 reason the standards are consistent, and that is exactly
12 what we are asking for here. We are asking for disabled
13 students to get equal access to school, and that's what
14 the FAPE facilitates.

15 THE COURT: You do talk about intradistrict
16 protection as opposed to interdistrict. But do I have
17 evidence that the non-special education kids in the Del
18 Norte Unified School District are receiving that hundred
19 eighty days? I'm assuming they are, but do I have
20 evidence of that?

21 MR. SHAH: Your Honor, there is a statutory
22 presumption of the evidence code that they are receiving
23 the one hundred eighty days of instruction, that's what
24 we rely on, Your Honor. The Defendants do not contest
25 that the non-disabled students are getting access to the
26 hundred eighty days and access to the school itself.

27 Appreciate the question because it brings me to
28 the next point which is we have identified two similarly

1 situated groups. One is the disabled students throughout
2 the state who are statutorily entitled to a FAPE are
3 getting it according to the evidence code presumption.

4 And frankly, Your Honor, the Defendants'
5 argument that these disabled students throughout the
6 state are not receiving a FAPE is quite preposterous.
7 They are receiving federal money to ensure every district
8 in the state is providing disabled students with the
9 right to FAPE. It would be a crisis of national concern
10 if the largest economy was not --

11 THE REPORTER: Your Honor, I'm thinking I need
12 to have a break.

13 THE COURT: We will be in recess for ten
14 minutes.

15 (Recess.)

16 THE COURT: We are back in session. Matter
17 Olivia R. Mr. Shah, you were in argument when we took
18 our break.

19 MR. SHAH: Yes, Your Honor, I have just one
20 quick point to make with respect to the FAPE as a
21 constitutional requirement and then one more point to
22 make with respect to our requested order with your
23 indulgence.

24 The final point that I want to make, Your Honor,
25 is that the Defendants' argument that we have not
26 demonstrated the similarly situated group is wrong for
27 two reasons: First as I stated we have identified
28 disabled students throughout the state as the comparative

1 group who are statutorily entitled to and by evidentiary
2 presumption receiving a FAPE.

3 But even more than that we have identified
4 non-disabled students in the district has the similarly
5 situated group. That is because the equal protection
6 jurisprudence in California is premised on the idea that
7 every single student is similarly situated in that they
8 are entitled to a basic education and access to that
9 education and for disabled students FAPE and the one
10 hundred eighty days each enabling facilitate that access.

11 Under the Defendant's formulation a school
12 district could just de-enroll every disabled student and
13 only allow non-disabled students into the district, that
14 is what's virtually happening here, and the disabled
15 students could not make out other than equal protection
16 claim.

17 The holding in Serrano actually rejects that
18 premise at page -- don't have the page but, Your Honor,
19 the Court there invalidated --

20 THE COURT: Which Serrano?

21 MR. SHAH: Serrano one, Your Honor, my
22 apologies, thank you for asking that question.

23 The Court in Serrano held that invalidating
24 state funding statute because it made access to a
25 function of student's income, that is what is happening
26 in this district, whether a student gets access to
27 education in the district is a function of their
28 disability.

1 Therefore, the comparison here is not difficult
2 as the Defendants contend. It's quite straightforward.
3 Disabled students, the Defendants do not contest, are
4 getting access to an education, and students with
5 disabilities by virtue of not getting the FAPE and the
6 one hundred eighty days are not getting access.

7 THE COURT: You are relying solely upon the
8 presumption for both disabled students throughout the
9 state and the non-special Ed kids in the Del Norte
10 Unified School District, you are relying upon the
11 presumption as opposed to other evidence that I have that
12 whether or not they are getting the FAPE, right?

13 MR. SHAH: Relying on the presumption and also
14 the holding of Shaw versus Los Angeles Unified School
15 District, that state statute can create the prevailing
16 statewide standard.

17 Equally to the point, Your Honor, is that the
18 very rights that we are talking about, the right to a
19 FAPE, the right to one hundred eighty days, they are what
20 enable access to the basic components of education. But
21 we believe was premised on the idea that they weren't
22 getting the hundred eighty days necessarily but without
23 the equal -- without the one hundred eighty days they
24 were not getting access to phonics, the ability to read,
25 what we consider an education, what we consider the floor
26 of education, a situation where disabled students are
27 locked out of the school, non-disabled students are
28 allowed to come in, that fits clean with Butts in equal

1 violation.

2 Want to get back, Your Honor, to the question
3 of the order. One thing I want to clarify we had stated
4 before that the district has been on this level of
5 monitoring, the middle tier for the 2022 through -- 2022
6 through 2023, 2023 to 2024 academic years, that comes
7 from the declaration of Shiyloh Duncan-Becerril at
8 paragraph 12.

9 So Your Honor, we've made a showing that the
10 state has taken action and it hasn't had the impact that
11 they are saying it is going to have. What we are asking
12 is for the Court to tell the state to do its job based on
13 the evidentiary findings, the evidence that is here.
14 They so far have not done individualized assessment of
15 how the school district is functioning through technical
16 assistance providers.

17 They have actually admitted that the district
18 has not reached out for technical assistance and,
19 therefore, they haven't provided that technical
20 assistance. Seems quite reasonable for Your Honor to
21 order them to go ahead and provide that technical
22 assistance when they have admitted that they have those
23 tools.

24 THE COURT: Wouldn't it be better if the
25 district was a party? We could order them to do that?

26 MR. SHAH: For the district to request technical
27 assistance, Your Honor?

28 THE COURT: Yes.

1 MR. SHAH: Your Honor, it's not necessary under
2 the holding of Butt, shouldn't be on the district's
3 obligation to reach out for assistance when the state is
4 on notice that it needs that assistance. It really is
5 antithetical to that idea, that the state had the
6 ultimate duty to provide education to drag the district
7 into this case when that hasn't been done in the previous
8 cases like Butt.

9 THE COURT: It seems to me from a practical
10 point of view if the district because a party -- lot of
11 the questions we have are the factual questions, could be
12 easier resolved, set of admission or interrogatory,
13 demand for documents. I mean, right now I feel like the
14 state is in a situation where they are responding to
15 your -- the Plaintiffs' factual allegations, and these
16 are documents that the -- or records that the state
17 doesn't really have.

18 MR. SHAH: That may be true, but the state
19 doesn't contest the evidence. They have at no point said
20 disabled students are in classrooms where they are
21 receiving instruction and they haven't made any attempt
22 to contest that.

23 There might be one solution here, Your Honor,
24 that would fit is that in addition for -- in the
25 alternative is telling the state to ratchet up their
26 level of monitoring and intervention and technical
27 assistance here is to tell the state to do its job and to
28 come back, Your Honor, for a follow-up hearing where the

1 state presents evidence about what exactly they were
 2 going to do that is actually what happened in Butt,
 3 Your Honor, I believe it was at page -- and I have it
 4 here at 694.

5 The Court there held there was constitutional
 6 violation. It told the state to do its discretion,
 7 figure out a solution, then had follow-up hearing for the
 8 the state to present evidence about what it had been
 9 doing and what it could do in the future before ordering
 10 the remedy. We believe it is important here, Your Honor,
 11 to find and establish there has been a constitutional
 12 violation to put the state -- to get the state on the
 13 hook for its duty.

14 We would be happy, Your Honor, for Your Honor to
 15 set an order to show cause in another twenty-one days for
 16 the state to come back in, say this is what we have been
 17 doing, this is how it is impacting the district in a
 18 positive way. But what we don't believe, okay, for the
 19 state to say we have been monitoring this district and
 20 the same monitoring tier for two years, that doesn't
 21 provide technical assistance. At the end of the year we
 22 will wait to see if that's enough.

23 The disabled students at this district, they
 24 can't wait that long, recognize the solution, this
 25 problem is not going to be fixed tomorrow, but the state
 26 needs to come in and fix it sooner rather than later.
 27 They have thrown in the towel for this school year.

