UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	2:20-cv-06472-SVW-AFM	Date	12/1/2020
Title	*Matthew Brach et al. v. Gavin Newsom et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE
Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING SUA SPONTE SUMMARY JUDGMENT FOR DEFENDANTS

I. Introduction

On August 21, 2020, this Court denied Plaintiffs' application for a temporary restraining order to enjoin enforcement of California's school reopening framework. Dkt. 51. On September 1, 2020, the Court notified the parties that it was inclined to grant summary judgment *sua sponte*, outlined the basis for summary judgment, and invited supplemental briefing from the parties. Dkt. 60. On September 15, 2020, Plaintiffs submitted a brief in opposition to *sua sponte* summary judgment. Dkt. 61. On September 25, 2020, Defendants filed a brief in support of *sua sponte* summary judgment. Dkt. 63. For the reasons articulated below, the Court GRANTS *sua sponte* summary judgment for Defendants.

II. Factual and Procedural Background

The Court set forth the facts giving rise to this suit in detail in its prior Order, which need not be repeated here. Dkt. 51, at 1-3. The Court briefly describes two developments since its prior Order.

Initials of Preparer PMC

a. Tier Framework

First, on August 28, 2020, the State reformulated its reopening framework, replacing the statewide monitoring list with a tier-based system ("Tier Framework"). *See generally* Supplemental Request for Judicial Notice ("Supp. RJN"), Dkt. 63-1, Ex. ZZ. The Tier Framework is similar to the previous framework in that it assigns counties to a particular tier based on "indicators of disease burden including case rates per capita and percent of positive covid-19 tests and proportion of testing and other covid-19 response efforts addressing the most impacted populations within a county." *Id.* at ZZ.2. A county's tier assignment determines the stringency of restrictions applicable in the county. *Id.* The criteria for tier assignment under the current framework do differ from those used in the prior reopening framework in that hospitalization rates are no longer considered. *Compare id. with* Dkt. 36, Ex.S.

The consequences for education of assignment to Tier 1, the most restrictive tier, are the same as the consequences of assignment to the statewide monitoring list under the prior framework. As the California Department of Public Health explains on its website, "[s]chools may reopen—for in-person instruction based on equivalent criteria to the July 17th School Re-Opening Framework previously announced. That framework remains in effect except that Tier 1 is substituted for the previous County Data Monitoring List (which has equivalent case rate criteria to Tier 1)." Supp. RJN, Ex. AAA.4. Schools are not required to close again if a county moves back to Tier 1. *Id.*

A county is placed in Tier 1 if its case rate excluding prison cases exceeds 7 per 100,000 or its testing positivity rate exceeds 8%. *Id.*, Ex. AAA.2. The case rate used to determine tier assignment is adjusted to reflect differential testing volume across counties. *Id.*, Ex. AAA.2-3.

To advance to a less restrictive tier, a county must be in the current tier for at least three weeks, meet criteria for the next less restrictive tier for two weeks, and meet health equity measures. *Id.*, Ex. AAA.3.

Under the Tier Framework, schools were permitted to re-open in Santa Clara, San Diego, and Orange Counties beginning in late September 2020. *Id.*, Exs. CCC, DDD, EEE.

b. Relaxation of Some In-Person Learning Restrictions

Second, on September 4, 2020, the California Department of Public Health issued guidance permitting "necessary in-person child supervision and limited instruction, targeted support services, and

facilitation of distance learning in small group environments for a specified subset of children and youth." *Id.*, Ex. FFF.1; *see also* Ex. GGG. The Tier Framework expressly permits schools that are not otherwise authorized to re-open to provide "structured, in person supervision and services to students under the Guidance for Small Cohorts/Groups of Children and Youth." *Id.*, Ex. AAA.4.

III. Sua Sponte Summary Judgment

a. Plaintiffs' Opposition to Sua Sponte Summary Judgment

As a threshold matter, the Court addresses the procedural propriety of a *sua sponte* summary judgment. As the Court explained in its September 1 Order, "[a]fter giving notice and a reasonable time to respond, the court may … consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f)(3); *see Norse v. City of Santa Cruz*, 629 F.3d 966, 971 (9th Cir. 2010) (en banc) ("District courts unquestionably possess the power to enter summary judgment sua sponte, even on the eve of trial.").

Beyond their arguments on the merits, Plaintiffs object to a *sua sponte* summary judgment. Plaintiffs cite two cases for proposition that summary judgment should generally not be granted at the preliminary injunction stage because the issues are unlikely to be fully developed. However, in both cases, district courts were reversed for failing to provide notice and an opportunity to respond. *See Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) ("[T]he district court, by not offering plaintiffs notice of its intent to convert the preliminary injunction motion into basis for grant of summary judgment, deprived plaintiffs of the opportunity to submit additional evidence and argument on the merits of their equal protection claim."); *Pugh v. Goord*, 345 F.3d 121, 124-25 (2d Cir. 2003) (reversing sua sponte grant of summary judgment after denying motion for preliminary injunction without notice and opportunity to respond). Here, by contrast, the Court gave plaintiff an opportunity to submit additional briefing, additional evidence, and to point to any disputed questions of fact that would preclude judgment as a matter of law. Dkt. 60.

