SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
NORTH COUNTY

MINUTE ORDER

DATE: 03/15/2021 TIME: 01:31:00 PM DEPT: N-27

JUDICIAL OFFICER PRESIDING: Cynthia A. Freeland
CLERK: Michael Garland
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2021-00007536-CU-WM-NC** CASE INIT.DATE: 02/16/2021
CASE TITLE: **A.A. vs NEWSOM [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Ex Parte

APPEARANCES

The Court, having taken the above-entitled matter under submission on March 15, 2021, and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

See attached.

DRAFT

Having considered the papers filed in support of the Ex Parte Application, including all admissible declarations and lodged exhibits, the opposition to the Ex Parte Application, including all supporting declarations and lodged exhibits, the arguments of counsel, and all matters about which the Court may properly take judicial notice, the Court rules as follows: The Ex Parte Application for Temporary Restraining Order is ***GRANTED IN PART***.

PROCEDURAL BACKGROUND

The matter came on for a hearing on Plaintiffs' Ex Parte Application for Temporary Restraining Order on March 10, 2021 at 8:30 a.m. in Department N-27 of the San Diego Superior Court. As of the time of the hearing, the Court did not have proof that the First Amended Complaint, which apparently had been filed on March 9, 2021, had been served on all parties. Further, the attorneys for Governor Gavin Newsom in his official capacity as Governor of the State of California, Dr. Mark Ghaly, in his official capacity as Secretary of the Department of Health and Human Services, Dr. Naomi Bardach, in her official capacity as Successful School Team Lead for the Department of Health and Human Services, and Tomas Aragon, in his official capacity as Director and State Public Health Officer of Department of Public Health (collectively, the "State Defendants") argued that the Plaintiffs' *ex parte* papers had not been served sufficiently in advance to allow them to prepare a thorough response[1]. As a result, the Court continued the hearing to March 15, 2021 at 9:00 a.m. and set a briefing schedule for the service/filing of any supplemental pleadings.

On March 12, 2021, the Court received the "Formal Objection by Defendants Oceanside Unified School District and Vista Unified School District to Ex Parte Application for Temporary Restraining Order Due to Lack of Service." As a result of lack of service, these two school districts request that the Court not issue any order against them. As the request at issue on March 15, 2021 is whether a temporary restraining order should issue enjoining the State Defendants from enforcing/applying the January 2021 Framework or the "Approval with Conditions" to the Safety Review Request made by San Dieguito Union High School District ("SDUHSD"), Carlsbad Unified School District ("CUSD"), and Poway Unified School District ("PUSD"), the Court concludes that the Formal Objection does not impede or otherwise prevent the Court from ruling on the requested provisional relief.

At the outset of the March 15, 2021 hearing, Plaintiffs' counsel inquired of the State Defendants' counsel whether the January 2021 Framework was merely "guidance" or whether it was intended to serve as a requirement. The inquiry seemed to be driven by confusion perpetuated by the State Defendants' opposition(s), wherein the State Defendants refer to the framework as setting forth guidance as well as requirements. The State Defendants' counsel noted that some aspects of the January 2021 Framework were intended to serve as a guideline while other aspects were

[1] To the extent that the State Defendants contended in their original Opposition that the Ex Parte Application should denied because Plaintiffs gave defective notice and because the Plaintiffs failed to comply with California Rules of Court, Rule 3.1204(a)(2), the Court respectfully rejects this contention. Any prejudice suffered by any purportedly defective notice has been remedied by the continuance of the hearing. Moreover, failure to articulate compliance with Rule 3.1204(a)(2) does not necessitate a denial of the application. As the State Defendants since have submitted an opposition, any purported failure to comply with Rule 3.1204(a)(2) has been rendered irrelevant.

requirements. With that clarification (or essentially lack thereof), counsel proceeded with their oral arguments.

LEGAL ANALYSIS

The Court acknowledges that these are unprecedented times. No one can deny that the world will be recovering from the effects of the deadly COVID-19 pandemic for years to come. Similarly, no one can or should take issue with the fact that governments have struggled (understandably so) with how best to minimize the devastating effects of the virus but nonetheless have done the best that they could with the information (or lack thereof) that was available. In such uncertain times, there is no path that is free from risk. This means that there must be careful forethought given to the steps that are taken to prevent the spread of the virus and a careful balancing of the need for those steps versus the impact those steps will affect all aspects of human existence. In engaging in the balancing analysis, it is incumbent upon the State Defendants to ensure that any steps taken are within appropriate legal boundaries. In this case, Plaintiffs seek injunctive relief, in sum, because they believe certain steps taken by the State Defendants exceeded the appropriate legal boundaries.

A restraining order may issue where "[i]t appears from the facts shown by affidavit or by the verified complaint that great or irreparable injury will result to the applicant before the matter can be heard on notice." (Cal. Code Civ. Proc. § 527(c)(1).) "The ultimate goal of any test to be used in deciding whether a preliminary injunction should issue is to minimize the harm which an erroneous interim decision may cause." (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.) Toward that end, in determining whether an injunction should issue, "a court must weigh two "inter-related" factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or nonissuance of the injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-78.) As the California Supreme Court explained, "[t]he trial court's determination must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Id.*, at 678.) To be clear, however, both factors must be present for an injunction to issue. (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442-43.)

1. Merits of Plaintiffs' Claims

In this case, Plaintiffs' claims, although bearing different titles in the operative pleading, can be summarized as follows: (1) the January 2021 Framework violates the Equal Protection Clause as set forth in the California Constitution[2], (2) the State Defendants are in violation of SB 98, (3) the January 2021 Framework violates the Separation of Powers Clause of the California Constitution[3],

[2] Although the State Defendants' Opposition to Plaintiffs' Ex Parte Application for Temporary Restraining Order filed on March 10, 2021 argued, in part, that the application should be denied because the complaint did not plead an Equal Protection claim predicated on Article I, Section 7 of the California Constitution, the argument was rendered moot (even assuming it was substantively correct) by the filing of the First Amended Complaint. As styled, the Fifth Cause of Action in the First Amended Complaint is "Violation of the Equal Protection Clause of the California Constitution."