28 The Butt court did not allow the district to

1 say, well, we will make it up the next school year. They
2 wanted the state to come in and fix the problem right
3 now. That was a unanimous decision.

4 THE COURT: Again, but different factual
5 situation, frankly, I think more amenable to fixing than
6 what we are dealing with here.

7 MR. SHAH: Certainly, Your Honor, it was more
8 amenable to fix in the immediate term because of the
9 financial shortfall. But the requirement and the duty of
10 the state to come in and take immediate action,
11 Your Honor, that was the order, that is what we are
12 asking for here. That is the amenable remedy in this
13 case. Thank you, Your Honor, appreciate it.

14 THE COURT: I may have you back up before we --

15 MR. SHAH: I would appreciate -- this is our
16 motion to respond to the Defendant's arguments. Thank
17 you.

18 THE COURT: Counsel?

19 MR. SONDEIMER: Thank you, Your Honor. Well, I
20 just have to respond off the bat to counsel's suggestion
21 state has thrown in the towel. That's not borne out by
22 the record. The state is following the processes
23 required that it is required to follow to implement the
24 IDEA through not only the CIM process but also through
25 compliant -- the complaint resolution process.

26 It's required the district to take action on
27 the complaints that some of these Plaintiffs themselves
28 have made. And some of those corrective actions have

1 already been implemented. The compliance dates for
2 others are not yet due, but they are not -- they are
3 due -- many of them are due before the -- before the end
4 of the school year.

5 THE COURT: What about counsel pointing out to
6 me that the Del Norte School District has been under the
7 same level of monitoring since the 2022 school year and
8 yet the problems apparently still persist?

9 MR. SONDEHEIMER: Your Honor, there is no record
10 that the level of problems that the Plaintiffs are
11 complaining about now happens existed for that amount of
12 time. The only compliance -- complaint that the
13 department has received in the last several years was
14 filed by one of the Plaintiffs Shawn T, I believe it was
15 in February of 2023, so prior school year, so one -- all
16 the rest of them have come in within the last four
17 months.

18 So I'm not sure --

19 THE COURT: You are saying it is not accurate
20 that the school district was under monitoring for the
21 same problem in -- I don't remember from the record.

22 MR. SONDEHEIMER: No, no, I wasn't saying that,
23 Your Honor. No, it was under the same level of
24 monitoring --

25 THE COURT: It was or wasn't?

26 MR. SONDEHEIMER: It was, for the prior school
27 year.

28 THE COURT: For the same problem?

1 MR. SONDHEIMER: No. Your Honor, sounds like
2 the Court has maybe misimpression about the way the
3 compliance monitoring process works. It's primarily a
4 result -- looks at education performance criteria
5 primarily, academic criteria as well as rates of
6 absenteeism -- goodness, forgetting some of the other
7 criteria. But basically academic performance or how is
8 the district doing in terms of absenteeism, discipline I
9 think is one of the other -- rates of discipline.

10 That's mandated by the IDEA to take the
11 results-oriented focus. Those are the criteria that
12 underlie the compliance monitoring process. There can be
13 reviews of files that may demonstrate students are not
14 receiving services required by an IEP, individualized
15 education program, but primarily the criteria are --
16 performance criteria.

17 Based on those performance criteria the district
18 has been under the same middle level monitoring criteria
19 level since the --

20 THE COURT: I think we have identified the major
21 problem that's the focus of this suit is lack of --
22 staffing shortage, all right? And that's what I have
23 been kind of focusing on more. Has the district been
24 under this mid-tier monitoring for staffing shortages
25 since 2022? Or is this something as you indicate just
26 within the last few months?

27 MR. SONDHEIMER: Your Honor, the monitoring
28 process -- I don't believe is accurate characterization

1 to say the district has been under this level of
2 monitoring for staffing problems. Staffing is, indeed,
3 one of several issues that the district identified as
4 areas of weakness and that they have included in their
5 compliance and improvement plan.

6 I know from the documents regarding the current
7 monitoring year that staffing was identified as one of
8 those issues that they are committed to addressing.

9 Honestly can't speak to what was in the plan in
10 previous years, and I don't think there is any
11 evidence --

12 THE COURT: Do I have a record of that, Mr.
13 Shah? Can I just ask you do I have a record showing that
14 the district was under monitoring and improvement plan
15 for staff shortages as early as 2022?

16 MS. RICE: I don't remember that.

17 MR. SHAH: It's not in the record, Your Honor.

18 THE COURT: Thank you. All right.

19 MR. SONDEIMER: It's also beyond the pale for
20 the Plaintiffs to suggest that, to say, well, the state
21 hasn't contested evidence about the issues that students
22 face in the district, students with disabilities are
23 facing. We have certainly in the two weeks that we had
24 to effectively to respond to Plaintiffs' papers, have
25 been been impossible to determine the nature and extent
26 of the problems independently with the district.

27 They haven't explained why the district is not a
28 party to this case. It's really unfair for them to

1 suggest that we conceded anything about -- certainly I
2 think we don't deny -- there's obviously the state is
3 aware there was an issue regarding staffing in the
4 district. How individual students have been impacted and
5 in the district is something we have no ability at this
6 point to address.

7 THE COURT: Can you address, maybe you can't
8 because, is it -- do you have an opinion at this point as
9 to whether the district is necessary and indispensable
10 party to this action?

11 MR. SONDEIMER: We believe -- we believe they
12 are a necessary and indispensable party because certainly
13 their interest are undeniably at issue in this
14 proceeding, Your Honor. And the Plaintiffs might argue,
15 well, the Court can just order relief against the state,
16 doesn't involve the district.

17 But their interests are so fundamentally
18 involved here and the state cannot adequately represent a
19 district's perspective because we are at arm's length
20 from the district, of course, even to the extent that our
21 arguments may align. I don't know what the district's
22 position with respect to Plaintiffs' allegations are, and
23 it is entitled to defend itself and put forth its
24 perspective regarding Plaintiffs' allegations,
25 Your Honor.

26 THE COURT: Okay.

27 MR. SONDEIMER: I would like to -- so I guess
28 let me respond to the Plaintiffs' first arguments about

1 exhaustion because I only addressed the Court's question
2 about constitutional issue. So beginning there, actually
3 on that issue let me start because we already had
4 discussed whether exhaustion is required for
5 constitutional claim.

6 It absolutely is, Your Honor, in addition to the
7 case that I cited, this is under state law, I bring the
8 Court's attention to the decision which is cited in
9 Grossmont, which I already provided, but County of Contra
10 Costa versus State, it is 1986 decision at 177
11 Cal.App.3d, 62 page 74.

12 It's states explicitly that it rejects an
13 argument just like Plaintiffs made here that exhaustion
14 remedies is not required for constitutional complaint.
15 Grossmont, one of the claims made by Plaintiffs relating
16 to the -- by the school district relating to unfunded
17 mandates was about violation of the protection, and Court
18 rejected the argument that exhaustion was not required.
19 It simply is not true. Constitutional issues are
20 excepted from the exhaustion requirement.

21 THE COURT: Is the Contra Costa case an
22 education case? It's okay --

23 MR. SONDEIMER: I don't think it is. I don't
24 recall, Your Honor, I'm sorry.

25 Again, just before addressing Plaintiffs'
26 specific arguments, I just want to reemphasize the
27 exhaustion requirement is tied into the whole notion
28 under the IDEA that the procedures, the substantive

1 requirements that are established under the act are
2 intended to provide a means to implement the rights of
3 students with disabilities to equal protection.

4 And for Plaintiffs to just suggest that that all
5 can be ignored, they can bring their equal protection
6 claim in this Court against the state is simply not
7 warranted.

8 First of all, with respect to exhaustion, I
9 don't want to -- I don't want to overemphasize this, but
10 we do believe it's the correct result. Plaintiffs have
11 waived argument on this, it is their burden to establish
12 the elements of their claim. They know that
13 exhaustion -- they must demonstrate as a moving party
14 that they have either exhausted remedies or excused from
15 doing so, they did not address it in their moving papers.