Plaintiffs also argue that they should be given an opportunity to take discovery. However, they have failed to comply with the procedural requirements of Rule 56(d). To grant a continuance of a summary judgment motion on the ground that a party cannot present facts necessary to resist summary judgment, "[t]he requesting party must show: (1) that it has set forth in affidavit form the specific facts it hopes to elicit from further discovery; (2) the facts sought exist; and (3) the sought-after facts are essential to oppose summary judgment." *Family Home and Fin. Ctr., Inc. v. Federal Home Loan*

Mortg. Corp., 525 F.3d 822, 827 (9th Cir. 2008) (citation omitted). "Failure to comply with these requirements 'is a proper ground for denying discovery and proceeding to summary judgment.'" *Id.* (citation omitted). Plaintiffs have failed to provide an affidavit and failed to articulate any facts that they would use to resist summary judgment if discovery were permitted. While this procedural failing is alone sufficient to deny a continuance to take discovery, the Court will set forth in its analysis of Plaintiffs' claims below why additional facts would not preclude summary judgment.

IV. Legal Standard[1]

Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of . . . [the factual record that] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the non-moving party must demonstrate with admissible evidence that genuine issues of material fact exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("When the moving party has carried its burden under Rule 56 . . . its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.").

A material fact for purposes of summary judgment is one that "might affect the outcome of the suit" under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Although a court must draw all inferences in the non-movant's favor, *id.* at 255, when the non-moving party's version of the facts is "blatantly contradicted by the record, so that no

[1] The Court previously relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and applied a presumption of constitutionality to the state framework. Dkt. 51, at 4-5. This use of *Jacobson* has recently been criticized. *See*, *e.g.*, *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2608 (2020) (Alito, J., dissenting from denial of application for injunctive relief) ("[I]t is a mistake to take language in *Jacobson* as the last word on what the Constitution allows public officials to do during the COVID-19 pandemic."); *County of Butler v. Wolf*, 2020 WL 5510690, at *6 (W.D. Pa. 2020). *Jacobson* at the very least recognizes that the "latitude" of public health officials in a pandemic "must be especially broad." *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613 (2020) (Roberts, J., concurring in denial of application for injunctive relief). Such deference is more appropriate to the discretionary inquiries of a court evaluating equitable relief. Because the Court makes a merits determination on a motion for summary judgment, the Court does not rely on *Jacobson* in this Order.

reasonable jury could believe it, [the] court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

V. Application

a. Article III Case or Controversy

i. Standing

To establish Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citations omitted).

The Supreme Court has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013). "When … a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else* … causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)). In this circumstance, "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (citations omitted).

"Causation exists where the alleged injury is 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Namisnak v. Uber Techs.*, 971 F.3d 1088, 1042 (9th Cir. 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). However, "[c]ausation can be established 'even if there are multiple links in the chain,' … as long as the chain is not 'hypothetical or tenuous.'" *Juliana v. United States*, 947 F.3d 1159, 1169 (9th Cir. 2020) (citations omitted). A theory of standing may satisfy the causation requirement if it "relies … on the predictable effect of Government action on the decisions of third parties." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019) (citations omitted).

"To establish Article III redressability, the plaintiffs must show that the relief they seek is both (1) substantially likely to redress their injuries; and (2) within the district court's power to award." *Juliana*, 947 F.3d at 1170. However, "[p]laintiffs need not demonstrate that there is a 'guarantee' that

their injuries will be redressed by a favorable decision." *Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012). Redressability is not defeated when "the defendant's actions produce injury through their 'determinative or coercive effect upon the action of someone else.'" *Skyline Wesleyan Church v. Cal. Dep't of Managed Health Care*, 968 F.3d 738, 749 (9th Cir. 2020) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). The redressability analysis is "focused on … the predictable effect of an order granting the relief [Plaintiffs] seek[]." *Id.* at 750. "The plaintiffs' burden is 'relatively modest.'" *Renee*, 686 F.3d at 1013 (quoting *Bennett*, 520 U.S. at 171)). "Plaintiffs need only show that there would be a 'change in a legal status,' and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Id.* (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)).

Because Plaintiffs are parents and students challenging a statewide framework affecting third parties (namely, counties, public school districts, and private schools), the Court directed the parties to address whether Plaintiffs have Article III standing. Dkt. 48. After reviewing the parties' supplemental briefing, the Court now concludes that at least one Plaintiff has Article III standing as to each claim. *See Ramirez v. TransUnion LLC*, 951 F.3d 1008, 1024 (9th Cir. 2020) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006)) ("[A] 'plaintiff must demonstrate standing for each claim he seeks to press.'")); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (citation omitted) ("Plaintiffs seek injunctive relief, not damages, and '[a]s a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.'").[2]

Plaintiffs have demonstrated a "direct chain of causation" between statewide in-person learning restrictions and school closures. *Skyline Wesleyan Church*, 968 F.3d at 748. There is admissible evidence in the record that one school district was engaged in extensive preparations to reopen for in-person learning in the 2019-20 school year. Plaintiff Matthew Brach, a "Governing Board Member" of the Palos Verdes Unified School District (PVUSD) provides an affidavit describing these preparations.

[2] The primary Article III standing issues are with causation and redressability. Defendants briefly argue that parents lack standing to bring claims asserting educational injuries suffered by their children. Dkt. 54, at 2-3. That argument is inconsistent with caselaw holding that parents asserting similar educational injuries had standing. *See Parents Involved in Cmty. Schs.v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-19 (2007) (association of parents had standing to challenge race-based public school assignments); *see also Renee*, 623 at 797 (parents, along with other plaintiffs, had standing to challenge federal regulation affecting the education of their children) ; *D.K. v. Huntington Beach Union High Sch. Dist.*, 428 F. Supp. 2d 1088, 1091-92 (C.D. Cal. 2006) (citation omitted) (parents had standing to bring IDEA claims).