[3] The State Defendants argue that Plaintiffs are unlikely to prevail on their first cause of action (violation of Article IX of the California Constitution) and their second cause of action (violation of the Separation-of-Powers Clause). As

and (4) the California Department of Public Health's ("CDPH") denial of the school district requests for waiver was unlawful. As discussed more fully below, the Court concludes that Plaintiffs have demonstrated the requisite probability of success on the merits.

a. The January 2021 Framework Violates the Equal Protection Clause

The California Constitution, Article I, § 7(a) provides, in pertinent part, that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . ." "'The concept of the equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' [Citations.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 531.) As Plaintiffs accurately note:

> [t]he California Constitution thus prohibits the government from making a law, rule, or regulation that restricts the freedom of one group while not restricting the freedom of other similarly situated groups unless there is a rational basis connected to a legitimate governmental interest sufficient to justify the disparate treatment. Where "the disparate treatment has a real and appreciable impact on a fundamental right or interest," strict scrutiny applies. (Butt, supra 4 Cal.4th at 685-686.)

(Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Ex Parte Application for TRO ("Pl. Memo of P(s) & A(s)"), ll. 5-10.) At issue, in part, in this litigation, is the January 2021 Framework, which has as its effect the unequal treatment of students in the various Defendant School Districts. More specifically, secondary students in the Defendant School Districts have been prevented from returning to in-person learning whereas elementary students have been provided the opportunity to receive varying levels of in-person instruction. Indeed, there can be no dispute that students throughout the districts at issue have, as a result of frameworks or rules adopted by various governmental agencies, received differing forms and levels of education, which the evidence demonstrates have significantly affected the quality of education being delivered to students. Because of this, it cannot be denied that the January 2021 Framework touches upon, in a direct and significantly impactful way, a fundamental interest, namely education.

In analyzing whether education is a fundamental interest, the California Supreme Court in *Serrano v. Priest* (1971) 5 Cal.3d 584 commenced its analysis with the following observation:

> [w]e, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a

discussed in detail below, however, because the Court concludes that the Plaintiffs have demonstrated a likelihood of prevailing on their Fifth Cause of Action (violation of the Equal Protection Clause), this is sufficient to issue the provisional relief requested, and there is no need to analyze the likelihood of prevailing on all causes of action at this stage of the proceedings.

> child's development as a citizen and his participation in political and community life. "[T]he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (Note, Development in the Law – Equal Protection (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

(*Id., at* 605.) The court thereafter concluded that "the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest'." (*Id.*, 608-609.) The California Supreme Court has reached this conclusion time and time again. (*See e.g., Jackson v. Pasadena City School Dist.* (1963) 59 Cal.2d 876, 880 ("[i]n view of the importance of education to society and to the individual child, the opportunity to receive schooling furnished by the state must be made available to all on an equal basis."); *Butt v. State of California* (1992) 4 Cal.4th 668, 685 ("[i]t therefore appears well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibit maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts.".)

While the State Defendants do not dispute the importance of education and, indeed, concede the State's ultimate responsibility to ensure a level of educational equality that meets constitutional standards, they nonetheless contend that the Plaintiffs have not made the requisite showing of a "constitutional disparity" because they have not demonstrated that "the actual quality of [a particular] districts' program, viewed as a whole, falls fundamentally below prevailing statewide standards[.]" (*Butt, supra*, 4 Cal.4th at 686-89.) To this point, the State Defendants contend that: (1) Plaintiffs have not alleged or established a "prevailing statewide standard" against which their opportunity to access education can be measured, and (2) "[n]or can the plausibly do so, as the evidence plaintiffs submitted establishes that many schools (and in San Diego, the majority of public schools) are not offering full-time in-person learning as plaintiffs ask this Court to compel." (State Defendants' Opposition to Plaintiffs' Ex Parte Application for Temporary Restraining Order ("State Defs. Opp."), p. 8, l. 23-p. 9, l. 4.) Given this, the State Defendants conclude that strict scrutiny of the disparity is not required and that the framework at issue should be analyzed using the rational basis standard. The Court respectfully finds this conclusion to be misguided.

Notably, the California Supreme Court in *Butt* confirmed that "[a] finding of constitutional disparity depends on the individual facts." (*Butt, supra*, 4 Cal.4th at 687.) Initially, the Court finds that it is disingenuous for the State Defendants to argue that Plaintiffs cannot demonstrate that the January 2021 Framework causes the school districts' programs to fall fundamentally below a prevailing statewide guideline because the evidence presented demonstrates that the nearly 73% of K-12 students in San Diego county have not been physically in a classroom in nearly one year. This argument is circular – how could Plaintiffs demonstrate the prevailing standard to be applied to in-person learning without being permitted to attend in-person learning? Moreover, and perhaps of more significance, the State Defendants' argument lacks credibility given that the State Defendants, themselves, perpetuated (if not created) the predicament in which the Plaintiffs

currently find themselves, physically shut out of the premises wherein the educational standard could be analyzed.

The fact that the majority of students in San Diego County have not physically been in a classroom for over year is not dispositive of a prevailing statewide standard. Instead, the Court looks to the Education Code for that issue. As Plaintiffs demonstrated, the prescriptions of California Education Code section 43504 are mandatory – local educational agencies ***shall*** offer in-person instruction to the greatest extent possible. This prescription was reiterated in AB86. As such, the Court concludes that the prevailing statewide standard is in-person learning[4].