16 And so to line weight and raise their arguments
17 solely on reply is procedurally unfair. The Court should
18 hold Plaintiffs have waived any argument on that issue.
19 Nevertheless, if the Court is inclined to reach the
20 merits of the issue, exhaustion is required under state
21 law, didn't even hear Plaintiffs argue otherwise.

22 One of the cases they themselves cite makes that
23 clear. They have argued in the papers that exhaustion is
24 not required for state law claim. That's only true if
25 FAPE is -- if FAPE is not involved. But with respect to
26 claims involving FAPE they cite to Graham versus
27 Friedlander in support of their argument that exhaustion
28 is not required for state law claims.

1 That claim says, and I quote, "The Plaintiffs
2 must exhaust administrative remedies before filing a
3 claim for the denial of a FAPE under state law." That's
4 a Connecticut Supreme Court decision.

5 THE COURT: What was that case again?

6 MR. SONDEIMER: Graham versus Friedlander.

7 THE COURT: Can you give me the cite, please?

8 MR. SONDEIMER: 334 Connecticut, 564576, two
9 twenty-three eight Atlantic 3d, 796.

10 THE COURT: That's --

11 MR. SONDEIMER: Not a California case, but they
12 cited for the proposition that claims under the IDEA are
13 not -- exhaustion is not required for IDEA claims under
14 state law, but one of the cases specifically says to the
15 contrary. The point is that --

16 THE COURT: I was under the impression that the
17 Plaintiffs were arguing that this isn't an IDEA case, it
18 is strictly a California constitutional case, maybe
19 statutory.

20 MR. SONDEIMER: Your Honor, it is an IDEA case
21 because they are expressly arguing in support of their
22 claims that the state is responsible for denying the
23 Plaintiffs' FAPE. So --

24 THE COURT: Their argument the gravamen of the
25 case is --

26 MR. SONDEIMER: Correct, don't need to reach
27 whether the gravamen of the case is ultimately denial of
28 FAPE because they are expressly making their claim

1 dependent upon denial of FAPE so -- but be that as it
2 may, state law also is very clear that even with respect
3 to constitutional claims, as long as it's not a facial
4 challenge, facial validity of a statute or ordinance.

5 For example, that exhaustion is also required,
6 as I think we put up the Campbell case in our papers.
7 It's a fundamental principle of the jurisprudence of the
8 state that exhaustion of remedies, remedies is required.
9 Undeniably there are remedies provided under the IDEA for
10 claims involving a denial of FAPE.

11 So Plaintiffs tried out all of the -- assert
12 all of the exceptions to exhaustion apply, but none of
13 them do, Your Honor. First of all, the systemic
14 exception has a specific meaning. It's when the agency
15 has adopted -- in the IDEA context, when the agency has
16 adopted a policy or pursuit of practice of general
17 applicability that is contrary to the law, we cited
18 other -- that's in the Hoeft case that Plaintiffs
19 themselves referred to.

20 We recognize that exhaustion also, systemic
21 exception applies if there is dispute about, if claims --
22 concerns the dispute resolution procedures themselves or
23 if they call for a wholesale restructuring of the
24 education system.

25 There is nothing that reaches that level here.
26 And a quote from the student aide case, Your Honor, that
27 the Plaintiffs also refer to describing problems as broad
28 and far-reaching as not enough to meet the standard,

1 systemic exception to apply. Again, quoting policy and
2 practice is not necessarily systemic or if general
3 applicability simply because it applies to all students
4 or because the complaint structured as a class action
5 seeking injunctive relief.

6 Simply not enough to throw out the idea of a
7 systemic problem as a -- there's a specific definition
8 under the IDEA jurisprudence as to what that means, and
9 the Plaintiffs do not meet that test. It's also relevant
10 to point out here, relevant number of ways, but this is
11 not class action. Not plead as class action, the
12 Plaintiffs are not purporting to bring an action on
13 behalf of any other students in the district other than
14 themselves.

15 It's not a writ of -- not seeking -- not claim
16 for Writ of Mandate, these are claims regarding these
17 individual Plaintiffs. They have alleged broader issues
18 certainly within the district, but these claims are not
19 plead on behalf of other students within the district

20 It's not systemic. The remedies are -- they
21 have argued that exhaustion would be futile. Futility
22 requires something more than just we don't think the
23 district is going to be able to provide compensatory
24 education. I would like to clarify the record.

25 The district has, it's in the record that we
26 have submitted -- the district has already provided
27 compensatory education to Shawn T regarding at least the
28 hours that he was entitled to for the previous school

1 year. He got 74, as I understand, even from the
2 Plaintiffs' declarations of 94 hours that were ordered in
3 the summer of 2023.

4 Under the department's -- the Department of
5 Education's determinations on the compliance complaint
6 filed on behalf of Shawn T, his compensatory education is
7 not even due until March 1st, 2024, so the Plaintiffs are
8 not even giving the process the opportunity to play out.

9 Same with respect to some of the other students
10 on his behalf. Compensatory education already has been
11 ordered by the department, for Monica R June 1st of this
12 year.

13 THE COURT: I'm aware of that, but I am so
14 really bothered by your earlier response that you don't
15 know what is going to happen if that doesn't -- if those
16 services aren't provided and the staffing isn't fixed. I
17 mean, that's really a huge issue with me.

18 I realize that you are not the Department of
19 Education, you are their attorney. But as I am sitting
20 here now I am thinking are we just going to be in the
21 same situation in two months from now that we are now,
22 three months from now --

23 MR. SONDEIMER: Your Honor, I understand again
24 the concern, but I think the remedy for the Plaintiffs is
25 to first with the district to address -- to address those
26 problems. Again, Plaintiff suggests its omission that
27 the district, as far as the department, excuse me, that
28 the district hasn't reached out specifically for

1 affirmative technical assistance.

2 I should make clear the department makes
3 available resources, I think we have identified them in
4 our papers, makes available resources. It's not true the
5 state just throws up its hand, does nothing. It has
6 affirmatively provided resources for districts that are
7 in the position of this district to access.

8 THE COURT: But if they don't then we are back
9 to the problem of the kids not getting -- not getting the
10 services, right?

11 MR. SONDEIMER: You know, for purposes,
12 Your Honor, for purposes of this motion the district has
13 not -- the district has not said, look, we can't address
14 this problem. In fact, what the record is it hasn't
15 reached out to the state and said (audience makes loud
16 sigh), we need the state to come in and do something,
17 because we weren't able to. District has represented
18 that it is taking necessary steps to address the problem.

19 THE COURT: What do you see as being, if there's
20 not significant progress in meeting the goals of the
21 corrective action plan, that's not the right name for it,
22 where do you see us being in the end of May if they
23 haven't done it? Do we come back here and do this again
24 and then -- where do you see us being?

25 I don't want this to be a hypothetical. I have
26 got a record before me that says this is a statewide
27 problem and that the problem is particularly acute in
28 rural remote areas, particularly Del Norte County. So I

1 don't think this is just a theoretical problem, but it's
2 a real practical problem. What should we be planning
3 now?

4 MR. SONDHEIMER: Your Honor is raising a much
5 broader question than I think I am even hired to address,
6 what remedies the state may -- not remedies, what
7 measures the state may take to address frankly national
8 and statewide general future shortage.

9 I think we have identified in the record the
10 state has taken substantial steps that are within its
11 purview to increase the pipeline of teachers and
12 encourage teachers to join the profession or stay in the
13 profession.

14 THE COURT: Doesn't really address the
15 particular problem in this district, correct? Clearly
16 billions of dollars you spent according to the record,
17 but what's been done in this community?

18 MR. SONDHEIMER: I think those measures,
19 Your Honor, they don't have an impact necessarily
20 overnight. We don't know what the record is regarding
21 what impact those measures may have even had on this
22 problem, we don't know.