See Declaration of Matthew Brach, Dkt. 28-23 ¶¶ 2, 6, 10-17. The district purchased personal protective equipment and developed a mitigation strategy including staggered arrival times, masking requirements, a "grab/go" lunch plan, and a specialized protocol for high touch areas. *Id.* ¶ 12.[3] Additionally, several Plaintiffs submitted declarations indicating that their private schools and school districts began remote learning in the 2019-20 school year after statewide restrictions were put in effect. *See*, *e.g.*, Supplemental Declaration of Roger Hackett, Dkt. 55-7; Supplemental Declaration of Christine Ruiz, Dkt. 55-8; Supplemental Declaration of Marianne Bema, Dkt. 61-3.

Defendants identify some school districts that opted for remote learning independent of statewide restrictions – namely, Los Angeles Unified School District, San Diego Unified School District, San Francisco Unified School District, Oakland Unified School District, Santa Ana Unified School District, and Long Beach Unified School District. *See* Declaration of Darin L. Wessel, Dkt. 54-3, Exs. TT, UU, VV. However, this list does not include several public school districts and private schools attended by Plaintiffs' children, such as PVUSD, *see* Brach Decl., Oaks Christian School, *see* Supplemental Declaration of Roger Hackett, Dkt. 55-7, Los Primeros School of Sciences and Arts in Ventura County, *see* Supplemental Declaration of John Ziegler, Dkt. 55-6, Santa Monica Malibu Unified School District *see*, Bema Suppl. Decl., Saugus Union Unified School District; *see* Ruiz Suppl. Decl., or any schools in Riverside County, *see* Declaration of Brian Hawkins, Dkt. 28-36.[4]

Furthermore, the causation element does not require that the Defendant's action be the "very last step in the chain of causation" where Plaintiffs' injury is "produced by determinative or coercive effect upon the action of someone else," *Bennett v. Spear*, 520 U.S. at 169, as demonstrated by several recent Ninth Circuit cases, *see Skyline Wesleyan Church*, 968 F.3d at 748-49 (state defendant's policy, which prevented third-party insurer from offering plan with abortion exclusion to plaintiff, was causally connected to plaintiff's alleged Free Exercise injury); *Renee*, 623 F.3d at 798 (federal regulations had causal connection to California regulations regarding teacher qualifications that allegedly caused educational injuries to children); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1121-22 (9th Cir. 2009) (pharmacists had standing to sue state officials over policy making it likely pharmacies would terminate

[3] Defendants object to this and other declarations as hearsay. Dkt. 54, at 5 n.4. While some portions of these affidavits may be inadmissible, the cited portions of Brach's declaration are nonassertive conduct personally observed in Brach's work as a Board Member of PVUSD. Fed. R. Evid. 801(a), (c).

[4] This list does not include any schools at issue in Defendant's mootness argument discussed below.

or refuse to hire them because of their religious or moral objections to birth control). While there are "multiple links in the chain" connecting school district and private school closures to statewide restrictions, that link is not "hypothetical or tenuous." *Juliana*, 947 F.3d at 1169.

A similar analysis shows that Plaintiffs' alleged injuries would be redressable by an injunction prohibiting enforcement of statewide in-person learning restrictions. An injury may be redressable by an injunction against a higher-level government official even if alleviating the injury still requires action within the discretion of a third party. *See Bennett*, 520 U.S. at 168-69 (invalidation of scientific opinion redressed injuries dependent on action by separate agency which "retains ultimate responsibility for determining whether and how a proposed action shall go forward"); *Renee*, 623 F.3d at 798 (enjoining federal regulation "significantly increases the likelihood that California will take steps" to improve teacher qualifications in certain schools even though California retained "great flexibility" to do so); *Stormans, Inc.*, 586 F.3d at 1122 (injunction against state would improve prospects of conscientious objector pharmacists to be employed by third-party pharmacies). The question is not whether it is certain or guaranteed that the third party would take steps to alleviate the injury; rather, plaintiffs "need only show that there would be a 'change in legal status,' and that a 'practical consequence of that change would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.'" *Renee*, 623 F.3d at 797-98 (quoting *Evans*, 536 U.S. at 464).

Here, it is at least the "predictable effect" of an injunction that some schools would reopen for in-person learning, including a school attended by one of Plaintiffs' children bringing each set of claims. *See Skyline Wesleyan Church*, 968 F.3d at 750 (injury redressable by injunction of state policy where it was "the predictable effect … that at least one insurer would be willing to sell [plaintiff] a plan that accords with its religious beliefs"). This predictable effect is evident not only from the preparations described above at PVUSD geared towards reopening during the pandemic but also from the fact that the schools had operated in person until statewide public health restrictions were imposed. *See id.* (finding "strong evidence" supporting redressability that insurers had offered plans consistent with plaintiff's religious commitments before implementation of state policies).[5]

[5] Defendants note that several counties have been removed from Tier 1 or received waivers for elementary education since Plaintiffs' complaint was filed. Dkt. 63, at 5 n.1. If presented in admissible form, evidence that schools in those counties moved to in-person learning would be persuasive evidence supporting this predictable effect. However, because no such admissible evidence was presented, the Court does not rely on reopening of other schools in its standing analysis.