As an aside, Plaintiffs' preliminary showing suggests that the impact of the January 2021 Framework has caused and will continue to cause an extreme and unprecedented disparity on educational service and progress. Plaintiffs have presented evidence that general academic success, as measured by standardized grades, significantly has declined since the school closures and the implementation of remote learning nearly one year ago, with school districts issuing an enormous number of D and F grades in that period of time. (Plaintiffs' Notice of Lodgment of Exhibits in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order, Ex. 9 ("Pl. NOL, Ex. __"). As set forth in the Declaration of Cecilia Duenas, PsyD, "[i]n October of 2020, the Carlsbad Unified School District reported an over 300 percent increase in "F" grades compared to last year." (Declaration of Cecilia Duenas, PsyD, ¶ 4.)

To demonstrate the effect remote learning has had on an individualized basis, Plaintiffs have submitted the Declarations of A.I, who declared her son is now receiving C and D letter grades which he previously had never done before, C.R, who declared her son consistently had earned straight A(s) but, due to remote learning, fell behind and received F grades, and C.U., whose son had been a "solid A/B student his entire life" but finished the first semester of the 2020/2021 school year with failing grades and now 25 credits behind the pace necessary to graduate with his classmates. Based on the evidence presented, it is difficult to conclude that remote learning is an effective educational model.

Additionally, Plaintiffs have submitted evidence that distance learning has resulted in reduced instruction time, with some teachers being online for only 15 to 20 minute periods. (*See* Declaration of S.D. in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order, ¶ 7; Declaration of C.U. in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order, ¶ 8.) Indeed, such evidence begs the question how could such limited actual instruction time comport with prevailing statewide guidelines when the average class time pre-pandemic was, in many cases, three times more than this. While the State Defendants urge that such a deficiency falls on how the individual school district provide education, such a position ignores the disparities in *access* to education perpetuated by the January 2021 Framework.

[4] To the extent that the State Defendants' counsel argued during the hearing that the prevailing statewide standard is distance learning, the Court finds this argument unavailing given that the State Defendants acknowledge that throughout the state schools have been and are in varied degrees of "open" and/or postures with regard to in-person learning.

Further, as explained by the California Supreme Court, education, "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, *and in helping him to adjust normally to his environment.* In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." (*Serrano v. Priest*, 5 Cal.3d at 606 (emphasis added).) As Plaintiffs have demonstrated, and the State Defendants have not refuted, remote learning has led to alarming rates of depression, suicidal ideation, anxiety, and substance abuse among children. (*See* Declaration of Veronica Naudin, M.D., FAAP, ¶ 7; Declaration of Anna Mendenhall, M.D., FAAP, ¶ 8; Declaration of Cecilia Duenas, PsyD.) More specifically, as Dr. Duenas explained in her declaration,

> the Centers for Disease Control and Prevention found that from April to October 2020, hospitals saw a 24 percent increase in the proportion of mental health emergency visits for children ages 5 to 11, and a 31 percent increase for children ages 12 to 17. . . . .
>
> According to a report from FAIR Health of medical insurance claims from 2019 to 2020, there was a 334 percent increase in intentional self-harm claims among teenagers aged 13-18 as a percentage of all claims, a 95 percent increase in overdose claims and a 94 percent increase in in [sic] generalized anxiety disorder claims. . . .
>
> It is my professional opinion, to a reasonable degree of medical certainty, that in-person learning is vital to the mental health of all children.

(Declaration of Cecilia Duenas, PsyD, ¶¶ 6-8.) With the mental health effects resulting from (or being exacerbated by) remote learning, one can conclude that disparate treatment being experienced by children affected by the January 2021 Framework is depriving those same children of a fundamental benefit of education, namely provision of the necessary tools to help children adjust normally to their environment.

Notwithstanding the above, the State Defendants contend that the Plaintiffs have failed to demonstrate that the State's actions discriminate against an identifiable group and/or that the difference in the State's approach between elementary and secondary grades is warranted because the groups are not similarly situated. In support of this contention, the State Defendants represent that there is evidence establishing different risks of transmission of and seriousness of illnesses from COVID-19 among younger children. For this proposition, the State Defendants rely on the Declaration of James Watt, M.D., M.P.H. and they cite to a document entitled "Evidence Summary:TK-6 Schools and COVID-19 Transmission updated December 20, 2020 and February 23, 2021. (*See* cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Safe-for-All-Plan-Science.aspx.) The Court respectfully must disagree with the State Defendants' contention for several reasons.

First, the Declaration of Dr. Watt, while setting forth a historical perspective of the State's response to COVID-19, provides no specific, admissible evidence in support of the State Defendants'

contention that elementary school students are not similarly situated with middle and high school students. Instead, in paragraph 36 of his declaration, Dr. Watt concludes, without reference to any specific report or study, that COVID-19-related risks in elementary-age students in grades TK-6 are lower than and different from the risks to staff and students that serve older students and that there appears to be a lower child-to-child and child-to-adult transmission in children under 10. Dr. Watts also notes, in paragraph 28 of his declaration, that elementary students are less likely to get COVID-19 because their systems are more accustomed to fighting off common colds. Again, however, Dr. Watt cites to no specific study for this conclusion. To the extent that Dr. Watt is referring to the document entitled "Evidence Summary:TK-6 Schools and COVID-19 Transmission updated December 20, 2020 and February 23, 2021," as discussed more fully below, Dr. Watt's declaration is unhelpful.

Second, while the State Defendants cite to (and request that the Court take judicial notice of) various governmental publications, guidelines, frameworks, legislation, and information accessible through various websites, including the link set forth above, the State Defendants did not provide the Court with hard copies of the information upon which it would have the Court rely. This is problematic because the information on websites has a shelf-life and may be changed after dates of last access. Seeming to acknowledge this, the State Defendants represent, in footnote 1 to their Request for Judicial Notice, that all links in that document are current as of March 11, 2021.