23 Let's see. I just want to address the issue
24 that the -- other issue that Plaintiffs have raised for
25 an execution for non-exhaustion which is the emergency
26 exception. It's a very narrow exception, Your Honor,
27 they have to demonstrate there's serious and irreversible
28 mental or physical damage that is irremediable.

1 It is not enough to allege generalized --
2 generalized irreparable harm. It's a higher degree of
3 harm to warrant exception from the exhaustion
4 requirement.

5 We submit that on the record that Plaintiffs
6 provide does not reach to this level. I don't believe
7 there's authority in the state recognizing that exception
8 also so --

9 THE COURT: You say that's not a state exception
10 to the exhaust requirement --

11 MR. SONDEIMER: Correct. I don't believe the
12 Plaintiffs have cited to any state authority for that. I
13 think I will try to address very briefly, Your Honor, the
14 subjective claims -- items on the subjective claims of
15 Plaintiffs --

16 THE COURT: Counsel, this is an important issue,
17 and I don't want to be here all day, but by the same
18 token if it takes all day we will be here all day.

19 MR. SONDEIMER: Do my best to be very brief.
20 The first point that I think hasn't been addressed that I
21 want to address is the overarching point is the
22 Plaintiffs are seeking a really extraordinary
23 unprecedented mandatory preliminary injunction as we have
24 identified in our papers that imposes a heightened burden
25 of proofs to clearly establish entitlement to a
26 preliminary injunction, beings they have not and cannot
27 establish that heightened level of proof.

28 I think I will just address the equal

1 protection claim. They suggest they need not prove that
2 the education standards being provided elsewhere in the
3 state. Simply not true. They are trying to make too
4 much of an evidentiary -- of the evidentiary presumption
5 of regularity in official conduct. The purpose of that
6 presumption is to relieve government of the burden of
7 proving that it actually is, in fact, complying with law.

8 It is not designed to provide Plaintiffs to
9 allow Plaintiffs to avoid their burden on this motion of
10 demonstrating evidence necessary to support their claims.
11 Remains the Plaintiffs' burden to demonstrate that the
12 educational program as a whole, that is language from the
13 Butt case, as a whole falls substantially fundamentally
14 below the standards of education being provided elsewhere
15 throughout the state.

16 The Plaintiffs can't even -- can't avoid that
17 burden simply by relying on unwarranted extension of the
18 intent of the evidentiary presumption under Evidence Code
19 664.

20 THE COURT: Can you address a couple things what
21 you just said? What is fundamentally below? Is that
22 defined in one of the cases that you have cited? I
23 looked at that, what does that mean?

24 MR. SONDEIMER: I think the Butt case gives
25 some guidance as to what that means. The Butt Court
26 recognized that it's impossible to require precise
27 equality of educational opportunity. There's always
28 going to be some level of difference the Court

1 recognized.

2 The Court and I think the Court just emphasized
3 that for the state to be held responsible the differences
4 between districts must reach a truly fundamental level
5 sufficient as you had in that case where some children
6 were going to be entirely -- the entire population of the
7 school district was going to be deprived of a fifth of
8 their school year.

9 So I don't believe there has been additional
10 interpretations of what that means, but talking about
11 something that reaches a level that is truly fundamental
12 and of grave magnitude.

13 The other reason, Your Honor, that the
14 presumption just can't apply to satisfy Plaintiffs'
15 burden to establish these substantial intradistrict
16 disparities, FAPE is a vague and individualized
17 determination that it's ultimately a conclusion of law.

18 And you can't presume that based on -- that
19 statewide as to each individual that FAPE is being
20 provided. There are mechanisms obviously that are being
21 utilized throughout the state for parents to challenge
22 whether a district is providing FAPE. It's just not
23 enough to assume that every child in the state is being
24 provided FAPE.

25 Finally, the Butt standard requires looking at
26 the education program of the district as a whole versus
27 that being provided elsewhere. It's not -- the focus is
28 not simply on one element of students, you know, with

1 particular needs, it's are they reaching -- what is the
2 program as a whole? The evidence before the Court
3 through the compliance improvement monitoring process
4 information that we provided demonstrates based on those
5 performance factors and active performance that the
6 district is in a middle tier in terms of the performance
7 of the system as a whole.

8 THE COURT: So you are saying that, for purposes
9 of determining FAPE and equal protection, you can't take
10 a block of ten or twenty students and look at them and
11 compare them and say that there's a violation of equal
12 protection based upon what happens in ten or twenty kids?

13 MR. SONDEHEIMER: Yes, Your Honor. The Butt
14 standard requires that the -- that the court look to the
15 educational program actually being provided in the
16 district versus that being provided elsewhere throughout
17 the state. That's what the meaning of prevailing
18 statewide standards is. I think the Plaintiffs have
19 sought to confuse the Court as to what the meaning of
20 that is, but Butt is very clear.

21 What prevailing statewide standards means is the
22 educational program being provided elsewhere throughout
23 the state. It's not a statutory standard. In that
24 connection -- let me address the Shaw decision because
25 Shaw does not support the Plaintiffs' argument that
26 statutory -- any statutory standard can establish
27 prevailing statewide standards being provided throughout
28 the state.

1 In Shaw the Court was simply responding to the
2 school district's argument that the remote learning
3 statutes that have been in effect during the COVID --
4 height of the COVID pandemic could no longer be used as
5 prevailing standards because they were no longer in
6 place, they had been superceded.

7 The Court said -- the Court said no, it is still a
8 remedy available for alleged deprivation of harm to
9 students.

10 THE COURT: That occurred during that period?

11 MR. SONDEIMER: That occurred during that
12 period. Notably, this is also on demurrer, so on an
13 appeal from the sustaining of a demurrer. And so the
14 Court was responding to a mootness argument that the
15 district didn't even assert that categorically the
16 statute couldn't alone -- standing alone establish a
17 prevailing statewide standard.

18 So a decision as the Court I'm sure is aware is
19 only authority for points actually decided in the case
20 and whether a statute, especially the statutes that
21 Plaintiffs are alleging here, can provide a statewide --
22 prevailing statewide standard is simply not addressed in
23 Shaw.

24 The one hundred eighty day education code
25 provision, we have already identified in the papers, I
26 will briefly, does not establish a one -- a right on the
27 part of school students to hundred eighty days. There's
28 no allegation, first of all, that all students are not

1 receiving hundred eighty days. The provision is really
2 administrative requirement for the school.

3 Plaintiffs have not suggested even that statute
4 is being -- is being violated. So that statute does not
5 support their claim for violation of equal protection or
6 establish statewide standards regarding the number of
7 school days.

8 Beyond that the Butt case makes abundantly clear
9 in footnote fourteen that we have referenced in our
10 papers that the statute standing alone is not evidence of
11 beyond statewide standards. The Butt case the Court
12 specifically looked to certifications that districts had
13 provided to the state regarding the number of
14 instructional days provided. It was based on that that
15 the Court determined what the prevailing standard was
16 regarding the number of school days.

17 THE COURT: Do I understand your argument
18 distinction is being made here, I am going to have to go
19 back and read this to come to my own conclusion, but you
20 are saying Butt says that the statute does not set
21 statewide standard? Mr. Shah, I believe you are saying
22 that Shaw says just the opposite, is that --

23 MR. SHAH: That's correct, Your Honor.

24 THE COURT: Okay. Thank you.

25 MR. SONDEIMER: With respect to FAPE, the
26 Rowley case, Your Honor, Supreme Court decision, we have
27 cited it in the papers, Your Honor, but makes very clear
28 that the notion of FAPE is to -- this is near quote, I

1 will paraphrase, is too vague and individualized to serve
2 as a standard for equal protection.

3 So FAPE can't be the basis for statutory
4 prevailing standard for purposes of equal protection
5 under the Butt criteria.

6 Just briefly with respect to the carrier
7 classes that the Plaintiffs have alleged, for the same
8 reasons I have already addressed with respect to other
9 disabled students throughout the state, throughout the
10 state the Plaintiffs have the burden to demonstrate by
11 actual evidence of what prevailing standards are for
12 those students.