Defendants argue that, under Cal. Health & Saf. Code § 120175, public health officers could impose similar restrictions on a countywide level if state restrictions are enjoined. Dkt. 54, at 4-5. While it is true that causation and redressability are more difficult to establish when standing depends on the exercise of discretionary power by intermediaries, *see Clapper*, 568 U.S. at 412, that is not the position of county health officers. Defendants have not argued that county health officers would have to exercise discretion to approve in-person schooling if statewide restrictions are lifted. Instead, Defendants only argue that county health officers *could* impose new restrictions. Without evidence that such restrictions are likely, however, such speculation does not undermine causation or redressability. *See Renee*, 623 F.3d at 799 (rejecting as speculation argument that California would independently adopt regulations consistent with enjoined federal regulations to allow less qualified teachers in public schools). If the possibility of local restrictions were sufficient to defeat standing, federal and state laws could never be enjoined where local governments had the power to impose similar restrictions.

Because the causal link between Plaintiffs' asserted injuries and statewide restrictions is not hypothetical or tenuous, *see Juliana*, 947 F.3d at 1169, and the reopening of some of Plaintiffs' schools is the predictable effect of an injunction, *see Skyline Wesleyan Church*, 968 F.3d at 750, Plaintiffs have established Article III standing at this stage.

ii. Mootness

"When an 'intervening circumstance … at any point during litigation' eliminates the case or controversy required by Article III, 'the action can no longer proceed and must be dismissed as moot.'" *Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (quoting *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 669 (2016)). Defendants make two arguments that some or all of Plaintiffs' claims have been rendered moot by post-complaint developments.

First, Defendants argue that claims are mooted for plaintiffs living in San Diego County, Orange County, or Santa Clara County, which have been removed from Tier 1, because schools in those counties are now free to resume in-person instruction. Supp. RJN, Exs. CCC, DDD, EEE. If these plaintiffs are not currently participating in in-person education, that would be attributable to independent decisions of parents, schools, school districts, or counties. However, the mooting of some claims does not moot the entire case if there is at least one Plaintiff who remains injured. *See Townley*, 722 F.3d at 1133 (citation omitted) ("Plaintiffs seek injunctive relief, not damages, and '[a]s a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has

standing.'"). Several Plaintiffs attend school in Los Angeles County, Ventura County, and Riverside County. Dkt. 9 ¶¶ 7-21. The case is not moot as to those Plaintiffs who are still attending schools in counties subject to statewide restrictions on in-person learning.

Second, Defendants argue that Plaintiffs' claims are mooted by state guidance permitting in-person services in stable cohorts of no more than 16 individuals. Wessel Decl., Exs. XX-YY. Students with disabilities who need specialized services and targeted support are prioritized under this guidance. *Id.*, Ex. YY.3. While this guidance removes an absolute prohibition on in-person learning in Tier 1 counties, it still imposes limits on in-person learning. Plaintiff Bema's autistic children were still engaged in remote learning even after this cohort guidance went into effect. Bema Suppl. Decl. ¶ 19.[6] There is no evidence that any other Plaintiffs in Tier 1 counties have resumed in-person learning as a result of the new cohort guidance. Therefore, notwithstanding this minor exception, the Tier Framework continues to limit Plaintiffs' opportunities for in-person learning.

b. Substantive Due Process

In its prior Order, the Court explained in detail its conclusion that Plaintiffs were unlikely to succeed on the merits of their substantive due process claim. In its brief opposing summary judgment, Plaintiffs attempt to respond to the Court's earlier concerns with additional historical citations and arguments. *See generally* Dkt. 61. None of these new submissions undermine the rationale of the Court's Order, and the Court therefore concludes that summary judgment is appropriate in favor of Defendants on the substantive Due Process claim.

Plaintiffs have not established that the Due Process Clause of the Fourteenth Amendment contains a fundamental right to basic education. Presented with the opportunity, the Supreme Court has declined to recognize such a right. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (citation omitted) ("Public education is not a 'right' granted to individuals by the Constitution."); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) ("We have carefully considered each of the arguments

[6] Most of Bema's supplemental declaration consists of quoting or paraphrasing emails she received from various education officials regarding implementation of the cohort guidance. *See generally* Bema Suppl. Decl. Because Bema's own testimony is being used to prove the contents of writings, namely emails from school officials, and Plaintiffs have not produced those emails or explained why they couldn't be produced, these statements would be barred under the best evidence rule. *See Medina v. Multaler, Inc.*, 2007 WL 5124009 (C.D. Cal. 2007). However, her statement that her children remain in online education after the cohort guidance went into effect comes from her own observations rather than any writing and is not barred by the best evidence rule.

supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

Plaintiffs present no case law that would support a fundamental right to minimum education. Plaintiffs repeatedly cite *dicta* from a footnote in *United States v. Harding*, 972 F.2d 410 (1992), which rejected an Equal Protection challenge to sentencing disparities between crack and powder cocaine. *Harding* neither discusses substantive due process principles nor education, and therefore has no instructive value in this case. While at least relevant to the question, *Plyler v. Doe*, 457 U.S. 202 (1982), did not recognize a fundamental right to education. In *Plyler*, the Supreme Court held instead that the Equal Protection Clause prohibited excluding undocumented children from public schools. 457 U.S. at 230. In doing so, however, the Supreme Court reaffirmed that "[p]ublic education is not a 'right' granted to individuals by the Constitution," *id.* at 221 (quoting *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)), much less a right to education of a certain quality or format, *see id.* at 223 ("[A] state need not justify by compelling necessity every variation in the manner in which education is provided to its population." (quoting *Rodriguez*, 411 U.S. at 28-39)).