Third, when a party simply refers the Court to a website link, the party runs that risk that the Court is not able to access the information.[5] For example, in the State Defendants' Request for Judicial Notice, they request that the Court take judicial notice of "the following facts and matters in support of their opposition to plaintiffs' ex parte application for a temporary restraining order . . . 18. California Department of Public Health, Evidence Summary: TK-6 Schools and COVID-19 Transmission, Dated December 20, 2020, updated February 23, 2021, available at https://cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Safe-fir[**sic**]-All-Plan-Science.aspx." The misspelling in the link initially hindered the Court's ability to access the information, which is the information upon which the State Defendants purportedly rely for the disparate treatment of elementary versus secondary school students.

Fourth, the State Defendants proffer that this specific link is the proper subject of judicial notice because it is an official act of an executive department in that because it is an executive order, order of the public health department, and county health emergency operation. (*See* State Defs. Request for Judicial Notice, p. 5, ll. 18-22.) The "Evidence Summary," however, is not such an order. Instead, it is a summary of, in some cases, unidentified studies conducted globally and nationally by unidentified individuals/groups. The State Defendants have proffered no legal authority for the proposition that the Court can take judicial notice of a governmental agency's summary of studies done by unaffiliated and unidentified entities.

Fifth, even if the Court considers the Evidence Summary and Dr. Watt' reliance on it, the summary generally talks about *children*, without defining the age groups considered. Throughout most of

[5] For purposes of the hearing on the order to show cause why a preliminary injunction should not issue, parties are directed to lodge any additional authorities upon which they intend to rely in support of their respective positions.

the summary, the CDPH distinguishes instead only between "children" and "adults," which vague distinction provides no support for the State Defendants' position. While there is a specific reference to two distinct age groups in the Evidence Summary, the discussion upon which the State Defendants seems to rely similarly is unavailing.

More specifically, the Evidence Summary does include the following discussion:

> There are two general explanations for why children get COVID-19 less frequently and have less severe disease compared to adults. The first is that they produce fewer ACE-2 receptors. Essentially, ACE-2 receptors are doorways into human cells for SARS-CoV-2, the virus that causes COVID-19. A study from May 2020 showed that elementary students produce fewer ACE-2 receptors than middle and high school-aged students, who produce fewer receptors than receptors [sic] adults. Consequently, children have fewer doorways into the body for the virus, which leads to fewer infections and less severe infections for those who catch the virus.
>
> The other explanation is that, because children's immune systems are used to fighting off colds, they are better primed to fight off COVID-19. Other viruses in the same family (coronaviruses) as the SARS-CoV-2 virus cause the common cold. Since they are in the same family of virus, some parts of the virus, including something called the S2 spike, are very similar. There is a study of children from 2011-2018 (before SARS-CoV-appeared) that shows that more children (ages 1-16) had antibodies against S2 spike than young adults (17-25), likely because they have coughs and colds from other coronaviruses more often than adults. It is likely a combination of these two phenomena-ACE-2 receptor production and pre-existing antibodies to other coronaviruses – that explain why children get disease less frequently and less severely.

This analysis, however, at least to the extent that the State Defendants rely on it for the basis of the January 2021 Framework, suffers from the following flaws: (1) no definitive data is provided so as to assess the propriety of the guess-work captured therein or from which to assess the vacuum in which the conclusion is reached, (2) the conclusions about the S2 spikes (along age lines that do not support a distinction among students in elementary, middle and high schools), pre-date COVID-19, and (3) it is contrary to the specific studies that were identified in the February 23, 2021 update, one of which was provided by Plaintiffs in their Notice of Lodgment.

In particular, Plaintiffs have presented the Court with the North Carolina study that is referenced in the February 23, 2021 update of the CDPH Evidence Summary. The North Carolina study, which is COVID-19 specific, demonstrates that there is no basis for distinguishing between elementary students, on the one hand, and secondary students, on the other, as it relates to the number of in-school transmission cases. To the contrary, the North Carolina Study concluded that

the number of in-school transmission cases for middle and high schools ***combined*** was precisely the same as for elementary schools. (Pl. NOL, Ex. 16.)

Further, as Plaintiffs point out, the French study relied upon by the CDPH in its Evidence Summary is inapposite because it was based on infection data at a single high school in January to March 2020, before any mitigation measures were implemented. This factor, namely the lack of implementation of any safety mitigation measures, also renders the information about the outbreak at the high school in Israel inapposite. Consequently, the State Defendants have not refuted the position asserted by the Plaintiffs, namely that students in public schools, regardless of grade, are similarly situated but they nonetheless are being treated differently under the January 2021 Framework.

In light of all of the considerations set forth above, the Court concludes that enforcement of the January 2021 Framework has had and will continue to have a real and appreciable impact on the affected students' fundamental California right to basic educational equality.[6] Given the significance of the issue at play in this litigation and given that the disparate treatment of similarly situated individuals implicates the State's constitutional duty, the Court must analyze the January 2021 Framework under a strict scrutiny standard[7]. Under the applicable standard of review, "the governmental entity 'bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*Hartzell v. Connell* (1984) 35 Cal.3d 899, 921 quoting *Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 785.) In assessing the propriety of the law, the Court also must consider whether the law is no more broadly drafted than necessary to serve the compelling government interest.

While the Court acknowledges the State Defendants have a compelling interest in protecting the public by stemming the spread of COVID-19, the Court cannot conclude that the January 2021 Framework is so narrowly tailored to serve the articulated compelling interest. To the contrary, the January 2021 Framework is selective in its applicability, vague in its terms, and arbitrary in its prescriptions. For example, the January 2021 Framework provides, in pertinent part, as follows:

> The COVID-19 and Reopening In-Person Learning Framework for K-12 Schools in California, 2020-2021 School Year (July 17, 2020

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[6] Additionally, the State Defendants do not thoroughly address Plaintiffs' position that disparate outcomes for poor and minority children are increasing, with "[o]nly 60% of low-income students regularly log into their online classes, while 90% of high-income students do." (Pls. Memo of P(s) & A(s), p. 9, ll. 6-8; Pls. NOL, Ex. 24.) As the January 2021 Framework disparately affects those of different financial positions, and as disparate treatment on this basis has been determined to implicate a "suspect class," (*see Serrano v. Priest, supra*), the framework at issue arguably would require analysis under the strict scrutiny standard under this theory alone.