13 There is a statewide shortage of teachers, I
14 think that seems to be undisputed here. The extent of
15 it, what the impact is is not certain, and we don't know
16 that in every district of the state. However, it's fair
17 to assume that other districts are also affected by that
18 shortage including with respect to the provision of
19 special education.

20 State has taken measures as we have addressed to
21 try to alleviate that, but the burden remains on the
22 Plaintiffs to demonstrate with the evidence what the
23 prevailing standards are for the provision of education,
24 elsewhere throughout the state for students with
25 disabilities.

26 As to non-disabled students in the district,
27 they simply cannot be compared because they are not
28 similarly situated. For that I would bring the Court's

1 attention to the Grossmont Union case, Union High School
2 District case that I referred to earlier at 169
3 Cal.App.4th 869, page 892, the Court says by definition
4 special and regular education students not situated
5 similarly with respect to the applicable laws. So that's
6 simply not a valid basis for comparison, Your Honor, for
7 purposes of equal protection.

8 Let me just complete, Your Honor, by addressing
9 briefly Plaintiffs' suggestion that the Butt case rejects
10 the notion that local control is an important policy of
11 the state. Education Code Section 1400 expressly makes
12 it the the policy of the state to strengthen local
13 control of school administration.

14 So the Butt case addressed the issue of local
15 control within the context of the state's argument that
16 local control is so paramount that the Court should not
17 require that the state to intervene. That's a different
18 question, and the Court was not addressing the issue of
19 local control as matter of public policy in determining
20 whether or not a preliminary injunction should be issued.

21 This Court is required as we have identified in
22 our papers to consider the public policy implications of
23 an injunction. We submit that based on the strong policy
24 favoring local control and the fact that there are
25 established mechanisms to address the claims that the
26 Plaintiffs are seeking to raise here that a preliminary
27 injunction is not warranted. Thank you.

28 THE COURT: Related to that on page 9 of your

1 brief you indicated that California law implementing IDEA
2 places primary responsibility for providing FAPE on the
3 local educational agency. You cited code section --
4 Education Code Section 46205. I read that and I didn't
5 see it said that. Was that a misprint as to the section?
6 If you don't have the answer to the problem -- wondering
7 if that was a typo?

8 MR. SONDEIMER: I don't know -- if I could ask
9 you to repeat.

10 THE COURT: Page 9. Cited Education Code 46205.

11 MR. SONDEIMER: I will take a look at that,
12 Your Honor, don't have the response right now.

13 MR. SHAH: Yes, Your Honor, I wanted to support
14 with the discussion with testimony order.

15 The state is making my point for me. The CIM
16 process is not designed to address these staffing
17 shortages. In fact, Your Honor, if you look at the
18 declaration of Shiyloh Duncan Becerril at paragraph
19 eleven it states that, quote, "The CIM process expressly
20 includes an inquiry regarding staffing issues, including
21 an examination of processes to monitor and address
22 personnel needs and strategic allocation of staff is one
23 of the six components of an infrastructure review that
24 local educational agencies in attempts of monitoring must
25 take and target monitoring may take."

26 Your Honor, they is a category of CIM where
27 they are not even actually required to do this
28 infrastructure analysis that would take into account and

1 address staffing shortages.

2 THE COURT: Didn't they say that that was
3 addressed with the local school district and the local
4 district was given the timeline to comply and they have
5 agreed to it and they would agree to get staffing up to
6 snuff by the end of school year?

7 MR. SHAH: They have been told to look at their
8 staffing shortages not necessarily to do this
9 infrastructural review analysis. And they have been told
10 that -- we have been told at least that the district aims
11 to have that done -- or the staffing problem fixed by the
12 end of the year, not that it actually will of course be
13 fixed.

14 The other point that I wanted to make,
15 Your Honor, is that if in -- with the factual record
16 shows this problem has been occurring for some number of
17 years. If indeed state is saying their CIM process did
18 not encounter a problem in the 2022 to 2023 academic
19 year, it does show a problem with this tool that it is
20 not capturing the staffing shortages as one of the
21 critical responsibility components of loss of education.

22 THE COURT: I don't recall that's what was said.
23 It was more like it wasn't in the record, that is part of
24 the problem. That was raised in response to what you
25 said that it was --

26 MR. SHAH: Right. I may have misunderstood
27 opposing counsel. My understanding he was saying that
28 the plan did not at that point address that specific

1 component.

2 With respect to the district as an indispensable
3 party, Your Honor, we have briefing on this, we are more
4 than happy to provide -- I don't have the cites off the
5 top of my head. We briefed this before in Courts at this
6 level have rejected that idea that the district is an
7 indispensable party at this point so more than happy to
8 provide that.

9 THE COURT: I will ask for that.

10 MR. SHAH: Certainly happy to give that.

11 Your Honor, on the -- going back a little bit to the Butt
12 point, the poorly named case, the Butt versus State of
13 California case, to your question about what falls
14 fundamentally below a statewide standard, I recognize I
15 agree with my opposing counsel it hasn't been defined.

16 This is why we always go to that footnote 16 in
17 that case where the teachers and staff members provide
18 declarations saying that the loss of these school days
19 has deprived students of access to phonics, handwriting
20 skills and mathematic skills.

21 What we consider in what the Hartselle Court,
22 the California Supreme Court case held integral
23 components of an education, the education means more than
24 just access to the classroom. That is what we believe,
25 that is what the Plaintiffs argued is means that the
26 district has fallen fundamentally below --

27 THE COURT: I took the Attorney General's
28 argument to be that, yes, it's frequent that you may

1 have -- in a district you may have some students who fall
2 below. But he is saying it has to be districtwide as I
3 understand it, and you can't take a block specifically in
4 response to my question ten or twenty children and find
5 those are below, therefore, as an equal protection
6 violation.

7 I think some of the cases we have, that are
8 cited, you are going to have -- you are going to have
9 some kids who aren't getting services, but that doesn't
10 mean it isn't equal protection. So that's -- clearly you
11 have some kids, some students who are not getting what
12 they should, according to the declarations. But does
13 that rise to equal protection argument when it's a
14 relatively small number?

15 MR. SHAH: Two responses. Yes is my short
16 answer.

17 THE COURT: Okay.

18 MR. SHAH: The O'Connell versus Superior Court
19 Case that we cited in our reply brief, I don't have the
20 case cite on me right now, my co-counsel might be able to
21 get it for me, that was a case involving high school
22 students in school districts who were deprived of the
23 educational resources necessary to pass the high school
24 exit exam.

25 The Court held that that was a sufficient class
26 of people to find an equal protection violation based on
27 the fundamental rights to education, based on the equal
28 protection clause. So Your Honor, the Courts have taken

1 a smaller group of students and held that that is
2 integral protection basis.

3 But more to that, equally to the point is that
4 what we have here are just a group of students who are
5 defined by a quality-like disability. Whether the
6 district as a whole with respect to these students is
7 falling fundamentally below the state standards.

8 Butt doesn't necessarily require, Your Honor,
9 that every single student be affected. The critical
10 inquiry is that the disabled students as a whole are
11 receiving an education that doesn't meet the statewide
12 standards.

13 We cited a case, Your Honor, in our reply brief
14 on page -- one second please, Your Honor, Connerly versus
15 State Personnel Board, that's on page 8 of our reply
16 brief holding that the government cannot discriminate
17 someone because similarly-situated people did not endure
18 discrimination.

19 Here just because there might be one or two or
20 a few disabled students who aren't -- who are receiving
21 an education or just because they are non-disabled
22 students in the district who are receiving an education
23 doesn't mean that on the one hand the state is allowed to
24 discriminate against disabled students, does not mean
25 that the state is allowed to go below the statewide
26 standards when it comes to providing education for that
27 group of people.

28 This is, of course, a district as a whole

1 analysis, but as O'Connell Court said, look at a specific
2 group of students who haven't been provided access to
3 student components --

4 THE COURT: Wouldn't that small group have
5 protection under the IDEA as opposed to having a
6 constitutional equal protection argument or a remedy?