As the Court explained in its prior Order, the structure of substantive due process doctrine – with its focus on protecting liberty and autonomy – suggests that no fundamental right to basic education exists. First, substantive due process "refers to certain actions that the government may not engage in" and "[g]enerally speaking … protects an individual's fundamental rights to liberty and bodily autonomy." *C.R. v. Eugene School Dist. 4J*, 835 F.3d 1142, 1154 (9th Cir. 2016) (citations and quotation marks omitted). Plaintiffs ask this Court to recognize a right that would not prevent government interference but require a government service of a certain quality. Plaintiffs cite *Obergefell v. Hodges*, 576 U.S. 644 (2015), for the proposition that an individual may have a fundamental right to a government benefit because same-sex marriages can only be recognized through state action. However, the Supreme Court in *Obergefell* explained the right to same-sex marriage as a component of the fundamental liberty recognized by the Due Process Clause. 576 U.S. at 665 ("[T]he right to personal choice regarding marriage is inherent in the concept of individual autonomy."). While the Due Process Clause does recognize "the right of parents to be free from state interference with their choice of the educational forum itself," the Ninth Circuit has declined to extend that liberty interest to parents seeking to control the content or format of public education. *See Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1207 (9th Cir. 2005). The Ninth Circuit has rejected a substantive due process challenge to a public school's questioning of children about sexual topics, and in so doing affirmed this broader principle: "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school,

Initials of Preparer PMC

they do not have a fundamental right generally to direct *how* a public school teaches their child." *Id.* at 1206 (quoting *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395-96 (6th Cir. 2005)).

Even if the Court did recognize a fundamental right to basic education, the Court would be left without criteria to apply to the facts of this case. Plaintiffs present absolutely no standard for evaluating what should count as a minimally adequate education. When *Plyler* invalidated the exclusion of a population from public education on Equal Protection grounds, it spoke of harms such as illiteracy, inability to participate in political institutions, and limited economic opportunities. 457 U.S. at 221. Plaintiffs' argument about a fundamental right to minimum education invokes these same purposes of public education. Dkt. 28-1, at 15-16; Dkt. 61, at 10-14. Yet Plaintiffs do not even argue that their children face any of these risks as a consequence of several months of remote education. Dkt. 28-1, at 3-9, 16-18.

Without a viable legal theory or any argument that additional evidence would support their theory on its own terms, the additional discovery Plaintiffs seek – from "school administrators, teachers, and special education counselors" – would not alter the Court's conclusion.

Therefore, the Court grants summary judgment for Defendants on the Due Process claim.

c. Equal Protection

The Court explained in detail in its prior Order why Plaintiffs were unlikely to succeed on the merits of their Equal Protection claim. The Court has now reviewed Plaintiffs' additional submissions, *see* Dkt. 55, at 12; Dkt. 61, at 19-21, and the Court concludes that summary judgment on the Equal Protection claim is appropriate in favor of Defendants.

Because the Court has rejected Plaintiffs' argument that there is a fundamental right to basic education, rational basis review applies to their Equal Protection claim. *See United States v. Padilla-Diaz*, 862 F.3d 856, 862 (9th Cir. 2017) ("Classifications that do not implicate fundamental rights or a suspect class are permissible so long as they are 'rationally related to a legitimate state interest.'" (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985))).

"Under rational basis review, a classification is valid 'if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993))). "This inquiry is not a 'license for courts to judge the

wisdom, fairness, or logic of legislative choices'; if we find a 'plausible reason[] for [California's] action, our inquiry is at an end." *Fowler Packing Company, Inc. v. Lanier*, 844 F.3d 809, 815 (9th Cir. 2016) (quoting *Beach Commc'ns*, 508 U.S. at 313-14). Differential treatment may still be upheld under rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data." *United States v. Navarro*, 800 F.3d 1104, 1114 (9th Cir. 2015) (quoting *Beach Commc'ns*, 508 U.S. at 315). "[A] legislative classification must be upheld [under rational basis review] 'so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Angelotti Chiropractic, Inc.*, 791 F.3d at 1085 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992)).

"Under rational-basis review, '[t]he burden falls on the party seeking to disprove the rationality of the relationship between the classification and the purpose.'" *Navarro*, 800 F.3d at 1113 (citation omitted).

Plaintiffs do not dispute that curbing the spread of COVID-19 is a legitimate state interest. *See* Dkt. 28-1, at 19-20; Dkt. 61, at 17-21. Nor could they. "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens." *South Bay United Pentecostal Church*, 140 S. Ct. at 1614 (Kavanaugh, J., dissenting).

Defendants have set forth plausible policy reasons for limiting in-person learning in Tier 1 counties with higher rates of confirmed COVID-19 cases and higher positivity rates. *See* Supp. RJN, Ex. ZZ (explaining Tier Framework). In counties with higher numbers in these categories, "the risks and impacts of disease transmission are even greater." Request for Judicial Notice ("RJN"), Dkt. 36, Ex. H.2. In these counties, where there are "higher levels of community spread," there is also an "increase [in] the likelihood of infection among individuals at high risk of serious outcomes from COVID-19, including those with underlying health conditions who might live or otherwise interact with an infected individual." *Id.*, Ex. I.3. California has restricted a variety of activities in Tier 1 counties that are deemed higher-risk, particularly those involving "indoor operations," because "the odds of an infected person transmitting the virus are dramatically higher compared to an open-air environment." *Id.*; *see also id.*, Ex. I.