[7] Even if the standard to be applied was "rational basis," which the Court concludes is not the appropriate standard in this case, as the Defendant School Districts point out in their March 12, 2021 Response to the Ex Parte Application for TRO, there is no rational basis to distinguish between schools in a county that happened to open more fully and quickly than other schools in a county that took time to implement safety measures before more fully reopening. To this point, regardless of any comparisons between public and private schools, the evidence presented demonstrates that there are numerous schools in San Diego County that opened *to all students* during the pandemic and that those schools remain open, which argument undermines the State Defendants' position that there is rational basis for the January 2021 Framework and/or any distinctions drawn therein. (*See* http://covid-19.sdcoe.net/Reopening-Plan/School-Reopening-Dashboard.)

> Framework) permitted schools to reopen for in-person instruction at all grades if they are located in counties in the Red, Orange, or Yellow Tiers under the Blueprint for a Safer Economy. Operations for schools that are already open must adhere to the School Reopening Guidance section below. . . . . ***Schools that have reopened are not required to close if the county moves to the Purple Tier or goes over a CR of 25 per 100,000 population.***

(Pl. NOL, Ex. 4, pp. 7-8 (emphasis added).) If the purpose of the January 2021 Framework is to stem the spread of the virus, how do the State Defendants justify the exception and/or the changing definitions of "open" and "reopening"? The State Defendants have not demonstrated that the disparate treatment of elementary schools and secondary schools serves the purpose of slowing the spread of COVID-19. To the contrary, if it is possible for some schools to continue to offer in-person instruction, even while the County is in the Purple Tier, it must be possible, with the appropriate precautions and adherence to standardized safety protocols, for all schools to offer at least some in-person instruction.

Further, the State Defendants effectively concede that the undefined "stable groups" requirement imposed by the January 2021 Framework is vague, ambiguous, and arbitrary, as evidenced by the State's implicit retreat from the requirement by the CDPH's directive that the school districts follow the "intent" of the requirement, even in the absence of the ability to discern that intent. Indeed, the State Defendants' counsel conceded at the outset of the March 15, 2021 hearing that the "stable groups" reference is a guideline, not a requirement. Moreover, the State Defendants proffer no satisfactory justification for the arbitrary retreat from the previously prescribed social distancing requirement (which provided "wiggle" room) to the four-foot distancing requirement mandated by the January 2021 Framework, which modification has affected the Defendant School Districts' ability to reopen for in-person learning and/or the extent to which the Defendant School Districts can offer in-person learning. As such, Plaintiffs have demonstrated that the January 2021 Framework has created an unconstitutional disparately applied impediment to schools offering in-person instruction which impediment is not so narrowly tailored as to serve the underlying compelling state interest.

The State Defendants alternatively posit that it is unlikely that Plaintiffs will prevail on the merits because Plaintiffs "cannot establish that the harms that [Plaintiffs] allege are caused by the State's actions rather than other factors, such as how a particular school conducts its distance learning program or whether and how the school chooses to open when previously permitted to do so." (State Defs.' Opp. p. 9, l. 24 – p. 10, l. 2.) The Court finds this argument unpersuasive.

To reiterate, Plaintiffs' evidence demonstrates, and the State Defendants do not dispute, that it is possible for local educational agencies to offer, at the very least, some in-person instruction. Indeed, some of the defendant school districts did reopen and continue, ***to this day***, to operate elementary schools with at least some in-person learning. Further, as evidenced by the Defendant School Districts' lack of opposition to the requested temporary restraining order, those Defendants concur that the State Defendants' actions, namely the implementation of the January 2021 Framework and the effective denial of the Defendant School Districts Safety Review Requests,

effectively have prevented the Defendant School Districts from complying with the prescriptions of California Education Code section 43504.

As reflected in correspondence provided by CUSD Superintendent Dr. Ben Churchill dated January 15, 2021, but for the January 2021 Framework, CUSD was ready to expand to Phase 3 of its reopening plan at both the elementary and the secondary level on January 25, 2021. However, with the issuance of the January 2021 Framework, Dr. Churchill noted, in bold, that CUSD planned to continue to Phase 3 of its elementary reopening on January 25, 2021 but that "[***a]t the secondary level, we will not be allowed by CDPH to implement the hybrid schedule as planned on January 25.*** (Pl. NOL, Ex. 5 (emphasis in original).) This position is confirmed in the Response of Defendants Carlsbad Unified School District and Poway Unified School District to Plaintiffs' Ex Parte Application for a Temporary Restraining Order, in which those defendants note:

> [a]ccordingly, the Districts are in support of Plaintiffs' application for a temporary restraining order inasmuch as the State and Dr. Naomi Bardach are the sole barriers between a safe reopening and return to in-person instruction for their middle schools and comprehensive high schools. Absent the State Defendants' actions, the Districts would already be providing in person instruction to the greatest extent possible, based on the District's local discretion and the counsel of the local San Diego public health officials.

(Response of Defendants Carlsbad Unified School District and Poway Unified School District to Plaintiffs' Ex Parte Application for a Temporary Restraining Order, p. 10, ll. 20-25.) Given this, the State Defendants should not be permitted to deny liability when they, themselves, are hindering the Defendant School Districts from complying with the mandates of the California Education Code, even if the State Defendants, as discussed below, are not themselves subject to compliance with the pertinent sections of the Education Code.

In further support of their contention that the Plaintiffs have not shown the likelihood that they will prevail on the merits, the State Defendants also assert that the Plaintiffs:

> completely ignore the substantial efforts that the State has made, not only to support safe reopening of schools, but also to ensure school districts have the resources to, and in fact provide, extended learning to address any impacts on students and disparities that may have occurred due to the implementation of distance learning in response to a once-in-a-century pandemic that has cost more than 54,000 lives of Californians to date.