7 MR. SHAH: There are some remedies available
8 under the IDEA, of course, which is the ability to go to
9 the office of administrative hearings and get an award of
10 compensatory education, that is true, Your Honor. But
11 that does not also take away the fact that they also have
12 the state constitutional right to an education.

13 Again, I don't like to deal with the
14 slippery-slope argument, but the idea is that the
15 district can de-enroll disabled students from the
16 district. There would not be an equal protection
17 claim -- that actually does allow the state to delegate
18 its authority to a district which the Butt Court said the
19 state cannot do. If a district can de-enroll a bunch of
20 students and the state can say that's a district problem,
21 that's not our deal, that is antithetical to that idea of
22 the fundamental right to education.

23 And in fact, Your Honor, the Serrano one Court
24 stated at page 613 that, quote, access of boundaries, end
25 quote, cannot be responsible, access of boundaries cannot
26 cause a constitutional violation in that they cannot be
27 sufficient basis for denying some students access to an
28 education.

1 At page 612 the Court states that, quote, the
2 state cannot close public schools of one area while at
3 the same time it maintains schools elsewhere, Your Honor.
4 That gets directly to this point whether we can bring the
5 claim on behalf of a subset of students in a district.

6 With respect to Defendants' point, Your Honor,
7 I have the O'Connell cite for Your Honor, that is 144
8 Cal.App.4th at page 1465.

9 THE COURT: Thank you.

10 MR. SHAH: With respect to Your Honor the
11 Defendants' argument that FAPE is an individualized
12 determination and cannot be the basis for finding the
13 statewide standard here, two responses: One is that we
14 are arguing that FAPE as a whole is not being provided.

15 There are no individualized inquiries to be
16 done here when disabled students throughout the district
17 are either being told don't come to school or they are in
18 classes where they don't the the services necessary to be
19 provided their services, their instruction. This is
20 across the board claim.

21 I know I already belabored this point, but they
22 are misapplying Rowley. The Rowley, the case from the
23 United States Supreme Court, they are saying that case is
24 about equal educational opportunity under the
25 constitution or equal protection. It is not what the
26 Court said.

27 The Court said that the right to a FAPE cannot
28 guarantee equal -- strict equality but it can guarantee

1 equal access. That's at page 188 and 89 and page 200.
2 Again, the Butt court cites Rowley for the very idea that
3 the state constitution provides equal access which is
4 what we are requiring here. The right to a FAPE is
5 consistent with that state constitutional standard.

6 One second, Your Honor, please. With respect
7 to the Defendants' argument related to Shaw, Your Honor,
8 the case there, even though it was looking back at a
9 previous time period for finding of prevailing state
10 standard, the Court did not require and did not require
11 any kind of showing that you have to show what is
12 happening in school districts across the state. The
13 Defendant is incorrect.

14 Footnote 14 of Butt does not say that you cannot
15 use a statute to provide -- to create a prevailing state
16 standard. In that case it was necessary to look at what
17 districts around the state were doing because the entire
18 district had shut down. They couldn't make any
19 intradistrict comparisons. Here you have a large group
20 of students, disabled students in the district, about
21 twenty percent of the student population being deprived
22 of access to their education. We can compare how they
23 are being treated compared to other other students --

24 THE COURT: You are saying twenty percent of the
25 students in this district are --

26 MR. SHAH: Are students with IEPs, Your Honor,
27 correct. I believe that is the case, might be off couple
28 percentage. It is cited in our briefing, it is cited in

1 the testimony, IEPs' own website that we have cited.

2 The final point I want to make with respect to
3 Butt, Your Honor, is that the Defendants are misstreaming
4 our argument that local control is not a policy of the
5 state. It certainly is a policy of the state because
6 they are putting the onus on the district but states that
7 it is not a compelling interest to have local control --
8 local control is not a compelling enough interest to
9 deprive disabled students, to deprive students of their
10 right to an education. So two very different points,
11 policy versus compelling points for the purposes of a
12 strict policy analysis.

13 Your Honor asked about the citation that says
14 that. The California Education Code makes FAPE an aspect
15 of local responsibility. Even if that were the case,
16 Your Honor, so are the one hundred and eighty day
17 requirements, it's an aspect of local responsibility.

18 That does not mean that on the one hand cannot
19 create a statewide standard. On the other hand it
20 doesn't mean that the state gets off the hook when
21 districts are providing -- not providing that kind of
22 education and the quality of education is falling
23 fundamentally below statewide standards.

24 It's required. It is access here we are asking
25 for, access to the basic components of an education.
26 That is the state's responsibility here. I believe I
27 have addressed most of the arguments.

28 I do want to just talk really quickly about

1 exhaustion very quickly just to clarify exactly what we
2 are arguing.

3 Now, the IDEA at 20 U.S.C. Section 1415 L, that
4 states by just the plain language exhaustion is required
5 of claims under the ADA, Section 504 Rehabilitation Act
6 and any other federal statutes or constitutions. That's
7 why we are saying the IDEA does not require exhaustion
8 here. If state law does require exhaustion, state law
9 exceptions apply.

10 This is the reason we cited the emergency
11 exception, Your Honor, because the state keeps wanting to
12 go back to federal law so to be safely cited we cited
13 those cases but don't even believe federal exhaustion law
14 applies. State exhaustion laws applicable here, state
15 exhaustion law says if you are bringing a claim that the
16 individual hearing process cannot remedy that you are not
17 required to go down that route.

18 The idea that exhaustion be required in this
19 case feels antithetical to the exhaustion scheme. In my
20 opinion, Your Honor, on the one hand they have had notice
21 of this problem for some years now. And second, if every
22 single time I had to take my client to the office of
23 Administrative Hearings for a two to three-month trial
24 before I could bring the motion for a preliminary
25 injunction, asking for the Court to intervene in what is
26 a serious crisis, that would get away from the idea of
27 making a child whole.

28 THE COURT: Isn't that what the whole federal

1 scheme entails is at the federal level and that you will
2 exhaust? Even though I realize that's very frustrating
3 if you are the person who is being deprived of services
4 or some right to have to do that, but I mean, that's the
5 way it is --

6 MR. SHAH: That's the case, Your Honor, for
7 individual cases. There's the reason that the systemic
8 exceptions exist both under state and federal law is
9 where they can't actually solve the problem. It's the
10 reason, Your Honor, we actually did not bring a class
11 action here. I recognize that Defendants made that
12 argument. It's because the class action here is not
13 necessary. The very remedy that the Plaintiffs would
14 even get from the administrator remedies channel in that
15 the remedy we are seeking here are ones that require a
16 restructuring of the system.

17 These students are not going to get their
18 individual daily instruction services or even their
19 compensatory education services if it were not for
20 changing the systemic staffing shortage at this school
21 district.

22 And the Defendants' citation, Your Honor, to
23 Hoeft is actually misleading. There, Your Honor, the
24 Court held that, yes, you did not include a challenge to
25 the full special education system, focused only on
26 shortcoming of particular components of the Tucson
27 Unified School District, page 1305. We believe
28 Your Honor that the factual record here shows we have

1 made that showing.

2 We have also made a showing that eight out of
3 the eleven school sites in this district are being
4 affected by the staffing shortage that students disability
5 at each of those sites is being affected. We have
6 declarations from staff members at many of these school
7 sites saying that in all the classrooms they are in they
8 are not witnessing -- that they are witnessing a loss of
9 services that at best teachers can provide ten percent of
10 the education that they are meant to be providing.