Defendants have also offered plausible reasons that these higher-level public health principles should apply to schools. This is explained in two declarations submitted by Dr. James Watt, Chief of

the Division of Communicable Diseases at the California Department of Public Health. *See* Dkt. 35-1 ("Watt Decl."), 54-1 ("Watt Supp. Decl."). Dr. Watt explains that, "[i]n schools, adults intermingle with children, and transmission may happen between adults, between children, from adults to children, or from children to adults." Watt Decl. ¶ 26. "By gathering in large groups, and in close proximity to others, individuals put themselves and others at increased risk of transmission, which could be expected to increase the spread of COVID-19 in their communities and in any other communities they visit." *Id.* This spread could fan out into different parts of the state, jeopardizing the hard work to contain COVID-19 that is going on in many communities and placing a further strain on hospitals and other resources across the state." *Id.* "In-person classroom instruction thus creates increased public risk of COVID-19 transmission until localities have attained sufficient testing, tracking, hospital capacity, and infection rates that indicate epidemiological stability and an ability to treat outbreaks if they occur." *Id.* ¶ 29. The "movement and mixing" associated with in-person instruction "would introduce substantial new risks of transmission of COVID-19. *Id.* ¶ 37.

These explanations indicate that Defendants have a plausible policy goal for restricting in-person schooling in counties with greater community spread of COVID-19. In counties with greater community spread, in-person schooling poses a high risk of infecting individuals at school and those whom students, teachers, and staff may encounter in the community, which could jeopardize other preventive measures, strain health care and public health resources, and lead to severe illness or death. Because there is a 'plausible reason[] for [California's] action, [the Court's] inquiry is at an end." *Fowler Packing Co.*, 844 F.3d at 815 (quoting *Beach Commc'ns*, 508 U.S. at 313-14).

Plaintiffs have assembled a veritable library of declarations from physicians, academics, and public health commentators who disagree with the scientific or policy basis for in-person learning restrictions. *See*, *e.g.*, Dkt. 61-2 (Declaration of Sean Kaufman); Dkt. 28-3 (Declaration of Dr. Jayanta Bhattacharya), Dkt. 28-4 (Declaration of Dr. Scott Atlas), Dkt. 28-5 (Declaration of Dr. James-Lyons-Weiler). These scientific and policy disagreements take several different forms, including skepticism that PCR tests accurately measure infectiousness, Dkt. 61, at 20, insistence that hospitalizations are a more reliable indicator of community spread than case numbers, *id.* at 21, and a belief that children "are not at risk of being sickened or killed by COVID-19," Dkt. 28-1, at 19.

The Court need not address each of these scientific and policy objections in detail. As the Court noted in its prior Order, the Equal Protection Clause simply does not require that government classifications be supported by scientific consensus – or even the most reliable scientific evidence. Dkt. 51, at 10. "[R]ational-basis review allows for decisions 'based on rational speculation unsupported by

evidence or empirical data.'" *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns*, 508 U.S. at 315). Even if a firmer basis were required than the public documents and declarations cited above to show that "the legislative facts … rationally may have been considered to be true by the governmental decisionmaker," *Angelotti Chriopractic, Inc.*, 791 F.3d at 1085 (quoting *Nordlinger*, 505 U.S. at 11), Dr. Watt's declarations refer to examples, epidemiological data, and scientific studies that would give Defendants such a basis. *See* Watt Decl. ¶¶ 18, 25, 38; Watt Suppl. Decl. ¶¶ 3-7. Mere disagreement with Defendants' plausible scientific and policy premises does not satisfy Plaintiffs' "burden to negative every conceivable basis which might support" in-person learning restrictions. *Navarro*, 800 F.3d at 1114 (quoting *Beach Commc'ns*, 508 U.S. at 315) (citation and quotation marks omitted).

Defendants argue that they should be permitted to depose Dr. Watt regarding his scientific opinions and obtain documents and communications on which Defendants relied to formulate in-person learning restrictions. Dkt. 61, at 5. This request once again misunderstands the highly deferential inquiry under rational basis review. Because the Court concludes that the Tier Framework, and its consequences for in-person learning, are rationally related to the purpose of mitigating the spread of COVID-19, Plaintiffs cannot succeed on this claim "regardless of what facts plaintiffs might prove during the course of litigation." *Angelotti Chiropractic, Inc.*, 791 F.3d at 1087. "A legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* (quoting *Beach Commc'ns*, 508 U.S. at 315).

Therefore, the Court grants summary judgment for Defendants on the Equal Protection claim.[7]

d. Title VI of the Civil Rights Act of 1964

Plaintiffs conceded in their reply brief in support of their application for a temporary restraining order that their Title VI claim "is currently foreclosed" by adverse precedent. Dkt. 40, at 9. Plaintiffs made no effort to rescue this claim in their opposition to summary judgment. *See generally* Dkt. 61.

[7] The Court does not rule out that Defendants could be entitled to dismissal of the Equal Protection claim for failure to state a claim. Equal Protection claims can be properly resolved by a motion to dismiss because a government's asserted rationale will often be codified in judicially noticeable legislative findings or history or an administrative record. *See*, *e.g.*, *Angelotti Chiropractic*, *Inc.*, 791 F.3d at 1087-88. However, the judicially noticeable documents supporting in-person learning restrictions here are more generic, and do not describe in detail the application of general public health principles to the context of K-12 schools. *See* Dkt. 63, at 10-14. The Court therefore considers it prudent to take into account the declarations of Dr. Watt which provide detail about risks posed in the K-12 school context. As the Court explained in its September 1 Order, the Court decided to resolve this case on summary judgment instead of on a motion to dismiss on this basis. Dkt. 60.