(State Defs' Opp. p. 10, ll 5-9.) For this proposition, the State Defendants cite to AB86, which was approved by the Governor on March 5, 2021 and filed with the Secretary of State the same day. While the Court concurs that the State is making fiscal efforts to mitigate the damage that has been done, the State Defendants' argument somewhat supports Plaintiffs' points for two reasons.

First, the State Defendants argue that the State has taken steps to ensure resources are provided to address any impacts and disparities that may have occurred due to the implementation of distance learning. The Court takes this as an implicit, if not explicit, acknowledgment that disparities have occurred. As discussed herein, those disparities have only been exacerbated by the perpetuation of distance learning for some students, namely secondary students, but not for others, namely elementary students; in sum, there has been unequal treatment of similarly situated individuals.

Second, AB86 resulted in the adoption of California Education Code section 43520, which provides, in pertinent part, that:

> [i]t is the intent of the Legislature that local educational agencies offer in-person instruction to the greatest extent possible during the 2020–21 school year, consistent with subdivision (b) of Section 43504, and, starting in the 2020–21 school year and continuing into the 2022–23 school year, expand in-person instructional time and provide academic interventions and pupil supports to address barriers to learning and accelerate progress to close learning gaps. The Legislature strongly encourages local educational agencies to prioritize pupils who would benefit the most from in-person instruction and who have been identified as needing integrated supports or academic interventions, *including, but not limited to*, pupils with disabilities, youth in foster care, homeless youth, English language learners, pupils from low-income families, pupils without access to a computing device, software, and high-speed internet necessary to participate in online instruction, disengaged pupils, credit-deficient high school pupils, pupils at risk of dropping out, pupils with failing grades, and pupils identified as needing social and mental health supports.

(Emphasis added.) The evidence submitted by the Plaintiffs, particularly when considered against the backdrop of the expansive language of Section 43520 emphasized above, suggests that ***all students*** in TK-12 public schools fall into the categories of students for whom the Legislature strongly encourages in-person instruction, and Plaintiffs have demonstrated that the January 2021 Framework, which is not modified substantively by SB86, undermines the expressly articulated legislative intent.

b. SB 98/California Education Code section 43504

Plaintiffs also contend that the State Defendants, as well as the Defendant School Districts, are in violation of California Education Code section 43504[8]. In particular, section 43504(b) requires

[8] The Court is perplexed by the State Defendants' contention that Plaintiffs, in their *ex parte* papers, fail to address, among other things, the claim under SB 98. (*See* State Defs. Opp., p. 7, ll. 22-24.) To this point, in their *ex parte* application, Plaintiffs expressly state, which statement is supported by the evidence submitted, that numerous schools in this state (indeed, several located within the school districts named as Defendants) have reopened "demonstrating not only that it is "possible" to reopen, but that it is "possible" to do so safely without the new and arbitrary rules of the January 2021 Framework." (Pl. Memo of P(s) & A(s), p. 18, ll. 15-17.) While the Court concludes that California

that "[a] local educational agency shall offer in-person instruction to the greatest extent possible." A "local educational agency," for purposes of the statute is defined to mean "a school district, county office of education, or charter school, excluding a charter school classified as a nonclassroom-based charter school pursuant to Sections 47612.5 and 47634.2 as of the 2019–20 fiscal year." (Cal. Educ. Code § 43500(c).) Given the plain language of the statute, section 43504 does not apply to the State Defendants. As a result, Plaintiffs have not demonstrated that there is a likelihood that they will prevail on their fourth cause of action as alleged against the State Defendants.[9]

c. CDPH's Approval with Conditions of Safety Review Request

In response to the January 2021 Framework, CUSD, SDUHSD, and PUSD applied for a "Safety Review Request," which, if granted, effectively would have served as a waiver of the pertinent requirements under the January 2021 Framework and would have allowed those school districts to open their secondary schools for in-person learning as they stood poised to do. (Pl. NOL, Ex. 7.) As reflected in Dr. Churchill's Declaration, CUSD spent millions of dollars implementing safety measures that met with approval by local health officials, and the district had reached an agreement with the pertinent labor groups based on the safety measures adopted. (Declaration of Benjamin Churchill, Ed.D. in Support of Defendant Carlsbad USD's Response to Plaintiffs' Ex Parte Application for a Temporary Restraining Order, ¶¶ 15-16; Declaration of Marian Kim, Ed.D. in Support of Defendant Poway USD's Response to Plaintiffs' Ex Parte Application for a Temporary Restraining Order, ¶ 18.) The Defendant School Districts' Safety Review Request was "Approved with Conditions," (the "Approval with Conditions"). (*See* Pl. NOL, Ex. 15.) Plaintiffs argue that the "Approval with Conditions" suffers the same fate as the January 2021 Framework and that the Approval with Conditions was predicated upon "arbitrary, capricious, and unlawful agency action". The Court agrees.

First, there is no need for a Safety Review Request in the absence of enforcement of the January 2021 Framework. Moreover, the State's adoption of a safety review process after the implementation of the January 2021 Framework suggests that the January 2021 Framework is not so narrowly tailored to pass strict scrutiny analysis.

Second, to approve with conditions the Safety Review Request on the ground that there is an "[i]nsufficient track record of experience implementing safety protocols and routines, as indicated by small percentages of students being on campus" is, as Plaintiffs contend, circular. As set forth above, the State Defendants have prevented the students at issue from returning in sufficient numbers to allow a sufficient track record of experience, whatever it means to be "sufficient."

Moreover, to the extent that the State Defendants conditionally approved the Defendant School Districts' Safety Review Request on the ground that there was an "inadequate plan for ongoing safety monitoring using an asymptomatic testing regime," the State Defendants' position does

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Education Code section 43504 does not apply to the State Defendants, the State Defendants' actions do prevent the School District Defendants from complying with the Education Code mandate.