11 I have one more point, Your Honor, that I am --
12 that is now missing. I found it. One, Your Honor, is
13 that the case of Shawn T that we highlighted in our
14 declarations and our reply brief, that student has been
15 owed hours for now more than a year, and the district has
16 not finished it. Jonah V, another Plaintiff, they are
17 offering that --

18 THE COURT: Shawn as I recall got most but
19 not -- substantial amount of hours he did not get.

20 MR. SHAH: Correct, most but not all. Jonah B,
21 they are requiring him to leave his classroom in order to
22 get -- it is creating a cycle of loss instruction. And
23 Your Honor, if we were to file grievance complaints on
24 behalf of every single student with a disability in the
25 district who hasn't gotten education and get them
26 compensatory education hours awarded, I can't imagine
27 that the district is going to actually be able to provide
28 compensatory education regardless how long the CD gives

1 them.

2 If you look, Your Honor, at the reply
3 declaration of Sarah Elston, she talks about how she does
4 not have the ability to provide compensatory education to
5 all her students. She's not just talking about the
6 students who missed days of school, talking about all the
7 other students who she has not provided instruction to
8 this year because she's busy providing behavioral
9 interventions because she doesn't have enough aides.

10 I think that's it for me, Your Honor.
11 Appreciate your indulgence.

12 THE COURT: Couple questions if I can. I
13 believe paragraph twenty-one of your complaint, there's a
14 reference to what the superintendent of public
15 instruction is required to do under statute then tries to
16 refer to some code sections. I'm sure there is a typo.
17 I don't know if that is something that you can tell me
18 what the code sections are.

19 MR. SHAH: Yes, that is a mistake, Your Honor, I
20 apologize for that. I believe what that should say, we
21 can clarify, is 33111 through 3303.

22 THE COURT: 3303?

23 MR. SHAH: You know what, I apologize for that.
24 I think I know what it is. Should be 33111 comma and
25 then the rest of that, 33301 through 3303. Still doesn't
26 make sense. We will fix that, I apologize.

27 THE COURT: I started off by saying I was not
28 inclined to grant the injunction at this point. Still I

1 think awfully early in the litigation. If I don't do it
2 what would be appropriate, if anything, as far as any
3 additional orders that you think could be done? You
4 mentioned at one point issuing a preliminary injunction
5 then coming back in twenty-one days. If I didn't issue
6 it would it be appropriate to come back at some other
7 point and look at things and decide?

8 MR. SHAH: Even if Your Honor did not grant the
9 preliminary injunction, Your Honor could still set an
10 order to show cause for another twenty-one days or a
11 month if Your Honor pleases to really look at what
12 exactly the district has been doing in this case and what
13 the state has been doing to monitor the school district
14 so we can have a better understanding and Your Honor can
15 have a better understanding of what exactly is going to
16 be happening between now and the end of the school year.

17 Whether the state is, indeed, at the end of the
18 school year going to say, you didn't fix the problem, we
19 have to figure out a new plan. I think that would be
20 appropriate.

21 THE COURT: If I don't issue an injunction then
22 I don't know what I could realistically be expecting him
23 to do in twenty-one or thirty days.

24 MR. SHAH: Certainly, Your Honor. We could
25 request another order to show cause. If Your Honor is
26 inclined to grant that we could present live testimony at
27 this and issue subpoenas for testimony in front of
28 Your Honor for another motion for preliminary injunction.

1 Would be happy to do that.

2 THE COURT: Mr. Sondheimer, do you have a
3 response to that?

4 MR. SONDEIMER: Yes, Your Honor. I think the
5 code provides the Plaintiffs the opportunity to have
6 early hearing on their motion for preliminary injunction,
7 request for preliminary injunction. This hearing has
8 provided that opportunity, and if the Court -- I think
9 the Court must find -- must reach the merits and
10 determine that the Plaintiffs are entitled to some relief
11 if it is going to seek an order requiring department to
12 respond about measures its taken.

13 We don't believe the Plaintiffs have
14 demonstrated -- have met their burden to clearly
15 establish entitlement to preliminary relief.

16 THE COURT: You are saying that the Court
17 couldn't just order you back on the first week of June to
18 show us where we are?

19 MS. RICE: Your Honor, I would have to look
20 into -- I don't want to presume to know the law, but I
21 think this hearing is providing the opportunity for the
22 Defendants to show cause why preliminary injunction
23 should not issue. And I think the -- I understand the
24 Court's interest in seeing -- interest in determining
25 whether there is going to be a practical solution here.

26 THE COURT: The reason is because is being
27 presented to the Court that the district is working on
28 this under the supervision of the state and that there is

1 a commitment to fix the problem by the end of May or so.
2 And so what I am inclined to do is at this point is not
3 to grant a preliminary injunction at this point based
4 partly upon that representation.

5 But if it doesn't turn out that there has been
6 substantial progress then I might want to reconsider.
7 And I -- it doesn't seem to me it's to anyone's benefit
8 to start the whole process over again. So just the time
9 that it would take -- took you folks I think in December
10 started this, it is February before we could get to it,
11 and if we have to wait until the 1st of June to start
12 again it will be August. Then I don't see where there is
13 time to do much before the beginning of the year.

14 MR. SHAH: If I may, Your Honor, Your Honor can
15 also issue an order finding the violation, if the
16 question is only with respect to relief and whether
17 Your Honor can and should grant relief, Your Honor can
18 hold a hearing twenty-one days from now or however long
19 Your Honor wishes to get testimony from both sides.
20 Your Honor, would be within your right to ask for
21 testimony about what remedy can and should look like.

22 At that point if Your Honor is satisfied that
23 the state based on the evidence they submit to you has
24 done enough then Your Honor can say you are not going to
25 grant any requests for an injunction.

26 And, of course, the opposite would be true if
27 they don't present enough evidence, Your Honor can
28 require them to step in. But that would be, Your Honor,

1 way of not having to wait an entire three to four months
2 to bring this entire motion again for us to continue to
3 have to talk to every declarant, get every single person
4 to write another declaration to Your Honor what has been
5 happening between now and whenever, whenever Your Honor
6 wants to hear more testimony.

7 THE COURT: Mr. Sondheimer, anything further?

8 MR. SONDEIMER: No, Your Honor.

9 THE COURT: You have time to address whether
10 Court has that authority to order you back? Here's what
11 I am inclined to do at this point for reasons stated and
12 any additional reasons I haven't enunciated is not to
13 grant the preliminary injunction at this point, to give
14 the school district and the state an opportunity to
15 address the issue under the -- I think called CIM is what
16 you call it, and then come back and see where we are,
17 sometime around the first of June.

18 That will also give me an opportunity to address
19 the -- to further look at the issues that we talked about
20 with regard to exhaustion and also hear from you folks
21 with regard to whether the state -- whether the Court
22 should order school district join pursuant to Code of
23 Civil Procedure Section 389 and see what progress has
24 been made and whether any of that would change my ruling
25 on the preliminary injunction.

26 MR. SONDEIMER: If I may for point of
27 clarification, certainly we would have no objection to
28 the Court asking for essentially status report, if I am

1 understanding correctly, that's essentially what the
2 Court is requiring. However, if it's in the framework of
3 a further hearing on motion for preliminary injunction
4 that gives us greater concern.

5 THE COURT: What was that last --

6 MR. SONDEIMER: That would give us greater
7 concern if the further proceeding is further proceeding
8 on a motion for preliminary injunction as opposed to
9 something more in the nature of a status report.

10 THE COURT: Okay. I think what I am inclined to
11 do then is again deny the preliminary injunction at this
12 point without prejudice to bring it, if there has not
13 been substantial progress. And this time there was a lot
14 of continuances I think for people's schedules, things
15 like that, but let you know it probably will not be as
16 long a time to -- before I set it for hearing again if
17 there is a request.

18 And also that will give me a chance, if I
19 decide, well, there has to be exhaustion or has been
20 exhaustion, that takes care of it. But if I decide there
21 does not need to be exhaustion, there's not been
22 substantial progress and looks like we are just going to
23 start another year, then I may reconsider the preliminary
24 injunction. Does that make sense?

25 MR. SHAH: The only concern, Your Honor, would
26 be with respect to what opposing counsel is saying about
27 a status report where Plaintiffs have no opportunity then
28 to actually cross-examine any of their witnesses about --

1 or actually testimony that Your Honor would actually want
2 about how they have been doing. I think that would be a
3 lower evidentiary basis to actually make a finding for a
4 need for a further preliminary injunction.