Therefore, the Court deems this claim abandoned and grants summary judgment in favor of Defendants. *See Shakur v. Schriro*, 514 F.3d 878, 892 (9th Cir. 2008) ("[A] plaintiff has 'abandoned … claims by not raising them in opposition to … summary judgment.'" (quoting *Jenkins v. Cty. Of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005))).

e. IDEA

The Court explained in its prior Order that Plaintiffs were unlikely to succeed on the merits of their IDEA claim because they failed to exhaust administrative remedies. Dkt. 51, at 11-14. The Court has reviewed Defendants' additional submissions, *see* Dkt. 55, at 9-12; Dkt. 61, at 22-24, and the Court now concludes that summary judgment is appropriate in favor of Defendants on the IDEA claim.

The IDEA provides federal funds to states in exchange for "furnish[ing] a 'free appropriate public education' – more concisely known as a FAPE – to all children with certain physical or intellectual disabilities." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 748 (2017). The IDEA's mechanism for providing disabled children with a FAPE is an "individualized education program" ("IEP"), which is "[c]rafted by … a group of school officials, teachers, and parents … to meet all of the child's 'educational needs.'" *Id.* at 749 (internal citations omitted). "Because parents and school representatives sometimes cannot agree on such issues, the IDEA establishes formal procedures for resolving disputes." *Id.* "There must be an opportunity for mediation, an impartial due process hearing, and an appeals process." *Paul G. v. Monterey Peninsula Unified Sch. Dist.*, 933 F.3d 1096, 1099 (9th Cir. 2019) (citing 20 U.S.C. § 1415(e)-(g)). The California Department of Education uses California's Office of Administrative Hearings (OAH) to provide these remedies. *Id.* (citing Cal. Educ. Code § 56504.5(a)).

"[A] parent unhappy with the outcome of the administrative process may seek judicial review by filing a civil action in state or federal court." *Fry*, 137 S. Ct. at 748 (citing 20 U.S.C. § 1415(i)(2)(A)). "Judicial review under the IDEA is ordinarily only available after the plaintiff exhausts administrative remedies." *Doe v. Arizona Dep't of Educ.*, 111 F.3d 678, 680-81 (9th Cir. 1997) (citation omitted). In California, administrative remedies are exhausted when a plaintiff obtains a final decision from OAH. *See Paul G.*, 933 F.3d at 1099.

Plaintiffs do not dispute that they have not exhausted administrative remedies under the IDEA. Instead, Plaintiffs argue that they are excused from compliance with the exhaustion requirement by the

exceptions to the exhaustion requirement recognized in the Ninth Circuit. *See* Dkt. 9 ¶¶ 136-42; Dkt. 40, at 9-10; Dkt. 55, at 6-12; Dkt. 61, at 21-25.

In *Hoeft v. Tucson Unified Sch. Dist.*, the Ninth Circuit held that exhaustion under the IDEA was not required where "(1) it would be futile to use the due process procedures…; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)." 867 F.2d 1298, 1303 (9th Cir. 1992). "The party alleging futility or inadequacy of IDEA procedures bears the burden of proof." *Doe*, 111 F.3d at 681 (citing *Hoeft*, 867 F.2d at 1303).

"In determining whether these exceptions apply, our inquiry is whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme." *Hoeft*, 967 F.2d at 1302-03. "Exhaustion of the administrative process allows for the exercise of discretion and educational expertise by state and local agencies, affords full exploration of technical educational issues, furthers development of a complete factual record, and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children." *Id.* at 1303.

Plaintiffs first argue that exhaustion would be futile because a hearing officer would lack authority to grant the relief they seek – an injunction against the enforcement of statewide restrictions on in-person learning. Plaintiffs' primary argument is that *Hoeft*, which first articulated the exceptions, quoted legislative history to the effect that exhaustion should be excused when "the hearing officer lacks authority to grant the relief sought." 967 F.2d at 1304 (quoting H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)). However, "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). More importantly, the Ninth Circuit has consistently held that administrative procedures are not futile simply because they cannot afford the precise relief that IDEA plaintiffs might envision. *See Paul G.*, 933 F.3d at 1102 (rejecting argument that exhaustion would have been futile because hearing officer could not order state to provide requested relief); *Doe*, 111 F.3d at 683 ("That the class might not get … injunctive relief" by pursuing administrative remedies "is not decisive."). Rather, the question is "whether the administrative process is adequately equipped to address and resolve the issues presented" in the sense that "the administrative process has the potential for producing the very result plaintiffs seek, namely, statutory compliance." *Hoeft*, 967 F.2d at 1309.

Initials of Preparer PMC

Here, a hearing officer could provide compensatory education or additional services. *See Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006). OAH can also order compliance with procedural requirements under the IDEA. Cal. Educ. Code § 56505(f)(4). It would therefore not be futile for a parent seeking to remedy denial of a FAPE to pursue these remedies, because they could ensure that Plaintiffs' children receive a FAPE or remedies for a past denial. *See generally Martinez et al. v. Newsom et al.*, No. 5:20-cv-01796-SVW-AFM, Dkt. 103, at 5-8 (C.D. Cal. Nov. 24, 2020).

Plaintiffs next argue that they are excused from the exhaustion requirement because they are seeking systemic relief. Systemic claims are excused from the exhaustion requirement because "the nature of the claim renders those procedures futile (the nature of the state's administrative process is being challenged in an across-the-board manner – e.g., the very process of bringing due process complaints is inadequate) and no adequate relief can be obtained by pursuing administrative remedies (the remedy sought is outside the agency's ability to grant – e.g., restructuring the state process for IDEA due process appeals)." *S.B. v. Cal. Dep't of Educ.*, 327 F. Supp. 3d 1218, 1249 (E.D. Cal. 2018). "[A] claim is 'systemic' if it implicates the integrity or reliability of the IDEA dispute resolution procedures themselves, or requires restructuring the education system itself in order to comply with the dictates of the Act." *Doe*, 111 F.3d at 682.