[9] Plaintiffs have demonstrated a likelihood that they will prevail on the fourth cause of action as it is alleged against the Defendant School Districts. However, the temporary injunctive relief sought is only against the State Defendants.

nothing more than highlight the vagaries from which the underlying framework suffers in the first instance. This is true as to the changing definition of "open" as well, which demonstrates the unfettered discretion with which the State Defendants change pertinent rules. Compliance with rules that are ever-changing cannot be accomplished fully, and the State Defendants fail to adequately address the Safety Review Request issue in their opposition papers. In sum, Plaintiffs have demonstrated a likelihood of prevailing on the merits with respect to the impropriety of the State Defendants' response to the Defendant School Districts' Safety Review Request.

2. ***Interim Harm***

Given that Plaintiffs have demonstrated the likelihood of prevailing on the merits as to the claims discussed above, the Court must analyze the relative harm to the parties from the issuance or nonissuance of the provisional relief requested. Initially, the Court is perplexed by the State Defendants' contention that the "Plaintiffs have not shown that any interim harm they may suffer is irreparable." (State Defs' Opp., p. 12, l. 24.) To the contrary, the Plaintiffs have submitted numerous declarations, many of which are uncontradicted, detailing the substantial harm that has been inflicted and will continue to be inflicted if, at a minimum, a temporary restraining order is not issued. The evidence submitted demonstrates that the January 2021 Framework and the Approval with Conditions, which perpetuate remote learning for some students while not for others, has created an impermissible divide in access to education as otherwise guaranteed by the California Constitution and as otherwise prescribed by the California Education Code. As the California Supreme Court in *Serrano* noted, "unequal education . . . leads to . . . handicapped ability to participate in the social, cultural, and political activity of our society." (*Serrano, supra*, at 606.) At a minimum, the declarations of the named Plaintiffs demonstrate just how significantly the January 2021 Framework has adversely impacted secondary students' abilities to fully and in a meaningful way participate in an education system that should be equally available to all students.

In contrast, the State Defendants have offered no evidence to suggest that the harm the State will suffer, if any, as a result of the issuance of injunctive relief outweighs the harm that will befall the Plaintiffs if the injunctive relief is not granted. The State Defendants argue that the public has a strong interest in protecting itself from infectious disease and in curbing COVID-19 to prevent illness and death. The Court concurs, as the Court is confident so too do Plaintiffs. Indeed, the Court does not take Plaintiffs' position to be one that disregards the State's need to ensure that all who participate in the education process, teachers, staff, and students alike, are protected to the greatest extent possible as the schools reopen.

Where the State Defendants and the Court diverge, however, is with the State Defendants' contention that "[t]he public interest would be directly harmed if the State is unable to enact temporary restrictions tailored to fit regional needs to stave off the very real possibility of increased rates of transmission caused by school reopenings with no meaningful restrictions . . . " (State Defs. Opp., 13, ll. 11-13.) While the Court takes no issue with the premise, the Court disagrees

that the January 2021 Framework is "tailored to fit regional needs.[10]" The State Defendants have offered no admissible evidence to justify the disparate treatment of similarly situated students, which failure then undermines their contention that the January 2021 Framework is tailored to fit regional needs or that the Approval with Conditions serves the regional needs.

The State Defendants additionally argue that any limited and temporary harm Plaintiffs may suffer from the January 2021 Framework is outweighed by the potential harm to the public health should the enforcement of the January 2021 Framework be enjoined, especially because the January 2021 Framework "may become moot if San Diego advances to the Red Tier under the March 4 update ...." In the State Defendants' Supplemental Opposition filed on March 12, 2021, the State Defendants more specifically argue that "the extraordinary relief Plaintiffs seek should be denied because their schools will be able to reopen on Wednesday." (State Defendants' Supplemental Opposition, p. 5, ll. 7-8.) From this, the State Defendants conclude that emergency relief is not warranted. The issue of mootness, however, already has been rejected by courts faced with challenges to orders promulgated purportedly to attempt to stem the spread of COVID-19.

As courts have explained, applications to enjoin orders are not rendered moot where the plaintiffs remain subject to the real possibility that evolving circumstances may lead to the resurrection/imposition of the same restrictive orders in the future. (*See County of Los Angeles Department of Public Health v. Sup. Ct.* (2021) 2021 DJDAR 1969, 1971 citing *Roman Catholic Diocese v. Cuomo* (2020) 592 U.S. __,__ [141 S.Ct. 63, 68, 208 L.Ed.2d 206, 210].) In this case, the State Defendants do not confirm or otherwise guarantee that once the County moves into the Red Tier, students may be free from concerns about future distance learning mandates. This case presents the classic example of a "substantial and continuing public interest" that is capable of repetition yet could evade review, a conclusion supported by the State Defendants' acknowledgment that the existing framework is "continually adjusted to account for evolving scientific understanding and changing conditions . . .". (*See Amgen Inc. v. California Correctional Health Care Services* (2020) 47 Cal.App.5th 76, 728; State Defendants' Supp. Oppo., p. 14, ll. 10-12.)

For all of the foregoing reasons, the Court grants Plaintiffs' request for and hereby issues a temporary restraining order, albeit more limited than that specifically requested by Plaintiffs. The Court issues a temporary restraining order enjoining and restraining the Defendants from: (1) applying and enforcing the provisions of the January 2021 Framework, which framework prevents Plaintiffs' children and other children in TK-12 public schools from receiving in-person instruction; and (2) applying and enforcing the March 7, 2021 "Approval with Conditions" of Safety Review Requests by SDUHSD, CUSD, and PUSD.