5 I am belaboring the point, I apologize, Your
6 Honor, we hope that Your Honor finds at least the
7 violation hold --

8 THE COURT: Finds violation of who by what?

9 MR. SHAH: Find violation by the state of the
10 state equal protection guarantee and hold at the very
11 least a hearing if Your Honor wants it to be June 1st for
12 further evidence of whether or not the Court should grant
13 an injunction -- denying the injunction now but staying
14 for future consideration whether or not injunction should
15 be granted so Your Honor can get the evidence that you
16 need, especially given we need to move very quickly if
17 the state indeed shows it has not done enough with
18 respect to the district.

19 THE COURT: I am not prepared to do that at this
20 point to make that finding. I am not precluding that,
21 but I am not prepared to do -- I don't think I need to do
22 that today. And so I am not prepared to do that. I will
23 give you a chance to address that, but I don't think I
24 have to do that to make my ruling today.

25 MS. RICE: Your Honor, Cynthia Rice, another
26 option could be to continue the preliminary injunction
27 hearing that we have today for the purpose of determining
28 in June or whatever time the Court deems appropriate that

1 the injunction should issue. Then you don't have to make
2 your finding with respect to whether or not there has
3 been a legal violation, we don't have to renew the motion
4 per se, we can just supplement briefing and everything is
5 already before the Court. That may be procedurally a way
6 that you can accomplish what I think the Court has
7 explained with the status conference --

8 THE COURT: Mr. Sondheimer?

9 MR. SONDHEIMER: I guess, Your Honor, I would
10 say we would want an opportunity to respond about that.
11 I'm not certain we will have a response about either the
12 propriety of continuing the hearing in that nature, but I
13 think that's all I'm going to ask at this point. I am
14 not really prepared at this moment to suggest new -- it's
15 inappropriate on legal grounds to do that.

16 THE COURT: How would you like to address it?

17 MR. SONDHEIMER: I guess I just like the
18 opportunity to, if indeed, to submit something on this
19 procedural question about how to proceed. But the --

20 THE COURT: Let me suggest this from what I am
21 hearing. Put it on calendar in a couple weeks, allow
22 counsel to appear by telephone to decide whether or not
23 we will continue the hearing or whether I am simply going
24 to deny it, and then you can look to see if there is
25 any -- both of you can research, see if there is any
26 statutory or case law that would prevent the Court from
27 simply continuing this hearing for two months.

28 MR. SHAH: Certainly, Your Honor.

1 THE COURT: Does that work for you,
2 Mr. Sondheimer?

3 MR. SONDHEIMER: Certainly. I would add after
4 having chance to look into the matter, if we acceded to
5 the suggestion of a continuance we could potentially
6 obviate the need for a continuance, submit a statement or
7 letter or something to the Court.

8 THE COURT: You folks work very well sounds
9 like. Don't agree on the issues but you work together
10 professionally.

11 Want to set date and time now or do it -- is
12 two weeks about the right amount of time for you?

13 MR. SONDHEIMER: Sure.

14 MS. RICE: Would it be possible, Your Honor, to
15 set that for two weeks and one day on Wednesday the 28th?

16 THE COURT: I was going to say possibly two
17 weeks.

18 MS. RICE: I have a deposition that I've
19 rescheduled three times --

20 THE COURT: Turns out I'm not available starting
21 Wednesday of that week so if we did it in two weeks it
22 would have to be on either Monday or Tuesday. Actually
23 serving this whole week in this department the following
24 week on the week of the 4th.

25 MS. RICE: The 26th does not work?

26 THE COURT: 26th would work?

27 MS. RICE: We can do the 26th, Your Honor, if
28 that is good for counsel.

1 MR. SONDHEIMER: I think that should be fine.

2 THE COURT: Madam Clerk, trying to think what
3 department would be best and what time that we would have
4 a court reporter?

5 THE CLERK: I can look at the schedule.

6 THE COURT: Do you know what time Department 2
7 starts on the --

8 THE CLERK: The 26th in February? That day we
9 have a five-day jury trial --

10 THE COURT: Department 2?

11 THE CLERK: Department 1 we have three 9:00
12 o'clocks, a 2:00 o'clock, and that's it.

13 THE COURT: How about 8:30 in the morning, is
14 that too early for you folks?

15 MS. RICE: You are allowing Court Call
16 appearances?

17 THE CLERK: There is a jury trial scheduled for
18 Department 1 on the 26th.

19 THE COURT: Set 8:30 on the 26th, courtroom to
20 be determined, and that will be on whether the Court can
21 continue the ruling on the preliminary injunction until
22 around the first of June. If not then I will tell you
23 denying it and I will also like to -- if you before then
24 if you could submit to me your arguments on whether the
25 Court can -- can or should order the school district to
26 be joined as a party. Can you have any of those
27 documents submitted by -- that's less than two weeks, I'm
28 not sure how quick --

1 MR. SHAH: We can do that by that date,
2 Your Honor.

3 THE COURT: I want to have some chance to read
4 it --

5 MR. SHAH: If we got that to you the Wednesday
6 before, would that be sufficient?

7 THE COURT: How about Thursday before? 22nd?
8 If not we will give you more time.

9 MR. SONDEHEIMER: I think I am -- talking about
10 the Thursday before?

11 THE COURT: Which would be February 22nd, that
12 is only a week away or week and two days.

13 MR. SONDEHEIMER: Your Honor, that is difficult
14 for a briefing on whether the district should be brought
15 in. We would appreciate additional time for that. I do
16 have --

17 THE COURT: Tell you what we will -- you folks
18 want to submit it in writing, I will either give -- let's
19 say you will submit it by the 26th, that's the day we
20 come back in, I won't make a decision that day. Will
21 that work if you need more time, let me know.

22 MR. SONDEHEIMER: By February 26th, is that --

23 THE COURT: How much time would you like?

24 MR. SONDEHEIMER: That's two weeks. I don't want
25 to get in the way, Your Honor, I do have another
26 matter --

27 THE COURT: If you want to do three weeks --

28 MR. SONDEHEIMER: I would prefer that.

1 THE COURT: Let's say three weeks from today
2 which would be Tuesday the 5th of March, does that work?

3 MR. SHAH: That works for us, Your Honor.

4 THE COURT: I will either decide it on the
5 briefs or set it for hearing, and I will tell you what if
6 anybody wants to file a response to the others file it by
7 the end of that week March the 8th because we did have a
8 problem --

9 THE CLERK: 10:30?

10 THE COURT: File it by 5:00 o'clock on March 8th
11 would be fine.

12 MR. SONDEIMER: A response?

13 THE COURT: If you wish to respond to the other
14 parties' brief with regard to whether the district should
15 be joined. Need more time?

16 MR. SONDEIMER: With the necessity for client
17 review Your Honor, that's --

18 THE COURT: A week later then will be
19 March 12th. Does that work?

20 MR. SONDEIMER: That's fine.

21 THE COURT: Anything further?

22 MS. RICE: No, Your Honor.

23 MR. SHAH: No, Your Honor.

24 THE COURT: Folks, I want to thank you,
25 appreciate the professionalism, the arguments, very
26 enlightening in this difficult problem and looking
27 forward to working with you.

28 MR. SONDEIMER: Thank you, Your Honor.

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THE CLERK: Can we change that to 9:00 o'clock
because Department 1 has an 8:30 calendar that day? 9:00
o'clock on March 12th.

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REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF DEL NORTE)

I, Carol Lehman, CSR 3500, a Certified Shorthand Reporter, do hereby certify that I correctly reported to the best of my ability the within-entitled matter on February 13, 2024; and that the foregoing is a full, true and correct transcription of my shorthand notes of the testimony and other oral proceedings.

In witness whereof, I have hereunto affixed my signature this 20th day of February 2024.

Carol Lehman
CAROL LEHMAN, CSR No. 3500