Plaintiffs do not raise any objections to the IDEA dispute resolution procedures in California or propose any restructuring of the education system. Rather, they essentially seek relief for seven children with special needs from a statewide policy that affects every disabled student differently and that local school districts have some discretion to implement. *See* Supp. RJN, Exs. FFF, GGG (describing cohort guidance); *Doe*, 111 F.3d at 682-83 (claim was not systemic when it sought IDEA implementation in one facility). While the policy Plaintiffs challenge is applicable statewide, their purported right to relief under the IDEA is based on an individual denial of a FAPE, a determination which must be made by a state hearing officer. *See Paul G.*, 933 F.3d at 1102 (Plaintiff was required to obtain a determination that he was denied a FAPE through the administrative process before bringing suit to require the state to provide an in-state residential facility).

The Court's determination is bolstered by the teaching of *Hoeft* – that the ultimate question in deciding whether exhaustion is required is "whether pursuit of administrative remedies under the facts of a given case will further the general purposes of exhaustion and the congressional intent behind the administrative scheme." *Hoeft*, 967 F.2d at 1302-03. IDEA's exhaustion requirement embodies a policy choice that favors "full exploration of technical educational issues" and "further[] development of

Initials of Preparer PMC

a complete factual record" by the agency before federal courts intervene. *Id.* at 1303. Here, Plaintiffs' declarations leave the Court with little factual detail about their individual needs, the services they are receiving online, and why a FAPE is only possible in their case with in-person services. *See generally* Declaration of Ashley Ramirez, Dkt. 28-33; Declaration of Brian Hawkins, Dkt. 28-36; Ruiz Decl.; Bema Supp. Decl.; Declaration of Marianne Bema, Dkt. 28-32. Likewise, the record contains no case-specific expert analysis necessary for the Court to evaluate these issues. Finally, this Court is hopeful that the cooperative, individually tailored decision-making envisioned by the IDEA will better serve students than the blunt instrument of an injunction from a federal court. The general purposes of exhaustion – adequate fact development, expert decision-making, and a preference for cooperative solutions – thus weigh against excusing Plaintiffs' failure to exhaust in the circumstances of this case.

Whether exhaustion is required is a question of law. *C.C. by and through Ciriacks v. Cypress Sch. District*, 2010 WL 11603053, at *2 (C.D. Cal. 2010). Because the Court has concluded that Plaintiffs were required to exhaust administrative remedies under the IDEA, summary judgment is appropriate in favor of Defendants on their IDEA Act claim.

f. ADA/Rehabilitation Act

The Court explained in its prior Order that its conclusion that Plaintiffs' IDEA claims were unexhausted made it unlikely that Plaintiffs could succeed on their ADA and Rehabilitation Act claims. Dkt. 51, at 11-14. The Court has reviewed Defendants' additional submissions, *see* Dkt. 55, at 6-9; Dkt. 61, at 21-22, and the Court now concludes that summary judgment is appropriate in favor of Defendants on Plaintiffs' ADA and Rehabilitation Act claims.

Under 20 U.S.C. § 1415(l), "before the filing of a civil action under [the ADA and Rehabilitation Act] seeking relief that is also available [under the IDEA], the procedures [applicable to IDEA claims] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." Whether the ADA and Rehabilitation Act claims are exhausted depends on whether the gravamen of the complaint seeks relief for denial of a FAPE. *See Fry*, 137 S. Ct. at 752; *Paul G.*, 933 F.3d at 1100 ("The crucial issue is therefore whether the relief sought would be available under the IDEA.").

Here, Plaintiffs' ADA and Rehabilitation Act claims do seek relief for denial of a FAPE. The Supreme Court in *Fry* recommended that courts approach this inquiry with two considerations in mind – whether plaintiffs could have brought the same claim against another non-educational facility, and

whether a non-student could bring the same claim against the school. 137 S. Ct. at 756. Both considerations support this conclusion. "[W]hen the answer [to those questions] is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so." *Fry*, 137 S. Ct. at 756.

First, Plaintiffs could not have brought the same claim if Defendants' alleged conduct occurred at a public facility that was *not* a school. Plaintiffs essentially allege that in-person learning restrictions prevent schools from providing the services necessary for an adequate education for disabled students. Such a claim would make no sense with respect to a public theater or library because those facilities do not provide education. Second, an adult employee or visitor could not assert such a claim against the school because they are not owed an education. These considerations suggest that Plaintiffs' complaint is about inadequate education for disabled students rather than equal access to public facilities.

Plaintiffs argue that their ADA and Rehabilitation Act claims do not seek relief for denial of a FAPE because they "seek reasonable accommodations to permit them to receive instruction on the same terms as non-disabled students." Dkt. 55, at 7. Whether Plaintiffs can articulate their claims in the language of anti-discrimination statutes is irrelevant. The three statutes have "some overlap in coverage." *Fry*, 137 S. Ct. at 756. "The use (or non-use) of particular labels and terms is not what matters." *Id.* at 755. Because Plaintiffs' claim is that their special education services have not been adequately provided during distance learning, the gravamen of their complaint seeks remedies for the denial of a FAPE.

Therefore, the Court concludes that summary judgment is appropriate in favor of Defendants on their ADA and Rehabilitation Act claims.

VI. Conclusion

For the foregoing reasons, the Court GRANTS summary judgment *sua sponte* in favor of Defendants.

IT IS SO ORDERED.

:

Initials of Preparer PMC