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[10] As the United States Supreme Court has explained, under the Constitution, the responsibility for addressing COVID-19 matters such as phased reopenings and school closures lies with the state and local governments, not the courts. That being said, the United States Supreme Court also has explained that COVID-19 is not a "[b]lank check for a State to discriminate . . . There are certain constitutional red lines that a State may not cross even in a crisis." (*County of Los Angeles Department of Public Health v. Sup. Ct., supra*, at 1972 citing *Jacobson v. Massachusetts* (1905) 197 U.S. 11.)

Further, the parties are ordered to appear on ***March 30, 2021 at 9:00 a.m.*** in Department N-27 of this Court to show cause why a preliminary injunction pending trial in this action should not be ordered as follows:

(1) Restraining and enjoining you, your officers, agents or any other persons acting with you or on your behalf from applying or enforcing the provisions of the January 2021 Framework or other orders, statutes or laws that include the prescriptions/provisions of the January 2021 Framework;
(2) Restraining and enjoining you, your officers, agents or any other persons acting with you or on your behalf from applying or enforcing the March 7, 2021 "Approval with Conditions" of Safety Review Requests by SDUHSD, CUSD, and PUSD; and
(3) Directing the Defendant School Districts to reopen their schools for in-person instruction to the greatest extent possible at the earliest practicable time.

The Order to Show Cause and supporting papers shall be served on all Defendants no later than March 16, 2021 by electronic service. Proof of such service shall be filed with the Court no later than March 17, 2021. Any additional opposition papers shall be filed and served by Defendants on Plaintiffs by electronic service no later than March 23, 2021. Any additional reply papers shall be filed and served by electronic service by Plaintiffs on Defendants no later than March 26, 2021.

IT IS SO ORDERED.

Date: MAR 15 2021

Cynthia A. Freeland

Cynthia A. Freeland
Judge of the Superior Court

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, NORTH COUNTY DIVISION

A.A. et al.,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California, et al.,

Defendants.

Case No. 37-2021-00007536-CU-WM-NC

[PROPOSED] ORDER ON PLAINTIFFS' *EX PARTE* APPLICATION FOR TEMPORARY RESTRAINING ORDER

Dept: N-27
Judge: Hon. Cynthia A. Freeland
Date: March 10, 2021
Time: 8:30 a.m.

Action Filed: February 16, 2021
Trial Date: Not set

The hearing on Plaintiffs' ex parte application for a temporary restraining order and order to show cause re a preliminary injunction, having come in on March 10, 2021, at the above-entitled Court, and the Court, having considered the pleadings in this action, the memorandum of points and authorities, declarations filed, and argument of counsel, and good cause appearing:

ORDER TO SHOW CAUSE

To Defendants GAVIN NEWSOM, Governor of the State of California, DR. MARK GHALY, Secretary of the Department of Health and Human Services of the State of California; DR. NAOMI BARDACH, Successful Schools Team Lead and Safe Schools for All Team Lead for the Department of Health and Human Services of the State of California; DR. TOMÁS ARAGÓN, Director and State Public Health Officer of the Department of Public Health of the State of California (collectively, "State Defendants") and to Defendants San Dieguito Union High School District ("SDUHSD"), Carlsbad Unified School District ("CUSD"), and Poway Unified School District ("PUSD"); Oceanside Unified School District ("OUSD"); San Marcos Unified School District ("SMUSD"); and Vista Unified School District ("VUSD") (collectively, "School District Defendants"):

Based upon the ex parte application filed in this action, you are ordered to appear on MARCH 30, 2021, at 9:00 a.m./~~p.m.~~ in Department N-27 of this Court to show cause why a preliminary injunction pending trial in this action should not be ordered as follows:

1. Restraining and enjoining you, your officers, agents, or any other persons acting with you or on your behalf from applying and enforcing the provisions of the January 2021 Framework ~~and any other related~~ or any orders ~~subsequent government orders~~, statutes, or laws that ~~prevent~~ include the prescriptions/provisions of January 2021 Framework ~~Plaintiffs' children and any other children in TK-12 schools in the State of California from receiving in-person instruction in any public or private school~~;

2. Restraining and enjoining you, your officers, agents, or any other persons acting with you or on your behalf from applying and enforcing the March 7, 2021 "Approval with Conditions" of Safety Review Requests by SDUHSD, CUSD, and PUSD; and

3. Ordering the School District Defendants to reopen ~~all~~ their schools for ~~some form~~

~~of~~ in-person instruction ~~within seven days and to return to full time in-person instruction no later than April 15, 2021.~~ to the greatest extent possible at the earliest practicable time.

This Order to Show Cause and supporting papers shall be served on Defendants no later than 3/16, ~~2020~~ 2021, by electronic service. Proof of such service shall be filed and delivered to the court hearing the Order to Show Cause no later than 3/17, 2021. Any ~~reply~~ additional opposition papers shall be filed and served by Defendants on Plaintiffs by electronic service no later than 3/23/21. ~~a.m./p.m. on _____ 2021~~. Any additional reply papers shall be filed and served by electronic service by Plaintiffs on Defendants no later than 3/26/21.

TEMPORARY RESTRAINING ORDER

Pending hearing on the above Order to Show Cause, Defendants, their officers, agents, and/or any other persons acting with them or on their behalf, are restrained and enjoined from:

1. Applying and enforcing the provisions of the January 2021 Framework ~~and any other related or subsequent government~~ or any orders, statutes, or laws ~~that prevent Plaintiffs' children and any other children in TK-12 schools in the State of California from receiving in-person instruction in any public or private school~~ that include the prescriptions/provisions of the January 2021 Framework; and

2. Applying and enforcing the March 7, 2021 ~~applying and enforcing the March 7, 2021~~ "Approval with Conditions" of Safety Review Requests by SDUHSD, CUSD, and PUSD.

IT IS SO ORDERED.

Dated: 3-15-21

Cynthia A. Freeland

Hon. Cynthia A. Freeland
Superior Court Judge

Cynthia A. Freeland